A Primer on Shareholder Litigation

- US Class and Direct (Opt-Out) Actions
- Global Securities Actions
- Derivative Actions, Mergers & Acquisitions Actions
- US Appraisal Actions

Revised in 2025

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Disclaimer:

This article is intended to provide a thorough background on various forms of shareholder litigation. However, it is not intended as a substitute for legal advice with your chosen counsel and discussions as to the merits of each particular action you may consider.

- All citations are omitted, but available upon request.
- All financial figures are in U.S. dollars unless otherwise indicated.

Firm Overview

Kessler Topaz Meltzer & Check, LLP is one of the largest firms in the world specializing in the prosecution of complex litigation on a contingent basis.

Kessler Topaz has developed a worldwide reputation for excellence in the areas of securities, shareholder, and consumer class actions.

With offices in Radnor, Pennsylvania (Headquarters) and San Francisco, California, Kessler Topaz is comprised of a highly skilled team of attorneys, paralegals, in-house investigators, legal clerks and other personnel. The Firm proudly notes that it has recovered billions of dollars on behalf of its clients.

Litigation Practice Areas:

- Securities
- Corporate Governance & M+A
- Global Shareholder Litigation
- Direct & Opt-Out
- Banking & Financial Services
- Consumer Protection
- Data Privacy & Cyber Security
- Antitrust
- Whistleblower
- Arbitration

Acknowledgment

Many thanks to those who contributed to the International Shareholder Litigation Sections

THE NETHERLANDS

Michelle Krekels is a seasoned attorney at Rubicon Impact & Litigation, a Dutch law firm specializing in complex litigation. With particular expertise in group litigation and investor and securities litigation, Michelle has represented shareholders affected by the bookkeeping fraud involving the South African company Steinhoff.

She is a regular speaker at conferences and spoke at the "Rights and Responsibilities of Institutional Investors" conference in Amsterdam in April 2024. During her presentation, Michelle discussed how securities litigation serves as a primary tool for investors to address corporate fraud and seek compensation. She also emphasized the potential of ESG-litigation to drive positive change.

In addition to her legal work, Michelle has been recognized as one of the 2024 Lawdragon 500 Global Plaintiff Lawyers. Furthermore, she serves as a supervisory board member of a well-established Dutch foundation focused on health.

BRAZIL

Maria Isabel Gori Montes is a Partner at and an Assistant Professor at the Arbitration Course offered by Professor Cláudio Finkelstein at the Pontifical Catholic University of São Paulo. She earned her law degree from the University of São Paulo and holds both an LL.M. and a specialization in Business Law from the University of California, Berkeley.

UNITED KINGDOM

Andrew Hill leads Fox Williams' securities litigation team and has been at the forefront of developing this area in the UK since 2014. Specialising in group actions for institutional investors, Andrew has spearheaded high-profile cases, including one of the UK's first securities litigation claims (under s90A FSMA), against Tesco. He is currently leading major claims against Glencore, Petrofac, Boohoo, and Entain, focusing on corporate misconduct and ESG-related issues. Recognised in Chambers & Partners as "one of the leading practitioners in securities litigation" (Band 2 in 2025), Lawdragon's 2024 Global 500 Plaintiff Lawyers, and Legal 500 as a Leading Partner. Andrew is dual-qualified in the UK and Australia.

Matthew Reach is a Partner at Fox Williams LLP, also specialising in large-scale group litigation for institutional investors. Like Andrew, he has been at the forefront of developing this area in the UK, as counsel to a funder involved in one of the UK's first securities litigation claims (under s90 FSMA), against Royal Bank of Scotland, and other claims. Matthew is now co-leading significant securities litigation claims alongside Andrew, including cases against Glencore, Petrofac, Boohoo, and Entain, where investors are seeking nearly £1 billion in damages. Matthew is recognised for his strategic approach to complex claims, with Chambers & Partners 2025 ranking him as 'Up & Coming' in Group Litigation: Claimant, Legal 500 naming him a Leading Partner and being named (with Andrew) in Lawdragon's 2024 Global 500 Plaintiff Lawyers. His practice focuses on holding companies accountable, particularly in ESG-related matters.

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SOUTH KOREA

Mr. Joo Young Kim is the Managing Partner of Hannuri Law LLC., a plaintiff firm focusing on securities litigations and corporate governance disputes. Mr. Kim successfully led the LG stockholders' derivative action, ELS (Equity Linked Securities) closing price manipulation lawsuits against Deutsch Bank and Royal Bank of Canada, Daewoo accounting fraud lawsuit, Hyundai Securities' stockholder's derivative lawsuit and contributed to the settlement of US style class action system in Korea by leading representative cases. Prior to founding Hannuri Law, he started his career in Kim & Chang in 1992. Recipient of Fulbright scholarship, he studied in Chicago University Law School and earned his LL.B. from Seoul National University in 1987 and was admitted to the Korean Bar in 1992.

JAPAN

Takahiko Kobayashi is an Associate at Iwaida Partners. Iwaida Partners is a boutique law firm based in Tokyo, and specializes in corporate and securities law and litigation. Takahiko was admitted to Dai-ni Tokyo bar in Japan, 2011, and has been working in Tokyo at Iwaida Partners for ten years. He specializes in M&A and corporate litigation, and handled securities fraud cases for foreign clients as well as Japanese clients in Japan. He also graduated from University of California, Berkeley (LL.M.) in 2023 and worked at Kessler Topaz Meltzer & Check, LLP until June 2024.

ITALY

Cino Raffa Ugolini is a Partner of Lègister. Lègister is a multi-disciplinary and business-oriented law firm which practices include business law, commercial law, corporate and labor law, insurance law, compliance and data protection, advertising, banking and financial services, securities litigation, class actions and collective remedies, and arbitration. Cino graduated from the University of Milan in 1984 and holds a Master of Laws from New York University School of Law. Cino has been admitted to the Italian Bar Association since 1986, and has been admitted as an attorney and counsellor at law in the State of New York since 1990.

AUSTRALIA

Brett Spiegel is a Principal Lawyer at Phi Finney McDonald. Brett is a senior class action litigator with over 20 years of legal experience. A qualified lawyer in Australia and the United States, Brett has prosecuted complex and challenging cases in the fields of public health, mass tort, institutional abuse, the environment, and shareholder claims. In addition to his experience at a large Australian plaintiff law firm and a U.S. commercial law firm, Brett served as a Trial Lawyer for the U.S. Department of Justice, where he worked on the landmark case of U.S. v Philip Morris, and as a Counsel to the U.S. Senate Judiciary Committee. He was named one of Lawdragon's top 500 Global Plaintiff Lawyers.

Alexandra George is a Lawyer at Phi Finney McDonald. Since joining the practice in 2021, Alexandra has worked on a broad spectrum of class actions on behalf of shareholders, consumers and First Nations people.

GERMANY

Maximilian Weiss is the Director of WEISSWERT, a boutique law firm based in Germany that specializes in investor protection and complex financial disputes, often with cross-border dimensions. With a focus on capital markets and banking law, he represents both institutional and private investors in high-profile litigation. Maximilian holds a German law degree and an LL.M. from Northwestern University. He frequently publishes articles and speaks on topics such as collective redress and securities litigation. A native German speaker, Maximilian is also fluent in English and Spanish.

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I. Introduction

Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz" or the "Firm") is pleased to provide this primer on shareholder litigation to institutional investors. The goal of this primer is to briefly explain litigation options available under federal and state securities laws of the United States, as well as in a growing number of non-U.S. jurisdictions. We believe these laws should be viewed as tools that allow investors, among other things, an opportunity to recover investment losses suffered as a result of fraud or other illegal conduct and/or to implement corporate governance changes.

The information contained herein provides a general overview of various substantive and procedural issues that may arise in connection with pursuing some of the options we discuss, and is intended to assist institutional investors in gaining a general understanding of the rights and remedies available under various laws, particularly the ability to serve as a plaintiff in a class action, pursuing a direct action, initiating a takeover or derivative action, as well as any benefits associated with these and other options. We hope this primer will assist the reader in becoming familiar with these areas of the law and about how the institutional investor community may use these laws to safeguard the value of their investments and potentially recover losses if misconduct is involved.

II. Overview of the United States Federal Securities Laws

Congressional regulation of securities transactions followed the historic stock market crash of 1929. According to congressional findings (published in 1933) in the decade following World War I, of the $50 billion in securities offered in the United States, approximately $25 billion were completely worthless. Deceptive business practices and rampant fraud in the sale of securities prior to the 1929 crash led the United States Congress to enact significant legislation to regulate securities markets and transactions.

The two primary pieces of federal legislation enacted during this era are: (i) the Securities Act of 1933 (the "Securities Act"); and (ii) the Securities Exchange Act of 1934 (the "Exchange Act"). As stated by the United States Supreme Court, the "fundamental purpose" of both the Securities Act and the Exchange Act is to "substitute a philosophy of full disclosure for the philosophy of caveat emptor [or buyer beware] and thus to achieve a high standard of business ethics in the securities industry". Both Acts therefore seek to provide investors accurate material information about a security to permit investors 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. Congress recognized that inaccurate or misleading information precludes such an assessment and the Acts were designed with this policy in mind.

A. The Securities Act

The Securities Act provides protections for investors purchasing securities in issuer transactions (initial or secondary offerings of securities). The Securities Act has two basic objectives: (i) to require issuers to provide potential investors with financial information and other material information concerning securities being offered for public sale; and (ii) to provide a statutory remedy to investors in such offerings when misrepresentations are made in the offering documents or material information is left out of such documents. The Securities Act accomplishes its objectives by mandating that, before an offering of securities occurs, an issuer must disclose all material facts about the company and the proposed security in a registration statement and a prospectus. Generally (unless specific exemption requirements are met), any securities sold in the United States must be registered. According to the Securities and Exchange Commission ("SEC")[1] the information required under

[1] The SEC is an independent, nonpartisan, quasi-judicial regulatory agency created by the Exchange Act. The SEC has been granted "broad authority over all aspects of the securities industry" including the "power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations (SROs)." The SEC is also empowered to investigate and remedy

the Securities Act should enable "investors, not the government, to make informed judgments about whether to purchase a company's securities. While the SEC requires that the information provided be accurate, it does not guarantee it. Investors who purchase securities and suffer losses have important recovery rights if they can prove that there was incomplete or inaccurate disclosure of important information".

The inclusion of false or materially misleading statements (even ones that may be technically correct) or omissions of material information in offering materials violates the Securities Act and may allow investors in the offering to file suit to recover damages. Liability under the Securities Act can be imposed upon the issuer of a security, every person who signed the registration statement, every person who was a director of the issuer at the time the registration statement was filed, every underwriter of the security, and every accountant or other "expert" who consented to be named as having prepared or certifying any part of the registration statement. Entities engaged in the sale of registered securities (such as underwriters) are subject to liability for misleading statements in a prospectus or oral communication related to an offering. The Securities Act also imposes "control person" liability on any person who, by virtue of their position, holdings or relationship to the other persons, controls another person liable for having issued a false and misleading registration statement or prospectus.

The Securities Act provides investors with significant protections. When suing the issuer of a security (usually the corporation), the Securities Act provides for strict liability, meaning the investor is not required to establish that the issuer defendant acted intentionally or even negligently when making false and misleading disclosures in a registration statement or prospectus, or that the investor even relied on the misstatement. The investor need only establish that it bought the security in (or traceable to)[2] an offering that was conducted pursuant to a materially false and misleading registration statement or prospectus. All other potential defendants (other than the issuer) may be held liable for "mere negligence". In other words, no intent is required for their liability.

With respect to non-issuer defendants, however, the Securities Act permits such defendants to assert various "affirmative defenses" to avoid liability. One such defense, the "due diligence" defense, provides that a non-issuer defendant can avoid liability under the Securities Act upon a showing that "he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading". Another judicially-created defense which protects accountants in these causes of action, primarily in the Second Circuit, provides that a clean audit opinion stating that the financial statements of the issuer fairly reflect its financial condition cannot constitute a false statement unless such opinion is not actually held by the accountant, or that the auditor had no reasonable basis for the opinion. Other defendants have attempted to use this "opinion" defense in Securities Act case but have not had as much success as the accountants.

The Securities Act also sets forth the amount of damages that a plaintiff may recover. Generally, and subject to certain limitations, damages are determined by measuring the difference between the amount paid for the security (not exceeding the

violations of the federal securities laws through civil enforcement actions. Criminal prosecutions are conducted by the United States Department of Justice.

[2] Generally speaking, an investor who buys in the after-market of an initial public offering, can also file suit for misrepresentations contained in or omitted from offering documents, even though the investor did not actually buy in the offering, if the investor can "trace" its purchases to the offering itself. So long as no additional shares have entered the market place since the offering through subsequent offerings or sales by insiders, an investor can easily allege and prove that all shares available for sale are traceable to the initial offering and can bring claims under the Securities Act.

public offering price) and (i) the security's value when the suit was filed; (ii) the price at which the plaintiff disposed of the security before filing suit; or (iii) the price at which the plaintiff disposed of the security after filing suit but before judgment, if those damages are less than the security's value when the plaintiff filed suit. Defendants in such cases do have the ability to reduce plaintiff's claimed damages by proving some factor other than the false and misleading statement caused the loss, a concept known as a "negative causation" defense.

B. The Exchange Act

While the Securities Act governs the public offering of securities, the Exchange Act governs aftermarket trading including purchases and sales of securities on securities exchanges.

The principal goal of the Exchange Act is to ensure that investors have access to accurate and truthful information concerning a security being traded, including any material facts about the issuer that may affect the value of a security. In cases of securities traded in an efficient market, courts presume that most publicly available information is reflected in the security's market price. Accordingly, misrepresenting a company's performance or omitting adverse information about the company would tend to artificially inflate the price of a security (or, in some cases, maintain the inflation that is already in the price based on prior false statements or omissions).

The Exchange Act accomplishes its goal by, among other things, requiring that any statements made by or on behalf of a publicly traded company, whether they be in financial filings such as the annual report, the quarterly report or the current report, or in press releases, conference calls or otherwise — relating to a security or to an issuer of a security — not contain any material misrepresentations or omit material information. Thus, while the Securities Act covers statements made in connection with an issuance (registration statement and prospectus), the Exchange Act covers a much broader set of disclosures.[3]

The enforcement mechanism of the Exchange Act is found in Section 10(b). Section 10(b) prohibits acts or practices that constitute a "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe". Pursuant to its rulemaking authority under Section 10(b), the SEC promulgated Rule 10b-5, which has become the primary antifraud provision under federal law. Rule 10b-5 states that "it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person".

In private lawsuits, courts require plaintiffs to plead the following six elements in order to state a claim under Section 10(b) and Rule 10b-5:

1. **A material misrepresentation, false statement, or omission of material fact**— a statement or omission of fact is deemed to be material "if a reasonable investor would consider it important in determining whether to buy or sell stock".
2. **scienter** — plaintiffs must allege that defendants acted with an intent to deceive (i.e., a wrongful state of mind). The scienter element is not met if a plaintiff merely alleges that defendants' actions were negligent or simply poor business decisions.
3. **in connection with the purchase or sale of a security** — this element requires a plaintiff to allege that they have engaged in some type of transaction involving a security.

[3] Statements made in offering documents may be subject to liability under both the Securities Act and the Exchange Act.

4. **reliance** — where securities are traded in an efficient market, reliance is presumed and plaintiffs are not required to plead that they read defendants' material misrepresentations.[4] Rather, the market's incorporation of publicly available information into the price of a security will satisfy the reliance element. If a security is not traded in an efficient market, then the plaintiff will be required to plead actual reliance (i.e. they read a false statement issued by a defendant before purchasing a security).[5]
5. **economic loss** — plaintiffs must allege that they sustained a loss from their investments.
6. **loss causation** — plaintiffs are required to plead a causal connection between the material misrepresentation and the loss.

Liability under the Exchange Act can be based on any false statement (whether or not the statement is filed with the SEC) issued by a corporation, its officers or third-parties whose statements are included with a corporation's filing (such as an auditor). Court decisions have, however, limited private litigants' (but not the SEC's) ability to bring suit against third parties who aid defendants' violations of federal securities laws.[6]

C. Private Remedies Under Federal Law

Violations of the Securities Act and/or the Exchange Act can be enforced by the federal government or by investors through private litigation. Private investor-led enforcement of the federal securities laws is a necessary component of the regulation of securities markets. To this end, the United States Supreme Court has noted the Court's long recognition "that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)."

Congress enacted the securities laws intending that investors would enforce the laws through private actions. Specifically, the Securities Act provides investors an expressed private right of action allowing any person acquiring a security based on materially false offering documents to file suit under the Act. While the Exchange Act does not contain language expressly providing investors with a private right of action, since 1946, federal courts have consistently recognized the existence of an "implied" private right of action under Rule 10b-5. Congress has itself implicitly recognized the right of investors to sue under the Exchange Act and, as recently as 1995, enacted significant legislation to regulate private lawsuits under federal law. The 1995 amendments, known as the Private Securities Litigation Reform Act of 1995 ("PSLRA"), not only implicitly acknowledged investors' ability to seek private remedies for violations of the Exchange Act, but fundamentally altered the manner in which federal securities lawsuits are litigated.

As explained in greater detail below, the PSLRA, for example, amended normal pleading rules for civil fraud suits to require heightened pleading standards for actions alleging violations under the Exchange Act. The heightened pleading standards require that a complaint filed by a private litigant specifically plead each statement alleged to have been misleading, the reasons why the statement is misleading, and, if an allegation is based upon "information and belief", the complaint must state with particularity all facts upon which the belief is based. In other words, the complaint must do much more than provide a defendant with general notice of the causes of action. Rather, courts have interpreted the pleading standard to mean that a complaint must identify the "who, what, when, and where" of the fraud.

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[4] This legal concept is known as the "fraud on the market doctrine."

[5] Under the current state of the law, if an investor can show that the market for a particular stock generally reacts to material information, the presumption of reliance will attach and it becomes simpler to have a class certified.

[6] The Exchange Act includes a provision for imposing liability on any person controlling a primary violator of the Exchange Act. The elements of control person liability are not uniform and vary from court to court.

Second, while "scienter" (or a culpable state of mind) has been a required element for imposing liability under Section 10(b), the PSLRA increased the pleading requirements by requiring plaintiffs to plead particular facts that give rise to a "strong inference" that the defendant possessed either motive and opportunity to commit fraud (such as unusual insider sales of securities before the fraud is revealed), or by setting forth facts and circumstances that constitute strong circumstantial evidence of either recklessness or conscious misbehavior. Case law requires courts to consider plausible, non-culpable inferences flowing from plaintiffs' allegations when assessing whether scienter has been sufficiently pled.

The PSLRA requires plaintiffs to meet the heightened pleading requirements without the benefit of reviewing any information produced by defendants through the discovery process, such as document production, interrogatory responses or deposition testimony.[7] As a result, plaintiffs' claims often must be supported by facts developed through private investigations conducted by counsel, government investigations and other public sources.

III. Securities Class Action Litigation

The class action mechanism is a powerful procedural tool to hold wrongdoers accountable for widespread damages caused to a large number of victims, who individually may not have sufficient damages to support the cost of prosecuting individual claims. This scenario is especially true when it comes to securities violations where individual investor damages will likely be dwarfed by class-wide damages. The class action mechanism also allows a defendant to settle all applicable claims on a class-wide basis and, in the process, limit its exposure by obtaining a class-wide release. This procedural tool serves a useful social function because it provides remedies for all persons in a class who have suffered damages stemming from the same misconduct. For these reasons, many countries recently have begun to explore implementing class or group action provisions in their own laws.

In the United States, class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. This rule permits one party or a group of parties (the "Lead Plaintiff") to file a class action complaint on behalf of a "class" of similarly situated persons and institutions when certain requirements under Rule 23 are met.

The Lead Plaintiff is responsible for prosecuting claims on behalf of the class and has the power to settle and release claims of all class members, with due process and notice being provided to the class to weigh in on any such decision to resolve a class action. When a Lead Plaintiff files a lawsuit as a representative of a class of similarly situated victims, a federal court judge must, at an early, practicable time, determine whether to certify the action as a class action. This procedure is commonly known as "class certification" and is a critical hurdle in a securities case.[8] The Lead Plaintiff is also charged with selecting and supervising attorneys to represent the class ("Lead Counsel").

