AHEAD OF THEIR TIME: MEASURING DAMAGES PURSUANT TO SECTION 11(E)(1) OF THE SECURITIES ACT

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ABSTRACT

Through the Securities Act of 1933, Congress protects investors from securities fraud by ensuring that persons who purchased securities directly from the securities issuer had complete and accurate information at the time of purchase. Section 11 of the Securities Act accomplishes this purpose by holding issuers civilly liable for registration statements that contain an untrue statement of material fact and those that omit necessary material facts.

Specifically, Section 11(e) states that in a suit alleging that a registration statement contained an untrue statement of material fact or an omission of a necessary material fact, damages are to be measured by "the difference between the amount paid for the security" on the one hand and "(1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security . . . and the value thereof as of the time such suit was brought." Determining the date for measuring damages pursuant to Subsections 2 and 3 is rather straightforward. Subsection 1's "time such suit was brought" language is similarly straightforward when a single plaintiff files a complaint with Section 11 claims against a defendant. However, the language of Subsection 1 is less straightforward when being applied to a consolidated securities class action where "such suit" for Section 11 damages "was brought" on more than one date, by more than one plaintiff, in more than one complaint.

Courts have not uniformly measured damages pursuant to Section 11(e)(1) in consolidated securities class actions. For example, some courts have measured the damages from the date of the first-filed complaint; other courts have measured the damages from the date of an individual plaintiff's own first-filed complaint; and still others have measured the damages from the date of the first-filed complaint which contained facts sufficient to plead a Section 11 violation, even though the particular suit only brought claims pursuant to the Securities Exchange Act of 1934 or state law securities statutes rather than the Securities Act.

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The core question this article addresses is whether—in the context of a consolidated securities class action—an amended or subsequently filed complaint should relate back to an earlier-filed complaint for purposes of measuring damages pursuant to Section 11(e)(1). The statute does not provide an answer, and Congress has not passed subsequent legislation to clarify. Case law is thin on the issue, providing no definitive answer, and present legal scholarship on point is also lacking. This article provides an analysis of the key considerations related to measuring damages pursuant to Section 11(e)(1) and proposes a uniform framework for how courts should measure such damages.

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INTRODUCTION

The Securities Act of 1933 (the "Securities Act") provides a congressional safeguard against securities fraud by ensuring that persons who purchased securities directly from the securities issuer (the "issuer") had

complete and accurate information at the time of purchase.[2] Specifically, Section 11 of the Securities Act ("Section 11"), codified at 15 U.S.C. § 77k, holds issuers civilly liable for registration statements that contain an untrue statement of material fact and for those that omit necessary material facts.[3]

That civil liability for issuers is measured pursuant to Section 11(e), which states that damages in such a suit are measured by "the difference between the amount paid for the security" on the one hand and:

> "(1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security . . . and the value thereof as of the time such suit was brought."[4]

Under Subsections 2 and 3, the damages calculation is straightforward—it is determined by measuring the sales price of the security against the purchase price of the security.[5] Note that where the plaintiff sells the security at a price that is greater than the purchase price, no damages can be recovered.[6] As set out above, there also exists a scenario where damages measured pursuant to Section 11(e)(3) will simply revert into a measurement of damages pursuant to Section 11(e)(1). This occurs if the value of the security under Subsection 1 would be greater than the price that the purchaser disposed the security for.[7] To the extent that there is any ambiguity in the formula of Subsection 3, it is the calculation of the value of the security at

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[2] 15 U.S.C. § 77k.

[3] *Id.*; *see also* Samuel L. Moultrie, *It's Not Simply a Matter of Opinion: Pleading Standards Under Section 11 for Untrue or Misleading Opinions*, AMERICAN BAR ASS'N. (May 22, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/05/07_moultrie/.

[4] *Id*.

[5] *See* Recovery of Damages Where Stock Was Sold in Excess of Offering Price, Securities Act Release No. 33, 45 2 Fed. Sec. L. Rep. (CCH) ¶ 4655, 4089 (Sept. 22, 1933); Arnold S. Jacobs, *Disclosure and Remedies Under the Securities Laws § 3:87* (December 2020) (explaining the Section 11 damages formulae and providing examples).

[6] *See* Recovery of Damages Where Stock Was Sold in Excess of Offering Price, *supra* note 5; *see also* Jacobs, *supra* note 5.

[7] The statute uses the term "value" rather than "market price" to measure damages pursuant to Section 11. *See* 15 U.S.C. § 77k(e). These two terms are not necessarily interchangeable in this context. *See* Beecher v. Able, 435 F. Supp. 397, 40405 (S.D.N.Y. 1975); Cai v. Switch, Inc., No. 2:18-cv-1471, 2020 WL 3893246, at *3 (D. Nev. Jul. 10, 2020). However, "[i]n general, price and value are used interchangeably, and the courts have not often found the 'true value' of a stock to differ from its market value." *In re* Fortune Systems Sec. Litig., 680 F.Supp. 1360, 1370 (N.D. Cal. 1987) ("The 'value' of a security may be found to be different from the actual price of the security, but this is an unusual and rare situation.").

the "time such suit was brought" as set forth in the language of Subsection 1.

Even still, Subsection 1's "time such suit was brought" language is straightforward when a single plaintiff files a complaint with Section 11 claims against a defendant. However, the language referring to the difference between the amount paid for the security and the value of that security as of the time such suit was brought becomes ambiguous when multiple complaints alleging similar misstatements or omissions are filed at different times and a court consolidates the lawsuits into a single class action—by no means a rare occurrence.[8]

The determination of what date to use in connection with measuring damages under Section 11(e)(1) is a function of what complaint or complaints the court decides to use. Courts, however, have not uniformly measured damages pursuant to Section 11(e)(1) in consolidated securities class actions. For example, some courts have measured the damages from the date of the first-filed complaint.[9] Other courts have measured the damages from the date of an individual plaintiff's own first-filed complaint.[10] Still, others have measured the damages from the date of the first-filed complaint which contained facts sufficient to plead a Section 11 violation, even though the particular suit only brought claims pursuant to the Securities Exchange Act of 1934 (the "Exchange Act") or state law securities statutes rather than the Securities Act.[11] When determining the date to relate back Section 11 damages claims to, courts have found that fairness to the litigants, including discouraging plaintiffs from seeking to capitalize on drops in stock prices after the first-filed complaint and holding defendants liable for material misrepresentations regardless of post-filing price changes, and the preservation of judicial economy, including that evidence of value can be limited to one particular day and that the selection of the filing day of the

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[8] *See Securities Class Action Clearinghouse: About Us,* STANFORD L. SCH., https://securities.stanford.edu/about-the-scac.html ("Often when there is a violation of the federal securities laws, issuers, underwriters, investment banks, broker firms, mutual funds, or a combination of these, will be sued in multiple class action complaints, filed by different named plaintiffs represented by different plaintiff law firms. While these filings often contain substantially similar allegations, there may be variations between the allegations or defendants in separate complaints. In the early stages of the litigation, one court will typically consolidate all of the related securities class actions into a single proceeding that can be jointly managed."); Elizabeth L. Yingling, *U.S. Securities Class Actions – An Overview*, BAKER MCKENZIE, https://www.bakermckenzie.com/-/media/files/locations/india/overview_of_a_securities_class_action_suit.pdf?la=en. ("No later than 90 days after the notice is published – so generally, 110 days after the first lawsuit is filed – the court must consider any motions requesting appointment as lead plaintiff . . . Once the court designates a lead plaintiff, the court will also consolidate the pending cases and, if necessary, order the lead plaintiff to file a single, consolidated complaint.")

