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Defendants' Standing to Oppose Lead Plaintiff Appointment Under the Private Securities Litigation Reform Act of 1995

Tiffany M. Wong

In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA" or "Reform Act") in an attempt to discourage the filing of frivolous securities fraud lawsuits. Six years later, the number of federal securities class action filings reached an all-time high. While this extraordinarily high number can be attributed partly to the large increase in initial public offerings during that time period, the reforms of the PSLRA did not in fact reduce the number of securities fraud actions brought as Congress had intended. With the size of post-PSLRA settlements also increasing, both plaintiffs and defendants have more at stake than ever in securities litigations. One reform the PSLRA instituted was a new method of selecting the lead plaintiff. The PSLRA instructs courts to adopt a presumption that the most adequate party to represent the plaintiff class is the one with the greatest financial interest who also satisfies the requirements of Federal Rule of Civil Procedure 23 ("Rule 23"). District courts currently are split as to whether or not defendants may challenge the adoption of the lead plaintiff presumption prior to a motion

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1 B.A. 2001, Dartmouth College; J.D. Candidate 2004, University of Chicago.  
B.A. 2001, Dartmouth College; J.D. Candidate 2004, University of Chicago.  
15 USC §§ 77z-1 (2000).  
3 Jason Hoppin, Securities Fraud Suits Break Record; Record Number of Stock Fraud Suits Filed in 2001, available online at <http://www.mfo.com/practice/ArticleDetail.cfm?MCatID=&concentrationID=14&ID=513&Type=4> (visited Apr 29, 2003).  
4 Id.  
for class certification, and appellate courts seem unwilling to rule on the issue. Resolving this question in the defendants’ favor could reduce the overall costs of litigation and serve as a possible deterrent to plaintiffs and attorneys who bring frivolous suits solely in an attempt to force defendants into expensive settlements.

This Comment argues that defendants should and do have standing to oppose a motion for lead plaintiff prior to class certification. Part I introduces the background behind the PSLRA and sets up the framework for analyzing the lead plaintiff provisions. Part II analyzes the current state of the law, including the various legal and policy rationales behind the court split. Part III examines the relevant text of the statute and its legislative history, and then presents several public policy arguments in favor of allowing defendants the opportunity to challenge a court’s adoption of the most adequate plaintiff presumption.

I. HISTORY OF THE PSLRA

The PSLRA was the first substantial reform of federal securities law since the Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted as part of the New Deal legislation. Congress perceived that abusive practices were undermining the overriding purposes of the securities laws, which were to protect investors and maintain the public’s confidence in the securities markets in order to promote investment and capital growth. Such abuses included the filing of frivolous class action lawsuits, initiated by attorneys with the help of “professional plaintiffs,” with no regard for the underlying culpability of the

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9 See Zelensky, 73 Notre Dame L Rev at 1136 (cited in note 2).
13 See id at 32, reprinted in 1995 USCCAN at 731 (defining “professional plaintiffs” as investors who own a nominal number of shares in a wide array of public companies and who readily permit lawyers to file abusive securities class action lawsuits).
entity being sued. Plaintiffs' lawyers would routinely engage in a "race to the courthouse" in order to file their complaint first and consequently be named the lead counsel in a securities class action. Despite the fact that most of these suits were meritless, the defendant corporations usually chose to settle the cases rather than face the enormous expenses of discovery and trial. The plaintiffs' lawyers often negotiated such settlements to favor themselves rather than the investors they purported to represent.

The PSLRA fundamentally altered the lead plaintiff and lead counsel selection process for securities class actions. The Act instructs courts to adopt a presumption that the "most adequate plaintiff" to lead the litigation is the investor who (1) has made a motion to the court to serve as lead plaintiff, (2) has the largest financial interest in the relief sought, and (3) has otherwise satisfied the requirements of Rule 23. Once the lead plaintiff has been selected, the lead plaintiff then selects lead counsel, subject to the court's approval.

In enacting these new provisions, Congress intended to encourage institutional investors, whose assets account for 51 percent of the equity market, to serve as lead plaintiffs and exercise more effective control over the attorneys. Because these investors had such high stakes in the outcome of the lawsuits, they would be more likely to monitor the lawyers carefully and participate in directing the course of the litigation. The legislature believed the PSLRA would wrest control of securities litigation from the plaintiffs' lawyers and place it back into the hands of the shareholders.

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15 See id.
18 Id (quoting testimony that "counsel in securities class actions receive a disproportionate share of the settlement award").
19 Id at 6, reprinted in 1995 USCCAN at 685 ("Numerous studies show that investors recover only 7 to 14 cents for every dollar lost as a result of securities fraud.").
20 15 USCA § 77z-1(a)(3)(B)(iii)(I). See also Fischler v AmSouth Bancorp, 1997 WL 118429, *2 (M D Fla) (restricting the focus of the inquiry into qualities of the class representative to typicality and adequacy).
22 See House Report at 34, reprinted in 1995 USCCAN at 733 (cited in note 13) (noting that pension funds account for almost half of all institutional assets).
23 See id.
Although a court must presume that the investor with the largest financial interest is the most adequate lead plaintiff, the presumption is a rebuttable one. The Reform Act provides that the presumption may be rebutted upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff will not fairly and adequately protect the interests of the class or is subject to a unique defense that renders him unable to adequately represent the class. However, the Act does not explicitly address the question of whether a defendant may challenge the "most adequate plaintiff" presumption.