A. The PSLRA & Institutional Investors

As noted above, the PSLRA fundamentally changed the requirements for pleading violations under federal law. Just as important, however, is the impact of the law on the organization and leadership of federal class action lawsuits.[9]

1. Reasons for Reform

Congress enacted the PSLRA to curb what it had identified as "abusive litigation" in the process of class actions, and in securities class actions in particular. It was argued that often, when a stock price dropped dramatically and suddenly, plaintiffs sought to prove fraud by hindsight through extensive

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[7] The PSLRA stays all formal "discovery" until defendants' motions to dismiss are denied. Discovery is the formal process of gathering evidence to prove claims or establish defenses.

[8] Rule 23 and class certification are discussed in greater detail below. 3EE Section III.F.3.

[9] The PSLRA applies to claims pled under the Securities Act and the Exchange Act.

“fishing expedition” discovery, and trial lawyers would file a complaint using a “token plaintiff” who had no stake in the action, then “race to the courthouse” to file such complaints in a jurisdiction that was expected to be most favorable to the plaintiff to preside over the case. Whether or not the bleak picture being painted by critics was based upon reality, Congress introduced reforms, both in procedure and substance, to securities class actions through the enactment of the PSLRA, which was made into law when both houses of Congress overrode President Clinton’s veto of the PSLRA. In his veto, President Clinton stated that the PSLRA would “have the effect of closing the courthouse door on investors who have legitimate claims”.

2. The PSLRA: Procedure & Substance

The PSLRA requires a court overseeing federal securities fraud class action lawsuits to adopt a rebuttable presumption that the most adequate plaintiff to represent a class as Lead Plaintiff is the investor(s) who suffered the largest financial loss. Thus, the PSLRA removed the perceived advantage to filing the first action through this portion of the legislation.

Before appointing the Lead Plaintiff, however, the plaintiff filing the first class action lawsuit must publish notice of the filing of an action via a wire service or widely circulated publication, advising investors of the pendency of the action, the claims asserted therein, and the respective class period, and to inform investors that any class member may apply to the court to serve as the Lead Plaintiff. These applications must be made within sixty (60) days of the publication of the notice. The purpose of the initial notice and the 60-day period that follows, is to alert potential class members to the commencement of the litigation and to provide investors with time to measure their losses and consider whether they would like to move to be appointed Lead Plaintiff.

An investor does not need to file a complaint to be appointed Lead Plaintiff; rather, any investor within the class may move the court by filing a motion for appointment as Lead Plaintiff. The motion must be accompanied by a PSLRA certification which, among other things, provides: (i) that the plaintiff did not purchase the subject security at the direction of counsel in order to participate in the action; (ii) that the plaintiff is willing to serve as a representative party on behalf of a class; (iii) information regarding all transactions in the subject security; (iv) information about all other securities class actions in the past three (3) years in which the plaintiff is serving (or sought to serve) as a representative party; and (v) that the plaintiff will not accept any payment for serving as a representative party beyond his or her pro rata share of any settlement or award.[10]

After evaluating the Lead Plaintiff applications, including any arguments or briefs in support or in opposition, the judge will appoint a Lead Plaintiff or Lead Plaintiff group. The PSLRA requires courts to appoint as Lead Plaintiff the movant or movant group with the “largest financial interest” in the case (often measured as the largest loss), so long as they are also adequate to lead the class and have claims typical of other class members. Congress expressed its clear intention that institutional investors serve as Lead Plaintiffs because generally institutions: (i) have the largest investments, and therefore often the largest losses; and (ii) have the sophistication and experience to work most effectively and efficiently with lawyers.

One important goal of the PSLRA was to shift control of securities class actions from the lawyers to the plaintiffs. Indeed, the PSLRA “increased the likelihood that institutional investors will serve as Lead Plaintiffs” because, as Congress stated in published reports, institutional investors with large amounts at stake “will represent the interests of the plaintiff class more effectively than class members with small amounts at stake”. Similarly, the Senate

[10] If the Lead Plaintiff movant did file a complaint, the certification must also state that the Lead Plaintiff reviewed the complaint and authorized its filing.

Report on the PSLRA states that "[t]he Committee believes that increasing the role of institutional investors in class actions will ultimately benefit the class and assist the courts". Senate Report No. 104-98 at 11. Consistent with the goals of the PSLRA, since its passage, institutional investors have become much more active in prosecuting securities class actions of the top 100 securities settlements of all time, 93% were led by an institutional plaintiff.[11]

B. What is Being Accomplished (Important Trends in Securities Class Actions)

Historically, securities class actions have been criticized by some who suggest that these lawsuits return little value to those harmed by the fraud. However, beginning in or around 2010, several trends favorable to investors began to arise that demonstrated class actions are indeed a valuable vehicle not only for recovering lost monies, but also to implement meaningful corporate governance changes which produce long-term value for investors retaining positions in corporate defendants. These trends included significantly larger monetary settlements, potential corporate governance changes, lower attorney fees, payment from individual wrongdoers, creative settlements (such as those involving equity as part of settlements) and pre-packaged bankruptcies, to name a few. These trends have persisted and, in many ways, continued to evolve over the last decade. It is beyond debate that the main factor influencing these trends is the involvement of institutional investors as Lead Plaintiffs.

1. Increase in Monetary Value of Settlements

The increased size of settlements in securities class actions from 1995 through the present has been somewhat staggering. Prior to 1995 (the year the PSLRA was passed), class action settlements averaged approximately $5 million per settlement. By 2003, the average settlement had risen to approximately $25 million. The period of 2015-2018 saw the highest averages, followed by an average decline in the period 2019-2021; however, the average settlement in 2022 was $37 million and the average increased in 2023 to $46 million.[12]

The explanations for these increased settlements are not hard to find. As the size and scope of the frauds have grown significantly, so have investor losses per case. In 1996, the median loss for settled class actions was $64 million. That figure has risen steadily over the last twenty-five (25) years, reaching $739 million, $984 million and $923 million in 2021, 2022, and 2023,[13] respectively (even accounting for the slowdown in class action litigation during the height of the COVID-19 pandemic).

Also, the increasing number of institutional investors stepping forward to become lead plaintiffs have increased average settlements. Indeed, studies have shown that, in cases where institutional investors have served as the lead plaintiff, the average settlement was substantially higher than those led by individual investors. Of the five largest settlements in securities class actions from 2023, totaling over $1.9 billion in settlement proceeds, more than 80% of those were led by institutional investors, with only one case that had a mix of retail and institutional investors.[14] Of course, this has also meant a similar increase in the total settlement dollars available. In 2001, the value of all securities class action settlements for the year was approximately $1.9 billion. Of the cases that settled

[11] ISS SCAS, *The Top 100 U.S. Class Action Settlements of All-Time, as of December 31, 2023*. Feb. 2024. P. 16.

[12] Flores and Starykh. *Nera, Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review*. Jan. 2024. P. 18.

[13] *Id.* P. 26.

[14] Sena. *Largest Securities-Related Class Action Settlements of 2023.* ISS Securities Class Action Services. Jan. 2024. P. 3.

that were filed in 2019 and 2020 the aggregate settlements were $2.6 billion, and $1.9 billion, respectively.

2. Overseas Litigation and Recoveries

In June 2010, the United States Supreme Court issued an opinion that affirmed the rights of all investors (U.S. and non-U.S.) purchasing securities in the United States to assert claims in a U.S. court. See *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010) ("*Morrison*"). At the same time, however, the Court limited claims by investors who purchase securities on non-U.S. exchanges, regardless of where the misrepresentations were made or from where the shares were purchased. In *Morrison*, the Supreme Court held that Australian shareholders who had purchased securities in an Australian bank could not bring securities-fraud claims in a U.S. court. More specifically, the Supreme Court held that the Exchange Act does not apply extraterritorially, meaning that only securities listed on an American stock exchange that are purchased or sold are protected by the provisions of the Exchange Act. Subsequent decisions interpreting *Morrison* have likewise limited the ability of investors who purchased shares outside the U.S. exchanges to bring claims under the U.S. securities laws.

In response to these drastic changes to the legal landscape, there has been an increasing number of jurisdictions where shareholder claims are being filed and where shareholders have successfully recovered damages, including but not limited to, Australia, Brazil, Canada, Germany, Italy, Japan, the Netherlands, South Africa, South Korea, Sweden, Taiwan, and the United Kingdom.

In 2007, Kessler Topaz served as co-counsel in the Netherlands' groundbreaking Royal Dutch Shell European Shareholder Litigation, resulting in a $352 million recovery for non-U.S. investors in 2009. In January of 2011, the Firm and its partners established a Dutch Foundation and filed a claim on behalf of more than 200 institutional investors with €2 billion in losses against Fortis Bank, N.V. ("Fortis") and its successor companies BNP Paribas and Ageas NL. The case against Fortis arose out of the subprime mortgage crisis and alleged fraud in connection with the company's failed 2007 attempt to acquire Dutch bank ABN Amro Holding NV (ABN Amro). Specifically, the Firm's clients alleged that Fortis misrepresented the value of its collateralized debt obligations, its exposure to subprime-related mortgage-backed securities, and the extent to which the decision to acquire ABN Amro jeopardized its solvency. After the acquisition failed, Fortis encountered financial difficulties and broke up in the fall of 2008. Investors in Fortis lost as much as 90% of the value of their investments. The lawsuit survived rigorous jurisdictional challenges before both the Utrecht District Court and the Dutch Court of Appeals. In July 2018, the Dutch Court approved a global multi-party settlement with the defendants for €1.3 billion. The settlement is the largest shareholder recovery in Europe to date.

Most recently, the Firm litigated and resolved claims brought by Steinhoff common stock shareholders before courts in the Netherlands, Germany, and South Africa for losses they sustained as a result of the company's December 2017 revelation that it had discovered accounting irregularities and that it had overstated profits by $7.4 billion between 2009 and 2017. Kessler Topaz, representing over 40 institutional investors from around the globe, initially filed legal action in the Netherlands seeking recovery of investor losses and a judicial examination. On February 15, 2022, following three years of complex multiparty investigations, litigation, and court approvals by the District Court of Amsterdam and the High Court of South Africa, a $1.6 billion global settlement became effective with Steinhoff International Holdings N.V. and the former Steinhoff International Holdings Proprietary Limited, Steinhoff's auditor Deloitte & Touche South Africa and Deloitte Accountants B.V., and Steinhoff's former directors and officers and their D&O insurers. The settlement is the largest securities settlement outside the United States to date.

Today, global shareholder litigation continues to evolve, as new jurisdictions begin to allow multiparty or group shareholder actions and debate class action procedures. Since 2019, alone, there have been more than 160 filings outside of the Unites States, and over the past four years, settlements in international jurisdictions have totaled more than $3.3 billion.

3. Decreased Attorney Fees

As contemplated under the PSLRA, institutional investors are in a better position than individual investors to negotiate lower attorney fees, which increases the size of the recovery for the class without generally sacrificing the quality of counsel. Indeed, institutional investors are able to negotiate sophisticated fee arrangements, which may include provisions for sliding scales based on either the amount recovered for the plaintiff, the time it takes to litigate the case, or both. Moreover, bonuses for certain types of recoveries (i.e., when individual defendants contribute to the settlement recovery or corporate governance measures are also enacted as part of a settlement) have become more common as motivators for counsel.

4. Creative Settlements

In addition to corporate governance reforms, institutional investors have been at the forefront of reaching more creative settlements with defendants, particularly settlements that include payment in company stock in lieu of only cash. Including stock in the settlement is particularly useful when a company's long-term viability is healthy, but its short-term position leaves the company with limited ability to pay a large monetary judgment. This type of settlement structure seeks to maximize the recovery by aligning the interests of the class with the future performance of the defendant company. Other creative settlements have included the use of pre-packaged bankruptcies, downside protection for plaintiffs when taking equity as part of a settlement, and others.

C. The Benefits of Serving as the Lead Plaintiff

One of the leading misconceptions with regard to securities class actions is that there are no advantages to assuming the role of the Lead Plaintiff. While taking on the role of Lead Plaintiff requires careful consideration, it is important to note that the majority of institutional investors do not understand what is entailed. Indeed, most believe that the role of Lead Plaintiff is much more burdensome than it truly is, and do not fully understand the benefits or the impact that Lead Plaintiff's decisions have on all investors. This section will detail the responsibilities of a Lead Plaintiff and the advantages to serving as Lead Plaintiff when the circumstances are right for your particular fund.

1. Serving as Lead Plaintiff and Its Advantages

In order to have a representative of the plaintiff class overseeing the litigation, the court will appoint a single plaintiff or a small group of plaintiffs as the Lead Plaintiff. As noted above, this selection is based primarily on which plaintiff or plaintiff group has suffered the largest financial loss. While nearly all courts allow small groups of plaintiffs to come together to represent the class, the size of these groups generally does not exceed five members so that they are able to work together in an efficient manner. The court will then typically approve the Lead Plaintiff's selected attorneys as Lead Counsel. This organization is usually established by the court within the first several months after the lawsuit is initiated.

a) Overseeing the Litigation

The Lead Plaintiff is responsible for managing the litigation primarily by overseeing and monitoring the progress of the action and the efforts of counsel. Specifically, the Lead Plaintiff will review and comment on important filings and other documents pertaining to the prosecution of the action. Lead Counsel is responsible for litigating the action and, at the same time, keeping the Lead Plaintiff well-informed so that the Lead Plaintiff can effectively monitor all progress and provide comments and suggestions. Kessler Topaz works with all of its clients to establish a reporting system that they determine to be effective, yet not overwhelming.

b) Costs and Expenses

There is no financial risk in serving as a Lead Plaintiff. Kessler Topaz advances all costs and expenses incurred in the prosecution of the case and will be reimbursed only if there is a successful settlement or judgment recovery on behalf of the class. This reimbursement comes from the money recovered on behalf of the class and, thus, there is never a time when the Lead Plaintiff would have to pay anything out of its own pocket. Furthermore, unlike many other countries, in U.S. class action cases, the Lead Plaintiff is not responsible for the legal costs or expenses of the defendants in the event that a case does not resolve favorably for the class. In addition, fees earned by Kessler Topaz are contingent upon a successful recovery and are ultimately determined by the court based on the complexity of the lawsuit, the duration of the litigation and the quality of work performed. Institutional Lead Plaintiffs often will negotiate a competitive fee agreement with counsel to limit the maximum percentage that their selected counsel will request from the court if there is a successful resolution of the case.

c) Settlement Discussions

Once discussions aimed at resolving an action commence, the Lead Plaintiff will have an opportunity to be active in all negotiations relating to the size of the financial recovery, the makeup of the consideration (i.e., cash and stock, cash and options, etc.), the proposed plan of allocation for distribution of the recovery to the class, and corporate governance demands aimed to protect shareholders from similar future frauds. Generally, the Lead Plaintiff has a strong voice when negotiating settlements and the clout of a sophisticated institutional investor cannot be overstated in these situations. Moreover, the Lead Plaintiff must approve any settlement before it is presented to a court.

d) Attorneys' Fees

A common complaint directed at class actions is that plaintiffs' attorneys are awarded too large a portion of the recoveries they achieve. The reality, however, is that attorneys' fees by percentage have been dramatically reduced in the last several years as institutional investors have begun stepping forward to serve as Lead Plaintiffs. Institutional investors are able to establish more competitive contingent fees with their counsel, well below the benchmark set by many courts. As a result, the class is benefited by a return of a larger portion of the settlement. While attorneys' fees are generally agreed to when an investor retains counsel, there are many different ways to structure agreements so that the fee properly reflects the amount and type of recovery achieved, as well as the complexity and longevity of the litigation (i.e., sliding scales that encompass both the amount and timing of recoveries). It is important to note that even if counsel and the Lead Plaintiff agree on an appropriate fee, all fees must still be approved by the court as fair and reasonable.

2. Dispelling the Myths of Being a Lead Plaintiff

There are several myths about serving as a Lead Plaintiff. Below are several comments that we have encountered from both U.S. and non-U.S. investors, as well as the realities associated with the Lead Plaintiff role.

- *There is a large time and resource commitment in being a Lead Plaintiff.*

Incorrect. Lead Counsel does all of the legal work and advances all of the costs and expenses associated with the litigation. The Lead Plaintiff monitors the progress of the litigation by reviewing important documents. While it is true that the Lead Plaintiff may need to participate in discovery, typically by producing a targeted set of documents and having a representative available for a deposition to answer certain questions, the time commitment generally is not significant and all expenses will be advanced by Kessler Topaz.

- *Lead Plaintiffs may be held financially or otherwise liable if the case is unsuccessful.*

Incorrect. Unlike certain courts outside the United States, an unsuccessful plaintiff is not responsible for the defendants' fees, costs and expenses. Likewise, a plaintiff is not responsible for paying its own counsel fees, costs or expenses in a contingency matter, regardless of the outcome of the case.

- The Lead Plaintiff will receive unwanted media publicity.

Incorrect. In response to questions of publicity, we typically ask investors to name the Lead Plaintiff in the Enron securities class action — arguably the most widely publicized class action ever. Most investors cannot answer this question. The truth is that most Lead Plaintiffs have as much or as little publicity as they seek. Indeed, in some instances institutional Lead Plaintiffs desire publicity to demonstrate that they are active, when necessary, to combat corporate fraud and that they are fulfilling their obligations to protect and preserve their funds' assets.

- Lead Plaintiffs will have to make frequent trips to the United States.

Incorrect. Even before "remote" proceedings became somewhat of the norm in securities litigation, the Lead Plaintiff was generally not required to attend most hearings. We do encourage our institutional clients, however, to consider attending the important hearings as the Lead Plaintiff's appearance often has a positive impact on the court. There is always the possibility that a Lead Plaintiff or other representative plaintiff will be required to sit for a deposition. These depositions typically are not burdensome and are scheduled at a convenient time and place and, if requested, can often take place remotely. All costs and expenses for the litigation, including any travel related expenses, are advanced by Kessler Topaz, and are not the responsibility of the Lead Plaintiff.

- There is no reason to be a Lead Plaintiff because institutions receive the same return when, and if, the case resolves in a recovery for the plaintiffs.

Incorrect. As discussed above, institutional Lead Plaintiffs frequently achieve larger recoveries than individual Lead Plaintiffs and are uniquely capable of implementing meaningful governance changes with the corporate defendant. As such, institutional Lead Plaintiffs offer material advantages for investor classes. Without question, a decline in the number of active institutional investors would lead to a decline in the quantity and quality of the recoveries and governance reforms accomplished by class actions.

- There is no need to seek to be a Lead Plaintiff because another institution will step forward anyway.

Incorrect. The reality is that while there are a growing number of institutions that regularly seek to serve as Lead Plaintiffs, those same institutions are beginning to speak out against what they view as "free-riders" — institutional investors that rarely or ever serve as Lead Plaintiffs, yet always participate in class action recoveries. There is no risk in filing a Lead Plaintiff motion; indeed, one can always withdraw a motion once it is determined that another qualified institutional investor (with similar or greater financial losses) has stepped forward to protect the putative class. However, there exists a substantial risk when an institutional investor with substantial losses elects not to file a Lead Plaintiff motion and, instead, allows other smaller (perhaps individual) investors to assume the important role of Lead Plaintiff. Oftentimes, smaller investors have selected counsel with less experience and resources to prosecute these class actions which directly impact the quality and quantity of the recoveries and reforms.

- Non-U.S. based investors cannot serve as a Lead Plaintiff.

Incorrect. We live in a global economy and courts in the U.S. have continually recognized that non-U.S.-based investors, many of which have very substantial holdings in U.S. securities, are adequate Lead Plaintiffs with just as much right to seek leadership positions in these cases as U.S.-based investors. While the *Morrison* opinion did limit the ability for investors to bring claims for investments made on non-U.S. exchanges, investors domiciled anywhere can bring claims and serve as a lead plaintiff for claims brought on behalf of investments made on U.S. exchanges. Indeed, over the last five years, some of the largest settlements in securities fraud class action litigations were achieved by non-U.S. investors serving as Lead Plaintiffs.

D. Determining Your Financial Interest in the Litigation

As discussed above, the PSLRA creates a rebuttable presumption that the plaintiff with the largest financial interest (of the movants seeking appointment) in the litigation should be appointed as Lead Plaintiff. Congress established this framework to encourage courts to appoint institutional investors as Lead Plaintiffs, reasoning that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions". While the PSLRA requires a financial interest analysis to identify the movant with the most at stake in the litigation, the PSLRA does not define "financial interest" or otherwise guide courts on how to calculate an investor's "financial interest" for the purposes of selecting a Lead Plaintiff. As a result, determining how to calculate an investor's financial interest, or financial loss[15], remains the subject of much debate among the courts.