[9] *See Cai*, 2020 WL 3893246 *2.

[10] *See Beecher*, 435 F.Supp. at 401-02.

[11] *See* Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1543-44 (8th Cir. 1996).

first suit may limit the multiplicity of identical suits, to be key considerations.[12]

It is important that courts remain consistent by using a uniform framework in measuring damages from the date "such suit was brought" pursuant to Section 11(e)(1).[13] A well-articulated and easily administrable framework would allow litigants to have a greater understanding of potential outcomes from the onset of the litigation and may influence whether plaintiffs decide to file suit at all. At present, the statute is silent and courts have not had significant opportunities to adequately develop the case law.[14] The latter is due, in large part, to the high rate of settlements in securities class actions.[15] "A recent study found that, from 1997 to 2018, 49 percent of core federal filings (that is, securities class actions excluding M&A cases) were settled, 43 percent were dismissed, and overall, less than one percent reached a trial verdict."[16] Although settlements already occur at a high rate, the settlements are not necessarily optimal nor efficient.[17] This is because parties are negotiating without a clear understanding of how a court may ultimately award damages at trial, if the defendant is ultimately liable.[18] A uniform framework would add immediate clarity to all parties' bargaining ranges, and would likely lead to quicker and more optimal settlements.

Part I of this article analyzes the extent to which courts relate back an amended or subsequently filed complaint to an earlier-filed complaint. Part II explores the case law that has measured damages in consolidated actions pursuant to Section 11(e)(1). Part III considers the extent to which statutes and federal rules containing heightened pleading standards, including the Private Securities Litigation Reform Act and Federal Rule of Civil Procedure 9(b), impact whether amended or subsequently filed Section 11 claims can relate back to an earlier-filed complaint. Part IV denotes the benefits of relating back Section 11 claims, including that plaintiffs are less able to strategically file their Section 11 claim on a certain date so as to gain

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[12] *See Beecher*, 435 F.Supp. at 402.
[13] *See* 15 U.S.C. § 77.
[14] *See Alpern*, 84 F.3d at 1542 n.11.
[15] *See Securities Class Action Clearinghouse: Box scores or key statistics from 1996 to YTD,* STANFORD L. SCH., https://securities.stanford.edu/stats.html (last visited Oct. 26, 2021); *see also* George v. China Auto. Sys., Inc., No. 11-Civ.-7533, 2013 WL 3357170, at *1 (S.D.N.Y. July 3, 2013) ("Purported class actions alleging securities laws violations are commenced in this district with frequency. And with frequency, class certification is granted. The certified action proceeds along a relatively predictable path of expensive litigation, significant potential loss allegations, and most often, an eventual settlement.").
[16] Gregory A. Markel, *et al.*, *Settling Securities Class Actions*, PRAC. L. THE J. 27 (2020-2021), https://www.seyfarth.com/dir_docs/publications/PLJ_LIT_Dec20Jan21_Feature.pdf (citing Cornerstone Research, Securities Class Action Filings: 2019 Year in Review, at 16, available at cornerstone.com).
[17] *See* Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, STAN. L. REV. 1487, 1537 (1996).
[18] *See id*. at 1487.

the largest award, and that judicial economy is preserved both because damage trials would be shortened since evidence of value can be limited to one date and also because relating back such claims would limit the multiplicity of identical suits. Part V contends that a uniform framework for measuring damages pursuant to Section 11(e)(1) would actually improve settlement negotiations because parties would be able to more accurately assess what the potential damages award would be at trial, which improvements to the settlement process benefits the parties specifically and the civil litigation process generally.

This article concludes by proposing a uniform framework for measuring damages in consolidated securities class actions pursuant to Section 11(e)(1) that considers the existing case law, comports with the relation-back doctrine and applicable heightened pleading standards, minimizes plaintiffs' ability to damage-shop, preserves judicial economy, and makes the settlement process quicker and able to achieve more optimal settlement outcomes.

I. THE RELATION-BACK DOCTRINE

As noted above, the judicial doctrine of relation back is critical to the date that damages are to be measured against for Section 11(e)(1) purposes as that date is a function of which complaint the court ties the claims to.[19] In fact, the courts that have evaluated what date to use to measure damages under Section 11(e)(1) in situations where multiple complaints were filed have typically relied upon the relation-back doctrine, either expressly or impliedly.[20] The relation-back rule states, in pertinent part, that "[a]n amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[21]

The standard for relation-back requires that an amended complaint must be "tied to a common core of operative facts" to the original complaint, or be "part and parcel of the original complaint" in order to relate back.[22]

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[19] *See* Mayle v. Felix, 545 U.S. 644, 664 (2005).
[20] *See* Fed. R. Civ. P. 15(c).
[21] *Id.* at 15(c)(1)(B).
[22] *See Mayle*, 545 U.S at 664; Anza Technology, Inc. v. Mushkin, Inc., 934 F.3d 1359, 1369 (Fed. Cir. 2019); *see also* Dodd v. United States, 614 F.3d 512, 515 (8th Cir. 2010) ("To arise out of the same conduct, transaction, or occurrence, the claims must be tied to a common core of operative facts. An amended motion may raise new legal theories only if the new claims relate back to the original motion by arising out of the same set of facts as the original claims."); Goldman v. Barrett, 733 Fed. App'x. 568, 570 (2d Cir. 2018) ("To relate back, an amendment must concern "the general fact situation alleged in the original pleading."); Norfolk County Retirement System v. Community Health Systems, Inc., 877

Under Rule 15, "new allegations 'separated in time and type' from those in the original pleading" do not relate back.[23] Like an amended complaint, a subsequently-filed supplemental complaint in an action that has not yet been consolidated may also relate back to an earlier filed complaint pursuant to Rule 15.[24]

The "overriding purpose" of the relation-back doctrine is "the elimination of unjust dismissals resulting from pleading mistakes that cause no prejudice to the defendant."[25] The "central inquiry" of the doctrine "is whether the original complaint 'gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one.'"[26] Courts have determined that the relation-back doctrine should be "liberally" construed, but not "in such a broad manner so as to construe essentially all amendments as permissible."[27]

For purposes of Section 11(e)(1), courts have indeed employed the doctrine of relation back, but not in a uniform way. Courts have related both amended and subsequently filed complaints back to a host of earlier dates, including: the date of the first-filed complaint; the date of an individual plaintiff's own first-filed complaint; and the date of the first-filed complaint which contained facts sufficient to plead a Section 11 violation, even if the

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F.3d 687, 693-94 (6th Cir. 2017) ("As interpreted by our court, this standard is met if the original and amended complaints allege the same 'general conduct' and 'general wrong.'"); Slayton v. Am. Express Co., 460 F.3d 215, 228 (2d Cir. 2006) ("claims that are based on an 'entirely distinct set' of factual allegations will not relate back" (internal quotation omitted)); Caron v. NCL (Bahamas), Ltd., 910 F.3d 1359, 1368 (11th Cir. 2018) ("When the facts in the original complaint do not put the defendant 'on notice that the new claims . . . might be asserted,' but the new claims instead 'involve[] separate and distinct conduct, such that the plaintiff would have to prove completely different facts' than required to recover on the claims in the original complaint, the new claims do not relate back." (internal quotations omitted)).

