THE MEMBER BACKING PENSIONS AND LIFETIME SAVINGS ASSOCIATION

September 2022

GLOBAL SECURITIES LITIGATION

MADE SIMPLE GUIDE

ACKNOWLEDGEMENTS

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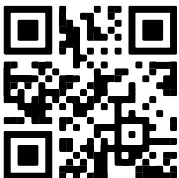


CONTENTS

Foreword 4

Introduction 5

1. Global Securities Litigation Explained 6
2. Relevance of Securities Litigation for Pension Funds 13
3. Setting and Managing a Trustee Policy for Securities Litigation 15
4. Litigation to Compel Corporate Governance Reforms or to Require Better Environmental and Social Practices 18
5. Key Takeaways for Pension Funds 20

FOREWORD

KESSLER TOPAZ MELTZER & CHECK, LLP ('KTMC') IS PLEASED TO PROVIDE THIS GLOBAL SECURITIES LITIGATION MADE SIMPLE GUIDE TO THE PLSA MEMBERS. THE OBJECTIVE OF THE GUIDE IS TO PROVIDE PENSION FUNDS AND THEIR TRUSTEES WITH GUIDANCE ABOUT HOW THEY CAN UTILIZE SHAREHOLDER LITIGATION IN THE UNITED STATES, AS WELL AS IN A GROWING NUMBER OF NON-US JURISDICTIONS.

When one of the companies your pension fund is invested in engages in fraud or other illegal conduct, and that reality is then made known to the investing public, this typically results in a declining share price and a corresponding loss on your investments. Shareholder actions provide a meaningful tool for investors to recover investment losses as well as to hold corporations and their directors accountable.

The information contained in the guide is intended to educate pension funds of the rights and remedies available, and the relevance, of shareholder actions for the benefit of their funds. Herein you will also find information and guidance about how to develop a responsible litigation policy. The guide also describes how shareholder litigation may be used as an instrument to enhance the environmental, social and governance ('ESG') practices of corporations. Asset owners and managers are expected to make diligent use of their shareholder rights to impact the ESG practices at investee companies. Responsible investor stewardship has become a widely used concept in effecting positive ESG changes at public corporations.

We hope this guide will demonstrate the importance and value of shareholder actions and the opportunities they offer to safeguard investments and potentially recover losses when there is corporate misconduct.

INTRODUCTION

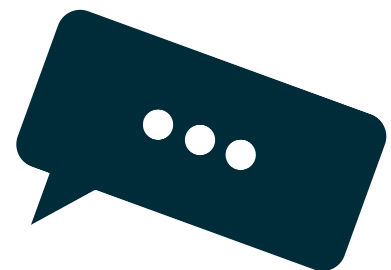
SHAREHOLDER LITIGATION PROVIDES A POWERFUL MECHANISM FOR INVESTORS TO RECOVER LOSSES THEY HAVE SUSTAINED IN THEIR INVESTMENTS AS A RESULT OF FRAUD OR OTHER MISCONDUCT. EACH YEAR, BILLIONS OF DOLLARS ARE RECOVERED IN LEGAL PROCEEDINGS ON BEHALF OF INVESTORS WHO HAVE BEEN THE VICTIMS OF SECURITIES FRAUD.

Historically, shareholder actions have been most frequently pursued in the United States, but they are increasingly being brought in other jurisdictions as well. In a fast-growing number of jurisdictions around the world, collective action mechanisms are available that allow groups of shareholders to pursue claims to recover losses through either litigation or arbitration. For asset owners, including pension funds, the fiduciary duty to make responsible use of their ownership rights as shareholders in publicly listed corporations is widely acknowledged. The UK Stewardship Code, for example, references litigation as one of the legitimate instruments to hold directors to account for failures to uphold their fiduciary duties. Therefore, for an increasing number of pension funds, tracking, following and/or joining opportunities that result from shareholder actions has become an established element of their stewardship strategy, as well as a means to offset asset value loss.

This trend has provided more opportunities for investors to bring cases against corporations in an increasing number of European jurisdictions as well as in the Asia-Pacific region. In the UK, large shareholder actions have been brought against household names such as Royal Bank of Scotland, Barclays and Tesco in recent years. Because many UK pension funds hold these shares in their portfolios, it is likely they had recoverable losses.

Notably, recovering financial losses is not the only objective of securities litigation; implementing corporate governance improvements and/or changes to a company's ESG policies has also been achieved in US shareholder actions. In fact, there are a growing number of shareholder class actions that are the result of flawed ESG practices at listed corporations. Shareholders have a variety of powers and instruments to impact the ESG practices of companies they are invested in. This "stewardship toolkit" comprises of the "soft power" of dialogue and engagement with investee companies, and the 'hard power' of legal rights and enforcement actions. The latter includes the opportunity of pursuing redress through participation in shareholder litigation.

As the laws, requirements, and aims for pursuing shareholder actions and claims in the United States and around the world continue to evolve, and as the number and magnitude of claims continue to increase, it can be challenging for pension funds to keep track of these recovery opportunities. This guide aims to demonstrate how to develop a practical, efficient and effective securities litigation strategy. It provides an overview of the various opportunities available to pension funds to pursue legal claims against publicly traded companies, and explores class action opportunities in the United States as well as how litigation works in jurisdictions in Europe and in the Asia-Pacific region. In connection therewith, the guide includes practical advice for pension funds and their trustees for ensuring that they are well-informed about the risks and opportunities related to litigation. Finally, the guide provides an overview of the practical steps pension funds can take to ensure that they do not miss out on recovery opportunities they are entitled to.