Courts confronted with this question generally employ one of two methods for calculating financial loss. The first involves calculating the out-of-pocket financial loss experienced by the lead plaintiff movant under either the FIFO (first-in, first-out) or LIFO (last-in, first-out) share matching methodology. The second involves calculating the lead plaintiff movant's losses utilizing the principles set forth by the United States Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005), which limits recovery to losses tied to the disclosure of fraud. Dura excludes non-fraud (or general market) related losses, whereas FIFO and LIFO tend to capture fraud and non-fraud movements in the analysis.

Under either method, it is important at the outset to note that the Class Period – the time period during which the defendants' false and misleading statements inflated the price of the security – determines which purchases and sales of the security at issue factor into a plaintiff's financial interest. Consequently, when an institutional investor elects to pursue appointment as Lead Plaintiff, counsel will first request the client's transactions in the security during the Class Period, as well as any shares of the security the client held immediately prior to the beginning of the Class Period and all post-Class Period transactions. Using this data, counsel will calculate the client's financial interest in the litigation.

1. <u>Calculating Out-of-Pocket Losses (FIFO/LIFO)</u>

Historically, many courts have equated financial interest with the out-of-pocket financial loss experienced (either as owner of the stock or on behalf of the actual owners) by the Lead Plaintiff candidate. Out-of-pocket losses are a measure of the actual financial impact of a series of transactions on an investor regardless of the reasons (fraud or market factors) for the losses. Courts utilize one of two share matching methodologies to determine financial loss – FIFO and LIFO. A court's decision on which methodology to employ can have a dramatic impact on the Lead Plaintiff candidate's financial loss. Once shares are matched, movants then value the remaining (or retained) shares using the stock's average closing price for the 90 days after the end of the Class Period.

[15] Courts look at several factors when assessing financial interest, including, for example, net shares purchased, net funds expended, total funds expended, and loss. Loss is considered to be the most important factor.

a) Matching Shares

Under FIFO, the first shares sold during the Class Period are matched or offset against the earliest purchases, even if the purchases occurred before the Class Period. For example, if an institution owns 1000 shares of Sample Company stock at the start of the Class Period, and then purchases 3000 more shares during the Class Period while also selling 2000 shares during the Class Period, 1000 of those 2000 shares sold during the Class Period are offset against the 1000 share pre-Class Period balance. Accordingly, when counsel calculates the institution's financial loss, the first 1000 shares sold during the Class Period are effectively netted out (or zeroed out) for loss calculation purposes because they relate to pre-Class Period purchases. Once counsel nets all Class Period transactions, the institution would have a net balance of 2000 shares purchased during the Class Period that were still held at the close of the Class Period (net shares purchased).

This methodology accounts for the reality that many institutions typically enter a Class Period with a pre-existing balance of company stock.

Conversely, under the LIFO methodology, the last shares purchased are considered the first shares sold. Under the example below, 1500 of the 2000 shares sold during the Class Period would be offset against the 3000 shares purchased during the Class Period, thereby leaving a net balance of 1500 shares purchased during the Class Period. Because 500 shares were sold prior to any purchases (the sales on 11/1/2015), such shares could not be matched against purchases and thus are matched against the pre-class period holdings.

Currently, LIFO is the majority rule in many key jurisdictions in the United States. Courts favoring LIFO do so because this methodology, unlike FIFO, takes into account gains that might have accrued to plaintiffs resulting from sales during the Class Period due to the inflation of the stock price. Because FIFO

Sample Client									
FIFO Loss Calculation in Sample Company									
Class Period: 3/2/2015 - 7/30/2016									
Retained Shares valued at:		$21.00							
Transaction	**Date**	**Shares**	**Price**	**Cost**	**Transaction**	**Date**	**Shares**	**Price**	**Proceeds**
Open Balance		1,000			Sale	11/1/2015	500	$144.00	$72,000.00
					Sale	1/18/2016	500	$159.00	$79,500.00
						Sales offsetting opening balance:	1,000		$151,500.00
Purchase	11/5/2015	1,000	$150.00	$150,000.00	Sale	7/8/2016	1,000	$171.00	$171,000.00
Purchase	12/16/2015	1,000	$156.00	$156,000.00	Retained		2,000	$21.00	$42,000.00
Purchase	5/6/2016	500	$162.00	$81,000.00					
Purchase	7/7/2016	500	$168.00	$84,000.00					
		3,000		$471,000.00			3,000		$213,000.00
								FIFO loss:	($258,000.00)

Sample Client									
LIFO Loss Calculation in Sample Company									
Class Period: 3/2/2015 - 7/30/2016									
Retained Shares valued at:		$21.00							
Transaction	**Date**	**Shares**	**Price**	**Cost**	**Transaction**	**Date**	**Shares**	**Price**	**Proceeds**
Open Balance		1,000			Sale	11/1/2015	500	$144.00	$72,000.00
						Sales offsetting opening balance:	500		$72,000.00
Purchase	11/5/2015	1,000	$150.00	$150,000.00	Sale	1/18/2016	500	$159.00	$79,500.00
Purchase	12/16/2015	1,000	$156.00	$156,000.00	Sale	7/8/2016	1,000	$171.00	$171,000.00
Purchase	5/6/2016	500	$162.00	$81,000.00	Retained		1,500	$21.00	$31,500.00
Purchase	7/7/2016	500	$168.00	$84,000.00					
		3,000		$471,000.00			3,000		$282,000.00
								LIFO loss:	($189,000.00)

nets out (or zeros out) early Class Period sales, any inflationary gains from these early sales are not reflected in the traditional FIFO calculation. LIFO, on the other hand, is more likely to account for Class Period gains because early Class Period sales are not netted out against pre-Class Period purchases. LIFO typically takes into account more Class Period transactions than FIFO. FIFO and LIFO would be the same for investors without any pre-Class Period positions.

b) Valuing Retained Shares

After netting all Class Period transactions under either FIFO or LIFO, counsel determines a set-off value for the shares retained at the end of the Class Period to calculate the loss related to those shares. Under the PSLRA, the set-off value is equal to the mean trading price of the security during the 90-day period beginning immediately after the end of the Class Period ("hold price").[16] The use of the hold price is intended to reduce the impact of temporary stock price declines following the disclosure of corrective information that are erased if the stock price rebounds. After it is calculated, the hold price is multiplied by the number of shares purchased during the Class Period and still retained at the end of the Class Period – in the above example, 2000 under FIFO and 1500 under LIFO. That product is then netted with the out-of-pocket cost of the shares held at the end of the Class Period to calculate a movant's out-of-pocket loss.

2. Calculating Potentially Recoverable Losses Under *Dura*

Distinct from the FIFO/LIFO analysis, some courts have favored a method of calculating a prospective Lead Plaintiff's financial interest in a manner that is intended to more closely approximate the plaintiff's potentially recoverable losses rather than their out-of-pocket losses. This method is sometimes referred to as the retained shares method or the *Dura* method. The *Dura* method is designed to calculate losses only for those shares that suffered potential harm as the result of the revelation of fraudulent conduct. Sales of shares prior to any revelation of fraud are excluded from this calculation because any price decline they may have experienced is deemed not to be due to the fraud or its revelation. This calculation attempts to comply with the Supreme Court's decision in *Dura*, where the Court made clear that plaintiffs in securities fraud cases can recover damages only for "those economic losses that misrepresentations actually cause". 544 U.S. at 345. The *Dura* method is intended to be a proxy for damages before discovery, expert reports, or the court's ruling on potential legal theories. It is not a substitute for a fulsome damages analysis, which typically occurs later during the litigation.

Under the *Dura* method, counsel will calculate a plaintiff's financial interest by first determining, using the FIFO and/or LIFO methods described above, how many shares purchased during the Class

Sample Client										
FIFO Retained-DURA in Sample Company										
Class Period: 3/2/2015 - 7/30/2016										
Pre-disclosure Price on 7/30/2016		$87.50								
Retained Shares valued at:		$21.00								
Transaction	**Date**	**Shares**	**Price**	**Cost**		**Transaction**	**Date**	**Shares**	**Price**	**Proceeds**
Purchase	12/16/2015	1,000	$87.50	$87,500.00		Retained		2,000	$21.00	$42,000.00
Purchase	5/6/2016	500	$87.50	$43,750.00						
Purchase	7/7/2016	500	$87.50	$43,750.00						
		2,000		$175,000.00				2,000		$42,000.00
									FIFO Retained-DURA loss:	($133,000.00)

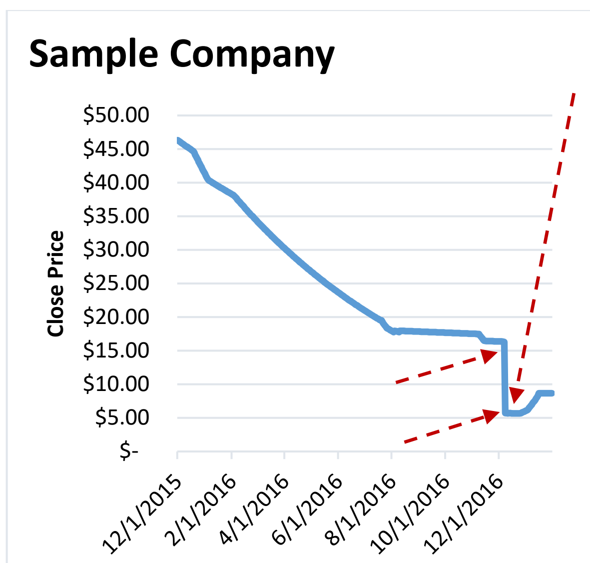
[16] If the institution sells the shares after the end of the Class Period, but before the end of the 90-day period, the actual sale price is not always utilized. Instead, counsel must use the greater of the actual sale price or the mean trading price from the end of the Class Period through the date of sale. Alternatively, if the institution sells after the 90-day period, the 90-day hold price must be used.

Sample Client										
LIFO Retained-DURA in Sample Company										
Class Period: 3/2/2015 - 7/30/2016										
Pre-disclosure Price on 7/30/2016		$87.50								
Retained Shares valued at:		$21.00								
Transaction	**Date**	**Shares**	**Price**	**Cost**		**Transaction**	**Date**	**Shares**	**Price**	**Proceeds**
Purchase	11/5/2015	1,000	$87.50	$87,500.00		Retained		1,500	$21.00	$31,500.00
Purchase	12/16/2015	500	$87.50	$43,750.00						
		1,500		$131,250.00				1,500		$31,500.00
									LIFO Retained-DURA loss:	($99,750.00)

Period were still held at the time of the corrective disclosure (which often is the end of the Class Period, except when there are multiple corrective disclosures). These shares are then multiplied by the difference between the price of the security immediately before disclosure of the fraud (in the examples below, $87.50), as opposed to the actual acquisition price,[17] and the hold price discussed above (in these examples, $21.00) to calculate the institution's financial loss. Shares purchased during the Class Period but sold before corrective information enters the market ("in-and-out transactions") are excluded from the analysis.

As can be seen from the examples above, using this method can result in dramatically different financial interest calculations in those instances where the share price immediately prior to the revelation of the fraud is materially different from the actual acquisition price.

The following chart illustrates the difference between calculating out-of-pocket losses and calculating potentially recoverable losses under *Dura*. The chart shows a sample company whose stock price drops steadily throughout the Class Period, and then drops sharply at the end of the Class Period (on December 1, 2016), after a single corrective disclosure is made. Under the out-of-pocket-losses method, the decline in the stock price throughout the Class Period will be taken into consideration in calculating a plaintiff's financial interest in the litigation, even though damages will not ultimately be recoverable for any declines in the Company's stock price that occurred before the single corrective disclosure was made. The Dura/retained shares method accounts for this by only considering the losses that stem from the decline in the Company's stock price occurring immediately after a corrective disclosure was made. Thus, although an initial damages calculation under the out-of-pocket-losses method may indicate that a plaintiff's losses are significant, counsel should calculate the plaintiff's losses under the Dura/retained shares method to ensure that the plaintiff's potentially recoverable losses are substantial enough to warrant pursuing appointment as lead plaintiff in the matter.



[17] If the acquisition price is lower than the price of the security immediately before disclosure of the fraud, the acquisition price is typically used in the Dura calculation.

It is important to recognize and understand that, no matter which of the methods described above, is used, calculating the greatest financial interest for purposes of determining which investor (or which group of investors) is best suited to serve as Lead Plaintiff is very different than calculating how much of the loss incurred is actually compensable under the securities laws, which is detailed further below. Even the Dura/retained shares method, which is intended to approximate the potentially recoverable losses, still provides only a rough estimate of actual damages. Ultimately, damages will only be awarded under the securities laws for the portion of the loss that was due to misconduct, as opposed to general market movements that could occur in any given stock during any given time period.

E. Litigating Securities Class Actions

This section provides a general overview of the typical stages in prosecuting a securities class action after the Lead Plaintiff is appointment.

1. <u>The Amended Complaint and Motion to Dismiss</u>

As noted above, the PSLRA provides specific procedures for the appointment of a Lead Plaintiff in a securities class action. Following the Lead Plaintiff's appointment, the Lead Plaintiff and defendants typically agree upon a schedule to file an amended complaint and for defendants to file responsive pleadings. The amended complaint is one of the more important steps in prosecuting a securities class action because it sets forth the relevant facts and pleads causes of action that the Lead Plaintiff intends to establish at trial.

Complaints typically assert claims against issuers and officers who issued materially false statements. The complaint may also name directors who signed documents, underwriters who assisted in selling securities, and accountants who issued unqualified audit opinions as defendants.

Securities fraud complaints must be pled with particularity pursuant to Rule 9(b) of the Federal Rule of Civil Procedure and the PSLRA. The failure to comply with these stringent pleading standards may provide a basis for dismissal of the action. Accordingly, Lead Plaintiff's counsel will promptly undertake a thorough investigation of the factual circumstance that underlies the fraud, including researching all of the defendant's SEC filings, press releases, and other company statements to determine which information was falsely stated or omitted. For purposes of pleading scienter, the state of mind of the defendant, for claims brought under the Exchange Act, the Lead Plaintiff must plead and ultimately prove that defendants acted intentionally or recklessly in making their false or materially misleading statements or omitting material information. One way in which such "state of mind" evidence is pled is through circumstantial evidence of motive, typically by analyzing any insider sales by officers and directors, or acquisitions that the issuer may have made with inflated stock which may expose any motive for the fraud.

Depending on the nature of the fraudulent statements, Lead Counsel may also engage investigators to identify and contact potential witnesses, such as customers, suppliers/vendors, former employees, non-defendant companies, or retain industry experts who help better understand the industry and the fraud. Lead Counsel may also engage accounting experts to analyze the issuer's financial statements and identify violations of generally accepted accounting principles. All of these efforts go towards attempting to plead and ultimately prove that defendants knew their statements were false at the time they were made or acted recklessly in making their statements.

Once the Lead Plaintiff files the amended complaint, defendants will invariably move to dismiss the complaint on any number of grounds in order to continue the automatic stay of discovery that is mandated by the PSLRA until a decision on the motion is rendered by the court. Motions to dismiss typically argue that the alleged false statement was immaterial to investors, that the defendants did not know the statement was false when made, that the complaint fails to satisfy the heightened pleading requirements of Rule 9(b) and the PSLRA, and that the false statements did not cause the Lead Plaintiff's losses.

Lead Plaintiff's counsel will file a brief in opposition to the motion to dismiss and the court will issue an opinion and order that either grants or denies the motion to dismiss, or parts thereof. This process can sometimes take an exceedingly long period of time based upon the complexity of the issues or the schedule of the court deciding the motion. It is also not uncommon for a court to give the Lead Plaintiff another chance to plead their theory, even if the first motion to dismiss is successful in causing the court to dismiss the complaint.

2. Merits Discovery

Once the defendant has either answered the complaint, or the court has denied the defendant's motion to dismiss, the discovery stay, which is automatically in force under the PSLRA, is lifted and discovery begins.

Under the Federal Rules of Civil Procedure, before the discovery process begins, the parties must confer to discuss, and ideally to agree upon, a comprehensive discovery plan. The plan may address: (i) the scope and timing of discovery; (ii) the number of depositions and their length; (iii) the number of written questions (or interrogatories) each party may serve on another party; (iv) expert discovery including exchange of reports and scheduling of expert depositions; (v) issues concerning access to and retrieving documents; and (vi) obtaining document or deposition discovery from third parties. Following the meeting, the parties must provide the court with the proposed discovery plan for its approval, or if agreement is not reached, each party may submit their own proposed schedule. The court will often make modifications to the plans depending on its own schedule.

Within fourteen (14) days of the parties meeting, each party must provide the other parties to the action with their "initial disclosures." These disclosures include basic information concerning: (i) the parties' claims and defenses; (ii) identification of witnesses and contact information; (iii) identification of documents that support a party's claim or defense; and (iv) the identification of applicable insurance coverage. The Lead Plaintiff will generally be required to provide copies of its trading records, either through its own records or through its investment managers, to demonstrate its holdings in the defendant's company, as well as any other information the Lead Plaintiff possesses concerning the issuer of the securities or its decision to invest in the securities.

After the parties have provided initial disclosures, they may then serve discovery requests. These requests are made in the form of document requests and interrogatories (which are written questions), directed to parties in the action. The Lead Plaintiff will receive document requests and interrogatories relating to the claims asserted, and counsel will review the requests to ensure they are appropriate, and assist in the preparation of any responses.

The Lead Plaintiff may also be notified of the need for deposition testimony. The parties must give reasonable advance notice of any deposition and in general, the Lead Plaintiff need only sit for a few hours on a single day and counsel is generally able to schedule the deposition for a time convenient to all parties. Lead Counsel will prepare with the Lead Plaintiff prior to the deposition to assure that the Lead Plaintiff is familiar with the deposition process and is adequately prepared to respond to defendants' questions.

3. Class Certification

Rule 23 of the Federal Rules of Civil Procedure provides that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained". Class certification is an important procedural requirement that allows the Lead Plaintiff to maintain the action through trial on behalf of the Lead Plaintiff and all other similarly-harmed investors (the "Class"). Motions for class certification are typically filed several months after a court denies defendants' motions to dismiss.

A fundamental prerequisite to the maintenance of any class action is that there is an identifiable Class, that the Lead Plaintiff is a member of that Class, and that there are common issues of law or fact between Class members such that a Class action would be superior over any other available procedures for adjudicating the controversy.

Although class certification is a procedure distinct from the merits of the action, a court may nonetheless probe behind the pleadings before coming to rest on the certification issue. In making its class determination, the court will consider various prerequisites mandated by Rule 23, including: (i) numerosity of the parties; (ii) commonality of legal and factual issues; (iii) typicality of the claims and defenses of the class representative; and (iv) adequacy of representation. The party seeking certification bears the burden of establishing that all prerequisites are met.

Once the class is "certified", the court will direct that appropriate notice be made to the class members, generally through publication and individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; and (iv) that a class member may enter an appearance through counsel if the member so desires. Importantly, class members have the right to affirmatively opt-out of the class and to pursue a separate (but likely coordinated) action on their own behalf.

If a Class is not certified, each plaintiff is responsible for litigating its own individual claim in its own action. As such, defendants are highly motivated to defeat Lead Plaintiff's efforts to certify a Class.

4. Trial

While securities class actions rarely go to trial, the possibility does exist. Since the passage of the PSLRA, less than twenty-five (25) cases have gone to trial and reached a verdict. The purpose of a trial is to adjudicate contested issues of fact. In this regard, before the trial commences, judges may require Lead Counsel to draft a series of statements of fact that they believe will be established at trial. Defendants then indicate which of the proposed facts are admitted, or will not be contested, and which are disputed, specifying the nature of the disagreement, as well as drafting narrative statements of additional facts that they believe can be established. This process helps to narrow the factual issues in dispute.

Judges sometime place certain limits to avoid trials of excessive length, but without hampering counsel's ability to present their case or jeopardizing the fairness of the trial. Limits may be imposed in a variety of ways, including limiting the number of witnesses or exhibits to be offered on a particular issue or in the aggregate, controlling the length of examination and cross-examination of particular witnesses, limiting the total time allowed to each side for all direct and cross-examination, and narrowing issues by order or stipulation.