[23] Ransom v. Shulkin, 719 Fed. App'x. 8, 10 (D.C. Cir. 2018) (quoting *Mayle*, 545 U.S. at 657).

[24] *See* Garrett v. Wexford Health, 938 F.3d 69, 83 (3d Cir. 2019) ("Although Rule 15(d) does not expressly indicate whether or when a supplemental pleading can relate back to the original complaint, we determined that 'case law and secondary sources have long instructed that once a supplemental complaint is granted, it is treated like an amended complaint for purposes of relation back.' Thus, like an amended complaint, a supplemental complaint may relate back when it asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." (internal citations and quotations omitted)).

[25] Silbaugh v. Chao, 942 F.3d 911, 913 (9th Cir. 2019).

[26] Supreme Auto Transport, LLC v. Arcelor Mittal USA, Inc., 902 F.3d 735, 741 (7th Cir. 2018) (quoting Santamaria v. Sears, Roebuck & Co., 466 F.3d 570, 573 (7th Cir. 2006)).

[27] United States v. Santarelli, 929 F.3d 95, 101 (3d Cir. 2019) (citing *Mayle*, 545 U.S. at 656-57); *see* Tiller v. Atl. Coast Line R.R. Co., 323 U.S. 574 (1945); Downey v. Pennsylvania Dep't. of Corrections, 968 F.3d 299, 309 (3d Cir. 2020) ("liberal approach"); *Anza Technology*, 934 F.3d at 1368 ("liberal interpretation"); ASARCO, LLC v. Union Pacific R. Co., 765 F.3d 999, 1005 (9th Cir. 2014) ("liberally applied").

particular suit only brought claims pursuant to the Exchange Act or state law securities statutes other than the Securities Act.

It makes sense for the doctrine of relation back to be used for purposes of determining the date by which to measure Section 11(e)(1) damages. However, the doctrine should be applied uniformly across Section 11 cases so that litigants can accurately assess the potential award at trial. To do so, and as set out below, the date to measure damages pursuant to Section 11(e)(1) should be related back to the very first-filed complaint that alleged a cause of action pursuant to Section 11, that was brought by a party that had standing to bring a Section 11 claim, and that satisfied all applicable pleading standards. In any claim for damages pursuant to Section 11(e)(1) which could proceed to trial, the date in this proposed framework would always be ascertainable.

II. Case Law Measuring Damages Pursuant to Section 11(e)(1)

The text of the Securities Act is ambiguous with respect to measuring damages in consolidated actions pursuant to Section 11(e)(1) thus, courts have had to bear the burden of articulating the rules for measuring such damages.

Unfortunately, courts have been inconsistent in their approach of how Section 11(e)(1) damages should be measured in consolidated actions from "the time such suit was brought."[28] Approaches have included measuring damages from the following dates: the date of the first-filed complaint; the date of an individual plaintiff's own first-filed complaint; and the date of the first-filed complaint which contained facts sufficient to plead a Section 11 violation, even though the particular suit only brought claims pursuant to the Exchange Act or state law securities statutes rather than the Securities Act.

These approaches of how and whether to relate back claims in consolidated class actions are not merely distinctions without true differences. Instead, these inconsistent approaches have a direct impact on liability and the extent of any potential award at trial. The inconsistencies in the approach therefore leaves litigants at a disadvantage in assessing the strengths and weaknesses of their case, and in assessing potential case outcomes.

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[28] Beecher v. Able, 435 F. Supp. 397, 402 (S.D.N.Y. 1975); Merzin v. Providential Fin. Grp. Inc., 311 F. Supp. 2d 674, 686 (S.D. Ohio 2004); Alpern v. Utilicorp United Corp., 84 F.3d 1525, 1544 (8th Cir. 1996).

A. The Date of the First-Filed Complaint

The seminal case for purposes of determining the date used for calculating damages under Section 11(e)(1) where multiple actions were consolidated is *Beecher v. Able*, a consolidated action in the Southern District of New York.[29] The *Beecher* case consolidated three suits, which were filed on October 14, 1966, October 19, 1966, and November 9, 1966.[30] In the procedural history of *Beecher*, the defendant was found to have sold its debentures "under a materially false prospectus."[31] Amongst other disputes, the parties disagreed as to the meaning of "the time such suit was brought" under Section 11(e).[32] The plaintiffs' lead counsel "urged" the court to use October 19, 1966 (the date of the second filed suit) "as the date on which suit was filed."[33] Unsurprisingly, using October 19, 1966 as the date on which suit was filed—as opposed to October 14, 1966 or November 9, 1966—"would [have] tend[ed] to increase the damage award to the plaintiff class."[34] The Southern District of New York, in no uncertain terms, stated that "the time when the suit was brought was October 14, 1966, the day on which the first of these consolidated cases was filed."[35] The opinion went further and called October 14, 1966 "the most logical date," but left the door open for future courts to distinguish by stating that October 14, 1966 was "the most logical date *for present purposes*."[36] The court reasoned that "at the time of filing each of the three consolidated cases anticipated congruent classes" and that "[o]n October 14, 1966, when the first suit was filed, all those individuals who would eventually comprise the plaintiff class were already contemplated by the action."[37] The court relied on the principle that "there is no problem of selecting a date and suit which might prove under-inclusive."[38]

In an expansion of *Beecher*, the District of Massachusetts held in *In re Brooks Automation, Inc. Securities Litigation* that a newly-appointed lead plaintiff's amended complaint, which adds a co-lead plaintiff solely for the purpose of ensuring Section 11 standing, may relate back to an earlier complaint, as long as the defendants named in the amended complaint were

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[29] 435 F. Supp. 397 (S.D.N.Y. 1975).
[30] *Id*. at 401.
[31] *Id*. at 400 ("In particular, the court found that the break-even prediction, use of proceeds section and the failure to disclose certain pre-tax losses rendered the prospectus misleading.").
[32] *Id*. at 401.
[33] *Id*.
[34] *Id*.
[35] *Id*. at 401-02 (noting that its "decision to elect the date of filing of the first suit, as the date of suit is made without reliance on [defendant's] argument").
[36] *See id*. at 402 (emphasis added).
[37] *Id*.
[38] *Id*.

put on notice by that earlier complaint.[39] Further, the court also held that a first-filed complaint with a bare-bones Section 11 pleading (here, the "certification simply state[d] that he acquired Brooks' shares on October 26, 2005 [], and [did] not list any other transactions in Brooks' stock") is sufficient for purposes of putting a stake in the ground for a subsequent relation back.[40]