1 GLOBAL SECURITIES LITIGATION EXPLAINED

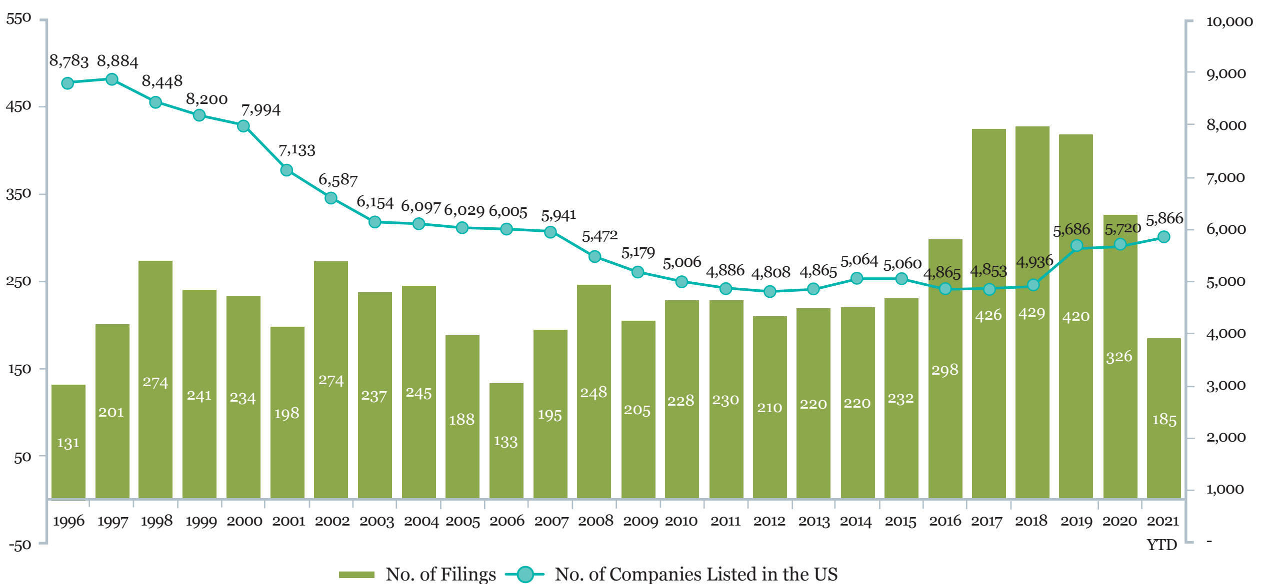
UNTIL ABOUT A DECADE AGO, ALMOST ALL SHAREHOLDER CLASS ACTIONS AGAINST PUBLIC COMPANIES WERE PURSUED IN THE UNITED STATES.[1] THIS IS STILL TRUE OF A MAJORITY OF SHAREHOLDER ACTIONS, BUT OVER THE LAST DECADE THERE HAS ALSO BEEN A SIGNIFICANT INCREASE IN THE NUMBER OF ACTIONS BROUGHT AGAINST LISTED CORPORATIONS IN EUROPE AND THE ASIA-PACIFIC REGION.

A key development was a landmark 2010 ruling, when the US Supreme Court handed down an opinion in the case of *Morrison vs. National Australia Bank*.[2] At its core, the ruling was that shareholders could no longer pursue securities fraud claims in US courts if the affected shares were purchased on a non-US exchange. As a result, investors needed to bring any action to recover financial losses either in the country where the company is headquartered, where its shares are listed, or where there is another compelling claim to jurisdiction. Given this new landscape, the ability to identify, monitor, and monetize recoveries for these types of global investments is of even greater important to fiduciaries.

1.1 SECURITIES CLASS ACTIONS IN THE UNITED STATES

A securities class action filed in the United States is a lawsuit brought by investors who bought a company's publicly traded securities on a US exchange within a specific period of time during which the alleged wrongful actions occurred (known as a 'class period') and suffered an economic loss as a result of a violation of federal securities laws. In the United States, hundreds of securities class actions are filed each year against publicly listed corporations, which account for the vast majority of class actions globally. Prior to the start of the global pandemic in 2020, there was a steady rise in the number of filings from 2012 until the onset of the COVID pandemic. Despite a dip in the number of cases filed in 2020 and 2021, the class action mechanism remains a powerful tool to hold public traded companies accountable for malfeasance.

Figure 1: Number of filed securities class actions (green bars) vs. number of listed corporations (yellow line) in the United States.



1 Some shareholder actions were pursued in Canada, Australia and the Netherlands prior to 2010. The majority of cases, however, were pursued in the US.
2 *Morrison v National Australia Bank Ltd*, No 08-1191

The two primary pieces of federal legislation at the heart of US securities litigation are the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). Their objective is to achieve a high standard of business ethics in the securities industry. Both Acts seek to ensure that investors have accurate and adequate material information to assess a company's risk exposure, properly value a security, and factor in an appropriate rate of return for the risks of the investment. The Exchange Act requires that statements made by or on behalf of a publicly traded company do not contain any material misrepresentations or omit material information, while the Securities Act limits its reach to policing statements made by public companies (or companies that are to become public) in the context of initial or subsequent public offerings.