The Lead Plaintiff is not required to attend a trial if one were to occur, but may be required to appear and present limited testimony related to the investment in the defendant issuer. Kessler Topaz is one of a handful of law firms in the United States that has tried a securities fraud class lawsuit to verdict.

IV. Litigating Securities Fraud Actions Outside of the United States

A. Litigating in Non-U.S. Jurisdictions

In today's global world, investors are increasingly investing in securities that are traded on non-U.S. exchanges. Unfortunately, while more investing is occurring in jurisdictions outside the United States, the ability of shareholders to recover losses due to serious financial fraud related to their foreign securities has been severely limited. The United States Supreme Court forever changed the shareholder litigation landscape with its decision in Morrison in 2010. In the *Morrison* decision, the Supreme Court restricted the right of investors who purchased shares on a non-U.S. market to pursue a remedy in U.S. courts. The practical effect of this is that investors are now precluded from filing shareholder litigation (alleging violations of the U.S. securities laws) in U.S. courts against non-U.S. companies when the investor purchased shares on a non-U.S. exchange.

The *Morrison* decision has also had a tremendous impact outside the United States. Shareholders in companies whose shares trade on exchanges outside the United States, no longer able to pursue legal recourse in the United States for high profile corporate scandals, are increasingly looking to pursue remedies in their home countries or in the courts of the country where a corporation is domiciled or where the exchange is located. The result is that more and more cases are being filed in more and more jurisdictions around the world. Sometimes multiple actions in competing forums are proposed or filed against a company for allegations stemming from the same events or facts. The result is that investors are left with a dizzying number of jurisdictions, new laws, and new options to consider when deciding whether to pursue a claim for an investment-related loss.

B. Factors to Consider When Deciding Whether to Litigate in Non-U.S. Jurisdictions

Litigating outside of the United States is not without its share of challenges. The global litigation field is in constant flux. Many jurisdictions are currently hearing multiparty shareholder litigation claims for the first time and there is no established precedent. A number of jurisdictions are also debating implementation of or currently adopting new collective action procedural mechanisms. In those jurisdictions that have already adopted some form of group litigation procedure, the litigation often proceeds much differently than it does in the U.S. Most jurisdictions outside of the U.S., Canada, and Australia, for example, do not allow for true "class actions" where the majority of claimants can simply remain a passive member of the class and file a claim once a settlement or judgment is reached. Instead, a claimant must typically affirmatively join the litigation if they wish to potentially recover any portion of a settlement or judgment. Although Australia allows most eligible class members to passively and pseudonymously participate, eligible investors are often required to register their claims prior to any settlement or judgment being reached. This highlights the need of investors to be generally aware of how securities litigation operates in various jurisdictions around the world and to understand what, if any, affirmative steps are required of them in order to potentially recover investment losses.

In addition to being aware of whether affirmative steps are required in order to recover, investors should understand and consider the following when assessing whether to get involved in a particular pending action:

- <u>The structure of the country/legal system:</u> The way a country is structured and the design of the legal system can impact how litigation will develop. Some countries like Canada, for example, are similar to the United States because they are a federal system. In a federal system, the laws and application of those laws will sometimes differ depending on the province or state in which the action is being pursued. Many other countries, however, operate with a centralized government and the laws and application of the laws are uniform throughout the country. Legal systems also vary around the world in terms of whether they are a common law system or a civil law system. In a common law system, case law has precedential value and the courts must typically base a judgment on the outcome of previous similar cases. In common law systems, lawyers are largely responsible for arguing the case before a judge or a jury and a judge's role is limited to presiding over the case and, in the case of a non-jury trial, rendering an opinion. In a civil law system, however, the judge often plays a much more active role in the litigation and previously decided cases may be referenced but judges are not required to specifically follow the outcome as precedent. Judges in civil law countries typically rely almost solely on legislation and regulations in determining the outcome of a particular case.

- The costs and attorney fees that the investor may incur: In many jurisdictions, attorneys are prohibited from representing clients on a contingent fee basis where the attorney is only paid a fee for their work if the litigation is successful. Additionally, some jurisdictions are "loser pays" systems, and if the claimants are unsuccessful in the litigation, they may be responsible for paying the attorney fees and costs incurred by the opposing party. Claimants interested in participating in litigation may be required to pay certain costs and fees upfront or, in lieu of paying upfront costs out-of-pocket, they may need to look to a third-party litigation funder to pay upfront costs (including the fees of the attorneys) and to assume the risk of the case being unsuccessful and not yielding a recovery. Third-party funders will often cover all the upfront costs of litigation as well as some or all of any adverse cost risk (whether by purchasing insurance or agreeing to indemnify investors) in exchange for a percentage of any proceeds that are recovered. Where a third-party litigation funder is being utilized, it is important to conduct due diligence on the funder (determining whether they are reputable, experienced, and sufficiently capitalized) and to thoroughly review the terms of the proposed agreement.

- Whether the case will be a case of first impression: Group litigation procedures and laws leading to private actions on the basis of securities law violations are relatively new in many jurisdictions outside of the U.S. As a result, a proposed case or action may be a case of first impression in the proposed jurisdiction. When a case is a case of first impression, it can be more difficult to determine the length of time it may take the case to reach a resolution and to evaluate the likelihood that an action will be successful.

- The types of discovery, if any, that are allowed: The types of evidence allowed to be presented and the procedures for gathering evidence vary greatly among jurisdictions. Many countries do not allow for depositions, requests for production of documents, or other types of open-ended discovery. Some countries require that all documents and other evidence be produced to the court as a matter of course. Institutional investors need to be aware of the amount of time and energy they may need to expend in complying with the discovery procedures (or lack thereof) in non-U.S. jurisdictions. They should also be cognizant of the fact that limited discovery may also impact the ability of the plaintiffs to obtain necessary evidence from defendants and prove the alleged claims that form the basis of any action.

- Requirements for proving claims: Investors are often required to prove their legal existence, legal standing, that the litigation was properly authorized (for example if the lawyers in the jurisdiction are required to obtain a signed power of attorney agreement, then it may also be necessary to demonstrate the power of attorney agreement was signed by one or more authorized signatories), and ownership of the relevant transactions in the securities at issue. Jurisdictions vary in terms of whether they require certain formalities like notarization, legalization, and apostilles on various official documents. They also have varying requirements regarding the types of documentation considered valid and acceptable and whether e-signatures are permitted or whether an original "wet ink" copy will be required.

- Language differences: When a jurisdiction operates in a different language than an institutional investor, it is often necessary to obtain translations of documents and interpreters to assist with any testimony at hearings or depositions. This can add to a legal proceeding's overall cost and it can lengthen the amount of time it takes for the action to reach a resolution.

- Time differences: When a jurisdiction is located in another time zone, communicating with local counsel, the court, and defendants can be difficult and time consuming. Moreover, institutional investors should understand whether there will be any requirement for them to travel to the local jurisdiction.

C. Overview of Litigation in Select Non-U.S. Jurisdictions

As a preliminary resource to assist institutional investors with their understanding of various jurisdictions, please refer to the ***International Shareholder Litigation*** section starting on page 38. Here we've provided a brief overview of the operation of group litigation in the following foreign jurisdictions: Australia, Brazil, Canada, Germany, Italy, Japan, the Netherlands, South Africa, South Korea, Sweden, Taiwan, and the United Kingdom. These are all jurisdictions where shareholder actions are currently pending or where we feel it is likely an action will commence in the near future.

V. Corporate Governance and M&A Litigation

While all litigation brought by corporate stockholders could fairly be considered "corporate governance" litigation, we use this phrase to distinguish cases brought under the federal securities laws, discussed above, from litigation brought under state law or other statutory regimes. Corporate governance actions typically seek (i) monetary recoveries, (ii) injunctive relief, or (iii) corporate governance reforms, or some combination of the three. Much of this litigation is brought in the state courts across the U.S., and particularly in Delaware because most public companies are incorporated there. This section is designed to provide an overview of the types of corporate governance cases Kessler Topaz brings on behalf of its clients, as well as the remedies and recoveries these actions have achieved.

A. Fiduciary Duties

Because corporate governance actions generally arise out of violations of state corporation laws, they are traditionally brought in state courts. However, these actions can be brought in federal court when the plaintiff is asserting a claim under federal law or if certain other requirements are met. Under Delaware state law[18], directors and officers of public companies owe the company and their stockholders two fiduciary duties: the duty of care and the duty of loyalty. Loyalty requires not just placing the corporation and its stockholders' interests ahead of the fiduciary's personal interests, but also that the fiduciary act in "good faith," and with "candor" to the company and its stockholders. Good faith means acting with a genuine attempt to advance the corporation's best interests. Candor means honesty. Thus, from these two fiduciary duties (care and loyalty), courts also speak of the duties of good faith and candor.

Duty of care violations amount to simple negligence. Virtually all corporations indemnify directors for

[18] Even courts outside of Delaware tend to look to the well-developed body of Delaware law to guide their own decisions on corporate matters.

breaches of their duty of care. This means that if a court finds that a fiduciary breach was merely of the director's duty of care, a stockholder cannot recover financially for that breach. Therefore, Kessler Topaz typically only considers bringing corporate governance litigation when we believe we can credibly allege a violation of a fiduciary's duty of loyalty.

B. Statutory Obligations

In addition to their fiduciary duties, corporate directors and officers also must comply with certain statutory obligations. Directors and officers of Delaware corporations, for example, must comply with Delaware corporate statutory law. All U.S. companies are also governed by federal law, which includes complying with various requirements promulgated by the Securities and Exchange Commission ("SEC"). For example, we might bring an action to force a corporation to hold an annual stockholder meeting, as required by Delaware General Corporation Law ("DGCL") Section 211(b) & (c), or we might bring an action seeking to enforce DGCL Section 203, an anti-takeover statute that generally prohibits a stockholder who has acquired 15% or more of a company's stock from buying more shares.

C. Derivative Actions vs. Class Actions

While a class action is brought on behalf of a class of investors, a shareholder derivative action is a lawsuit brought by a shareholder on behalf of and for the benefit of the company against the directors and/or officers of that company. A company's board of directors is traditionally responsible for making decisions about whether or not the corporation will pursue litigation; however, in a derivative action, shareholders are permitted to "step into the shoes" of the directors and bring litigation that the board would otherwise be unwilling to pursue. Such 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".

Shareholder derivative litigation can recover damages for financial harm caused by the conduct of its insiders. Any recovery of damages would be paid to the company to compensate the company for any financial harm. Recoveries in derivative suits do not get distributed to individual shareholders; rather, shareholders benefit "derivatively" through the corporation's recovery. Shareholder derivative actions also sometimes have explicitly non-monetary goals, such as corporate governance reforms. Such reforms are typically designed to prevent the complained of harmful conduct from occurring again in the future. In the event that either one (or both) of these forms of relief is obtained, the company and its shareholders both benefit: the company because of the recovered financial contribution and/or improved corporate governance; and the shareholders because of the company's improved corporate governance, which often results in an increase in stock price.

D. Lead Plaintiffs

1. Choosing a Lead Plaintiff in Corporate Governance Litigation

Whereas Congress determined that lead plaintiffs in U.S. federal securities actions are chosen according to the size of their "loss", lead plaintiffs in corporate governance cases are chosen under a different set of criteria. Of course, in many corporate governance cases, the shareholders may not have suffered an easily-quantifiable "loss". Thus, courts weighing lead plaintiff applications in corporate governance cases typically consider a variety of factors.

Among those factors are the "economic stakes" of competing lead plaintiff movants. Like the "largest loss" determination under the federal securities laws, courts evaluating lead plaintiffs in corporate governance cases generally consider stockholders with larger economic stakes in the company to have an increased incentive to monitor the litigation and oversee their counsel. This factor, however, is not dispositive; rather, courts choosing lead plaintiffs and lead counsel in corporate governance cases have significant discretion, and will not hesitate to choose a plaintiff with a smaller economic stake if that plaintiff demonstrates superiority with the other factors.

In addition to the movants' relative financial stakes, courts considering appointment of lead plaintiffs in corporate governance cases also consider the "quality of the pleadings", the "vigor" of the competing movants, and the "competence" and "resources" of plaintiffs' counsel. The quality of the pleadings refers to the work counsel has done in investigating the case and putting together a high-quality initial complaint. As the Delaware Court of Chancery wrote in *In re Delphi Financial Group Shareholder Litigation*, 2023 WL 424886, at *2 (Del. Ch. Feb. 7, 2012):

> The quality of the pleadings is relevant for two reasons. The first is obvious, and it is that a demonstrably superior complaint is more likely to represent the interests of the plaintiff class and more likely to produce a successful outcome. The second reason the quality of the pleadings is relevant is because each complaint demonstrates the competence and investigative diligence of the counsel who filed it.

"Vigor" refers to the enthusiasm and energy that a lead plaintiff movant has demonstrated thus far in the litigation. This factor can overlap with the "quality of the pleadings" factor, since a plaintiff can demonstrate its "vigor" by preparing a high-quality pleading. Vigor, however, can also refer to whether the potential lead plaintiff has moved with swiftness, done a more thorough pre-suit investigation, sought discovery, or moved for various forms of relief.

Finally, courts weighing competing lead plaintiff applications consider the competence of plaintiffs' counsel and counsel's access to adequate resources necessary to prosecute the claims. Kessler Topaz has a long track record of success in these matters, and is frequently complimented for the results it has achieved.

2. <u>Obligations of a Lead Plaintiff</u>

a) *Continue to Hold Shares*

To bring a corporate governance case, a shareholder needs to own shares in the company as of the time of the alleged injury. To prosecute a derivative claim on behalf of the company, the shareholder also needs to commit to continue to hold at least some portion of its shares through the conclusion of the litigation. This is because derivative claims are brought on behalf of the corporation, so if the client no longer holds shares it cannot continue to bring claims on behalf of the corporation. This requirement only applies to derivative cases; however, lead plaintiffs in class action cases should consult with counsel before buying or selling shares because those trades could run afoul of insider trading rules or otherwise affect the plaintiff's adequacy to continue to serve as a lead plaintiff.[19]

b) *Participate in Discovery*

The lead plaintiff in representative litigation will often need to participate in discovery. This typically means the lead plaintiff will need to collect and maintain any relevant documents in their possession, produce those documents (subject to a confidentiality order), and perhaps to sit for a deposition. Kessler Topaz will cover all costs of discovery, ensure that the discovery process is not overly burdensome on the lead plaintiff, and prepare the representative plaintiff well in advance of any deposition.

c) *Act in Best Interest of Shareholders*

Lead plaintiffs in corporate governance cases are obligated to act in the best interests of the company and its public shareholders. Among other things, this means that the lead plaintiff is obligated to monitor the litigation to ensure that it is being properly

[19] When the company's public shares no longer exist, for example in litigation challenging a merger transaction where the public shareholders receive cash for their shares, the client cannot (and need not) continue to hold shares.

conducted. Lead plaintiffs cannot use nonpublic information gleaned from the litigation for their personal (or institutional) benefit. Lead plaintiffs should also monitor settlement discussions and give input as to what they believe would be a fair resolution of the case.

E. Case Initiation

1. "Books and Records"

Most states allow a shareholder to seek "books and records" from a corporation if they can demonstrate that they have a "proper purpose" and that the documents sought are reasonably tailored to that purpose. Investigating a breach of fiduciary duty by a corporate insider is an example of a proper purpose for which a shareholder might seek books and records. Courts frequently encourage shareholders seeking to pursue breach of fiduciary duty claims to first seek books and records before filing a lawsuit.

A corporation is required to respond to a shareholder's request for books and records quickly (e.g., DGCL Section 220 gives a company five business days). Typically, however, companies respond by offering to produce some limited subset of the documents that would be responsive to the books and records demand. The shareholder will then typically agree to negotiate with the company as to the scope of the company's document production. If the shareholder reaches an impasse and believes that she is entitled to more documents than the corporation is willing to produce, the shareholder can then file a lawsuit to enforce her rights. Kessler Topaz has successfully litigated several of these actions through trial and appeal to the Delaware Supreme Court, causing shareholders to be granted more documents than the company was willing to produce and also creating favorable law governing the appropriate scope of document production in similar actions.

Once the shareholder receives books and records, she can then analyze them to determine whether it would be fruitful to pursue the litigation further. Kessler Topaz may advise clients after reviewing books and records that the potential claim being investigated lacks merit or would be excessively difficult to prevail. On the other hand, if the books and records corroborate the claim being investigated, these documents will often prove to be a centerpiece of the complaint.

2. Remedy Sought

The process for initiating a claim depends on what relief the plaintiff is seeking. Claims seeking monetary relief typically begin with the filing of an initial complaint, subject to the requirements discussed below. Defendants typically then move to dismiss the complaint. If defendants do not believe the law would allow the complaint to be dismissed, they can also file an answer. Discovery typically does not commence until the complaint survives a motion to dismiss or the defendants answer.

A plaintiff seeking injunctive relief, e.g., to stop a corporate transaction, needs to demonstrate that the harm she seeks to prevent cannot be remedied after the fact with monetary damages. If a plaintiff can make this showing, she may also be entitled to expedite the litigation in order to get either a preliminary injunction hearing or a trial prior to the closing of the transaction being challenged. Kessler Topaz has significant experience litigating expedited claims such as these, which may sometimes entail reviewing significant quantities of documents, taking depositions, and briefing injunction motions on highly-compressed timelines.

3. Initiating a Class Action versus a Derivative Action

The process for initiating a claim seeking relief for a breach of fiduciary duty depends on whether the claim is direct or derivative.

a) Direct or Derivative Harm

Delaware law provides a two-pronged test to determine whether claims are derivative or direct. The first question to be asked is: who suffered the alleged harm? If the company suffered the harm, then the claims are derivative; if the shareholder directly suffered the harm, then the claims are direct. The second question to be asked is: to whom would the benefit of any recovery accrue? If the company would benefit from the recovery, the claims are derivative; if the shareholder would benefit individually from the recovery, the claims are direct. If the shareholder suffered the alleged harm, or the benefit of the intended litigation would accrue to the shareholder, then the claims are direct and are more likely appropriately brought as an individual direct action or as a class action.

b) *Commencing a Direct (Class Action)*

If the shareholder seeks to bring a direct claim, she can file a complaint alleging direct causes of action, and will typically seek to certify the case as a class action. In determining whether the action can be certified as a class action, the court will consider a series of factors laid out in Rule 23 of the Federal Rule of Civil Procedure, or its state court counterpart. These factors include (i) numerosity, i.e., whether the class is large enough that it would be impractical to join each plaintiff individually; (ii) commonality, i.e., whether there are common questions of law and fact to the various class members; (iii) typicality, i.e., whether the claims of the proposed class representative are typical of the claims held by other class members; and (iv) adequacy, i.e., that the proposed class representative will fairly and adequately protect the interests of the class.

c) *Commencing a Derivative Action*

If the claim sought to be brought is derivative, i.e., for the benefit of the corporation, the shareholder needs to establish her standing to bring the claim. A company's board of directors is traditionally vested with the responsibility to bring whatever claims the corporation may have against any person or entity. Thus, in the first instance, a shareholder typically is required to make a "demand" on the board of directors to initiate the suit. If the board refuses to pursue the action after receiving a shareholder demand, the shareholder will need to allege that the board's refusal was improper. Alternatively, rather than making a shareholder demand, in some jurisdictions (such as Delaware), the shareholder can demonstrate that making a demand on the board to pursue the action would have been futile. This is typically because a majority of the board of directors would be incapable of impartially considering the shareholder demand.

i. *Shareholder Demands*

Because claims underlying derivative actions belong to the company, and because the company's board of directors is traditionally responsible for pursuing claims on behalf of the company they serve, shareholders are traditionally required to "demand" that the board pursue these claims. After a shareholder makes a demand on the board of directors, the board may either: (i) refuse the demand; or (ii) investigate the claims underlying the demand, after which the board may elect to refuse the demand or, alternatively, prosecute plaintiff's claims based upon the results of that investigation. An investigation into a shareholder's claims may be conducted by the entire board or by a committee of the board. If the board refuses a shareholder's demand to pursue a derivative action, the shareholder will need to demonstrate that the refusal was unreasonable. This typically involves allegations that the board undertook an unreasonable process in evaluating the demand, such as relying on conflicted board members or counsel, or failing to consider material facts.

ii. *Demand Futility*

Making a demand is not always a necessary prerequisite to bringing shareholder derivative litigation. Where making a demand on the board to commence litigation would be "futile", a shareholder may commence a derivative action without making such a demand. "Demand futility" exists where the board members are conflicted and cannot be expected to properly investigate or pursue the claims. In order to demonstrate demand futility, the plaintiff must plead particularized facts in his complaint that a majority of the directors either (i) "received a material personal benefit" from the alleged misconduct, (ii) "would face a substantial likelihood of liability" on any potential claims, or (iii) "lacks independence" from one of these former categories of directors. The issue of demand futility is a fact-specific inquiry that must be decided on a case-by-case basis. Common factors that establish demand futility are a director's direct involvement in the unlawful conduct underlying plaintiff's claims, and close familial, social, or business relationships among directors that preclude those directors from acting independently of one another.