More than forty years after *Beecher*, the Southern District of New York had an opportunity to revisit this Section 11 inquiry in *In re Barclays Bank PLC Securities Litigation*.[41] *Barclays* saw five different plaintiffs file pre-consolidation complaints for various offerings made by defendants.[42] The Court eventually dismissed the claims, but the lead plaintiffs were successful in re-pleading allegations for one of the offerings (the "Series 5 Offering").[43] When the court later certified the class, it held that the proper date for measuring Section 11 damages was the filing date of the first complaint which brought claims related to the Series 5 Offering,[44] despite the fact that the complaint used was the fourth overall complaint filed of the five complaints that were consolidated.[45] The district court granted the defendants' motion to dismiss on all counts and denied plaintiffs' motion for reconsideration.[46] Plaintiffs appealed to the Second Circuit, which upheld the dismissals with the explicit exception of the Series 5 Offering claims.[47] After remand, the operative complaint was filed.[48]

That *Barclays* court looked at three dates for purposes of assessing the time the suit was brought pursuant to Section 11: (1) April 8, 2008, the date of the initial complaint when the first plaintiff filed claims related to the material misrepresentations made by defendants' Series 5 Offering, which was before the multiple suits were consolidated; (2) February 4, 2011, when the then-lead plaintiffs filed a motion for reconsideration (after the motion

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[39] No. 06-cv-11068, 2007 WL 4754051, at *4-6 (D. Mass. Nov. 6, 2007) (finding that Section 11 claims cannot be related back against defendants named for the first time in the amended complaint where the "new defendants did not receive notice of the filing of the [earlier-in-time-filed] action, nor did they know that they would have been named in the initial complaint but for a mistake of identity").
[40] *Id.* at *5.
[41] No. 09-cv-1989, 2016 WL 3235290, *1 (S.D.N.Y. Jun. 9, 2016).
[42] Freidus v. Barclays Bank, PLC., No. 1:09-cv-01989 (S.D.N.Y Dec. 01, 2009).
[43] *Barclays Bank*, 2016 WL 3235290, at *3.
[44] *See id.* at *5-6.
[45] *Compare* Class Action Complaint for Violation of the Fed. Sec. L., *In re Barclays*, 2016 WL 3235290 (No. 1:09-cv-03608), 2009 WL 4974715, *with* Complaint for Violation of the Fed. Sec. L., *In re Barclays*, 2016 WL 3235290 (No. 1:09-cv-03949), 2009 WL 1623890, Class Action Complaint, *In re Barclays*, 2016 WL 3235290 (No. 1:09-cv-02668), 2009 WL 871590, Complaint for Violation of the Fed. Sec. L., *In re Barclays*, 2016 WL 3235290 (No. 1:09-cv-02326), 2009 WL 771975, *and* Complaint for Violation of the Fed. Sec. L., *In re Barclays*, 2016 WL 3235290 (No. 1:09-cv-01989), 2009 WL 602923.
[46] *In re Barclays*, 2016 WL 3235290, at *2.
[47] *Id.*
[48] *Id.*

to dismiss had been granted), in which plaintiffs proposed filing the operative amended complaint (incorporating the Series 5 Offering claims), and which was after the multiple suits were consolidated; and (3) September 16, 2013, when lead plaintiffs filed the operative amended complaint after the appeal.[49] There was limited analysis in the *Barclays* opinion that expanded upon previous courts' review.[50] Instead, the *Barclays* court primarily relied upon *In re Brooks Automation*, discussed above, which the *Barclays* court called "most analogous."[51] The *Barclays* court only cited to the *Beecher* precedent once, and it did so in a string citation that also included *In re Brooks Automation,* for the proposition that "the proper date is that of the first-filed complaint, rather than of a later-filed amended or consolidated complaint."[52] The *Barclays* court determined both that the relation back conditions were met in the present case and that the new plaintiff's Section 11 claims should be calculated from the filing of the initial complaint.[53]

Similarly, in *Cai v. Switch, Inc.*, the District of Nevada in 2020 analyzed the question of a security's "value" and, in so doing, held that "[h]ere, 'value thereof as of the time such suit was brought' is appropriately measured by market price *on the date of the first-filed complaint*."[54] That District of Nevada noted, however, that the date such suit was brought was not to be determined based upon the date the first related state court case was brought.[55] With not much more than a passing reference, the District of Nevada's addition strengthens the argument that measuring Section 11 damages can be determined as of the date of the first-filed suit, but again, like many courts before it, the District of Nevada limited its application of the law to the present facts.[56]

B. The Date of Each Plaintiff's Own First-Filed Complaint

In a distinct line of reasoning, some courts have used the date of each plaintiff's first-filed complaint to measure damages for that specific plaintiff pursuant to Section 11(e)(1) rather than the overall first-filed complaint in the consolidated action.[57] In *Grossman v. Waste Management, Inc.*, the Northern District of Illinois accepted that the amount of damages at the time such a suit was filed should be measured by the date that a plaintiff filed her

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[49] *Id.* at *3.
[50] *Id.* at *1-8.
[51] *See id.* at *5 (citing *In re* Brooks Automation, Inc. Sec. Litig., No. 06-cv-11068, 2007 WL 4754051, at *3 (D. Mass. Nov. 6, 2007).
[52] *Id.* at *5 (citing Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1541-44 (8th Cir. 1996); *In re Brooks*, 2007 WL 4754051, at *5-6; Beecher v. Able, 435 F. Supp. 397, 402 (S.D.N.Y. 1977).
[53] *Id.* at *6.
[54] No. 2:18-cv-1471, 2020 WL 3893246, at *2 (D. Nev. July 10, 2020) (emphasis added) (quoting 15 U.S.C. § 77(k)(e)).
[55] *Id.* at *3.
[56] *Id.* at *2.
[57] *See, e.g.*, Grossman v. Waste Mgmt., Inc., 589 F. Supp. 395, 416 (N.D. Ill. 1984).

suit prior to the consolidation, rather than the date that the initial plaintiff filed a complaint (or some alternative date).[58] The court provided a limited analysis, but its holding nevertheless favors a narrow interpretation of *Beecher* and how the relation-back doctrine applies in Section 11 consolidated actions, cutting against the broader reading of *Beecher's* progeny.[59]

In *Merzin v. Provident Financial Group Inc.*, a 2004 case in the Southern District of Ohio, the original complaint in the action was filed on March 6, 2003.[60] The only class/sub-class of plaintiffs who had standing to file a Section 11 claim (the "Silverback Plaintiffs") did not file that original complaint and did not become a party to the lawsuit until May 2, 2003.[61] Although the Silverback Plaintiffs argued their complaint should relate back to the original complaint, the court agreed with the defendants' argument against relation-back, designating the Silverback Plaintiffs' own filing date as the operative date for their Section 11 damages.[62] The Court reasoned that the Silverback Plaintiffs did not file the original complaint and that the earlier-filed complaints did not create standing under Section 11.[63] The *Merzin* court's reasoning is essentially an expansion on the above-mentioned *Grossman* court's rule for relating the measurement of Section 11(e)(1) damages back only to each plaintiff's own previously filed complaint.[64] In *Merzin*, the court found that "[i]t would not comport with the interests of justice to allow the Silverback Plaintiffs to relate back to a Complaint which they did not file, and for which no other party had standing to bring a Section 11 claim."[65]