A class action is litigated by a Court-appointed lead plaintiff on behalf of all affected investors. The lead plaintiff is typically an investor or group of investors with the largest financial interest in the case (often measured as the largest financial loss). Frequently lead plaintiffs will be institutional investors such as pension funds. Over the last decade, UK and European pension funds have frequently served as lead plaintiffs in securities class actions in the United States. A lead plaintiff is responsible for prosecuting the class's claims and has the power to settle and release the claims of all class members. Securities class actions most commonly provide a vehicle for recovering lost monies, but a lead plaintiff may also be able to use its leverage to influence a settlement beyond purely monetary compensation, including, for example, the requirement for corporate governance, environmental or social policy reforms. Thus, securities class actions can be a helpful instrument to produce long-term value for investors.

The securities class action mechanism is a powerful tool for holding publicly listed corporations accountable for damages caused to investors as a result of material corporate misconduct.

1.1.2 HOW DOES THE OPT-IN & OPT-OUT SYSTEM WORK IN US ACTIONS?

In US cases, when a securities class action is filed, a pension fund will automatically become a part of the class action if it purchased (or possibly sold) shares during the relevant period that the alleged corporate misconduct occurred (the class period). There is no need to register up front for a securities class action in order to benefit from a future settlement. Nevertheless, it is an essential best practice for pension funds to make sure that they have, at minimum, a process in place for identifying new pending settlements where their funds are entitled to a pro rata share.

As an alternative to participating in a class action, investors who seek to recover damages from violations of securities laws may instead file an individual, direct action (also known as an "opt-out" action) and recover losses on their own behalf. By bringing an individual direct action, the investor is generally not bound to the outcome of the class litigation and has a right to prosecute its own case independently of the class action. There are several potential advantages to bringing an individual direct action, including litigation independence and the ability to determine the settlement terms. However, there are also certain important risks in opting out of class litigation, including a bar on participating in any class recovery and the inability to insist on corporate governance reforms.

For pension funds, this illustrates the importance of having access to adequate information about their options, and of being able to seek competent legal advice before deciding to opt out of a class action.

1.2 SECURITIES LITIGATION OUTSIDE THE UNITED STATES

Over the last decade both the number of shareholder actions pursued outside the United States and the number of jurisdictions where actions are pursued have increased. In the last two years alone, cases were filed against well-known public companies in the Netherlands, Japan, Germany, Australia, Denmark, Brazil, Switzerland and the UK. Many cases were also adjudicated or settled during that same period, and participating institutional investors recovered billions of dollars as a result, see figure 2.

Figure 2: Top 15 Non-North American Settlements, 1 April, 2022

RANK	CASE NAME	COUNTRY	FUND AMOUNT ($)
1	Steinhoff International Holding	Netherlands	$1,620,000,000
2	Ageas S.A. / N.V. (f.k.a Fortis S.A. / N.V.)	Netherlands	$1,542,014,910
3	The Royal Bank of Scotland Group	U.K.	**$1,018,320,000**
4	Unilever N.V.	Netherlands	$406,245,345
5	Royal Dutch Petroleum Company / The Shell Transport & Trading Co.	Netherlands	$389,072,515
6	Storm Financial limited	Australia	$240,543,320
7	Centro Properties Group & Centro Retail Trust Australia	Australia	$200,615,000
8	Aristocrat Leisure Limited	Australia	$124,028,685
9	National Australia Bank Limited	Australia	$120,204,000
10	Tesco Compensation Scheme	U.K.	$106,688,600

These new avenues for recovery were largely a result of an increasing number of lawmakers looking either to utilise rarely-used laws or to develop new legislation. Several countries have recently passed legislation to facilitate collective redress. A number of European Union Member States are focusing on enacting legislation to allow shareholders to bring collective actions in their courts. The European Commission is encouraging Member States to provide consumers with an opportunity to recover economic losses from fraud or material corporate misconduct. Most notably, in 2020, the EU Collective Redress Directive established a legal framework for mass claims for both consumers and investors of the 27 member states. The Netherlands, for example, passed its Collective Damages Act in 2020 allowing for damages claims to be brought on behalf of affected investors. Other jurisdictions, such as Scotland (with the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020) and Germany (extending the Capital Investor Model Proceedings Act or "KapMUG" through to 2023) also enacted or extended legislation to increase the access to justice for shareholders and consumers.

These legal developments, which may allow for more shareholder redress, are occurring not only in European countries but also in the Asia-Pacific region where there are an increasing number of jurisdictions allowing for collective claim actions. In 2021 the first ever shareholder claim action in China settled.

It is also worth noting that the Covid-19 pandemic has not deterred investors from pursuing actions to recover financial losses. Institutional investors recently filed cases against companies like Daimler and Wirecard in Germany, Barclays and Standard Chartered in the UK, and Nissan in Japan.

Figure 3: Examples of corporations that have become subject to non-US shareholder claim actions

1.2.1 HOW DOES THE OPT-IN SYSTEM WORK IN NON-US ACTIONS?

While investors in US-listed entities are automatically, unless they choose to opt-out, included as class members in shareholder recovery litigation pursued via the US class action mechanism, the same is not true for most other jurisdictions around the globe. In nearly every other jurisdiction, investors must proactively join the litigation to potentially obtain a share in any recovery. Many collective shareholder claim systems in Europe and the Asia-Pacific region have an ”opt-in” process, meaning that any investor that wants to benefit from a future settlement or judgment needs to register as a participant/plaintiff before the case is filed.