F. Discovery

What is fact discovery and when does it occur?

After defendants' motion to dismiss is denied, fact discovery begins. During fact discovery, parties are permitted to serve document requests, interrogatories (questions asking for written responses), and take depositions, among other things. The information that a defendant can request from a lead plaintiff is generally limited to information about the claims at issue and the investments that were impacted by the defendant's misconduct. As a general matter, counsel for lead plaintiff tries to protect the lead plaintiff from unnecessary and unduly burdensome fact discovery, however, lead plaintiff may be asked to sit for a deposition, review and respond to discovery requests, and produce documents. Counsel for lead plaintiff covers all costs associated with the discovery and assists lead plaintiff throughout the entire discovery process.

What does a lead plaintiff do during fact discovery?

At the outset of fact discovery, a lead plaintiff is typically asked to provide limited information needed to respond to written questions from the defendant and to collect documents (with the assistance of counsel) that are responsive to document requests. A lead plaintiff may also be asked to designate a representative to sit for a deposition to answer questions relating to its investments or the litigation. In all instances, if a deposition is requested, we will provide your representative with ample preparation time and walk that individual through the process. The defendants are limited to only one noticed deposition of the lead plaintiff and it is typically for a limited amount of time. The topics are generally identified before a deposition so a lead plaintiff representative can adequately prepare and are generally limited in scope (e.g., organization structure, investment process and policies, and allegations regarding the fraud). Lastly, any travel required is fully paid for by Kessler Topaz.

What kind of information is usually requested through interrogatories?

The information a defendant seeks is typically readily available to the lead plaintiff, such as details about its investment approach or the identification of potentially relevant persons or entities, including the investment managers who made trades in the securities and the individual supervising the litigation. In all instances, we work to ensure the scope of the information sought is limited and minimize the burden on the lead plaintiff.

What kind of documents does a defendant usually request?

Document requests generally seek documents that concern the claims at issue and the investments that were impacted by the defendant's misconduct. This includes transaction data relating to the securities at issue (which we often already have from your custodian), documents concerning the defendants (to the extent any exist), and limited documents relating to the investment decisions (to the extent any exist). In every case, when we receive discovery requests, we determine the easiest and most efficient approach to collect information in a way that will not unduly burden you or your staff, including the use of outside vendors that can collect them electronically without burdening your IT Department, all done at Kessler Topaz's expense.

Are the documents that a lead plaintiff produces kept confidential?

At the outset of fact discovery, we will negotiate and agree to a Confidentiality Order (also known as a Protective Order). We are then permitted to designate as confidential a wide range of information, which ensures the protection of any confidential information that you provide. Details concerning your investment decisions or process, for example, are maintained as confidential, as are most internal communications or transaction data that is not otherwise public.

G. Case Resolution

1. Settlement

Any agreed settlement of a corporate governance case requires court approval. Courts consider the reasonableness of the compromise, examining the result achieved against its judgment of the best-case outcome of what the plaintiffs could have achieved at trial. Attorneys' fees are typically paid as a percentage out of any common fund, if a monetary result is achieved. If injunctive or corporate governance reforms are achieved to benefit the corporation, attorneys' fees are typically paid by the corporation or its insurers. Any attorneys' fee award will be subject to approval by the court as part of the settlement.

2. "Mootness"

Some defendants when facing claims that they breached, or are currently breaching, their fiduciary duties will simply choose to modify their behavior or otherwise cease the conduct the plaintiff is challenging. Under certain circumstances, defendants' conduct can "moot" the litigation. Some of Kessler Topaz's best results have come in these circumstances, as noted in the Facebook and Versum case examples below. When defendants voluntarily moot meritorious litigation, plaintiffs' counsel is entitled to seek a reasonable attorneys' fee from the corporation for the benefit created by the litigation and resolution of plaintiffs' claims. Any such "mootness" fees are subject to court approval.

3. Representative Plaintiff Awards

In agreeing to serve as a representative plaintiff, a stockholder typically commits to receive the same per share benefit as all other class members. Depending on the effort required of the lead plaintiff, however, if the litigation is successful, some courts are willing to reimburse the lead plaintiff for the time she spent contributing to the result. These "incentive" or "service" awards are typically modest (between $2,500 and $10,000), and are not always available, depending on the jurisdiction and the amount of effort actually expended by the representative plaintiff. Since these awards are designed to reimburse representative plaintiffs for their actual time expended on the litigation, we do not encourage our clients to agree to serve as a lead plaintiff simply for the purpose of possibly receiving an incentive award at the end of the case.

H. Case Examples

Corporate governance litigation can seek a variety of remedies under various causes of action. These actions typically seek monetary remedies, injunctive remedies, corporate governance reforms, or some combination of the three. The causes of action can derive from breaches of fiduciary duty or various statutory violations. Below are examples of successful direct and derivative claims Kessler Topaz has brought.

1. Mergers and Acquisitions by Controlling Shareholders

Mergers involving controlling shareholders pose great risk to public shareholders that those transactions will not treat them fairly. Such transactions are typically analyzed under the "entire fairness" standard under Delaware law, in which the controlling shareholder must prove that the transaction was fairly consummated both in terms of price and process. Kessler Topaz has amassed a string of successes prosecuting claims by shareholders that controlling shareholder-led transactions were not entirely fair to them. Several of these results have only been achieved after

Kessler Topaz attorneys took the case to trial, while others settled just on the brink of trial.

These transactions present in multiple ways. A controller might unfairly "squeeze out" the public shareholders, like in *In re Dole Food Company, Inc. Stockholder Litigation,* Consol. C.A. No. 8703-VCL, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015) ($148 million post-trial verdict). Or a controller might unfairly merge two companies that she controls, like in *In re CBS Corporation Stockholder Class Action and Derivative Litigation*, Consol. C.A. No. 2020-0111-JRS (Del. Ch.) ($167.5 million settlement), or in *In re Madison Square Garden Entertainment Corp. Stockholders Litigation,* Consol. C.A. No. 2021-0468-LWW (Del. Ch.) ($85 million settlement). A controller can also unfairly cause the company it controls to overpay for assets that are owned by the controller, like Southern Peru's controlling stockholder did in *In re S. Peru Copper Corporation Shareholder Derivative Litigation,* 52 A.3d 761 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corporation v. Theriault*, 51 A.3d 1213 (Del. 2012) ($2 billion post-trial verdict).

2. Private Equity Transactions

In corporate mergers involving private equity, the buyer will typically look to retain management post-closing, and will often incentivize them with equity in the post-closing company. This creates potential conflicts of interest in which management may not be incentivized to seek the highest price for public shareholders. An example is Kessler Topaz's $86.5 million settlement in *City of Daytona Beach Police and Fire Pension Fund v. ExamWorks Group, Inc.* et al., C.A. No. 12481-VCL (Del. Ch.), in which private equity firm Leonard Green & Partners bought out the public shareholders of ExamWorks but allowed management to retain an interest in the post-closing company. Discovery also revealed that ExamWorks' outside legal counsel at Paul Hastings was improperly helping management at the expense of the company's public shareholders. Kessler Topaz settled the action shortly before trial. The settlement included a $46.5 million contribution by Paul Hastings.

3. Other Conflicted Fiduciary Mergers

Fiduciaries negotiating a merger transaction are required to place the shareholders' interests before their own. Conflicts can arise, however, that can corrupt the negotiations and lead to unfair results. For example, in *In re Towers Watson & Company Stockholder Litigation,* Consol. C.A. No. 2018-0132-KSJM, in the midst of merger negotiations between Towers Watson and Willis Group Holdings plc, one of Willis' board members secretly told the Towers Watson CEO John Haley that if the merger was approved, he believed he could help secure a nine-figure compensation package for Haley as the CEO of the combined company. After Kessler Topaz's complaint was initially dismissed, the Delaware Supreme Court reversed the dismissal, finding that the undisclosed compensation package could create a loyalty breach by Haley. The action was later settled for a $90 million class payment to former Towers shareholders.

4. Injunctive Relief

Plaintiffs challenging breaches of fiduciary duty can seek monetary remedies, injunctive relief, or both. In *In re Versum Materials, Inc. Stockholder Litigation,* Consol. C.A. No. 2019-0206-JTL (Del. Ch.), plaintiffs challenged the deployment and maintenance of a poison pill rights plan ("Poison Pill") that Versum's board of directors adopted to protect an inferior stock-for-stock merger of Versum and Entegris, Inc. (the "Entegris Merger") and to block a $48.00 per share cash offer for Versum by Merck KGaA. While in place, the Poison Pill made it prohibitively uneconomical for Merck's higher cash proposal to succeed. While Merck was pursuing its hostile bid and a proxy contest to remove members of Versum's board, plaintiffs were taking expedited discovery and preparing for a preliminary injunction hearing to invalidate the Poison Pill. With depositions set to begin, the parties negotiated a stipulation in which plaintiffs agreed to suspend discovery and withdraw their preliminary injunction motion if Versum withdrew the Poison Pill. By agreeing to remove the Poison Pill, defendants mooted plaintiffs' claims. After the Poison Pill was withdrawn, a bidding contest between Entegris and Merck proceeded. Entegris increased its offer to $51.82 per share (including $5 cash) and Merck topped that with a successful $53.00 per share cash merger proposal pursuant to which Merck acquired Versum (the "Merck Merger"). The Merck Merger consideration was $1.17 billion more than the value of the Entegris Merger consideration on the day before Merck's $48 per share offer.

5. Failures of Board Oversight

Among other things, corporate officers and directors are charged with managing risk. Generally, if a board creates a reasonable system for managing risk, and monitors risk in accordance with that system, the board will be insulated from liability. However, if a board either fails to create a system to manage risk, or fails to follow that system, directors can be liable for that failure of oversight. Such claims often refer to directors' "ignoring red flags". For example, in *In re Cardinal Health, Inc. Derivative Litigation*, Case No. 2:19-cv-2491 (S.D. Ohio), Kessler Topaz challenged the Cardinal Health board of directors' failure to monitor the company's opioid distribution protocols to protect against opioids being improperly distributed by "pill mills" or other bad actors. To plead that the directors had failed to monitor the corporation's risk, Kessler Topaz alleged Cardinal Health's long history of ignoring government regulators and other enforcement actions. Cardinal Health ultimately ended up agreeing to settle, along with other opioid distributors, with multiple state attorneys general for billions of dollars. Kessler Topaz's action sought to force the directors (or their insurance policies) to reimburse the company for some portion of that liability. After defeating a motion to dismiss and taking document discovery, Kessler Topaz negotiated a derivative settlement of $124 million from the directors' insurance policies to be paid back to Cardinal Health.

6. Stock Reclassifications and Restructurings

Corporate insiders can sometimes propose transactions that favor their interests over those of public shareholders. In *In re Facebook, Inc. Class C Reclassification Litigation*, Consol. C.A. No. 12286-VCL (Del. Ch.), Kessler Topaz challenged a proposed stock reclassification that would have added a class of non-voting shares (Class C shares) to the company's one-vote Class A shares and ten-vote Class B shares. Kessler Topaz alleged that the addition of the class of non-voting shares was designed to further entrench Facebook's founder Mark Zuckerberg, who could then sell or donate his non-voting shares without diluting his voting control. The action sought a permanent injunction against the reclassification. Just days before trial, Facebook announced that it had abandoned its plan to pursue the reclassification, mooting the litigation by giving plaintiffs a full victory on the remedy they had sought.

7. Executive Compensation Abuses

Courts are typically deferential to corporate boards' executive compensation decisions. In certain circumstances, however, courts will allow stockholders to bring claims challenging executive compensation abuses. For example, in *In re Ebix, Inc. Stockholder Litigation*, Consol. C.A. No. 8526-VCS, Kessler Topaz attorneys, while awaiting the court's post-trial decision, were able to negotiate a package of executive compensation reforms that required the company's founder and CEO to give up hundreds of millions of dollars in compensation. Additionally, the company agreed to hire a general counsel, develop a CEO succession plan, hire a compensation consultant, and add an independent director to the compensation committee.

Kessler Topaz attorneys previously achieved pioneering governance reforms across a series of cases challenging the "backdating" of stock options to corporate executives, in which boards would pretend to have granted stock options at opportunistically low prices. Resolutions of these cases, such as *In re Comverse Technology, Inc. Derivative Litigation*, Index No. 601272/06 (N.Y. Sup. Ct.) and *Louisiana Municipal Police Employees' Retirement System, ex rel. Monster Worldwide, Inc. v. Camara, et al.*, Index No. 108700/06 (N.Y. Sup. Ct.), required executives to disgorge millions in improperly granted stock options and to adopt corporate governance reforms such as replacing directors, splitting the chairman and CEO positions, instituting majority voting for directors, and revamping the company's stock option granting policies.

8. Insider Trading

Insider trading cases involve allegations that executives and/or directors violated their fiduciary duties of good faith and loyalty by engaging in stock purchases or sales based upon non-public information that they learned through their positions with the company. Derivative cases alleging insider trading are brought in order to recover the amount of profits that were unjustly received as a result of insider trading transactions. For example, in *In re Oracle Corp. Derivative Litigation*, Consol. C.A. No. 18751 (Del. Ch.), KT alleged that CEO and Chairman of the Board Larry Ellison sold nearly $900 million of Oracle stock in the days immediately preceding the company's announcement that it missed its earnings estimates for the first time in five years. As a result of this litigation, Ellison disgorged $100 million worth of profit he received from his allegedly unlawful stock sales.

9. Statutory Compliance

Kessler Topaz often brings claims alleging statutory violations alongside claims that directors breached their fiduciary duties. For example, in *Chester County Employees' Retirement Fund v. KCG Holdings, Inc.*, C.A. No. 2017-0421-KSJM (Del. Ch.), Kessler Topaz alleged that KCG's largest shareholder conducted months of pre-negotiations and pressured KCG to sell the company, in violation of Delaware Statute DGCL § 203, which forbids stockholders holding more than 15% of a company's stock from pursuing merger transactions. Facing a possible injunction, defendants agreed to subject the stockholder vote to a 2/3 majority vote, rather than a simple majority. The litigation later settled for a $22 million cash payment to public stockholders. In *Heng Ren Silk Road Investments LLC v. Chen,* C.A. No. 2019-0010-JTL (Del. Ch.), Kessler Topaz initially brought the litigation to force the company, a Chinese auto manufacturer, to hold an annual meeting, as required by DGCL Section 211. This litigation pressure led to a settlement in which certain directors agreed to disgorge excessive director compensation, and the company agreed to hold regular teleconferences with its largest investors. And in *Sjunde AP-Fonden v. Activision Blizzard, Inc.,* C.A. No. 2022-1001-KSJM (Del. Ch.), the court held that in approving a merger with Microsoft Corporation, the Activision board had failed to comply with numerous provisions of Delaware statutory law, such as the requirements under (i) Section 251(b) that the board properly approve an agreement of merger with all required terms; (ii) Section 251(c) that the board provide proper notice of the stockholder meeting with the required copy of the full merger agreement or a brief summary thereof; and (iii) Section 141(c) that the full board (not a committee) approve the final terms of any merger.

10. Contractual Obligations

Stockholders' rights are enshrined in what is sometimes called a "bundle" of contractual rights that derive from the company's share certificates, corporate charter, bylaws, and the governing corporate law. Shareholders can bring actions to enforce their contractual rights, as they did in *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, Case No. 13-mc-1288-RCL (D.D.C.). Kessler Topaz brought claims on behalf of common and preferred shareholders of Fannie and Freddie in 2013 after Fannie and Freddie's government-appointed conservator, the Federal Housing Finance Agency ("FHFA"), improperly diverted all of Fannie and Freddie's profits to the U.S. Treasury. The government had bailed out Fannie and Freddie in

2008 when they were placed into conservatorship. FHFA promised to "preserve and conserve" Fannie and Freddie's assets, and to return the companies to shareholder control when they regained health. Instead, just as Fannie and Freddie were starting to recover, in August 2012 the FHFA schemed with the U.S. Treasury Department to amend the terms of the government's bailout to sweep all of Fannie and Freddie's profits to the government. Kessler Topaz and its co-counsel tried the case twice, after a first jury was unable to return a verdict. The second jury, however, found that FHFA had breached the "implied covenant of good faith and fair dealing" inherent in the shareholder contracts, and awarded damages of $612 million.

VI. Appraisal Actions

Stockholders of a company that is slated to be merged out of existence, who believe that the merger price does not reflect the company's true value, may have the option to ask a court to appraise the "fair value" of the company's shares and award that value to the stockholder. In such an "appraisal action", the stockholder generally does not receive the merger consideration. Instead, the appraisal-seeking stockholder receives whatever the court determines after a trial to be the fair value of the appraised shares, plus interest from the date of the merger. Appraisal rights are often referred to as "dissenter's rights" or "dissenting stockholder rights".

Stockholders in appraisal actions, unlike in fiduciary merger litigation, do not have to prove that any corporate fiduciary breached his or her duties to the stockholders. Instead, appraisal actions generally concern only (i) whether the stockholder has satisfied the statutory procedures for asserting appraisal rights; and (ii) evidence and expert testimony by corporate valuation experts concerning the company's fair value, presented at a trial. However, appraisal proceedings can yield a per-share "fair value" that is less than the merger price, meaning that stockholders would have done better by accepting the merger consideration. There is, therefore, the risk in all appraisal litigation that a stockholder receives less than the merger consideration for their shares.

A stockholder's right to appraisal is established by statute, and the rights and procedures vary from state-to-state. Discussing appraisal rights as they exist under Delaware law, however, gives stockholders a general framework for understanding this important post-merger remedy. Delaware's legal framework for appraisal is, such as its corporate law generally, far more developed and more frequently invoked than that of other jurisdictions.

A. Appraisal Proceedings under Delaware Law

In Delaware, appraisal rights are established under Section 262 of the DGCL. Section 262 was amended in 2016 to require that appraisal petitioners own either 1% of the outstanding shares or at least $1 million worth of company stock. It also specifies particularized requirements that stockholders must follow in order to pursue an appraisal remedy.

First, a stockholder seeking appraisal must deliver a timely demand for appraisal of its shares. Where a stockholder vote on the merger is required—as is typical in public-company mergers—the demand for appraisal must be delivered to and received by the company before the merger vote occurs. Where there is a merger that does not require a stockholder vote, such as a so-called "short-form" merger that often occurs after a tender offer, the demand must be postmarked within 20 days after the mailing of a required Notice of Merger by the surviving corporation. The stockholder will have to prove timely delivery or mailing, as the case may be.

Second, the demand must be made by or on behalf of the record holder. This is because Section 262 reflects the Delaware legislature's view that a company is entitled to rely on its list of stockholders— identifying the "record holders"—in determining with whom it may deal as stockholders. Accordingly, if a beneficial owner of company stock holds that stock in "street name" through a brokerage account and the brokerage is the formal "record holder", the brokerage must make the appraisal demand on behalf of the beneficial owner. The record holder's identity must be clear in the demand, as must the chain of custody leading to the beneficial owner.

Third, the appraisal petitioner cannot vote in favor of the merger. The petitioner can choose to seek appraisal for some of their shares while accepting the merger consideration for the remainder, but none of the stockholder's shares may be voted in favor of the merger. Doing so effectively invalidates the appraisal demand, even if the stockholder wants to seek appraisal for only some shares and receive merger consideration for the rest.

Fourth, the shares subject to an appraisal demand must not be surrendered for the merger consideration. This is critical: even if an appraisal-seeking stockholder's shares are negligently exchanged by a broker for the merger consideration, the stockholder's appraisal rights are vitiated unless a formal appraisal petition has already been filed with the court, as described immediately below.

Fifth, assuming that the stockholder has fulfilled the preceding steps, the right to appraisal terminates 120 days after the merger's effective date unless the stockholder files a "petition for appraisal" in the Delaware Court of Chancery.