C. The Date of the First-Filed Complaint Which Contained Facts Sufficient to Plead a Section 11 Violation

In a third line of reasoning, some courts have measured damages pursuant to Section 11(e)(1) based on the date of the first-filed complaint which contained facts sufficient to plead a Section 11 violation, even if that particular complaint only brought claims pursuant to other federal or state securities statutes.[66] Although this line of reasoning is not irreconcilable with *Beecher*, which used the first-filed complaint of the consolidated class

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[58] *See Grossman*, 589 F. Supp. at 415 ("[An individual plaintiff] first asserted her claim in a separate lawsuit, later consolidated here, on March 28, 1983. The parties agree that the market price of Waste Management stock on that date was $44⅝ . . . Applying the formula in § 77k(e)(1), defendants argue that since Chester's shares were worth more on the date of her lawsuit than she paid for them, she is not entitled to recover under the statute.").
[59] *See* discussion *supra* Part II.A.
[60] 311 F. Supp. 2d 674, 686 (S.D. Ohio 2004).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id; see also* Grossman, 589 F. Supp. at 415.
[65] *Merzin*, 311 F. Supp. 2d at 686.
[66] *See, e.g.*, Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1543-44 (8th Cir. 1996).

action, it is at least a narrowing of *Beecher*'s domain.[67] The most prominent case in this line of reasoning is *Alpern v. UtiliCorp United, Inc.*, a 1996 Eighth Circuit opinion.[68] The procedural history is particularly relevant here. William Alpern filed his first complaint on June 17, 1992, alleging causes of action under Section 10(b) of the Exchange Act that the defendant "fraudulently conceal[ed] adverse material information in order to maintain inflated stock prices."[69] On August 6, 1992, Alpern filed an amended complaint, lengthening the class period for the Section 10(b) claims and adding a Section 11 claim under the 1933 Securities Act.[70] The latter claim was on behalf of a subclass of persons who purchased UtiliCorp common stock pursuant to an August 14, 1992 registration statement which incorporated false statements made in a September 4, 1990 prospectus.[71] This amended complaint "was based on the same transactions, occurrences, and conduct alleged in the original complaint."[72] The Eighth Circuit noted that "the district court dismissed the first complaint on July 20, 1993, for failure to plead scienter with particularity," but that "[t]he complaint was reinstated on November 3 . . . after appellants filed a motion for relief from the judgment based on newly discovered evidence suggesting that UtiliCorp knew about the misappropriations four months prior to its public disclosure."[73] Alpern, along with plaintiff Russell Miller, filed a second amended complaint on December 6, 1993, which alleged a Section 11 claim as well as the Section 10(b) and Rule 10b–5 claims.[74] After losing on summary judgment with respect to the Section 11 claim and the dismissal of the Section 10(b) and Rule 10b–5 claims, the plaintiffs appealed.[75] The main issue on appeal was "which date should determine 'the time such suit was brought.'"[76]

On appeal, the defendant argued that the district court was correct in setting the date at August 6, 1992 "because that is when Alpern added a claim authorized by § 11(a) to his complaint."[77] Plaintiffs argued that the Section 11 claim related back to the original June 17, 1992 filing, as the "§ 11 claim [arose] from the same misappropriations as [the] § 10(b) and Rule 10b–5 claim, and because UtiliCorp had the same duty to disclose material facts in order to render its financial statements not misleading."[78] The Eighth Circuit set out that the "basic inquiry" of the relation back doctrine "is whether the amended complaint is related to the general fact situation alleged in the

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[67] *See id.*; *see also* Beecher v. Able, 435 F. Supp 397, 401 (S.D.N.Y. 1975).
[68] *Alpern*, 84 F.3d at 1544.
[69] *Id.* at 1531.
[70] *Id.*
[71] *Id.*at 1529, 1531.
[72] *Id.* at 1543.
[73] *Id.* at 1531.
[74] *Id.*
[75] *Id.* at 1532-33.
[76] *Id.* at 1542.
[77] *Id.*
[78] *Id.* at 1542-43.

original pleading."[79] The Eighth Circuit found that "Alpern's § 11 claim was based on the same misappropriations alleged in the original complaint," or, in other words, that it was "based on the same transactions, occurrences, and conduct" as the original complaint.[80] Based on this reasoning, the court held that the amended complaint, and therefore the Section 11 claim, indeed "relate[d] back to the filing date of the original complaint" and chose June 17, 1992 as the time the suit was brought, the date of the first-filed complaint which contained facts sufficient to plead a Section 11 violation for determining damages.[81]

Similarly, in *In re Fortune Systems Securities Litigation*, the Northern District of California briefly touched on this Section 11 inquiry.[82] Prior to the action at issue in *In re Fortune Systems*, the same plaintiffs filed a complaint against the defendants for state securities violations in state court on June 15, 1983.[83] The plaintiffs then filed another complaint one month later on July 15, 1983, but this time alleged violations of the federal securities laws, including Section 11 of the Securities Act.[84] In this federal securities law action, the defendants argued:

> [T]hat alleged post-June 15 losses [were] also not recoverable because the filing of the suit on June 15 bar[red] plaintiffs from recovering for any 'loss' after that date. Defendants assert[ed] that, under § 11, the time of filing suit create[d] a deadline for the recovery of any loss, and thus bar[red] plaintiffs' recovery for any alleged loss, after that date.[85]

The court determined, without providing an analysis of its interpretation of the statute, that damages for any of the federal securities violations alleged in the July 15 complaint would be calculated using the date of June 15, the date that the state court securities action commenced.[86]

In *In re AFC Enterprises, Inc. Securities Litigation*, a 2004 case in the Northern District of Georgia, the defendants argued that the operative date was the date that the consolidated amended class action complaint was filed.[87] The court expressly acknowledged that the defendants' "argument

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[79] *Id.* at 1543 (citing *In re* Bellanca Aircraft Corp., 850 F.2d 1275, 1283 (8th Cir. 1988)).
[80] *Id.* at 1543-44.
[81] *Id.*
[82] *In re* Fortune Sys. Sec. Litig., 680 F.Supp. 1360, 1369-70 (N.D. Cal. 1987).
[83] *Id.* at 1362.
[84] *Id.* at 1362-63.
[85] *Id.* at 1364.
[86] *Id.* at 1369-1370. The analysis in *In re Fortune Systems* is at odds with the District of Nevada's 2020 *Cai* opinion discussed in Section II.A. Cai v. Switch, Inc., No. 2:18-cv-1471, 2020 WL 3893246, at *3 (D. Nev. July 10, 2020).
[87] 348 F. Supp. 2d 1363, 1379 (N.D. Ga. 2004).