Law firms that are preparing to file an opt-in action typically set a registration deadline. Only those investors who register by the set deadline will be included in the complaint that is filed and benefit from any future settlement or judgment. It is, therefore, vital for pension funds to be aware of the actions they are eligible to participate in and the corresponding registration deadlines and that the pension fund be prepared to make an informed decision about whether to participate.

EXAMPLES OF RECENT CASES

Case	Description
Nissan (Japan)	Former Chairman and CEO Carlos Ghosn was arrested for financial misconduct. An internal investigation revealed that Nissan lacked adequate corporate governance controls. Litigation was filed in Japan on behalf of institutional investors who registered to participate.
Standard Chartered (United Kingdom)	Standard Chartered is accused of issuing false or misleading statements regarding its compliance with anti-money laundering regulations, its continued business dealings with countries subject to US economic sanctions, and measures taken to cure deficiencies in internal controls. Litigation was filed in the UK on behalf of investors who registered to participate.
Glencore (United Kingdom)	The company is accused of corrupt business conduct in several jurisdictions including the Democratic Republic of the Congo, Venezuela and Nigeria. Litigation was filed in the UK on behalf of investors who registered to participate.
BHP Billiton (Australia)	In 2015 a BHP mining dam collapsed in Brazil. There is evidence that BHP knew about the risks of dam collapse but failed to disclose this information to investors. Litigation was filed in Australia on behalf of an "open class" of investors. That means that, at least at the time of this guide's publication, investors could still register to participate in the pending action.
Volkswagen (Germany)	Over 1400 claims have been filed in litigation in Germany against Volkswagen and Porsche concerning Volkswagen's 2015 'dieselgate' emissions scandal.
Steinhoff (Multiple **Jurisdictions)**	On 5 December 2017, South African international retail holding company Steinhoff announced that it had discovered irregularities in its accounting practices. The Company later reported that more than EUR 6 billion was missing from its balance sheet. Cases were filed by different groups of investors in the Netherlands, Germany and South Africa. A global settlement for $1.6 billion was negotiated between Steinhoff, its auditor Deloitte, its Directors' and Officers' Insurer, and affected investors. Because the negotiated settlement was a global settlement, investors who had not affirmatively opted in to one of the investor actions in the Netherlands, Germany, and South Africa were permitted to file a claim with the appointed claims administrator in order to potentially receive a portion of the settlement proceeds. However, this scenario tends to be one that is fairly unique to some cases that are proceeding in the Netherlands and should be thought of as the exception rather than the rule.
Wirecard (Germany)	In June 2020 the company admitted that EUR 1.9 billion in reported cash assets did not exist. In response its stock dropped more than 99%. The company is currently involved in insolvency proceedings and a number of investors registered claims against the Company in the insolvency proceedings. Shareholders also filed direct litigation against the company's auditors, EY, along with certain former Directors and Officers. There was also litigation proposed against the German securities regulator BaFin because the regulator is alleged to have been negligent in its oversight of the Company.

1.2.2 CHALLENGES FACED IN NON-US ACTIONS

While the amount of shareholder litigation outside the United States continues to grow, the legal mechanisms and applicable case law are still developing and rapidly changing, including as it relates to the opportunity to pursue collective redress. Given the variety of jurisdictions where shareholder recovery actions are now possible, and the complexity of tracking and making informed decisions with respect to potential participation, it is extremely important for pension funds and their trustees to make sure that they aware of the opportunities and that they understand what participation in a case involves so that they can make an informed decision regarding whether to participate.

a. The Requirements for Active Participation

As noted above, most jurisdictions outside the United States have an opt-in system. This means that any pension fund that wants to benefit from a future settlement must proactively sign up for the litigation at the start of the case. It is important for pension funds and their trustees to seek clear information from the law firms or litigation funders organizing the action regarding what it means to become actively involved in a case in a particular jurisdiction.

Active participation in a non-US collective claim action means different things in different jurisdictions. In several jurisdictions the only obligation for participating investors is sign participation documents and to provide proof of their legal existence and their relevant transaction data. In other jurisdictions, additional information may be required. An investor may, for example, be required to furnish proof of reliance (i.e. that they were aware of certain statements or publications from the defendant company and that they relied on that information or lack of information in making certain investment decisions) or the investor may be required to furnish additional proof concerning the chain of custody and its relationship with its custodian bank(s) (e.g. the relevant agreements between the investor and its custodian bank(s)).

To avoid missing out on opt-in collective claim actions, it is critical to know the relevant registration deadline and to sign and return all participation agreements and any required documentation in time.

b. Identifying & Considering Your Options When Signing Up for a Shareholder Action

Outside the US, it is quite common for multiple investor groups to propose and/or pursue competing actions for the same factual and legal allegations against a company. Sometimes the competing actions are all proposing action in the same jurisdiction but in other instances, like the Steinhoff case example above, different groups propose and pursue action in different jurisdictions. In these cases, investors must decide not only whether to join the action, but also which group to join.