Once all five steps are satisfied and an appraisal petition is on file with the Court, the case is consolidated with other appraisal petitions concerning the same merger, and the case proceeds with all appraisal-seeking stockholders on one side and the surviving post-merger company on the other.

There is no motion to dismiss or similar procedural device to determine whether a valid appraisal claim exists. Instead, once the five steps are satisfied, the litigation is essentially a valuation exercise, with both the surviving post-merger company and the appraisal petitioners presenting competing testimony from financial experts and other evidence pertaining to valuation. It is then up to the Chancery Court judge assigned to the case to determine the "fair value" to award to the appraisal seeking stockholder. Appraisal awards also include an award of interest at a rate prescribed by statute, from the date of the merger to the date of payment.

B. Valuation Methodologies

There is no single valuation method used in appraisal actions. The only requirement is that a valuation model must be generally considered acceptable in the financial community and otherwise admissible in court. Valuation methods almost always take into account the company's future prospects, but excluded from the definition of "fair value" are events or increased value that arise solely from the expectation or closing of the merger. For example, a company's pre-merger projected future cash flows and earnings growth can be (and usually are) considered in determining fair value, but the value of cost savings or other synergies that would not be realized absent the merger are excluded from the fair value calculation.

The Chancery Court often employs and weighs several valuation methods in appraising stock. Among the valuation methods most respected today by the Delaware Chancery Court is the "discounted cash flow" model, which, in essence, values a company's positive cash flows in future years and discounts that value to achieve a present value. That method is nearly always used by investment bankers in valuing public companies and is generally considered among the most analytically rigorous of valuation models. Other corporate valuation methods commonly considered in appraisal proceedings, and used by investment bankers, are comparisons between the per-share merger consideration and (i) the implied per-share value of comparable companies based on their stock prices relative to earnings, using available current public market data; or (ii) the relative value paid to stockholders in other merger transactions involving comparable companies, using available historical data. Another method is to add together the values of a company's individual assets, and then divide the overall enterprise value by the number of outstanding shares to reach a per-share value. The Delaware Chancery Court will also consider the value of intellectual property, tax-loss carryforwards, and corporate legal claims, as well as the company's market value at the time of the merger, in appraising "fair value".

Starting in 2017, the Delaware Supreme Court issued several decisions directing courts to give greater deference to the actual merger price in determining fair value. Courts now often defer to the merger price in determining fair value if there is evidence that the company's stock was widely traded on a public market, and the transaction was negotiated between unrelated parties at arm's-length. Since 2017, the number of appraisal actions filed in Delaware has significantly decreased. The most promising appraisal cases (relating to public companies) now tend to be controlling stockholder transactions and deals with significant process flaws.

C. Appraisal Rights and Proceedings in Other Jurisdictions

Appraisal proceedings and prerequisites for stockholders of companies incorporated outside Delaware are, for the most part, substantially similar to those in Delaware. Appraisal-seeking stockholders must, generally, strictly follow prescribed statutory procedures for demanding appraisal and then subsequently participate in an appraisal proceeding. Experts present valuation opinions to the court, and the judge ultimately assesses and assigns a value to the company's shares.

There are, however, important state-specific differences from Delaware law. Some states, such as New York, do not provide appraisal rights for stockholders of publicly traded companies, regardless of the form of merger consideration. Other states, such as Maryland, use "fair market value" instead of "fair value" as the valuation goalpost. In Michigan and other states, the surviving corporation, rather than the stockholder, must initiate the appraisal proceedings. Several jurisdictions, such as Pennsylvania, make statutory appraisal actions a stockholder's sole remedy for an unfairly priced merger, absent a showing of fraud or intentional misconduct that could justify a separate cause of action.

In all jurisdictions, stockholders considering seeking appraisal would be well advised to seek the guidance of counsel to determine the steps that need to be taken in order to validly demand and pursue an appraisal remedy.

VII. Direct Actions (Opting-Out)

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 action, the investor is generally not bound to the outcome of the class litigation and has a right to prosecute its own case independent of the class action.

There are several advantages to bringing an individual direct action, including the ability to chart one's own litigation course and to determine the settlement terms. However, there are 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. As such, every investor should have access to relevant information about their legal options to bring an individual claim and should seek competent legal advice before making the decision to opt out of a class action.

In 2017, the U.S. Supreme Court issued a ruling that limits the availability of an opt-out action once the statute of repose has run on a particular claim. Unlike limitations periods, statutes of repose give explicit protection to defendants and enforce certainty. In *California Public Employees Retirement System v. ANZ Securities, Inc.,* (U.S. June 26, 2017), plaintiffs opted out of a class action and brought their own Securities Act claims more than three years after the challenged offering. The Supreme

Court held that the three-year statute of repose for claims arising under the 1933 Securities Act prevented them from filing a lawsuit. As a result, plaintiffs with 1933 Act claims who choose to opt out of a class action must do so and file their own actions within the three-year repose period. This holding has also been extended to Section 10(b) claims under the 1934 Exchange Act which are subject to a five-year statute of repose. As a result of the *ANZ Securities* ruling, it is now more important than ever to consult with appropriate legal counsel as soon as possible to determine an adequate opt-out strategy.

A. Larger Recoveries

The size of the out-of-pocket loss attributed to the alleged misconduct is often the most significant determinant of whether to file an individual direct action. Individual actions are usually not an option for investors with a nominal loss because of the time and expense involved in any litigation. Direct actions are usually reserved for investors with sizable losses who have the financial ability and structure to pursue their own claims.

For example, many public pension funds and large institutional investors opted out of the WorldCom class action litigation and pursued individual actions on their own behalf, including five New York City funds that eventually reached a $78.9 million settlement, an amount reportedly three times larger than what the funds would have recovered under the class settlement. Likewise, a group of Alabama public funds opted out of the WorldCom class case and ultimately achieved a $111 million settlement, several times what it purportedly would have received had it remained in the class. According to a spokesperson for the Alabama funds, the settlement amounted to roughly ninety percent of their losses.

Similarly, many public pension funds and institutional investors that opted out of the $2.65 billion dollar securities class action settlement with AOL Time Warner achieved recoveries that far exceeded what they would have recovered had they remained in the class case. For example, the State of Alaska reported that its settlement represented 50 times what it would have recovered in the class settlement and the California State Retirement System said its settlement represented 6.5 times what it would have recovered. State of Ohio public pension funds recovered $144 million in individual actions against AOL Time Warner, $135 million more than the $9 million they would have recovered under the class settlement, according to Ohio state officials. Thus, presuming the reports are accurate, in the right type of factual situation, a direct action could be advantageous.

B. Factors to Consider

The decision to file an individual action or remain a passive class member normally involves the consideration of many factors. These factors include: the size of your loss and the ability of defendant(s) to pay damages; the benefits of setting your own litigation strategy by pursuing an individual lawsuit; the advantage of being able to settle an individual claim without court approval and class notice; and the benefit of being able to select the forum in which to file the individual action subject to certain parameters regarding venue.

C. Size of Loss

By definition, the maximum recovery in an individual action is limited to the damages suffered by the individual plaintiff. There is no minimum threshold loss required to bring an individual action, but an individual action to recover a relatively nominal loss may not be a practical option given the time and expense usually associated with prosecuting a securities action against one or more defendants. It is for this reason that opt-out actions are typically filed in situations where the maximum recoverable damages in the parallel class action are substantial.

D. Aggregating Claims

Although it may be economically impractical to bring an individual claim that involves a relatively small loss, it is sometimes possible to join or consolidate multiple individual actions, commonly referred to as a “mass action”. By sharing the benefit of a coordinated investigation and prosecution, pooling claims of more than one investor may make economic sense with smaller individual claims, which, standing alone, would otherwise be impractical.

E. Availability of State Court Forum

A notable strategic advantage of litigating individual actions is that they are not subject to the Securities Litigation Uniform Standards Act ("SLUSA") that Congress passed in 1998. SLUSA gives exclusive jurisdiction of securities class actions to the federal courts. Because SLUSA applies to class actions, and not individual actions, state court forums may be available where there is no other basis for federal jurisdiction (such as arising under the federal bankruptcy code or diversity jurisdiction).

Whether there is an advantage to prosecuting the case in a state court forum varies from state to state, but state laws are generally more favorable to plaintiffs, and state courts normally provide a home court advantage to state and local pension funds, and other investors, located within the state.

Furthermore, class actions brought in federal court must satisfy heightened pleading requirements and are subject to automatic discovery stay of the PSLRA. On the other hand, individual actions brought in state court that allege violation of state securities and common law are normally not subject to such heightened pleading requirements, and in some cases, may not be subject to the automatic discovery stay of the PSLRA. Many states also provide for broader liability to "secondary actors" who either aid or abet the primary violation, thereby increasing the pool of possible defendants.

F. Settlement

Individual plaintiffs control the settlement negotiations and are able to settle their claim without having to obtain court approval or provide notice of the settlement terms to passive class members. Because the court does not have to approve the settlement and the parties do not have to give notice to the class, the process to settle an individual action is more streamlined and can result in a quicker recovery.

G. Avoidance of Class Certification Issues

As noted above, certification of a Class is a necessary component for litigating claims as a class action. Opt-out actions avoid this process and are able to litigate the merits of their claims without crossing this intermediate procedural hurdle.

H. Timing

The Federal Rules of Civil Procedure permit a court to refuse to approve a class settlement without extending the opportunity for class members to opt out of the settlement. While the decision to file an individual action usually occurs at an earlier stage, it may be possible to wait and see the amount of the class settlement before electing to opt out in order to pursue an individual action, and sometimes, this is the most prudent course of action. However, waiting may create discovery obstacles and other inefficiencies. For example, a court may not allow an opt-out plaintiff to re-depose witnesses deposed in the class case.

I. Risks / Discovery / Unique Defenses

The decision to forego possible recovery as a passive class member in favor of pursuing an individual claim may yield a larger recovery but certainly involves risk. First and foremost, opting out of the class action serves as a bar to participation in any future class settlement or judgment, and it is generally an irreversible decision. Thus, it is always possible remaining in a Class would yield a better result.

In addition, direct actions require active participation in the litigation, including responding to discovery requests and the appearance at depositions. Defendants will invariably seek to find some infirmity that will prevent the individual action from moving forward, which may involve trying to discredit the individual claim.

The decision to file an individual action should also involve consideration of unique defenses that may exist in a direct action that do not exist in the context of class action litigation. For example, individual actions may be time-barred while claims of passive class members are "tolled" under judicial doctrine; individual actions may involve unique issues of reliance that do not avail themselves to the "fraud on the market doctrine", and, among other things, the individual plaintiffs may have had access to unique information about the investment opportunity that defeats any claim of reliance on public statements by the company.

While there can be many advantages to pursuing a direct action or opting out of a class action, Kessler Topaz believes that actual opportunities to opt out or file a direct action are not very common and are often limited to larger institutional investors. Careful consideration must be given to the added value one can hope to achieve in a direct action or opt-out action before going forward with such an action.

J. Recent Decisions Involving Opt-Out Claims

Opt-Out Plaintiffs Withstand Defendants' Attacks on Standing to Bring Securities Fraud Claims. In *In re Petrobras Sec. Litig.,* 152 F. Supp. 3d 186 (S.D.N.Y. 2016), dozens of opt-out plaintiffs brought securities fraud actions against oil giant Petrobras and numerous corporate officers arising from the company's involvement in multi-year, multi-billion-dollar bribery and kickback scheme. Defendants argued that many of these plaintiffs lacked standing to bring claims because they were suing on behalf of an injured fund, series, or member, and themselves did not suffer an injury. This is a common challenge in opt-out cases given the complex structure of many participating plaintiffs, which typically include large foreign pension funds, mutual funds and trusts. In a victory for opt-outs, the district court rejected each of defendants' attacks, holding plaintiffs satisfied the requirements to invoke the "prudential exception" to standing under *W.R. Huff Management Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 109–10 (2d Cir. 2008). Huff requires plaintiffs sufficiently plead a close relationship with the injured party and a barrier to that party's ability to bring its own claims. By pleading that the injured funds or series on whose behalf they sued lacked a separate legal personality, had no employees and/or could not act except through the plaintiff, among other things, the opt-out plaintiffs passed that test.

Trial Court Rejects Defendants' Plea to Stay Opt-Out Actions Pending 23(f) Review. In *In re Petrobras Sec., 193 F. Supp. 3d 313* (S.D.N.Y. 2016), Judge Rakoff addressed and denied defendants' motion to stay all proceedings until the Second Circuit resolved their interlocutory appeal of his class certification order. At the time, those proceedings included "no fewer than 27 substantial entities, such as pension funds, institutional investors, and others" who had "opted out of the class action and brought their own, individual actions". In denying defendants' motion, Judge Rakoff underscored the significant work done and contributions made by the opt-out plaintiffs, reasoning that the resolution of class-specific issues by the Second Circuit should not "stall[] an entire litigation that has evolved into one that is primarily a non-class action" and was on verge of trial. Subsequently, in an unpublished order shortly thereafter, the Second Circuit granted defendants' renewed motion for stay, but did not provide any explanation for its decision.

District Court Sustains Opt-Out Plaintiffs' "Holder" Claims Under English Law. In *In re BP p.l.c. Sec. Litig.,* 2017 WL 7037706 (S.D. Tex. June 30, 2017), individual investors in twelve opt-out actions asserted "holder" claims under English common law against BP for misconduct related to the Deepwater Horizon explosion. In a holder claim, the plaintiff alleges that the defendants' misrepresentations induced the plaintiff not to purchase stock, but to continue holding (i.e., refrain from selling) stock. The decision is noteworthy for two reasons. First, because the Supreme Court has barred plaintiffs from bringing holder claims under federal securities laws in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), few cases have addressed the requisite standard to plead actual reliance for holder claims. In sustaining the opt-outs' claims, Judge Ellison held that to plead actual reliance in this context, plaintiffs must allege "that they reviewed specific statements; that they evaluated whether to hold or sell their shares; and, most important, they must allege facts . . . showing that the statements motivated them to hold their shares rather than sell them". Second, because the U.S. federal securities laws do not provide relief for injuries sustained on transactions through foreign exchanges, plaintiffs' novel holder claims provide the opt-out plaintiffs with a unique avenue of recovery not available in the class context.

To Plead Section 18 Claims, Investors Need Not Link Every Purchase to a Specific Misstatement. In *Discovery Glob. Citizens Master Fund, Ltd. v. Valeant Pharm. Int'l, Inc.,* 2018 WL 406046 (D.N.J. Jan. 12, 2018) and *T. Rowe Price Growth Stock Fund, Inc. v. Valeant Pharm. Int'l, Inc.,* 2018 WL 395730 (D.N.J. Jan. 12, 2018), several opt-out plaintiffs sued Valeant and its CEO and CFO for violating the Exchange Act of 1934, including Section 18. Section 18 requires a plaintiff to plead actual reliance on an alleged false or misleading statement – rendering such claims unsuitable for class treatment but available to opt-outs. Valeant argued plaintiffs had failed to plead actual reliance because they did not "link" each of their at-issue transactions to a particular misstatement. In other words, they did not specifically identify the statement they relied on when making each purchase. The district court disagreed and declined to adopt defendants' "linkage requirement", holding instead that in the Third Circuit, plaintiffs need only identify the alleged misstatements in specific SEC filings, and plead actual 'eyeball' reliance on these documents in deciding to purchase damages securities.

VIII. Conclusion

Kessler Topaz hopes this primer has helped to show that shareholder litigation can be a tool to recover losses and implement reforms. We also hope this information will assist institutional investors when assessing whether to come forward and serve as plaintiffs in the right circumstances. Considering what is at stake, it is crucial that a sophisticated investor, who understands the value that can be achieved through this type of litigation, be the one overseeing counsel in these actions. Kessler Topaz is committed to serving the investment community and providing the best possible results for our clients and the classes they represent.

If you would like any further information with regard to class actions in general, opt-out litigation, non-U.S. shareholder litigation, serving as a plaintiff, or any of the services which Kessler Topaz can provide to you, please do not hesitate to contact Darren J. Check, Esquire at (610) 822-2235 or via e-mail at dcheck@ktmc.com.

International Shareholder Litigation

Country Overviews

AUSTRALIA

At a Glance…

Legal System	Common Law
Statute of Limitations	Corporations Act claims for corporate misconduct: 6 years from the date the misconduct occurred. Australian Securities and Investment Commission Act claims for loss or damage: 6 years from the date the damage occurred.
Discovery	Pretrial document discovery is allowed, but not pretrial depositions. In representative proceedings, discovery is limited to defendants and the representative plaintiff.
Mechanisms for Collective Redress	The Federal Court of Australia Act 1976 provides for representative proceedings (i.e., class actions) as the primary mechanism for collective redress. These proceedings are generally opt-out, and the class composition can be either "closed" (meaning only on behalf of a subset of class members, and frequently defined with respect to those who signed retention documents with specific attorneys or a litigation funder) or "open" (meaning all who purchased during the relevant period).
"Loser Pays" System?	Yes (loser pays litigation costs and attorneys' fees of the prevailing party). However, only the "representative" group member is liable for these costs.
Opt-In or Opt-Out	Opt-out
Third Party Litigation Funding	Third party litigation funding is allowed.
Important Considerations for Investors	The Australian class action system is shifting towards an "open class" model, enabling wider investor participation. Courts are increasingly implementing fee and cost-sharing orders, ensuring all class members contribute to litigation funding fees and expenses. This change allows investors to register and potentially benefit from settlements or judgments, similar to the U.S. system, but with different timing requirements.

Background

Australia is now the number one location outside of North America where a corporation is most likely to find itself defending a class action. Australian class actions have collectively settled for over $8 billion, with shareholder class actions representing the largest share of settlements.

Shareholder class action litigation in Australia is undergoing rapid change. More law firms and litigation funders are entering the market, leading to increased competition. And new regulations and evolving case precedent are changing the way that cases are structured and ultimately proceed in court.

It is, for example, becoming more common for Australian courts to implement various fee and cost sharing orders that ensure that, in the event of a successful recovery, all class members are subject to paying a litigation funding fee and reimbursing any litigation funders or the retained lawyers for advanced expenses irrespective of whether they signed a funding agreement with the funder at the inception of the case. As a result, the vast majority of class actions are proceeding on an "open class" basis. This means that more and more cases are affording investors an opportunity to simply register to participate in any settlement or judgment; a process similar to filing a claim in the United States, except that the timing of the registration is different. Courts have also recently grappled with competing "open class" actions and have made determinations staying some of the competing actions or requiring one of the actions to proceed on a "closed class" basis (meaning only on behalf of a subset of class members and frequently defined with respect to those who signed retention documents with specific attorneys or a litigation funder). These developments and others have resulted in lower costs for participating shareholders. More details on these developments and what they mean for shareholder litigation in Australia appear below.

Legal System Generally

Australia is a common law based federal system. Australian trials, much like trials in the United States, are conducted in an adversarial manner. Civil actions are generally heard by judges, not juries.

Discovery

Australian civil procedure allows for pretrial document discovery but does not allow for pretrial depositions. Most Australian courts favor a category-based approach to discovery. Discovery may be sought from the defendants and the representative plaintiff in a representative proceeding, but not from non-representative group members. Group members, however, may be required to provide trading data and respond to inquiries confirming the accuracy of the data, but are not required to provide additional discovery, attend hearings or review submissions.

Role of the Courts in Class Actions

Australian courts have an expansive and protective role in relation to group members. For example, the courts have broad discretion in determining any legal costs visited upon group members and must determine the fairness and reasonableness to all group members, both of any settlement and any legal costs and funding fees.

Costs of Litigation and Attorneys' Fees

In all jurisdictions except the Supreme Court of Victoria, Australian lawyers are prohibited from representing clients on a contingent fee basis, but overall the risks to investors in participating in Australian representative proceedings are minimal because of the use of representative plaintiffs, the protective role of the courts and third party funding. Third party funding is widely available and funders make advance payments for expenses (including attorneys' fees) in exchange for a reimbursement of the advanced costs and a fee (a percentage of the amount of any recovery), if the case is successful for the claimants. Australia is a "loser pays" system, and the court may require the losing party to pay the prevailing party's costs and attorneys' fees. However, only the "representative" group member is at risk for these costs, and other group members are not responsible for paying any of the defendant's costs if the defendant prevails in a class action. Ultimately, the award of fees and costs is discretionary and the court may determine appropriate amounts and whether costs and fees should be awarded. Adverse cost liability is also typically covered by the third-party litigation funder. Alternatively, after-the-event insurance, also referred to as litigation insurance, can protect representative plaintiffs who are ordered to pay adverse costs when their claim is unsuccessful.