The statute's ambiguity on this question has led courts to disagree as to when defendants may challenge a party's motion for appointment as lead plaintiff. The majority of courts have found that defendants do not have standing to mount such an objection. Although only a few courts have explicitly granted defendants standing to object to the lead plaintiff appointment, several more have noted that whether or not defendants have formal grounds to contest an appointment, a court may, sua sponte, address any issue brought to its attention by the defendants.

Courts universally have acknowledged that, regardless of how this issue is decided, defendants retain their ability to challenge the selection of a lead plaintiff at the class certification stage. However, some members of Congress have expressed concern that the Reform Act's "most adequate plaintiff" presumption is, in reality, irrebuttable because it already incorporates Rule 23's adequacy and typicality requirements. Thus, in some cases,
the appointment stage may be the defendants’ only opportunity to challenge the court’s selection of the lead plaintiff.

II. INTERPRETING THE LEAD PLAINTIFF PROVISIONS OF THE PSLRA

Most courts, following the lead of an early Massachusetts district court ruling, have interpreted the plain language of the lead plaintiff provisions in the PSLRA to restrict formal challenges regarding the appointment of the most adequate plaintiff solely to those made by other purported class members. However, a subset of those courts has observed that nothing in the statute prevents them from raising the defendants’ objections sua sponte. Presently, only district courts in California and New York have found that the Reform Act permits defendants to formally question the adoption of the most adequate plaintiff presumption. These courts are able to justify their position by limiting such challenges to arguments relative to the application of the presumption.

A. Decisions Finding Defendants Do Not Have Standing to Substantively Challenge the Court’s Appointment of the Presumptive Lead Plaintiff

1. Textual analysis.

One of the earliest cases to examine this lead plaintiff issue and reject the defendants’ standing to challenge the presumption was Greebel v FTP Software, Inc. In Greebel, the defendants objected to Greebel’s motion for lead plaintiff status on both procedural and substantive grounds. They first claimed that the movants failed to satisfy the PSLRA’s certification and notice requirements, which are prerequisites for lead plaintiff selection. The defendants also argued that it was premature to determine

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33 See, for example, Greebel v FTP Software, Inc, 939 F Supp 57 (D Mass 1996).
34 See, for example, In re USEC Securities Litigation, 168 F Supp 2d 560, 565 (D Md 2001).
35 See, for example, Takeda, 67 F Supp 2d at 1138.
36 See Howard Gunty, Civ No 96-20711 SW, slip op at 1; King, 36 F Supp 2d at 190.
38 939 F Supp 57 (D Mass 1996).
39 Id at 59.
40 Id.
whether the movants satisfied all three of the criteria for most adequate plaintiff required by the statute.\textsuperscript{41}

The Massachusetts district court held that the defendants could not oppose the motion on grounds relating to the movants' satisfaction of the statutory criteria because "Congress provided that rebuttal of the lead plaintiff presumption shall be limited to 'proof by a member of the purported plaintiff class.'\textsuperscript{42} The court found that the plain text of the statute was sufficient to preclude a defendant from making substantive challenges to the appointment of the lead plaintiff prior to the class certification stage.\textsuperscript{43} However, defendants were permitted to object to the adequacy of certification and notice because failure to satisfy these procedural prerequisites would be "fatal to maintenance of the putative class action."\textsuperscript{44} Greebel thus limited a defendant's standing to challenge a motion for appointment as lead plaintiff to purely procedural objections. Later courts followed suit in making this distinction between substantive and procedural challenges when assessing the defendant's position to refute the most adequate plaintiff presumption.\textsuperscript{45}

Numerous subsequent courts have agreed that the text of the PSLRA effectively precludes a defendant from formally challenging a motion for lead plaintiff status on adequacy and typicality grounds.\textsuperscript{46} In \textit{Gluck v Cellstar Corp},\textsuperscript{47} a Texas district court followed the Greebel court's logic and stated that "[t]he statute is clear that only potential plaintiffs may be heard regarding appointment of a [l]ead [p]laintiff."\textsuperscript{48} The court reasoned that because defendants could raise all of their substantive arguments

\textsuperscript{41} Id.
\textsuperscript{42} Greebel, 939 F Supp at 60–61.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} See, for example, \textit{In re USEC Securities Litigation}, 168 F Supp 2d 560, 565 (D Md 2001) ("[D]efendant could object to the adequacy of certification and notice, inasmuch as they are procedural prerequisites for the court's consideration of a motion for appointment of a lead plaintiff."); \textit{California Public Employees' Retirement System v The Chubb Corp}, 127 F Supp 2d 572, 575 n 2 (D NJ 2001) ("[D]efendants do have standing to object to the form of the notice published by the plaintiff after filing the complaint.").
\textsuperscript{46} See, for example, \textit{Bell}, 2002 WL 638571 at *2 ("[R]ebuttal of the presumption of the most adequate plaintiff is limited to ‘proof by a member of the purported plaintiff class.’"); \textit{In re Milestone Scientific Securities Litigation}, 183 FRD 404, 414 n 14 (D NJ 1998) ("A defendant or defendants may not object to the adequacy or typicality of the proposed lead plaintiff at this preliminary stage of the litigation."); \textit{Fischler}, 1997 WL 118429 at *2 ("The plain language of the Act dictates only members of the plaintiff class may offer evidence to rebut the presumption in favor of the most adequate plaintiff.").
\textsuperscript{47} 976 F Supp 542 (N D Tex 1997).
\textsuperscript{48} Id at 550.
during the class certification stage, denying them the opportunity to speak earlier would not unduly prejudice them in any way.\footnote{See id.}