[was] misplaced, as it relie[d] on interpretation of the phrase 'at the time such suit was brought' to mean 'at the time that the amended complaint [was] filed.'"[88] Like the Eighth Circuit in *Alpern*, the Northern District of Georgia in *AFC Enterprises* found that where "the [S]ection 11 claim asserted in [a later-in-time-filed complaint] arose out of the general transactions and occurrences set forth in the original complaint, the appropriate measure of damages is the difference between the purchase price and the price of the stock on the day that the original complaint was filed."[89] Despite the fact that the initial complaints only alleged causes of action pursuant to the Exchange Act, the court chose the filing date of the first-filed complaint as the operative date for determining Section 11 damages.[90] This holding goes further than *Alpern*.[91] Whereas there was one initial complaint in *Alpern*, there were initial complaints filed by multiple plaintiffs in *AFC Enterprises* who were competing for the lead plaintiff designation.[92] Nevertheless, the court still chose the very first-filed complaint which contained facts sufficient to plead a Section 11 violation for determining damages, and, in turn, broadened the holding in *Alpern* and the application of relation-back doctrine in Section 11 consolidated class actions.[93]

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Although courts are not entirely consistent in how they approach calculating the date to measure damages under Section 11, the one constant is that the relation-back doctrine can apply to Section 11 claims under certain circumstances. Considering that courts have interpreted this statutory provision for nearly fifty years, the proposed framework in this article for analyzing "the time such suit was brought" in consolidated actions that include claims for damages pursuant to Section 11(e)(1) will also relate back claims. However, this framework does so to a certain date which is easily ascertainable and can be administered uniformly by courts in all consolidated cases.

III. HEIGHTENED PLEADING STANDARD STATUTES AND RELATION-BACK

In resolving the issue as of which complaints should be used as the filing date for measuring damages pursuant to Section 11(e)(1), the heightened pleading standards contained in the Private Securities Litigation Reform Act (the "PSLRA") and Federal Rule of Civil Procedure 9(b) ("Rule 9(b)") should be considered. This is because it would be imprudent to relate

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[88] *Id.*

[89] *Id.* at 1380.

[90] *Id.*

[91] *See id.*; *see also* Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1543-44 (8th Cir. 1996).

[92] However, this broadening is qualified by the fact that the *AFC Enterprises* Court, just like *Alpern*, also chose the very first complaint. *Alpern*, 84 F.3d at 1528, 1543-44; *In re* AFC Enters., 348 F. Supp. 2d at 1367, 1379-80.

[93] *In Re AFC Enterprises*, 348 F.Supp.2d at 1380.

back a subsequently filed complaint to an earlier-filed complaint if such earlier-filed complaint was itself deficient under an applicable heightened pleading requirement.

However, courts have not consistently considered the PLSRA or Rule 9(b) when determining whether and how to relate claims back for purposes of measuring damages pursuant to Section 11(e)(1). Courts have only considered whether these heightened pleading standard statutes apply to Section 11 claims generally.[94]

Requirements for a heightened pleading may significantly impact the relation-back doctrine for consolidated Section 11 class actions. As noted above,[95] courts have related back an amended or subsequently filed complaint which pleads a Section 11 claim to the original complaint for purposes of measuring statutory damages.[96] These courts have done so through their reliance that the subsequently-pled Section 11 claim arose out of the same general transactions or occurrences which were set forth in the original complaint.[97]

The PSLRA requires that, for any securities fraud complaint which alleges a misleading statement or omission of material fact, the plaintiff must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed."[98] Courts have routinely found that the heightened pleading standard of the PSLRA is not applicable to Section 11 claims.[99] Therefore, it makes sense that courts have not applied the PSLRA in claims for damages pursuant to Section 11.

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[94] *See* Todd R. David et al., *Heightened Pleading Requirements, Due Diligence, Reliance, Loss Causation, and Truth-On-The-Market – Available Defenses to Claims under Sections 11 and 12 of the Securities Act of 1933*, 11 TENN. J. BUS. L. 53, 61 (2010).
[95] *See supra* Parts I and II.
[96] *Alpern*, 84 F.3d at 1543-44; *In re AFC Enterprises, Inc. Sec. Litig.*, 348 F. Supp. 2d at 1380.
[97] *See supra* Parts I and II.
[98] 15 U.S.C. § 78u–4(b).
[99] Knollenberg v. Harmonic, Inc., 152 F. App'x 674, 683 (9th Cir. 2005) ("Claims brought under Sections 11 and 12 of the 1933 Act are not subject to the heightened pleading requirements of the PSLRA."); Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004) ("Similarly, the PSLRA, which applies in this respect only to claims brought under the Exchange Act, requires that any securities fraud complaint alleging misleading statements or omission of material fact must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed"); *In re* Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281, 338 (S.D.N.Y. 2003) ("In sum, because the phrase 'under this chapter' as used throughout [the PSLRA] only refers to the Exchange Act, the PSLRA pleading requirements have no application to claims that arise under Section 11 . . . ."); *but see In re*

Rule 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake," whereas "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[100] Although Section 11 holds defendants strictly liable for their conduct,[101] such Section 11 claims nevertheless "often are [] predicated on fraud."[102] As the Second Circuit noted in *Rombach v. Chang*, "[b]y its terms, Rule 9(b) applies to 'all averments of fraud.'"[103] Therefore, "Section 11 claims sounding in fraud are subject to the pleading requirements of Rule 9(b)."[104]

However, in applying the relation-back doctrine to determine the time such suit was brought for purposes of measuring damages pursuant to Section 11(e)(1), courts have not scrutinized the Section 11 claims under the heightened pleading standards of Rule 9(b).[105] The potential problem here is that courts may relate back an amended or subsequently filed Section 11 claim to an earlier-filed complaint, despite that the pleadings in the earlier-filed complaint would not have satisfied the heightened Rule 9(b) pleading standard, specifically when courts allow for relation back to a complaint which did not actually plead a cause of action under the Securities Act at all. Presumably, where the court allows an initial complaint that pleads a Section 11 claim to proceed, it also recognizes (either implicitly or expressly) that Rule 9(b) would not have stopped the claim from proceeding.[106]

However, given that an intended purpose of the heightened pleading standard was to "protect[] a defendant's reputation from the harm that general, unsubstantiated fraud accusations will cause, and [to] prevent[] a

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No. Nine Visual Tech. Corp. Sec. Litig., 51 F. Supp. 2d 1, 13 (D. Mass. 1999) ("Although Rule 9(b) does not apply to the Securities Act claims, *the requirements of the PSLRA still do*." (emphasis added)).

[100] Fed. R. Civ. P. 9(b).

[101] NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 148 (2d Cir. 2012).

[102] *Rombach v. Chang*, 355 F.3d at 171.

[103] *Id.*

[104] *In re AFC Enterprises, Inc.*, 348 F. Supp. 2d at 1377.

[105] *See generally id.* (discussing, for purposes of Section 11 pleading, the heightened pleading standard under Rule 9(b) but not the PSLRA); *Alpern*, 84 F.3d at 1542-44 (not discussing Rule 9(b)'s heightened pleading standard, but rather Rule 15(c)(2)'s pleading standard).