As discussed in more detail below, the lack of contingent fees in most Australian jurisdictions and the risk of being required to pay the defendant's costs if litigation is unsuccessful, has had a unique impact on collective actions in Australia. In the past, the necessity and use of third-party litigation funding influenced the way a class was defined so that only members who signed the litigation funding agreement would be considered class members. More recently, the vast majority of class actions proceed on an open class basis. Courts are increasingly willing to make "common fund orders" or "funding equalization orders" which ensure that all class members pay the same pro rata legal costs and allow the funder to recover reimbursement for costs and a litigation funding fee percentage (if determined by the court to be reasonable) out of any recovery before proceeds are distributed on a pro rata basis to all the class members.

Because of this, it is now possible for litigation funders to fund litigation on behalf of all group members, including those who do not sign a funding agreement, and receive compensation for its expenditures if the case is settled or decided in favor of the class.

Group Costs Orders

In 2020, the state of Victoria introduced legislation to allow, for the first time in any Australian jurisdiction, the charging of contingency fees by law firms acting for plaintiffs in class actions. Proceedings commenced in the Supreme Court of Victoria permit plaintiffs to apply to the court for an order that the legal costs payable to their legal representatives be in the form of a percentage of the amount of any award or settlement and for those costs to be shared between the plaintiff and all group members. This form of contingency fees is known as a "group costs order." Since the introduction of group costs orders, 19 such orders have been granted, making Victoria a jurisdiction of choice for class action plaintiffs. In the first group costs order case, *Allen v G8 Education Ltd*, the court ruled that group costs orders can provide certainty to group members and be "a suitable, fitting or proper way to ensure that justice is done in the proceeding in relation to the calculation of legal costs payable by the group to the solicitors conducting the proceeding."

Overview of Australia's Securities Laws

Securities regulations fall under the following laws: (1) the Corporations Act 2001; (2) the Australian Securities and Investments Commission Act 2001 ("**ASIC Act**"); (3) the Foreign Acquisitions and Takeovers Act 1975; and (4) the regulations that accompany all the three acts. Shareholder action in Australia typically alleges violations of either or both the Corporations Act or the ASIC Act.

The Corporations Act regulates the incorporation and behavior of companies, and it is the main statute responsible for financial products (e.g., securities) and the provision of financial services. Civil actions can be brought by investors alleging that a corporation committed a breach of the Corporation Act.[1]

The ASIC Act primarily governs the operations of the Australian Securities and Investment Commission, although it also contains provisions that govern the Corporations Act and some consumer protection laws (concerning financial services)[2]. The Corporations Act also prohibits insider trading and market manipulations.

When a corporation provides materially misleading or deceptive statements in a disclosure document, or it engages in conduct in relation to a financial product or service that is misleading or deceptive, it can be considered to have breached both the Corporations Act and the ASIC Act, and the corporation can be liable for damages.

[1] *See* § 10411 of Chapter 7.10 of the Corporations Act in particular which makes available private civil actions for those who suffer damages as a result of (1) false and misleading conduct; (2) improperly inducing somebody to deal; (3) dishonest conduct; or (4) misleading or deceptive conduct. Failing to abide by the continuous disclosure requirements outlined in Chapter 6CA of the Corporations Act also gives rise to civil liability.

[2] *See* § 12GF of the ASIC Act which provides private civil action for those injured by (1) unconscionable conduct; (2) misleading or deceptive conduct; or (3) false or misleading representations.

Civil actions alleging violations of the Corporations Act and/or the ASIC Act can be brought in federal court or in the courts of an Australian state or territory that has jurisdiction over the defendant.

Collective Securities Litigation in Australia

Representative proceedings, more commonly known as class actions, were introduced in Australia in 1992 through the enactment of Section IVA of the Federal Court of Australia Act 1976. A class action is commenced by a single representative where seven or more persons have a claim against the same person. A class action may be brought by an individual or a corporation that has sufficient interest to commence a proceeding. Australia allows class members to initially proceed anonymously, and neither the precise number of class members, nor the identity of the members must be disclosed to the defendants or the public. To qualify as a class action, all group members must have claims arising out of the same, similar, or related circumstances, and they must give rise to at least one substantial common issue of law or fact.

In the 2023 decision, *BHP v Impiombato*, the High Court of Australia (Australia's highest court) unanimously confirmed that group members who do not reside in Australia can participate in Australian shareholder class actions.

Unlike jurisdictions such as the Netherlands, representative proceedings in Australia are not limited to pursuing injunctive or declaratory relief, and the representative plaintiff may seek damages on behalf of the class. It is irrelevant to the courts if the damages might need to be determined on an individual basis – the claims can still be brought through representative proceedings as long as the tests described above are met.

In some respects, the Australian class action system is more accommodating towards plaintiffs than the United States because:

- There is no initial certification procedure that requires the court to be satisfied that the proceedings are appropriately pursued as a class action. In fact, the burden is placed on the defendant to show that it is inappropriate for the claims to be pursued via class action. The claimant simply commences a class action by filing a complaint and specifying: (1) that they are doing so on both their own behalf and on the behalf of a defined group; and (2) the common issues of law and fact that will be decided on behalf of all group members.

- There is no requirement that common issues predominate over the individual issues.

Strictly speaking, all Australian representative proceedings are "opt-out." The critical question is whether the proceeding is limited to those who have executed a litigation funding agreement as of the date of commencement (a closed class) or, absent such a limitation, the proceeding is open to all that purchased during the relevant period (an open class). Because Australian lawyers, except those in Victoria, are prohibited from representing clients on a contingent fee basis, many Australian class action representatives rely on third party litigation funding.

Until relatively recently, when third party litigation funding was utilized, class actions proceeded on a closed class basis and the class definition was written in a way that required those who wished to join in the litigation to register or opt-in in advance. This closed class mechanism developed as a way to guard against the "free rider problem," where absent class members who did not contribute to the costs of prosecuting the litigation, or share in the risk of any adverse costs, would benefit from any settlement or favorable judgment.

Common Fund Orders

More recently, the courts addressed the "free rider problem" by implementing common fund orders and funding equalization orders. This has shifted the way Australian representative proceedings are structured. Almost all class actions now are open class cases from their inception.

In October of 2016, the Full Court of the Federal Court of Australia (the federal appellate court) issued a landmark decision in *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited.* In *Money Max*, the court granted an application for a common fund order which allowed a litigation funder to provide funding for a representative proceeding and obtain a contingent funders' fee from all class members, if the litigation is decided in favor of the plaintiffs or resolves through a settlement. Since the *Money Max* decision, judges increasingly use the common fund approach and an increasing number of actions are proceeding on an open class basis. There is, however, still some degree of uncertainty.

In 2023, the Full Court of the Federal Court in *Elliott-Carde v McDonald's* ruled that courts may make common fund orders prior to settlement, pursuant to the court's settlement approval powers. The decision resolved a few years of uncertainty, after a 2019 High Court decision in *BMW Australia Ltd v Brewster* which had prohibited the making of common fund orders at early stages of litigation, but left open the question of whether a court could make a common fund order at the conclusion of a proceeding.

Registration, Opt-Out and Class Closure

Many law firms and litigation funders still elect to conduct a book building process prior to filing a complaint in order to ensure that a case is economically viable and to protect their ability to proceed on either an open class or closed class basis depending on the amount of competition in the field and decisions rendered by the court.

When a case proceeds on an open class basis, eligible shareholders are bound by the results of the action unless they opt-out by a court-prescribed deadline. Unlike the United States, there is no pre-determined point in time when a group member must be notified of their right to opt-out, nor is there a pre-determined amount of time in which they must opt-out. The timing of opt-out notices and the opt-out deadline is left to the judge's discretion and is often the subject of argument or negotiation between the parties.

Those who wish to remain members of a class and to share in any recovery if the action is successful, cannot just sit back until the case resolves like they can with respect to U.S. class actions. In open class proceedings, Australian courts often impose a requirement that group members "register" their claim before the case resolves. To that end, the court will usually issue a notice setting a registration deadline. This differs from the U.S. approach where class members submit their claims *after* a settlement is announced. Consequently, shareholders may end up registering for something that never leads to any recovery. It is also important to be mindful that the period of time between the court's announcement and the registration deadline can be short.

Courts often make orders for "soft class closure" at a stage in the litigation prior to mediation to facilitate settlement by allowing the parties to understand what group members are participating in the case and the scope of the alleged loss. Under soft class closure, a group member must register by a specific date set by the court or they will not be allowed to participate in the settlement. In the 2022 case of *Parkin v Boral* the Full Court of the Federal Court of Australia unanimously confirmed that court's power to order soft class closure. In contrast, the New South Wales Court of Appeal, in two earlier decisions, restricted that court's ability to require registration prior to the conclusion of the case. (See *Wigmans v AMP* and *Haselhurst v Toyota*).

Competing Class Actions

By commencing a class action, a claimant becomes the representative applicant. The claim is prosecuted on that basis unless the court orders otherwise. Recently, the increased number of law firms and third-party litigation funders has resulted in increased competition and multiple competing shareholder groups organized against the same defendant(s) regarding the same allegations. There is no clear statutory guidance on how a court should proceed when faced with multiple competing actions, colloquially referred to as "multiplicity." The High Court, however, recently acknowledged in *Wigmans* that there is no "one size fits all" approach, but that "[m]ultiplicity may be addressed by a variety of means instead of, or in addition to, staying one or more of the proceedings."

There are, however, a few potential outcomes, some of which have been adopted in recent cases:

- The lawyers for the competing groups may agree among themselves to joint case management agreements. In this case, all the class members who had signed funding agreements with one of the groups would be covered. Generally, in this circumstance, the class remains open and group members can register with either group.

- In *Centro Properties Limited*, the court ordered competing law firms to form a litigation committee to run the proceedings together. The "consolidation" of multiple claims by order that competing firms collaborate, has increasingly emerged as a solution by courts.

- The court may issue an order holding that none of the class actions can proceed on an open class basis and only allow all actions to go forward on behalf of the specific applicant and defined funded class members who joined the specific applicant. This might be similar to multiple opt out actions proceeding in the United States.

- The court may dismiss one or more of the cases in favor of one or more of the competing cases continuing to move forward.

- The court may stay one or more of the proceedings pending the outcome of one action. This approach may be favored.

- The court may order one case to proceed on an open class basis and any of the other actions to proceed on a closed class basis on behalf of only those who directly joined the actions. In that case, the closed class actions would operate effectively as an opt-out action would in the United States. The Australian court adopted this approach in *McKay Super Solutions v. Bellamy's*. In the *Bellamy* case, two competing law firm/litigation funder groups commenced open class actions against Bellamy. Both actions conducted a significant book build prior to commencing the class action and both contained a roughly equivalent size of institutional investor losses. The defendant asked the court to address the overlapping proceedings and the court decided that both cases could proceed concurrently but ordered one of the actions to proceed on a closed class basis (effectively making one of the actions an opt-out) on behalf of a defined group who had signed litigation funding agreements while allowing the other to proceed on an open class basis (although the definition of the open class group was amended in order to exclude those who were part of the opt-out group). In reaching its decision, the court reviewed the experience of the lawyers, the estimated costs of the group, the funding terms, the resources available to each group, the number of group members signed up for each group, and the ability of each funder to cover costs and any adverse cost order. The group selected to proceed on an open-class basis was selected because the court found the funder had a stronger financial position and could cover any adverse cost award made in favor of a defendant based on a large open class. The court, however, did not find the other litigation funder to be inadequate and it declined to order the other proceeding to be stayed because it felt it could not ignore the significant number of institutional investors who had elected to join that group. Instead, the court also allowed that case to proceed but required it to proceed on a closed class basis on behalf of only those investors who had already signed a litigation funding agreement and retention documents to join that group.

- The court may elect to conduct a carriage hearing and select only one of the law firms and plaintiffs to prosecute the action on behalf of all groups. In the recent case of *Perera v. GetSwift*, the Federal Court did just that. In *GetSwift*, there were three competing law firms/funder groups that initiated substantially similar proceedings on behalf of the same defined class in Federal Court. The judge overseeing the case ordered the parties to file their funding and legal cost proposals along with additional evidence in support of their application. The judge then weighed the following:
    - the experience of the lawyers;
    - resources available to each firm;
    - state of preparation of each proceeding;
    - the litigation funders' resources available to fund applicant costs and any adverse costs;
    - the strength of the individual cases of the representative applicants;
    - the number of group members each group had retained;
    - each group's estimated costs and proposed litigation funding fee;
    - proposals from each group to reduce or control costs; and
    - the consequences of a permanent stay in each proceeding.

In making its determination, the court declined to give preference to the first to file. It also declined to award carriage on the basis of the number of group members that had signed retention documents and joined a particular action (although it should be noted that the group members were all retail investors and the court was not evaluating claims for competing support brought by institutional investors). Instead, the court gave weight to novel proposals from the law firms/funders to keep legal expenses reasonable, and the factors outlined above, and determined that in the interests of justice, efficiency, and not burdening class members with significant costs, two of the proceedings should be stayed while the one remaining case could proceed. In making its order, however, the court did not preclude the applicants in the two stayed proceedings from later moving to replace the applicant in the active proceedings from serving as the representative applicant if they felt that the representation was inadequate or the litigation funder's resources were lacking. This order was made independent of a common fund order and as of the time this guide was written, the court had yet to issue a common fund order that would apply to all group members.

The Federal Court of Australia recently adopted a Practice Note on class actions that distilled these recent procedural developments into a set of fundamental underlying principles that judges should strive for. Those underlying principles are: (1) that the interests of group members are of the utmost importance; (2) that the courts should adopt the most efficient course of action and reduce any duplication or overlap; (3) that monopolies should not be entrenched; (4) that the race to the court house should be discouraged in favor of careful case investigation and preparation; (5) that the informed choices of sophisticated group members should be respected, but expensive book building processes avoided; and (6) that plaintiff lawyers and funders should be thought of as a joint commercial enterprise.

Substantive Legal Developments

There remains substantial uncertainty regarding how cases will proceed in Australia due to the fact that there are gaps in the legislative guidance, the relatively small number of cases that have gone to trial, and the broad judicial discretion conferred to judges under the legislation. Under Section 33ZF of the *Federal Court of Australia Act*, judges have a significant amount of discretion to manage the cases that are before them and to make any order that the court thinks appropriate or necessary in order to promote justice. To that end, courts in recent years have issued numerous interlocutory judgments (such as the *Money Max*, *Bellamy's*, and *GetSwift* decisions that are described briefly above) that provide some precedent for courts in navigating problems that different cases have presented in the past.

Additionally, recent trial and appellate decisions have started to answer some substantive questions about shareholder class actions. In 2019, the Federal Court issued its first final judgment in a shareholder class action in *Patrol Pty Ltd v Myer*. The court confirmed that Australian courts accept market-based causation, such that shareholders need not establish individual reliance with regard to losses from a defendant's breach of its continuous disclosure obligations.

In 2022, the Full Court of the Federal Court rendered its first appellate decision commenting on a final judgment in a shareholder class action proceeding in *Crowley v Worley.* The Full Court reversed the lower court judgment against the plaintiff and held that 'corporate awareness' for the purposes of disclosing market guidance, will be determined not just by the actual knowledge of a company's directors, or officers, but the information available to them. The court found that the defendant did not have reasonable grounds to disclose the earnings guidance that it did.

BRAZIL

At a Glance…

Legal System	Civil Law
Statute of Limitations	3 years
Discovery	Under Brazilian civil procedural law, a request for disclosure must include: (1) complete identification of the document or item; (2) the purpose of the evidence, indicating the relevant facts related to the document or item; and (3) the circumstances on which the interested party relies to assert that the document or item exists and is in the possession of the opposing party. In the arbitration framework, however, the rules applicable to the taking of evidence are primarily governed by party autonomy, and the parties are free to decide on the applicable rules on the taking of evidence. Arbitrators also have discretion to manage the proceedings as they see fit, in accordance with the governing rules.
Mechanisms for Collective Redress	Multi-party and Collective Arbitrations and Multi-party and Collective Actions.
“Loser Pays” System?	Yes. Additionally, under Brazilian civil procedural law, the prevailing party’s attorney may be awarded a contingency fee ranging from 10% to 20% of the amount in dispute. In the arbitration framework, the rules on reimbursement of costs and fees are subject to party autonomy, and arbitral tribunals tend to refrain from condemning the losing party to pay a percentage rate of the amount in dispute to the prevailing party’s attorney if the parties have not expressly agreed to this.
Opt-In or Opt-Out	Opt-in
Third Party Litigation Funding	Third party litigation funding allowed.
Important Considerations for Investors	Proof of the transactions; client naming considerations to ensure compatibility with the Securities and Exchange Commission of Brazil and Cadastro Nacional de Pessoas Jurídicas (tax) registries; and issues of legitimacy and procedural capacity under Brazilian law.

Background

Historically, private enforcement of shareholder rights in Brazil was subordinate to public enforcement. Shareholders rarely sought recovery for damages caused by fraud or abuse through a legal action against issuing companies. However, by the mid-2010s, a series of high-profile corporate frauds prompted investors to explore mechanisms for pursuing redress.

Resultingly, there's been a growing shareholder litigation trend, and investors are increasingly willing to initiate legal action to promote better corporate governance and seek to recover their investment losses.

Many of the actions commenced in the mid-2010s, are still pending, but in the next few years, it is likely that there will be judgments that establish non-binding precedent for the interpretation and application of Brazilian law. Furthermore, there is currently a minority view that argues that shareholders lack standing to directly sue companies for damages related to their investments.

Moreover, companies listed in the special listing segments of the Brazilian Stock Exchange ("**B3**") are required to adhere to stricter rules of corporate governance, and are required to include a mandatory arbitration clause in their bylaws. This means that in many instances investors must pursue a recovery for their investment losses via arbitration and not via the Brazilian court system.

For these reasons, it is crucial to have a thorough understanding of the legal framework to navigate potential claims effectively.

Legal System Generally

The Brazilian legal system is primarily based on the civil law tradition and is heavily influenced by French and German legal theories. While it is primarily based on codified laws, judicial decisions have become increasingly significant, and certain rulings by the Supreme Federal Court ("**STF**") and the Superior Court of Justice ("**STJ**") constitute binding precedent.

The judiciary is independent and divided into ordinary and specialized courts. The latter, have jurisdiction over labor, military, and electoral matters.

The STF stands at the apex of the judiciary, ensuring the Constitution's supremacy. Below the STF, the STJ handles non-constitutional issues and holds significant sway over the interpretation of federal law, which include legislation governing corporations.

Corporate disputes in Brazil are typically adjudicated in state courts, which handle all other types of cases not specifically allocated to federal courts. Federal courts handle specific categories of cases, primarily involving disputes concerning the federal government or its entities, the interpretation of federal laws and international treaties, and cross-border issues.

The Brazilian Civil Procedure Code (Law No. 13.105/2015) provides a comprehensive framework for the conduct of civil litigation. It sets out the procedures, rules, and guidelines that govern how civil cases are processed and resolved in courts.

Arbitration offers a dependable alternative to traditional court litigation for disputes concerning disposable property rights, especially those related to corporate matters. The Arbitration Law (Law No. 9.307/1996) governs both domestic and international arbitration proceedings, and it is aligned with international standards, including those of the UNCITRAL Model Law despite the fact that Brazil did not directly adopt it. Furthermore, Brazil's ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards facilitates the recognition and enforcement of arbitral awards across borders. The legal and regulatory environment, combined with judicial support and well-developed arbitration infrastructure, contribute to its status as an arbitration-friendly jurisdiction.

Collective Actions in Brazil

Civil collective actions, known as public civil actions are a vital tool in the Brazilian legal system for protecting public and collective interests, related to collective, diffuse, and homogeneous rights.

The legal basis is provided by the Public Civil Action Law (Law No. 7.347/1985) and the Consumer Defense Code (Law No. 8.078/1990), enabling public entities, associations, and other qualified organizations to address violations affecting a broad segment of the public across various domains, including consumer rights, environment, and other public interests.