2. Legislative history.

Several of the courts that reject defendants' motions to object to the appointment of the most adequate plaintiff on textual grounds have used the Reform Act's legislative history to bolster their position. The \textit{Greebel} court noted that Congress intended for motions for lead plaintiff and motions for class certification to involve distinct inquiries.\footnote{See id at 60–61. See also \textit{Bell, 2002 WL 638571} at *2 ("Congress intended that appointment of a Lead Plaintiff occur at an early stage of the litigation, before consideration of certification issues.").} Because the Act's underlying purpose was to allow early intervention and control of the lawsuit by the most adequate plaintiff, the court reasoned that the designation of the lead plaintiff should be done as quickly as possible.\footnote{See 976 F Supp at 550.}

The \textit{Gluck} court agreed that Congress intended a speedy lead plaintiff determination and added that allowing defendants to voice substantive objections at the appointment stage would waste judicial resources.\footnote{See 976 F Supp at 550.} It reasoned that the best way to execute congressional intent and benefit all investors in the class action was to wrest control of the lawsuit away from the lawyers of nominal plaintiffs and give the power to the largest shareholders.\footnote{See id.}

3. \textit{Sua sponte} exceptions.

Several of the courts that have denied defendants' formal standing to oppose the appointment of a lead plaintiff have nevertheless expressed a willingness to consider the defendants' arguments by raising their issues \textit{sua sponte}.\footnote{See \textit{Fields v Biomatrix, 198 FRD 451, 454 (D NJ 2000)} ("Even if Defendants do not have standing, Defendants point out that the Court may, however, \textit{sua sponte} consider the issues raised by them."); \textit{In re Waste Management, Inc, Securities Litigation, 128 F Supp 2d 401, 410 (S D Tex 2000)} ("[T]his Court may \textit{sua sponte} evaluate the adequacy of any proposed person or group of persons as Lead Plaintiff(s)."); \textit{Takeda, 67 F Supp 2d at 1138} ([D]efendants lack standing to object to the adequacy or typicality of the proposed lead plaintiff at this preliminary stage . . . [n]evertheless, the court may \textit{sua sponte} raise and address certain of the concerns addressed in defendants' statement.").} In \textit{In re The First Union Corp Securities Litigation},\footnote{157 F Supp 2d 638 (W D NC 2000).} the court declined to decide
conclusively the issue of the defendants' standing, instead stating, "[r]egardless of whether Defendants formally have standing . . . nothing in the Reform Act prevents this Court from considering the arguments raised and the authorities cited by Defendants." Because a lack of competing plaintiffs prevented any adversarial presentation of the issue in that particular case, the First Union court found it especially prudent to consider the defendants' concerns. The courts that have granted sua sponte exceptions thus reasoned that, independent of what Congress may have written in the text of the PSLRA, they could most effectively implement the statute's objectives by considering as many viewpoints as possible when determining who would control the litigation.

B. Decisions Finding That the PSLRA Does Not Prevent Defendants From Challenging the Adoption of the Most Adequate Plaintiff Presumption

1. Textual analysis.

The California district court, in Howard Gunty Profit Sharing v Quantum Corp, shared the concern identified in First Union, that silencing the defendants' objections in a situation where no other parties were competing for lead plaintiff status could result in insufficient information to administer effectively the most adequate plaintiff presumption. However, the Howard Gunty court took an additional step and explicitly permitted the defendants to challenge formally whether a particular party fulfilled the substantive statutory requirements to be the most adequate plaintiff.

The court held that the determination of the most adequate plaintiff under the PSLRA is actually a two-step process. A court must first decide whether or not to adopt the presumption that a certain party is the most adequate plaintiff based on the three criteria enumerated in the Act. Once this presumption has been

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54 Id at 641.
55 See id.
56 Civ No 96-20711 SW, slip op at 1 (N D Cal 1997).
57 See id at 6.
58 See id at 2.
59 Id at 4.
60 Howard Gunty, Civ No 96-20711 SW, slip op at 4.
adopted, other purported class members may introduce evidence to rebut it.63

Contrary to the Greebel court’s finding that the plain text of the statute prevented defendants from raising substantive challenges to a motion for lead plaintiff appointment, the Howard Gunty court found that the text prevents defendants from raising objections only after the most adequate lead plaintiff presumption had already been adopted.64 At that point, the court conceded that defendants no longer have standing to object.65 The statute, however, is silent on what challenges the court should consider when determining whether or not to apply the presumption.66 Accordingly, the court concluded that “nothing in [the PSLRA] limits standing of defendants to challenge the sufficiency of a plaintiff’s showing pursuant to [the statutory requirements].”67 The court’s textual analysis thus supports permitting defendants to argue against the application of the most adequate plaintiff presumption itself.