It is not unusual for the various competing groups to take different approaches to the same case. In fact, often the competing groups will have different litigation strategies, including:

- the jurisdiction(s) where they plan to file claims
- the legal theories they plan to present and pursue
- the relevant time periods
- the funding terms for participants
- the use of different local attorneys,and
- the existence of different litigation funders.

For example, when shareholders suffered losses after it was reported in 2018 that Danske Bank's central management had been aware of and attempted to cover up money laundering activities that had occurred at the bank's Estonian branches for a number of years, six (6) different law firms/litigation funder groups proposed competing shareholder recovery actions in Denmark. Most of these groups proposed a slightly different approach to the case, including pursuing claims based on different relevant periods. They also worked with different local law firms and litigation funders. Thus, the decision on which claimant group to join is an important one; the benefits and risks involved must be considered.

As such, it is vital for pension funds and their trustees to have reliable information about the different claim groups so they can make informed decisions about whether to participate. In making decisions, pension funds and their trustees may want to consider

- (i) which group has the strongest legal strategy, including an analysis of the reputation and experience of the lawyers involved,
- (ii) (ii) the proposed terms of any legal funding in place,
- (iii) (iii) the amount of time and resources required from the pension fund staff if it participates in a case, and
- (iv) (iv) any risks and costs involved.

c. Funding Arrangements

In most instances the costs of non-US collective actions are paid for by a litigation funder. Litigation funders typically team up with law firms that will handle filing and litigating a claim. This structure generally allows institutional investors to participate in a collective action and to avoid paying any out-of-pocket expenses and avoid any risk of incurring adverse costs if litigation is unsuccessful. In return for financing the litigation, litigation funders typically look to receive a percentage of the gross or net settlement or judgment amount if the litigation is successful. It is important to understand the terms of what the litigation funders (and lawyers) are entitled to if there is a recovery. For pension funds and their trustees, it is critical to verify that the litigation funder is sufficiently capitalized so that it can pay for all expenses and any adverse costs exposure over the course of the case. Institutional investors signing on to a collective action should not have to pay for any expenses out-of-pocket or assume exposure for any financial risk in the event the litigation is unsuccessful.

d. Adverse Costs

In several jurisdictions, including the UK, the'loser pays' principle applies. This means that, should a party lose the case, it may be liable to cover the legal expenses of the prevailing party. There is a possibility to secure insurance protection for adverse costs risk or, in many instances, the litigation funder will assume those risks. It is important for all investors to understand who assumes adverse costs risk, if any.

2 RELEVANCE OF SECURITIES LITIGATION FOR PENSION FUNDS

STEWARDSHIP HAS BECOME A FUNDAMENTAL FOCUS FOR PENSION FUNDS OVER THE LAST DECADE AS A LOGICAL EXTENSION OF FIDUCIARY RESPONSIBILITY. IT MEANS MAKING EFFECTIVE USE OF AVAILABLE SHAREHOLDER RIGHTS, AND HOLDING INVESTEE COMPANIES TO ACCOUNT FOR THEIR CONDUCT, INCLUDING THEIR ESG PRACTICES AND POLICIES. THE UPDATED 2020 UK STEWARDSHIP CODE EXPLICITLY INCLUDES MONITORING ASSETS AND SERVICE PROVIDERS, ENGAGING WITH THEM, AND HOLDING THEM ACCOUNTABLE ON MATERIAL ISSUES.

While much attention is focused on exercising voting rights and pursuing dialogue and engagement with investee companies, shareholder litigation should also be viewed as an effective instrument to hold corporations and their directors accountable. Many shareholder actions are the result of flawed corporate governance at listed corporations. For a growing number of institutional investors, shareholder litigation has become a core strategic element of their stewardship activities (for example, it is a form of engagement escalation once investors' stewardship approach has been unsuccessful).

Given that global companies such as Royal Bank of Scotland, Volkswagen, Petrobras, Nissan and Toshiba are alleged to have committed and, in some cases, have admitted to committing, very public and significant frauds resulting in billions of dollars in lost market capitalization, it is not surprising to see that global shareholder litigation has taken on a greater prominence. For those investors impacted – including pension funds – these actions represent the only real option to recoup investment losses.

2.1 WHAT TO LOOK FOR WHEN EVALUATING SHAREHOLDER RECOVERY ACTIONS

Adopting a securities litigation policy has become an important, if not necessary, part of a pension fund's fiduciary duties. When developing a process for managing securities class actions and shareholder actions, there are a number of key issues and questions to consider.

a. Claims Filing Process

In jurisdictions with an opt-out regime (see section 1.1.2), such as the in the United States and Canada, investors that bought or sold shares during the class period automatically become part of the class action. Thus, as soon as a case successfully resolves, all impacted investors are eligible to complete and submit a proof of claim form to receive their pro rata share of the recovery amount. Importantly, completing and submitting a claim form does not mean that that investor becomes actively involved in litigation. Rather, this is solely an administrative process. The proof of claim form, once submitted, is then assessed by the claims administrator which is responsible for the disbursement of the recovery amount to eligible shareholders.