[106] The assumption made here is that courts would not permit claims to proceed that should otherwise fail to move forward because the claim did not meet certain heightened pleading requirements. Where courts do permit claims that fall within the scope of Rule 9(b)'s heightened pleading requirements, it follows from this assumption that the courts found the claims did meet those certain heightened pleading requirements. The position here is that Rule 9(b) is applicable to Section 11 claims and that such claims must therefore meet the requirements of Rule 9(b).

claimant from searching for a valid particular claim after filing suit,"[107] it would flout Rule 9(b) for courts to relate back a plaintiff's amended or subsequently filed complaint to an earlier-filed complaint which did not allege a Section 11 claim—and did not otherwise satisfy the requirements of Rule 9(b). In order to comply with the prescription of Rule 9(b), courts should be wary of relating back Section 11 claims to earlier-filed complaints. Instead, courts should consider whether the complaint which is being used for the date of measuring Section 11 damages would have satisfied Rule 9(b)'s requirements.

IV. FAIRNESS AND JUDICIAL ECONOMY

As noted above, when determining what date to apply for Section 11(e)(1) purposes, fairness and judicial economy are key considerations. In addition to protecting litigants through the relation-back doctrine and protecting defendants through heightened pleading standards requirements of Rule 9(b), in measuring damages pursuant to Section 11(e)(1), courts also seek to avoid, or at least minimize, date-shopping.[108] Date-shopping occurs when an investor seeks "to capitalize on a further drop in stock prices by waiting for a more favorable date to file his § 11 claim."[109] Multiple courts that address this Section 11 inquiry also discuss date-shopping concerns. The *Beecher* court supported the notion of choosing the date of the first-filed complaint because doing so "may well reduce date-shopping subsequent to the first filing."[110]

This concern also arose in *Alpern*, as one of the plaintiffs argued that if his Section 11 claim did not relate back to the date on which the complaint was originally filed, then future plaintiffs would be "encourage[d] . . . to 'damage shop' by waiting to file an independent § 11 claim after the stock price drops further."[111] The plaintiff reasoned that the statute could not have intended for "date-shopping" and, therefore, the statute must have intended for the date to be related back.[112] Although the *Alpern* court acknowledged the *Beecher* court's date-shopping concerns, it also wrote that the plaintiff amended his complaint "based on additional information discovered about the same underlying occurrences," and that none of the evidence presented "suggest[ed] that Alpern sought to capitalize on a further drop in stock prices by waiting for a more favorable date to file his § 11 claim."[113] As noted above in Part II.C, the *Alpern* court decided that the date of the first-filed complaint

[107] Am. Realty Tr., Inc. v. Hamilton Lane Advisors, Inc., 115 F. App'x 662, 666-67 (5th Cir. 2004).
[108] Date-shopping has also been referred to as damage-shopping.
[109] *Alpern*, 84 F.3d at 1543.
[110] *Beecher*, 435 F.Supp. at 402.
[111] *Alpern*, 84 F.3d at 1542.
[112] *Id*.
[113] *Id*. at 1543.

which contained facts sufficient to plead a Section 11 violation should be used for determining damage.[114]

The *Beecher* court also recognized the distinct possibility, as suggested by the defendants in the action, that if the date of the first-filed suit is not selected, then "publicity surrounding the filing of suit may . . . artificially alter[] the market price of the [securities] during subsequent days and weeks."[115] The *Barclays* court similarly recognized the fairness consideration that if courts "lock[] in the applicable damages at the filing of the first complaint" then "defendants [will be] liable for material misrepresentations regardless of post-filing changes in price."[116]

Thus, avoiding date-shopping promotes fairness to the litigants as it discourages plaintiffs from seeking to capitalize on further drops in stock prices after the first-filed complaint while also holding defendants liable for material misrepresentations regardless of post-filing price changes. Beyond fairness to the litigants, selecting one date to measure all plaintiffs' claims for damages pursuant to Section 11(e)(1) also preserves judicial economy, including that "the certainty of the date . . . may shorten future damage trials, since evidence of value can be limited to one particular day" and that "selection of the filing day of the first suit may . . . so far as possible limit the multiplicity of identical suits." [117]

V. A UNIFORM FRAMEWORK FOR MEASURING DAMAGES PURSUANT TO SECTION 11(E)(1) WOULD IMPROVE SETTLEMENTS

The above considerations look into whether, and in what manner, amended or subsequently filed complaints should be related back to an earlier-filed complaint. Those considerations demonstrate how a uniform framework of measuring damages pursuant to Section 11(e)(1) would benefit courts and litigants by way of increased procedural fairness and outcome predictability. These same benefits would also improve the parties' settlement pursuits.

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[114] *See supra* Part II.C.
[115] *Beecher*, 435 F.Supp. at 402.
[116] *In re Barclays Bank PLC Sec. Litig.*, 2016 WL 3235290 at *6. *See also* Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 68 F. Supp. 3d 486, 491 (S.D.N.Y. 2014) (noting that post-filing price changes are "irrelevant" to calculating damages under Section 11; "[j]ust as defendants are not liable for subsequent decreases, defendants cannot benefit from any subsequent increases in value.").
[117] *Beecher*, 435 F. Supp. at 402.

Settlements are often analyzed against trials or other methods of dispute resolution.[118] This analysis tends to favor settlements.[119] For example, one scholar noted that "the nature of our civil process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial, and, in many cases, to agree upon terms that are beyond the power or competence of courts to dictate."[120] Courts recognize this, as well. In *McDermott, Inc. v. AmClyde*, the U.S. Supreme Court explained that "[t]he parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships is sufficient to ensure nontrial dispositions in the vast majority of cases."[121] Parties benefit from settlement,[122] and there exists a significant amount of scholarship that analyzes factors which indicate whether parties will ultimately settle.[123]

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[118] *See generally*, J.J. Prescott & Kathryn E Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. Rev. 59 (2016) ("In everyday parlance and in academic scholarship, settlement is juxtaposed with trial or some other method of dispute resolution in which a third-party factfinder ultimately picks a winner and announces a score."). *See also* D.R. by M.R. v. East Brunswick Bd. of Educ., 109 F.3d 896, 901 (3d Cir. 1997) ("Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by courts.").

[119] *In re* Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985) (noting "the familiar axiom that a bad settlement is almost always better than a good trial."), *aff'd,* 798 F.2d 35 (2d Cir. 1986); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 327 (1988) ("Settlement is more efficient for the parties, giving them more of what they hoped to gain at less cost."); David M. Trubek et al., *The Costs of Ordinary Litigation,* 31 UCLA L. REV. 72, 122 (1983) ("[B]argaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed.").

[120] Samuel R. Gross & Kent D. Syveryd, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH L. REV. 319, 320 (1991) ("Much of our civil procedure is justified by the desire to promote settlement and avoid trial.").

[121] McDermott, Inc. v. AmClyde, 511 U.S. 202, 215 (1994) (footnote omitted).

[122] *See, e.g.*, Kathryn E. Spier, *Litigation*, in 1 HANDBOOK OF LAW AND ECONOMICS 259, 269 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("The plaintiff and the defendant can typically avoid [litigation costs] through a private agreement to end dispute. . . . [This] leaves both the plaintiff and the defendant better off than they would be from going to trial."); J.J. Prescott, *supra* note 118, at 138 (collecting sources and noting that "[s]cholars and practitioners have long pointed to the shared private benefits of settlement in civil litigation to explain its pervasiveness.").