2. Legislative intent.

In King v Livent,68 a New York district court bolstered this textual analysis, noting that the Reform Act did not preclude defendants from challenging a motion for appointment as lead plaintiff.69 The court noted, “Section (a)(3) of the PSLRA contains no reference to any participation of a defendant in the appointment process.”70 The courts in King and Howard Gunty both reasoned that supporting such challenges was consistent with implementing the Reform Act’s goal of alleviating the abuses of the class action device in securities litigation by ensuring that genuine investors, rather than attorneys, were in control of the lawsuit.71 King concludes that “[o]n balance, a therapeutic appointment process such as is envisaged by the PSLRA will work better with more information than less.”72

63 Id.
64 See id at 6–7.
65 Id.
66 See Howard Gunty, Civ No 96-20711 SW, slip op at 5.
67 Id at 6.
68 36 F Supp 2d 187 (S D NY 1999).
69 Id at 190.
70 Id.
71 See King, 36 F Supp 2d at 190; Howard Gunty, Civ No 96-20711 SW, slip op at 7.
72 King, 36 F Supp 2d at 191.
The purpose of enacting the PSLRA was to eliminate the assignment of lead plaintiff status solely on a first come, first serve basis and to select instead the party who could most adequately represent the interests of the entire class. Allowing the defendants to point out flaws in a party's motion would ensure that the requirements for most adequate plaintiff were satisfied, especially in cases where there was only one party seeking to be named lead plaintiff. The courts did not want to risk muting the defendants in such situations for fear that this would open the door for lawsuits controlled by attorneys rather than true investors. Allowing the defendants to participate in the selection of the lead plaintiff would ensure that the process was completed as thoroughly as possible and would better serve legislative intent.

C. Judicial Disagreement About the Depth of Inquiry a Court Must Undertake Prior to Adopting the Most Adequate Plaintiff Presumption

In addition to disagreeing about how to interpret the lead plaintiff provisions of the PSLRA, courts are also divided on the issue of how thoroughly they must examine whether a party meets the necessary Rule 23 criteria before they adopt the most adequate plaintiff presumption. The conflict centers around how much evidence is sufficient to meet the showings of adequacy and typicality required under Section 77z-1(a)(3)(B)(iii)(I)(cc). Resolving this question draws attention to how much a defendant stands to lose from a preliminary determination about the plaintiff class's adequacy of representation.

The Gluck court found that no more than a "preliminary showing" of the Rule 23 elements was necessary to satisfy the requirements of the Reform Act. Such a low threshold would satisfy Congress's intent that the lead plaintiff determination be

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73 Clinton Foreign Policy, 104th Cong, 1st Sess in 141 Cong Rec H 13691, 13700 (Nov 28, 1995).
74 See Howard Gunty, Civ No 96-20711 SW, slip op at 6–7.
75 See id at 7. See also In re Orthodontic Centers of America, 2001 WL 1636846 at *2 ("[T]he Court will consider the arguments raised by the defendants as there are no competing claims to ensure compliance with the Act by other plaintiffs . . . but will limit its consideration to the arguments relative to the application of the presumption.").
76 See Howard Gunty, Civ No 96-20711 SW, slip op at 7.
78 976 F Supp at 546.
made quickly and easily at an early stage of litigation. Addition-
ally, prospective lead plaintiffs would not be burdened unduly by being forced to incur unnecessary expenses in order to provide extensive evidentiary proof of adequacy and typicality. The Third Circuit has embraced the view explicated in Gluck, finding it consistent with the statutory structure and legislative history of the PSLRA. The court concluded that a mere prima facie showing of adequacy and typicality by the movant would be sufficient for the application of the most adequate plaintiff presumption. At least one court has disagreed with the majority position that plaintiffs need only satisfy minimum standards of adequacy and typicality. The Northern District of California, in In re Critical Path, Inc, Securities Litigation, explicitly declined to follow Gluck, stating that “[t]he fact that a searching inquiry under Rule 23 is not required at this stage of the litigation does not mean that the Court must pay mere lip service to the requirement of the statute that a prospective lead plaintiff ‘satisfy the requirements of Rule 23.’” The purpose of foregoing an extensive Rule 23 inquiry at the appointment stage was best understood as a means of expediting the litigation, and thus encouraging efficiency, rather than a means of avoiding problems that could affect the class later on in the lawsuit. The court noted that while the goal of judicial efficiency was an important one, it needed to be balanced with protecting the interests of the class.

Defendants under a Critical Path regime may have a harder time defeating class certification than they would under a Gluck regime. If a court has already conducted a thorough inquiry into adequacy and typicality during the appointment phase, then defendants will have greater difficulty overcoming that showing during a class certification hearing. Less convincing evidence will be sufficient to overcome a simple preliminary showing of the Rule 23 requirements.