As many pension funds have a diversified equity portfolio and outsource part or all of the management of their assets to external managers, it is important to have a robust process in place for systematically (and timely) identifying and keeping track of settlement opportunities. All claims filing periods have set deadlines that, if missed, will result in forfeiture of any pro-rata share to which the pension fund was otherwise entitled. Completing and submitting a proof of claim is, at times, complicated and time consuming and can take up valuable resources for a pension fund. Accordingly, often institutional investors retain a third party, such as a law firm or custodian, to manage this task.

b. Timely Identification of Actions

In addition to identifying and filing claims in settled actions, it is critical that institutional investors are able to reliably and timely identify potential actions in which they may be eligible to participate.

A key feature of most shareholder actions filed outside the United States is that investors need to actively sign up or register for these cases at their outset. An issue that frequently arises in non-US actions is the uncertainty surrounding registration deadlines. Often, deadlines advertised by claim groups are merely commercial deadlines to establish critical mass of support and have little or nothing to do with actual statutes of limitations (which typically dictate when a claim must be filed or registered). Nevertheless, without a reliable process for evaluating these opportunities on a timely basis, there is a real risk of missing necessary deadlines. For example, many investors did not participate in the $1 billion recovery in the shareholder action against RBS that was filed in the United Kingdom. Similarly, there was a significant number of investors that were misled by a claim group and did not properly register their claims in the massive German action against Volkswagen. That failure to participate in high profile frauds that may lead to large recoveries may lead to fiduciary liability and reputational risk, as beneficiaries are increasingly aware of these opportunities.

c. Understand Your Legal Options

In addition to identifying case opportunities, it is equally important to be well positioned to make informed decisions on how to proceed. As such, it is important to have access to adequate legal guidance. It has become increasingly more challenging for global institutional investors to navigate the many different jurisdictions' rules, practices and laws. There is not one single global legal regime for dealing with collective shareholder actions. As such, responsible investors must ensure they are aware of the best way to protect their rights and interests in each jurisdiction in which they have investments. Similarly, they must understand and weigh the specific risks and costs associated with participating in actions filed in particular jurisdictions. Contrary to popular belief, most actions filed outside the United States do not require a significant amount of work on the part of each claimant (investor). However, there are jurisdictions where there will be demands for investor and/or custodial confirmations and documentary evidence, and participation in these cases may sometimes be time-consuming. It is a significant advantage to have access to legal expertise which can highlight potential pitfalls in advance.

3
SETTING & MANAGING A TRUSTEE POLICY FOR SECURITIES LITIGATION

THE LANDSCAPE FOR GLOBAL SHAREHOLDER ACTIONS CONTINUES TO GROW IN BOTH THE NUMBER OF ACTIONS FILED AND THE NUMBER OF JURISDICTIONS IN WHICH THEY ARE BROUGHT. LEGISLATION IS STILL BEING DEVELOPED, WHILE ATTORNEYS ARE ALSO FINDING NEW WAYS TO UTILISE EXISTING LEGISLATION.

For pension funds and their trustees, the question is how to manage the litigation landscape to ensure that they do not miss out on recovery opportunities so they may demonstrate that they are acting in the best financial interests of the pensioners they serve. Trustees who need to establish and manage a securities litigation approach may find the following guidance useful.

a. Set a Litigation Policy

A detailed written policy on handling shareholder litigation is an invaluable tool for investors. This can either be a standalone policy, or it may be integrated with a pension fund's regulatory policies such as its Investment Strategy Statement, Responsible Investment Strategy or Report, and/or its Stewardship Code disclosures.

A useful litigation policy typically sets out the circumstances under which participation in shareholder litigation could be considered, such as:

- Industry the issuer is involved in
- Nature of the alleged wrongdoing (strength of claims)
- Ability to recover monies
- Amount of work required by the claimants
- Adverse costs risk.