[123] *See, e.g.*, William M. Landes, *An Economic Analysis of the Courts*, 14 J. OF L. AND ECON. 61, 61 (1971); John P. Gould, *The Economics of Legal Conflicts*, 2 J. OF LEGAL STUDIES 279, 281 (1973); Robert Cooter et al., *Bargaining in the Shadow of the Law*, 11 J. OF LEGAL STUD. 225, 225-26 (1982); Steven Shavell*, Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. OF LEGAL STUD. 55, 55 (1982); Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. OF ECON. 404, 404 (1984); Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1564 (2008); ANDREW F. DAUGHETY & JENNIFER F. REINGANUM, *Settlement*, *in* PROCEDURAL LAW AND ECONOMICS, 386 (Chris William Sanchirico ed., 2012).

One such factor is the parties' subjective beliefs on the likely outcome of the adjudication.[124] Simply put, where parties have similar subjective views on the likely outcome of the adjudication, they likely have a desire to settle; where the parties have "mutually pessimistic [views] about their [own] prospects at trial," here too the parties likely have a desire to settle; however, where parties have "mutually optimistic [views] about their [own] prospects at trial," both parties may prefer proceeding to trial rather than settling.[125] Proceeding with litigation instead of settling is often a result of the "difference in information and belief between the parties about the likely outcome of adjudicating the dispute."[126] It follows that "[i]f the [] parties to a litigation largely agree about the likely outcome of a trial and both are well informed (i.e., each party has a good sense of what the other knows), full settlement is extremely likely, at least so long as the costs of litigation are non-trivial or one of the parties is somewhat sensitive to risk."[127]

The inverse is also true—a failure to settle between the parties is more likely where the parties lack information.[128] Amongst other information known by the parties, or the lack thereof, that could either induce settlement or increase the likelihood of proceeding to trial is their assessments of the likely award at trial.[129]

The potential value of the award at trial is ordinarily a crucial factor for a plaintiff's settlement offer, and for each party to determine its bargaining range for settlement. In *Evans v. Jeff D.*, the Supreme Court noted that "[m]ost defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package."[130]

Scholars have been in-line with the Supreme Court on that analysis. According to Richard Posner:

> The plaintiff's minimum offer is the expected value of the litigation to him plus

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[124] *See* Prescott & Spier, *supra* note 118, at 75.
[125] *Id*. at 75, 77.
[126] *Id.* at 77.
[127] *Id.* at 60-61.
[128] Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. OF ECON. 404, 414 (1984).
[129] Shavell, *supra* note 122, at 60; *accord* DAUGHETY & REINGANUM, *supra* note 123 (noting that where Plaintiff and Defendant "each faces an essentially similar level of uncertainty" with respect to "what [the Court] will choose as an award" is referred to as "imperfect or symmetrically uncertain information" as opposed to "asymmetric information" which "exists between [the Plaintiff] and [the Defendant] with respect to, [for example,] the information about revenues and costs that [the Defendant] knows [and the Plaintiff does not know].").
[130] 475 U.S. 717, 734 (1986).

> his settlement costs, the expected value of the litigation being the present value of the judgment if he wins, multiplied by the probability (as he estimates it) of his winning, minus the present value of his litigation expenses. The defendant's maximum offer is the expected cost of the litigation to him and consists of his litigation expenses, plus the cost of an adverse judgment multiplied by the probability as he estimates it of the plaintiff's winning (which is equal to one minus the probability of *his* winning), minus his settlement costs.[131]

Other scholars have similarly determined:

> if plaintiffs and defendants always agreed in their predictions of trial outcomes, there would be no trials at all. But the parties do not always agree, and their disagreements can lead to very different assessments of the expected judgment. As a result, the plaintiff's minimum demand will sometimes exceed the defendant's maximum offer. . . . The litigants make demands and offers, they settle or try cases, solely because of what they expect the court will do, and not at all because of how they expect opposing parties to respond.[132]

This is a rather straightforward proposition—that litigants' expectations for the value of a judgment at trial matters for purposes of settlement.

Currently, courts do not employ a uniform method of measuring damages pursuant to Section 11(e)(1). Without a uniform method of measuring damages, neither plaintiffs nor defendants can accurately assess a potential award against defendants if plaintiffs are to ultimately prevail at trial. As courts and scholars have set out with great detail, settlements are favorable and should be encouraged, yet, settlements are less likely when litigants lack certainty of the potential awards. Ultimately, if a uniform

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[131] Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. OF LEGAL STUDIES 399, 418 (1973).

[132] Gross & Syveryd, *supra* note 120, at 324 (citing George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation,* 13 J. OF LEGAL STUDIES 1 (1984)).

method of measuring damages pursuant to Section 11(e)(1) is adopted by the courts, the parties will likely have a greater ability to assess potential awards at trial. Parties would be left to their own assessment of litigation costs and estimates of winning at trial, but the expected damages award if the plaintiffs were to win at trial would become an identifiable dollar amount. It would then follow that parties would be more likely to settle Section 11(e)(1) cases, which benefits the parties and the civil litigation process generally.

VI. PROPOSED FRAMEWORK FOR RESOLVING THE SECTION 11(E)(1) PROBLEM

For measuring damages in consolidated securities class actions pursuant to Section 11(e)(1), courts should relate back all amended or subsequently filed complaints pursuant to the relation-back doctrine of Rule 15 to the date of the first-filed complaint that satisfies the following conditions: (a) the first-filed complaint alleged a cause of action pursuant to Section 11; (b) a party which filed that first-filed complaint had standing to bring a Section 11 claim; and (c) the first-filed complaint satisfied the heightened pleading standard of Rule 9(b).

Such a framework is articulable and easily administrable. It both acknowledges courts' acceptance since the time of the seminal *Beecher* case of the relation-back doctrine for Section 11 claims and applies the heightened pleading standards of Rule 9(b) when relating back amended or subsequently filed Section 11 claims to an earlier-field complaint, as Section 11 claims indeed sound in fraud (which, as noted above, claims that sound in fraud are subject to the pleading requirements of Rule 9(b)).

This framework would prevent plaintiffs from date-shopping by locking in the applicable damages at the first-filed complaint which alleged a cause of action pursuant to Section 11, which was filed by a party that had standing to bring a Section 11 claim, and which satisfied the heightened pleading standard of Rule 9(b). This would also hold defendants liable for their material misrepresentations or omissions regardless of post-filing changes in price. Further, this framework would preserve judicial economy by both limiting the multiplicity of identical suits after that first-filed complaint and by shortening any potential damages trial because evidence of the value of a security can be limited to the one date.

Perhaps the greatest benefit would be in the context of settlement negotiations. With a uniform method of measuring damages pursuant to Section 11(e)(1), litigants can accurately assess a potential award against defendants if plaintiffs are to prevail at trial. Parties would still be left to make their own assessment of litigation costs and estimates of winning at trial, but if the defendants are found liable, the parties at least knew in advance how the damages award would be measured. Adding greater

certainty to what the potential award would be at trial can be expected to increase the rate of settlements and improve the optimality of the results of such settlements. This framework provides clear benefits to the litigants involved in Section 11 claims and also improves the civil litigation process.