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79 See id at 542, 550.
80 Id.
81 See In re Cendant Corp Litigation, 264 F3d 201, 264 (3d Cir 2001) (“[T]he court’s initial inquiry as to whether the movant with the largest losses satisfies the typicality and adequacy requirements need not be extensive.”).
82 See id.
83 156 F Supp 2d 1102 (N D Cal 2001).
84 Id at 1110.
85 See id.
86 Id.
87 This argument is discussed further in Part III C 3.
III. DEFENDANTS SHOULD HAVE STANDING TO OPPOSE LEAD PLAINTIFF APPOINTMENT PRIOR TO CLASS CERTIFICATION

A thorough examination of the PSLRA's text, its legislative history, and underlying public policy concerns helps resolve the conflicting judicial interpretations of the statute's lead plaintiff provisions. While the text is ambiguous, the statutory history reveals a strong congressional desire to curb the filing of meritless lawsuits and reduce the costs of litigation. Although empirical evidence indicates that the PSLRA may not have achieved its intended effects of reducing the number of securities fraud class actions filed or encouraging more institutional investors to serve as lead plaintiffs, courts can still advance the goals of judicial economy and better protection for smaller investors by granting defendants formal standing to oppose the adoption of the most adequate plaintiff presumption. Such a move will help ensure that the plaintiff class is represented by the most capable party available.

A. Textual Analysis

When interpreting a statute, a court should first look to the plain language of the statute to interpret its provisions. The relevant sections of the PSLRA dictating the process of appointment of a lead plaintiff direct:

[T]he court should adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that-

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92 See TVA v Hill, 437 US 153, 184 n 29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning."); See also Tyler v Douglas, 280 F3d 116, 122 (2d Cir 2001) ("In determining the proper interpretation of a statute, [t]his court will 'look first to the plain language of a statute and interpret it by its ordinary, common meaning.'"); Cline v General Dynamics Land Systems, Inc, 296 F3d 466, 468 (6th Cir 2002) ("The starting point in determining how a statute is to be applied is the language of the statute itself.").
(aa) has either filed the complaint or made a motion in response to a notice [advising purported class members of the complaint];

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.92

The presumption . . . may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff-

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.93

Courts that have denied defendants standing routinely have cited the passage on rebuttal evidence as their justification.94 However, that logic ignores the point the court raised in Howard Gunty, that determining the presumption is actually a two-step process and the second section only applies after the court has already adopted the presumption.95

The statutory canon expressio unius est exclusio alterius lends support to the Howard Gunty position. Applying the maxim to the statute dictates an inference that all omissions be under-

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94 See, for example, Bell, 2002 WL 638571 at *2 ([R]ebuttal of the presumption of the most adequate plaintiff is limited to 'proof by a member of the purported plaintiff class.'); In re Milestone Scientific Securities Litigation, 183 FRD 404, 414 n 14 (D NJ 1998) ("A defendant or defendants may not object to the adequacy or typicality of the proposed lead plaintiff at this preliminary stage of the litigation."); Fischler, 1997 WL 118429 at *2 ("The plain language of the Act dictates only members of the plaintiff class may offer evidence to rebut the presumption in favor of the most adequate plaintiff.").
95 See Howard Gunty, Civ No 96-20711 SW, slip op at 6.
stood as exclusions. Under this interpretation, Congress's specific inclusion of "members of the purported plaintiff class" in the second prong of the most adequate plaintiff inquiry, but not in the first prong, was done intentionally. This omission demonstrates that Congress wanted to restrict most adequate plaintiff challenges to purported class members only after the presumption was actually adopted.

Admittedly, a subsequent provision in the Reform Act regarding discovery provides some justification for the prevailing interpretation that the text precludes defendant challenges. The statute provides that only "members of the purported plaintiff class" may conduct discovery relating to whether a certain party is the most adequate plaintiff, and only after first demonstrating a reasonable basis for finding the presumptive lead plaintiff incapable of adequate representation. Courts have relied on this parallel language in reading the plain text of the Act to deny defendants any opportunity to object during the lead plaintiff appointment process.

While this reading has merit in light of the fact that Congress intentionally used the same phrase in both clauses, one must still address the ambiguity regarding how the decision to adopt the most adequate plaintiff presumption is made. The language of the Act states that "the court shall adopt a presumption" if the three stated criteria are satisfied but gives no details on how to actually evaluate those criteria. The statute's silence on the issue raises the question of whether the text was intentionally left vague to give courts discretion, or whether it was mere oversight on the part of the drafters. A court must therefore look beyond the text to determine how to interpret and apply the statute.

B. Legislative History

When a statute is silent or ambiguous, courts generally interpret the language in light of the legislative purpose. Transcripts from congressional debates about the PSLRA reveal that

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98 See Norman J. Singer, 2A Sutherland Statutory Construction § 47.23 (5th ed 1992).
96 See, for example, King, 36 F Supp 2d at 190.
100 See, for example, United States v Hudspeth, 42 F3d 1015, 1022 (7th Cir 1994) ("[W]e may turn to the legislative history to interpret a statute only when the statute is ambiguous.").
the most adequate plaintiff presumption clause was added into the proposed bill at the last minute without any public hearings. Since the legislative history is silent on the specific issue of whether Congress wanted to allow defendants or other plaintiffs to object to the court's adoption of the presumption, one must examine legislative intent in light of the overarching goals of the PSLRA.