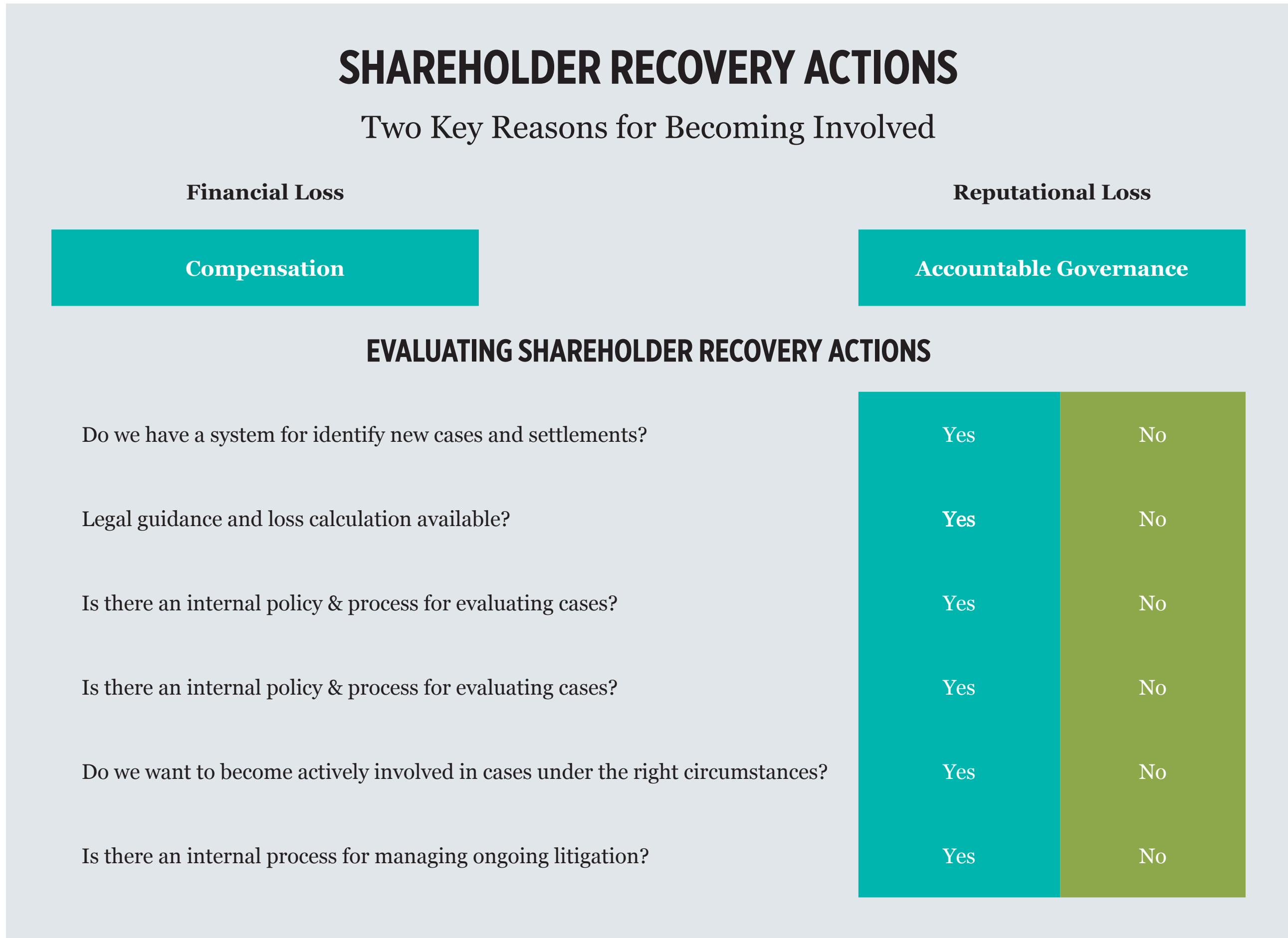
It is often helpful to build trigger points such as financial thresholds and other meaningful factors into a litigation policy; however, it makes sense to allow for some flexibility as there may be opportunities worth pursuing that may not fall within a predetermined set of parameters.

b. Decide What You Want to Achieve from Shareholder Litigation

Understanding the work that will be required and the possible outcomes will help you decide what you want to achieve. The typical objective of most shareholder actions is to recoup financial losses as a result of fraud or misconduct, but it may also be to hold companies and their insiders accountable when they commit fraud or misconduct. These scenarios are not typically resolved through dialogue and engagement, or by exercising voting rights. Furthermore, active pursuit of and participation in shareholder actions has become an essential part of a properly nuanced engagement strategy and stewardship framework for pension funds and their investment service providers.

In the process of evaluating an existing securities litigation policy and process, or when a new policy is being developed, the following questions may provide helpful guidance:

Figure 4: Sample questions for setting or evaluating your securities litigation policy & process



c. Select and Appoint a Service Provider that Matches Your Needs

Utilizing in-house resources to identify any and all new cases may be a cumbersome and potentially unreliable process. There are a wide array of services available for informing investors about shareholder actions. Historically, investors relied on their custodians or a third-party provider for certain services relating to shareholder actions, such as identifying potential claims when a case settles. More frequently now, however, investors have turned to retaining an experienced law firm (or law firms) specializing in representing shareholders to provide comprehensive portfolio monitoring services. Many of these law firms also provide robust claims filing services, which provides an institutional investor additional comfort that they are meeting their fiduciary responsibilities.

It is important to note though that most services are not identical or even comparable. Investors should ensure that they select and utilise a service, or a range of services, that is capable of:

(i) identifying all actions on a global basis in a timely manner;

(ii) properly analysing all cases, including providing legal advice regarding how best to proceed in all jurisdictions;

(iii) providing legal advice and recommendations on whether to remain passive or become active in a particular litigation;

(iv) identifying all settlements and other recoveries with recoverable losses; and

(v) preparing, filing and perfecting all necessary settlement claims and registration documents.

d. Managing a Trustee Policy

As soon as a pension fund has documented its approach to participating in class and shareholder actions and selected a service provider, it should set up an internal monitoring process. For US and non-US cases in which no action is required, whomever the fund has retained to provide a claims filing service should handle identifying and pursuing all recovery opportunities. It is important, however, to ensure that that entity is providing the fund with periodic updates and information so that the trustees remained informed and can monitor progress.

For the more active opt-in cases, it is recommended to organize an internal decision-making process which covers all of the following aspects:

- Before participating, obtain legal advice about all aspects of the case, discuss the merits of the case with your asset manager and organise an internal decision-making procedure.
- When a decision has been made to actively participate in the action, negotiate the retainer agreement. The retainer agreement typically contains the terms and conditions of the law firm and the litigation funder that are organising the claimant group: these terms should include the fee arrangements, handling of adverse costs risk and insurance, and progress reporting.
- Organise evidence, and make sure that you are aware which funds or entities have legal standing or challengeable issues to participate in the litigation. In many jurisdictions it is also helpful to store the investment decision-making records.
- Regularly review reporting updates about ongoing litigation the pension fund is involved in and all settlements from which a recovery is possible through the claims filing process.
- Provide comprehensive and regular reporting on all participation in legal actions and recoveries.

4
LITIGATION TO COMPEL CORPORATE GOVER TO REQUIRE BETTER ENVIRONMENTAL & SO

ANOTHER POTENTIAL OBJECTIVE FOR SECURITIES CLASS ACTIONS, PARTICULARLY IN THE UNITED STATES, MAY BE TO PURSUE CORPORATE GOVERNANCE REFORMS. INVESTORS REGULARLY BRING DERIVATIVE ACTIONS, WHERE REALISING CORPORATE GOVERNANCE REFORMS IS SIGNIFICANT, IF NOT THE MOST IMPORTANT OBJECTIVE. SETTLEMENTS IN SUCH ACTIONS MIGHT ENTAIL REFORMS SUCH AS IMPROVING BOARD INDEPENDENCE, ENHANCING INTERNAL CONTROLS OR STRENGTHENING THE INTERNAL AUDIT FUNCTION.

4.1 SHAREHOLDER DERIVATIVE & CORPORATE GOVERNANCE ACTIONS

Unlike a class action that is brought on behalf of investors, a shareholder derivative action is brought by a shareholder of a public company on behalf of and for the benefit of the company against the directors and/or officers of that company. In a derivative action, shareholders are permitted to "step into the shoes" of the directors and bring litigation that the board and management are unwilling to pursue. This unwillingness typically relates to the fact that the board members themselves are alleged to have participated in the misconduct, and thus would be unlikely to "sue themselves."

The objectives of these actions are generally twofold: (i) to recover monetary damages for the company from wrongdoers; and (ii) to require the company to adopt corporate governance improvements designed to prevent the harmful conduct in question from occurring again in the future. Where either or both is achieved, the company and its shareholders both benefit: the company benefits from the recovered financial contribution and/or improved corporate governance; the shareholders benefit from the company's improved corporate governance, which often results in sustained improvement in the company's stock price. Meaningful reforms often include:

- Director nominations and elections
- Proxy disclosures
- Executive compensation policies
- Audit and other risk policies.

Any shareholder of a company can serve as a plaintiff in a shareholder derivative action, provided that the shareholder has held stock in the company continuously throughout the time period in which the wrongful conduct occurred and throughout the litigation. Strategically, it usually makes sense for larger and more sophisticated shareholders to serve as derivative plaintiffs. In recent years, a number of European pension funds have served as plaintiffs in shareholder derivative actions and have established significant corporate governance reforms at listed corporations as a result. Companies with effective corporate governance practices are generally more profitable for their shareholders and, under the right circumstances, a derivative action can materially enhance a company's productivity and profitability.

Corporate Governance Actions

Plaintiffs frequently pursue corporate governance claims through derivative lawsuits. Corporate governance cases are based on allegations that directors have breached their fiduciary duty of care by failing to properly oversee the operations of the company. For example, derivative lawsuits often assert allegations of breach of fiduciary duty, misrepresentation, self-dealing, minority shareholder oppression, squeeze-out, or outright theft.

RNANCE REFORMS OR OCIAL PRACTICES

In January 2019 Alphabet stockholders alleged that the tech giant violated its fiduciary duties by enabling circumstances that allowed executives to sexually harass and discriminate against female employees.

The company paid outgoing executives excessive severance packages after internal investigations confirmed significant sexual harassment allegations against them.

As part of the settlement, the company agreed to significantly change and improve workplace equity and board oversight. The company also established a diversity, equity and inclusion advisory council comprising of outside experts and Alphabet executives, with a $310 million funding commitment.

facebook

Facebook went public in 2012 with two classes of stock: class A with 1 vote per share and class B with 10 votes per share.

Several years later the company introduced the plan to issue C shares with no voting rights and to distribute these shares via dividend to all A and B shareholders.

The underlying intention with this plan was that Mark Zuckerberg, the company's CEO, could than give away a significant part of his wealth without losing control over the company.

The introduction of the C-shares would cause overall harm to minority shareholders, who objected to this request at the general meeting.

Litigation challenged Zuckerberg's plan to have Facebook issue non-voting stock to cement his control over the company for life.

In response to the litigation Facebook withdrew the proposal to issue shares without voting rights before the start of the trial.

5
KEY TAKEAWAYS FOR PENSION FUNDS

- Securities litigation is a key part of a fully integrated stewardship strategy, as well as a fiduciary responsibility.
- The use of litigation by investors is expanding rapidly. There are an increasing number of actions related to both shareholders and instruments such as LIBOR, F/X, and ISDA FX in a growing number of jurisdictions.
- In addition to the obvious fiduciary responsibility to recover losses whenever possible, pensioners are increasingly aware of these actions and would expect their pension providers to pursue recoveries on their behalf.
- Ensuring that you have an understanding of these cases and how they affect investments, and are clear on what you need to do to recover and/or protect assets, is essential to serving as a fiduciary.
- Retaining an experienced service provider with significant expertise in these areas, including provision of legal advice, will add a great deal of value and provide peace of mind.
- Formalize your process for identifying, analysing, tracking and filing actions and claims. Selecting a comprehensive service provider and establishing a securities litigation policy are a great start.

NOTES

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