The House Conference Report debating the merits of the PSLRA notes that the new reform provisions of the Act were added in order “to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class.” Congress ultimately decided that the most capable representatives were institutional investors because they were likely to share typical claims with smaller investors and thus could represent hundreds of thousands of aggrieved investors at once. However, some members of Congress expressed concern that because institutional investors could afford to accept less than full recoveries, the most adequate plaintiff provisions could actually harm smaller investors by forcing them to be represented by attorneys who were not willing to invest their time and efforts into obtaining maximum recovery. These legislators seemed to fear that courts would adopt the most adequate plaintiff presumption too liberally, without any real investigation into whether the investor with the largest financial share was truly capable of adequately representing the interests of all class members.

Congress intended the lead plaintiff provisions to protect the interests of the class by having the most qualified representatives possible advocating on the class’s behalf. This may favor allowing both other plaintiffs and defendants to point out deficiencies in the court’s selection of the most adequate plaintiff. The House Report later acknowledged that potential conflicts could arise from designating the investor with the largest financial stake as lead plaintiff, although challenges to adequacy and typicality are only discussed in the context of rebutting the presumption. No

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103 See S 240, 141 Cong Rec S at 9094 (cited in note 32).
104 See id at 8908, 8915.
105 See id.
107 *As a result, this presumption may be rebutted by evidence that the plaintiff would not fairly and adequately represent the interests of the class or is subject to unique de-
mention is made of any challenges to the court's selection of the lead plaintiff that a party may raise before a court has adopted the most adequate plaintiff presumption. As with the textual analysis of the statute, the legislative history does not fully clarify Congress's position on the issue of defendants' standing to oppose the appointment of a lead plaintiff.

C. Public Policy Arguments

1. A comprehensive lead plaintiff selection process will conserve judicial resources.

Courts are often reluctant to conduct a thorough inquiry into whether a potential lead plaintiff meets the necessary criteria required by the PSLRA at the appointment stage of litigation. They reason that, because the issue will be revisited later when deciding the issue of class certification, a thorough inquiry at the appointment stage would unnecessarily waste judicial resources. However, under the prevalent interpretation of the statute, a lead plaintiff will still have to sustain adequacy challenges twice during the litigation—first from purported class members who wish to rebut the presumption during the appointment stage, and later from defendants during the class certification stage. By allowing defendants to raise substantive objections alongside other class members early on in the lawsuit, the court may actually conserve resources by avoiding duplicative litigation, thereby simplifying and expediting the certification process. Also, if the court later finds the party designated as the lead plaintiff during the appointment stage to be an inadequate representative, the court would have to review the phases of the lawsuit that the former lead plaintiff oversaw and correct any errors. Re-litigating would further lengthen an already burdensome process, thereby wasting judicial resources and perhaps unjustly burdening the defendants.

The high costs of discovery also provide a convincing rationale for allowing defendants to challenge prospective lead plain-

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108 See, for example, Gluck, 976 F Supp at 550.
109 See Zelensky, 73 Notre Dame L Rev at 1144 (cited in note 2).
tiffs prior to class certification.\textsuperscript{110} This is especially true for cases in which multiple investors seek to be appointed as named plain-
tiffs.\textsuperscript{111} If the defendants are able to eliminate part of the group at
the outset, then they will save the time and resources of obtain-
ing discovery from those plaintiffs during the class certification
stage.\textsuperscript{112} These savings would promote Congress's goal of reducing
the costs of defending securities class actions.\textsuperscript{113}

Because the lead plaintiff provisions were not intended to
change the current law with respect to class certification,\textsuperscript{114} de-
fendants might abuse a court's willingness to grant them stand-
ing to attack the appointment of the lead plaintiff by using it as
an additional opportunity to thwart class certification. However,
judges presumably would be able to see through these tactics. It
is unlikely that a judge who found a party to be an adequate lead
plaintiff over the defendants' objections during the appointment
process would later change his mind without any new, substan-
tial information.

Investing more effort into choosing a lead plaintiff during the
appointment phase would benefit plaintiffs as well as defendants.
The adequacy and typicality requirements of Rule 23 were de-
signed to safeguard the interests of absent class members as well
as to protect defendants from litigating lawsuits where the re-
sults would not be binding because of an error in certifying the
class.\textsuperscript{115} It is fairly unlikely that a subsequent court would find
the outcome of a class action nonbinding because of improper cer-
tification when other class members were given the opportunity
to protest the adequacy or typicality of the proposed lead plain-
tiff.\textsuperscript{116} However, smaller investors may not have had the resources
to conduct the discovery necessary to demonstrate the largest
shareholder to be an inadequate representative of the class.
While defendants' objections are likely made in their own self-
interest,\textsuperscript{117} hearing them during the appointment phase could
prove beneficial to the other class members as well.

\textsuperscript{110} See Ferillo, et al, 1332 PLI/Corp at 447 (cited in note 5) ("Developing arguments to
defeat class certification is likely to be a fact-intensive undertaking.").

\textsuperscript{111} Id at 455.

\textsuperscript{112} Id at 457.

\textsuperscript{113} Id.

\textsuperscript{114} See House Report at 34, reprinted in 1995 USCCAN at 733 (cited in note 13).

\textsuperscript{115} See Weiss, 39 Ariz L Rev at 570 (cited in note 16).

\textsuperscript{116} See id.

\textsuperscript{117} See id.
As noted in Part II, most courts are willing to allow defendants to object to a motion for appointment as lead plaintiff on procedural grounds, such as inadequate notice or certification, but not on substantive grounds such as adequacy and typicality. The Greebel court reasoned that permitting procedural objections would enhance effective judicial administration of the case since failure to serve proper notice is fatal to maintaining the class action.

The same logic should apply to the substantive requirements of Rule 23. If the class cannot be certified because the lead plaintiff does not satisfy the adequacy and typicality criteria, then the class action cannot proceed. Although the court could then select a different class representative to serve as lead plaintiff and continue with the litigation, the net result would be unnecessary expenditures of time and resources for both parties. Since the lead plaintiff is also the party who designates the lead counsel for the class, choosing an inadequate class representative could have extensive ramifications for the other members if the selected counsel has only the interests of the lead plaintiff in mind rather than the interests of the entire class.

2. The interests of the plaintiff class are best served by allowing the courts to have more information when selecting the class representative.

Setting aside for the moment the potential waste of judicial resources from giving defendants two separate opportunities to be heard, if the overall objective of securities reform is protecting investors and having the most capable representatives possible leading the litigation, then allowing the defendants to point out deficiencies in the court’s presumptive selection of the lead plaintiff would help achieve that goal. The court should make as in-

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118 See, for example, In re USEC Securities Litigation, 168 F Supp 2d 560, 565 (D Md 2001); Greebel, 939 F Supp at 60.
119 939 F Supp at 60. See also Wenderhold v Cylink Corp, 188 FRD 577, 579–80 (N D Cal 1999) (“Adequacy of notice, after all, is not a matter of concern only to class members. Defendants also have an interest... To be sure, defendants' interest is a self-interested one, but so of course is that of plaintiffs.”).
120 See Ferillo, et al, 1332 PLI/Corp at 440 (cited in note 5) (“[R]enewed focus on issues relating to class certification likely will help defense counsel eliminate some cases altogether, and limit potential liability in others.”).
formed a decision as possible. The plaintiffs can then rely on the courts to separate out legitimate objections to the adequacy of the chosen lead plaintiff from unsubstantiated attempts to defeat class certification.

Although Congress wanted the lead plaintiff to be chosen quickly so that he could take control of the litigation early in the process, speed should not occur at the expense of the class's interests. Some courts have acknowledged that postponing problems concerning the adequacy of the class representative until the certification stage is of no benefit to the class. In fact, delaying such problems may create even more trouble for the class, as the incompetent representative may have set the litigation back. In one instance, a court preferred selecting no lead plaintiff rather than one who would endanger the finality of class certification or thwart the goals of the Reform Act. All of this suggests that courts should expend a reasonable amount of time and resources in determining whether to presume a party to be the most adequate lead plaintiff.

Automatically adopting the most adequate plaintiff assumption without any contrary viewpoints can result in the same abuses of the class action device that Congress sought to avoid with the enactment of the PSLRA. This is especially true in situations where no other competitors are vying for lead plaintiff designation. The defendants may be able to provide the court with crucial information about problems that could potentially arise in the later stages of the litigation. As the King court noted, when deciding a question as important as who will be making decisions for the plaintiff class, a court should have as much information as possible. Given that principle, giving the defendants standing to challenge the adoption of the most adequate plaintiff presumption should not be limited to cases where there is only one party requesting lead plaintiff appointment. Even with several purported class members competing, the defendants

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123 See King, 36 F Supp 2d at 191.
124 See Gluck, 976 F Supp at 550 (citing Reform Act).
125 See, for example, In re Critical Path, 156 F Supp 2d at 1110 (“Refusing to conduct a thorough Rule 23 inquiry [in order to avoid problems that may affect the class later on in the lawsuit] is contrary to the interests of the class.”).
126 See In re Century Business Services, Securities Litigation, 202 FRD 532, 541 (N D Ohio 2001) (“Given the choice between appointing a lead plaintiff that jeopardizes the finality of class certification, and appointing a co-lead plaintiff structure that thwarts the goals of the Reform Act, the Court chooses 'none of the above.'”).
127 See Howard Gunty, Civ No 96-20711 SW, slip op at 6–7.
128 36 F Supp 2d at 191.
may be able to raise additional arguments that the other plain-
iffs had not considered. Furthermore, a plaintiff's attorney who
wants to control the lawsuit will not be able to escape beingchal-
lenged by simply getting two different parties to apply for lead
plaintiff.

3. The most adequate plaintiff presumption may, in
practice, be irrebuttable.

From the defendants' perspective, an important concern is
the refutability of the most adequate plaintiff presumption by the
time the class certification phase arises. While defendants have
the right to challenge the adequacy and typicality of the lead
plaintiff, there is some question as to whether they have any
chance of successfully rebutting the most adequate plaintiff pre-
sumption after the court has already conducted a Rule 23 analy-
sis. The answer to this question may turn on the depth of the
earlier analysis into adequacy and typicality.

If a court conducts a comprehensive inquiry into whether a
plaintiff meets the statutory criteria for most adequate plaintiff,
then it will be more burdensome for the defendants to later rebut
that presumption. They may need to present a heightened evi-
dentiary showing in order to convince the court that the lead
plaintiff does not adequately represent the class. This strength-
ens the argument in favor of allowing defendants to voice their
objections prior to class certification, for that may be their only
true opportunity to object. If only a cursory examination into
adequacy and typicality is conducted during the appointment
stage, then courts have a less urgent need to hear the defendants
that early in the litigation. However, such a perfunctory inquiry
contravenes the Reform Act's goal of placing control of the law-
suit in the hands of the party capable of adequately representing
the interests of the entire class. Legislative or judicial clarifica-
tion as to the extent of the inquiry a court should conduct when
selecting a lead plaintiff under the statute would be helpful in
resolving this debate, but none seems forthcoming.

Despite Congress's intentions in enacting the PSLRA, securi-
ties class actions filings are at an all-time high and the size of
settlements is increasing drastically. Since defendants have

126 See S 240 at 141 Cong Rec S 9114 (cited in note 32).
129 See In re Critical Path, 156 F Supp 2d at 1110.
more to lose than ever before, courts must take care to ensure that they have at least one legitimate chance to defeat unjustifiable class certification. Once the window has passed, a high-priced settlement seems inevitable, regardless of actual liability.

4. The selection process gains legitimacy when courts are not forced to raise defendants' objections sua sponte.

Courts and commentators have suggested that, in spite of the majority rule that defendants do not have standing to challenge the lead plaintiff appointment, defendants should not shy away from raising concerns at the lead plaintiff stage because courts may nonetheless read their submissions and raise their concerns sua sponte. However, since Howard Gunty has established that the text of the Reform Act does not preclude hearing defendants' objections to the adoption of the most adequate plaintiff presumption, courts no longer need to use this sua sponte "loophole" in the law.

Permitting defendants to freely raise their own arguments in open court will have several benefits. First, oral arguments will save time in the long run by giving the court the opportunity to ask questions of the defendants, as opposed to reading a written statement and trying to discern the defendants' arguments. Second, defendants may be more willing to raise objections at this early stage in litigation if they are given standing to do so openly. Third, explicitly giving defendants authority to challenge the lead plaintiff appointment gives the entire process more legitimacy.

The practice of encouraging defendants to submit written statements of objections—despite having already ruled that they lack standing to object, and then raising defendant's arguments sua sponte implies that the court is bending the rules and circum-

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132 See id at 440.
133 See, for example, In re Rhone-Poulenc Rorer Inc, 51 F3d 1293, 1299 (7th Cir 1995) (finding concerns about forcing defendants to settle class actions under fear of bankruptcy even if they have no legal liability).
134 See, for example, Sarah R. Wolff and Casey L. Westover, Adequacy and Related Class Certification Issues: The Defendant's Perspective, 1309 PLI/Corp 123, 135–36 (2002).
135 See Howard Gunty, Civ No 96-20711 SW, slip op at 6.
136 See Barry A. Miller, Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard, 39 San Diego L Rev 1253, 1260 (2002) ("The adversary system is based on the premise that allowing the parties to address the court on the decisive issue increases the accuracy of the decision. In addition, it increases the parties' sense that the court's process and result are fair.").
venting the law. Moreover, the court steps outside of its role as independent decision maker and instead becomes an advocate for one of the parties.\textsuperscript{137} Courts of law should not appear to sanction or encourage this kind of behavior, especially in this situation, since the benefits they are trying to obtain—namely, more information about the lead plaintiff—are in fact accessible under the statute.

\textbf{CONCLUSION}

From the defendants' perspective, the PSLRA has failed in its attempts to reduce the costs of defending securities class actions. If the defendant knows from the outset that settling a lawsuit is preferable to the high costs of litigation, then the defendant has an incentive to reach settlement as early in the process as possible. Once the most adequate plaintiff presumption has been adopted, the defendant may choose to forego the costs of discovery and any further attempts to defeat class certification if it feels that the showings of adequacy and typicality can no longer be rebutted. The defendant would be forced into paying out a huge settlement independent of the underlying merits of the lawsuit. Courts can avoid this situation, which is contrary to the explicit goals of the PSLRA, by allowing defendants to mount formal challenges to the court's selection of the lead plaintiff.

This Comment has made several textual and policy arguments as to why defendants should be permitted to raise objections to the appointment of the lead plaintiff prior to the class certification stage. The court in \textit{Howard Gunty} recognized that nothing in the text of the PSLRA prevents defendants from challenging the adoption of the most adequate plaintiff presumption.\textsuperscript{138} The legislative history establishes that Congress intended the PSLRA to make securities class action suits less expensive to litigate, so that defendants would not continually be forced into unmerited settlements.\textsuperscript{139} Permitting challenges to most adequate plaintiff presumptions could aid this goal by reducing the likelihood of re-litigation and facilitating the process of class certification. Providing courts with more information upon which to base their decisions would benefit both plaintiffs and defendants, and

\begin{footnotes}
\textsuperscript{137} D. Scott Crook, \textit{Affirming the Untested: Affirming a Trial Court Based on Issues Raised Sua Sponte}, 14 Utah B J 10, 13 (2001).
\textsuperscript{138} Civ No 96-20711 SW, slip op at 1.
\textsuperscript{139} See Senate Report at 9, reprinted in 1995 USCCAN at 688 (cited in note 9).
\end{footnotes}
eliminating the need for courts to raise defendants' issues for them sua sponte will help legitimize the entire judicial process.