These actions can be filed before either state or federal courts. Commencing the action requires that a lawsuit be filed by an entity that has standing to file class actions under the Class Action Law. Those entities include the (1) Federal Union (Brazilian federal government), states, or municipalities, (2) public companies, foundations, or mixed capital corporations, (3) the Public Prosecutor's Office or the Public Defender's Office, and (4) Civil associations that have existed for at least a year and whose purpose includes defending the interests for which they have commenced a class action. Additionally, under the Civil Code of Procedure, a judge can notify one of those entities and refer a matter for a class action when multiple individual cases involving the same facts or legal issues have been filed.

There is no class certification process and, because only qualified entities can pursue a class action, there is no lead plaintiff and no need for a process to appoint one.

Under the Brazilian model, class actions are a two-step process. Liability is first established on a class-wide basis, but damages must be established via individual follow-on proceedings. Once a decision is issued in favor of the class of plaintiffs, each individual class member can file an action for the damages they incurred.

If an individual commences litigation before a class action related to the same issue(s) is filed, it will not benefit from the resolution of the class case unless it requests its lawsuit be stayed within thirty days of the notice of the class action being published in the record of the individual case.

When a class action is commenced for homogenous individual rights, any decision made by the court will only be binding on all members of the represented class if the claim is successful. If the claim is unsuccessful, each individual member of the class still has the ability to commence their own litigation to establish liability and damages. Similarly, any decision dismissing the case with prejudice does not prohibit individual class members from commencing their own lawsuits.

In 1989, Brazil enacted a class action law (Law No. 7.913/1989), which is specifically designed to provide collective protection for investors in the securities market. It provides that, without prejudice to the injured party's claim for compensation, the Public Prosecutor's Office and, since 2021 (as per alteration provided by Law No. 14.195/2021), also the Securities and Exchange Commission of Brazil ("**CVM**"), have standing to initiate public civil actions in order to avoid or obtain compensation for damages caused by wrongdoings. If successful, the amounts resulting from the conviction shall revert to the injured investors, in proportion to their losses.

In practice, however, there is a limited history of securities class actions against publicly traded companies in the country. The small number of cases pursued could be due to: (1) lack of discovery or other suitable document production mechanism; (2) procedural obstacles, such as the limited, designated set of entities that are authorized to initiate such actions; and (3) the costs involved. Nonetheless, in public civil actions, there is no required advance payment of court costs, legal fees, expert fees, or any other expenses, and when the plaintiff is represented by a public entity, no adverse costs or fees apply unless it has been found that the public entity was acting in bad faith.

Securities Arbitration in Brazil

In 1996, Brazil passed the Arbitration Act, thereby establishing the general principles and procedures for arbitration, and ensuring its validity and enforceability. The constitutionality of the Arbitration Act was upheld by the STF in 2001, and, in the same year, the Brazilian Corporations Law was amended to allow corporations to enact mandatory arbitration provisions in their bylaws.

Just before the enactment of the 2001 reform of the Corporations Law, the B3 established the Market Arbitration Chamber ("**MAC**"), with the aim of providing an efficient forum for corporate disputes, especially those related to the capital market.

Although the first securities arbitrations brought by minority shareholders were only filed as of the mid-2010's, just as in class actions, there is virtually no precedent in securities arbitration.

Still, despite the lack of specific regulation and precedent, by the end of 2022, the MAC administered four collective arbitrations, in which investors could opt-in to have their claims grouped in a single proceeding. In addition to a number of multi-party arbitrations involving hundreds of investors with homogeneous individual rights.

Despite the lack of precedent, it is understood that arbitration allows for procedural flexibility and a few key advantages over civil litigation before the courts in Brazil.

- In securities actions brought before the Brazilian courts, the lack of discovery mechanisms can disadvantage investor plaintiffs and make it difficult to prove their claims. Conversely, securities arbitration can potentially benefit from the arbitrators' freedom to organize the proceeding as they deem appropriate, provided that it is in accordance with the applicable rules negotiated by the parties. The Brazilian Arbitration Law also provides in article 22 that "[t]he arbitrator or arbitral tribunal may take the testimony of the parties, hear witnesses and order expert opinions or other evidence it deems necessary, at the request of the parties or on its own initiative." Furthermore, while the Brazilian Code of Civil Procedure includes a "loser pays" provision, that provision does not necessarily apply in MAC arbitrations, allowing the parties to set forth the rules of the proceeding when negotiating the "terms of reference." Unlike court cases, in a MAC arbitration the plaintiffs have a direct influence on the composition of the panel and are responsible for selecting one arbitrator of their choice, who then jointly with the defendants' appointed arbitrator selects the third arbitrator on the panel. The Brazilian Arbitration Law does not require arbitrators to be Brazilian nationals or lawyers, although it is advisable to choose a professional that is fluent in Portuguese.

There is one major disadvantage to the arbitration of disputes related to the capital markets: a lack of transparency. The MAC Rules set forth that all arbitrations should be confidential "except in compliance with the instructions or rules of regulatory bodies and with the applicable legislation." Until May 2, 2022, there was no specific regulation outlining criteria for the disclosure of information related to arbitration proceedings. This created a great deal of legal uncertainty. The only transparency came from companies' compliance with the now revoked CVM Instruction 358/2002, which governed the disclosure of information about relevant acts or facts regarding publicly held companies. The duty of disclosure would arise for those facts that could have a significant influence on the price of the securities or on any investor decision. That regulation, however, allowed for different interpretations about materiality.

Fortunately, the CVM enacted Resolution 80/2022, which sets rules for the disclosure of corporate disputes, stating that companies should disclose the main details of corporate disputes to the market, notwithstanding any confidentiality rule applicable to the proceeding. The Resolution, however, only applies to arbitrations initiated after May 2020.

Discovery (Litigation)

Brazil does not have a discovery system like that available in the United States. Generally speaking, in Brazilian litigation, each party must rely on their own evidence. The Civil Procedure Code places the burden of proof on the plaintiff to prove all its allegations and the facts that give rise to its claims, and the defendant has the burden to prove facts in support of its defense. In consumer actions that arise under the Consumer Protection Code, however, the burden of proof is shifted to the defendant.

Still, the Civil Procedure Code contains provisions that allow either party to request the disclosure of documents from the other party or from a third party. The request must detail as completely as possible the document or evidence that is requested, demonstrate the purpose of the evidence, set out the facts that relate to it, and indicate the grounds for belief that the evidence is in the control or possession of the other party. Once a request is made, the other party is granted five days to respond and their response must detail the reasons why the evidence cannot be disclosed. A judge will not allow a party to refuse to disclose evidence when (1) the party has a legal duty to disclose it, (2) the party mentioned the evidence in the proceedings, or (3) the evidence is common to both parties.

If a party fails to produce evidence or remains silent, then the facts stated by the party making the disclosure request are presumed to be true and correct or the judge can issue a search and seizure order.

The Civil Procedure Code includes provisions that confer discretionary authority upon judges to oversee and administer litigation. Within this authority, judges possess the capacity to assign the burden of proof regarding specific issues to either party involved in the dispute, accept or reject document production requests, as well as compel either party to produce evidence as deemed necessary for the resolution of the case.

Discovery (Arbitration)

As explained above, in arbitration, the rules of evidence are not as strict or comprehensive as those found in the civil law system and discretion is conferred on the arbitral tribunal to determine what evidence is necessary and how it should be collected, often based on the principles of materiality, pertinence, and necessity.

The parties are also free to negotiate and adopt a set of rules to regulate the matter. The IBA Rules on the Taking of Evidence, for instance, are often explicitly adopted in arbitrations.

Costs and Attorneys’ Fees (Litigation)

The costs of litigation in Brazil vary widely, influenced by factors such as case complexity, court type, and duration.

Key expenses include: (1) court fees, which are based on a percentage of the claim value and differ by state and court; (2) attorneys’ fees, which may be structured contractually, as a contingency fee, billed hourly, or a combination of these; and (3) expert witness fees, which vary depending on the complexity of the issue. For international parties, additional costs may include: (1) administrative fees; (2) obtaining certified translations; (3) having documents apostilled; and (4) enforcing judgments, if necessary. Costs can increase with prolonged litigation, multiple appeals, or more complex cases, making mediation and settlement potentially more cost-effective solutions. Yet, the most significant cost that plaintiff(s) can potentially incur are adverse costs. If a party does not prevail, it may be required to pay attorneys’ fees to the winning party, which are typically set between 10% and 20% of the value of the judgment according to the loser pays rule.

Also, if a plaintiff resides abroad and does not own real property in Brazil, the defendant may petition the court for a security deposit for costs and require the plaintiff to provide collateral to cover all court expenses and adverse costs fees in the event the case is not decided in their favor. If there is an applicable treaty between Brazil and the country where the plaintiff resides, however, the security for costs requirement will be waived.

Costs and Attorneys' Fees (Arbitration)

The MAC stipulates that both administrative and arbitrator fees will be levied as per the Table of Expenses applicable to the dispute, along with adherence to the Arbitration Rules, the arbitration agreement, and the Terms of Reference.

The administrative fee for each arbitration case varies based on the claim amount and is payable monthly from the commencement of the arbitration until the final award is rendered. The fee structure ranges from R$1,000, for disputes up to R$100,000, to R$3,000, for disputes exceeding R$10 million. If the dispute value is indeterminate, a minimum fee applies, subject to adjustments as the case value is clarified or updated during proceedings. Importantly, administrative fees are due in full from each party unless represented collectively by a single law firm, in which case one fee covers all represented parties. Additionally, fees for counterclaims are calculated by adding their value to the main claim unless payment defaults occur, in which case only the counterclaims are processed.

As of July 2023, in new arbitrations, arbitrators are to be compensated at R$1,200 per hour for their services.

If a party challenges an arbitrator's appointment, the challenge committee fees are set at R$15,000 per challenged arbitrator. These fees are divided equally among committee members and are payable in advance by the challenging party.

As for expert fees, the arbitral tribunal is responsible for determining the fees for expert witnesses, including the payment structure and responsible party.

Attorneys' fees are negotiated and agreed upon by the parties within the Terms of Reference and are subject to the procedures outlined therein.

The parties can agree in the Terms of Reference to waive any adverse costs. Absent an explicit agreement to waive adverse costs, it is possible that adverse costs could be awarded to the prevailing party's attorneys according to the rules set out in the Brazilian Code of Civil Procedure. However, there is an open question in Brazil as to whether adverse costs are appropriate in arbitration. Many Brazilian attorneys, arbitrators, and legal scholars do not believe that the adverse costs outlined in the Civil Code of Procedure are applicable to arbitration. The Brazilian Arbitration Law does not contain express language concerning adverse costs like the one found in the Brazilian Civil Code of Procedure. Instead, the Brazilian Arbitration Law provides that "[t]he arbitral award shall decide on the parties' duties regarding costs and expenses for the arbitration, as well as on any amount resulting from bad faith conduct, if applicable, complying with the provisions of the arbitration agreement, if any." (Article 27 of Brazilian Arbitration Law).

Third Party Funding

The financing of litigation is permissible, allowing parties to seek external support to mitigate the substantial costs and share the outcomes of legal proceedings. Third party funding is still in its nascent stages in the country, yet it is increasingly becoming a common and standard practice, with numerous new institutional funders recently entering the market.

Such funding may cover administrative costs, fees for arbitrators, attorneys, experts, and even monetary judgments. The terms of remuneration between the lender and the funded party are subject to mutual agreement, allowing flexibility in financial arrangements.

Currently, there is a lack of specific regulatory guidelines governing this area. However, some arbitral institutions have proactively established their own protocols, which are considered best practice recommendations and may be referenced in arbitrations where they are not directly applicable.

This is particularly relevant in relation to voluntary disclosure and conflict of interest checks.

In light of these considerations, it is prudent for the funded party to be required to disclose the existence of funding and the identity of the funder(s). This ensures that the impartiality of the arbitrators is not undermined by any potential biases towards the funder.

Laws Applicable to Shareholder Claims in Brazil

Brazil's securities market is regulated primarily by the Brazilian Securities Law, the Brazilian Corporation Law, and specific regulations which may be issued by the CVM, for instance.

The laws require full disclosure and transparency of information, and issuers are required to periodically provide information to the CVM for the purpose of informing both the CVM and the market as a whole of the business and financial status of the issuer.

The CVM has the authority to investigate and punish any violations of the Securities and Corporation Law as well as any fraudulent practices that have caused damage to any person. A breach can result in administrative penalties and criminal charges (that must then be adjudicated in the competent courts).

Liability of Corporate Officers

Under the Corporation Law, corporate officers are subject to duties of diligence and of loyalty to the corporation and they are prohibited from misusing the powers of their office. Officers are also subject to a conflict-of-interest law prohibiting participation in any corporate transaction in which they have an interest that conflicts with the corporation's interest. In addition, officers of an issuing corporation are responsible for the accuracy of information submitted to the CVM. Officers are personally liable to the corporation for losses caused by actions they take beyond the scope of their authority with wrongful or knowing intent or that contravene the law or the corporation's bylaws. Moreover, an officer who is aware of misconduct by other officers with respect to their duties under the bylaws, but fails to make this known to the general meeting of shareholders, is jointly and severally liable with those other officers for that misconduct. A shareholder asserting claims against the directors or officers for misstatements must plead: (1) damages, (2) that the defendants negligently failed to disclose all material information, and (3) causation.

Managers, however, are exempt from liability in instances where shareholders have approved management's accounts and financial statements, unless there was fraud, error, or wrongful intent.

The company is entitled to sue its managers and seek compensation for illegal acts conducted by the manager. Under certain circumstances, shareholders can initiate derivative litigation on behalf of the company. Derivative litigation can be pursued when the shareholders authorize action at the annual general meeting but management fails to act pursuant to the authorization. Derivative litigation can also be pursued when the shareholders collectively do not approve litigation at the annual general meeting, but shareholders representing at least 5% of the stock can file. However, this type of litigation is rare in large part because of the adverse cost risk that a shareholder would incur in pursuing a derivative suit.

Shareholders can also file litigation directly against the management of a company for damages they sustained. The shareholders cannot file direct litigation if they only sustained damages indirectly. For example, a shareholder could have their own claim for damages due to misstatements or omissions made by management in certain required disclosure documents. The shareholder could pursue those damages in court. However, if management or others cause damage to the company (and thereby indirectly harm the shareholder) then the shareholders cannot pursue direct action against the company (or others) for those indirect damages.

Liability of Corporation

As mentioned above, publicly listed corporations in Brazil must register with the CVM. The CVM is tasked with regulating capital markets in accordance with the Corporation Law and the Securities Law. To make a public offering of shares, a corporation must file with the CVM a prospectus including any relevant fact concerning the issuer. Publicly held corporations must also file and make available annual and quarterly information reports, which must report any relevant events subsequent to the prior report. Moreover, the officers of a publicly held corporation have a duty to immediately make public any new material fact. The CVM defines "material fact" to include any act or event related to the corporation's business that may have a substantial bearing on, *inter alia*, an investor's decision to trade in the securities.

However, as explained further under the section *Liability under the Brazilian Civil Code,* there remains an unresolved issue regarding whether shareholders possess the legal standing to initiate lawsuits against the issuer for damages resulting from the issuer's misconduct. The Corporations Law is silent on this issue.

Liability of Controlling Shareholder

Under Brazilian law, the liability of controlling shareholders is specifically outlined to ensure that they do not abuse their power within the corporate structure. This set of responsibilities is primarily governed by the Brazilian Corporations Law, which imposes strict guidelines and significant responsibilities to protect the interests of the company and its minority shareholders.

Controlling shareholders must exercise their powers without conflicts of interest, ensuring no undue advantages are gained at the company's or minority shareholders' expense. The law prohibits abuses such as directing the company into disadvantageous transactions, obstructing minority rights, or misappropriating company assets. Controlling shareholders are held to fiduciary duties, requiring them to act in good faith and with due diligence. If they fail, they can be held liable for damages, face regulatory penalties from the CVM, or even criminal charges for severe infractions.

In the so-called representative actions, minority shareholders are entitled to file a lawsuit on behalf of the company against the controlling shareholder to recover damages. Any shareholder may pursue this action as long as they pay the court costs, attorneys' fees, and any resultant adverse costs. If the minority shareholder prevails, the law provides that the controlling shareholder must pay the award to the company, reimburse the shareholder for litigation expenses, and pay the minority shareholder who brought the action 5% of the total amount of rewarded compensation.

Liability under the Brazilian Civil Code

There is ongoing debate in Brazil regarding whether a company can be held liable for shareholder losses.

Some experts contend that companies cannot be held liable due to the specific provisions of Brazil's securities and corporations' laws, which regulate securities markets without expressly providing for such indemnity actions.

Conversely, other Brazilian legal practitioners maintain that a claim under the Civil Code is not precluded by the securities and corporations laws. They suggest that shareholders could lodge a Civil Code claim against a corporation by demonstrating: (1) a violation of the shareholder's rights by the corporation, (2) resultant injury, and (3) causation between the corporate action and the injury. This group of lawyers argues that the violation could be a specific breach under the Brazilian Corporation or Securities Laws, or it could involve actions not explicitly covered by these laws, such as general acts of fraud.

They further note that the provisions of the Brazilian Corporation Law do not exclude the application of general liability rules outlined in the Brazilian Civil Code.

The Brazilian Civil Code indeed provides a general cause of action for damages to individuals harmed by the intentional or negligent acts of others. Article 186 of the Civil Code specifies that a person commits an unlawful act by "a voluntary act or omission, negligence, or imprudence, violating rights and causing damage to another." In turn, Article 927 of the Civil Code stipulates the right to recover damages caused by violations outlined in Article 186.

Foreign Investment Registration in Brazil and Potential Issues with Proving Legal Standing

There is Foreign investors seeking to participate in Brazil's financial market encounter numerous preliminary challenges before initiating investment activities or resolving disputes.

To access this market, foreign non-resident investors must appoint one or more representatives who will act as legal and fiscal agents within the country. These agents are responsible for registering the investor with key regulatory bodies, including the CVM, the Central Bank of Brazil, the Federal Revenue Service, and B3.

The registration process becomes particularly complex when an investor appoints multiple local custodians, as each custodian operates under its unique set of tax ("**CNPJ**") and CVM registration identifiers. This arrangement can result in a single investor possessing multiple tax and regulatory identifiers, complicating the identification and verification of transactions conducted under these numbers.

Moreover, when initiating a legal dispute over securities in Brazil, a foreign investor must bear in mind that the CNPJ and CVM numbers used in the transaction registration will determine the presumed owner of the shares under Brazilian law, as set forth in Article 31 of the Brazilian Corporate Law.

By registering "other funds or collective investment entities," particularly those categories outlined in Article 1, Paragraph 1, Item XI of Annex I to CVM Instruction No. 560/15, the CNPJ and CVM identifiers might be registered under one of the investor's sub-funds, series, accounts, or other depersonalized investment vehicles.

Although it is true that Article 7 of the Law of Introduction to the Norms of Brazilian Law (Law-decree No. 4657/1942) stipulates that a person's legal capacity is governed by the law of the country where they were constituted, in Brazilian law, the concept of procedural capacity is given to natural and legal persons who possess civil capacity. It also includes "certain necessary asset groups," which, although they do not have legal personality, are permitted to participate in legal proceedings as either active or passive parties.

This is reflected in Article 70 of the Brazilian Code of Civil Procedure, which states that "every person who is in the exercise of their rights has the capacity to be in court." Additionally, Article 75 specifies that a variety of entities, whether personified or not – such as public bodies and entities, legal persons governed by public law, bankruptcy estates, unclaimed or vacant inheritances, estates, general legal persons, irregular companies or associations, foreign legal persons, and condominiums – are to be represented in court, both actively and passively.

This broad definition of procedural capacity ensures inclusivity in legal representation, recognizing the rights of a wide array of entities to seek legal redress or defend against claims in Brazilian courts. However, it also implies that a legal entity lacking procedural capacity in its country of incorporation could be deemed procedurally competent in Brazil, and required to act accordingly by courts and tribunals. Investors electing to pursue action in Brazil should therefore take care to review their CVM and CNPJ registries in order to determine the proper naming of the plaintiff(s) pursuing the claims.

Applicable Statute of Limitations

Legal actions arising from acts of wrongful intent, breaches of law, or violations of a company's bylaws must be initiated within three years from the date on which the minutes of the shareholders' general meeting that approved the balance sheet containing the violation are published. Similarly, lawsuits filed by shareholders against the company must also be commenced within a three-year period. However, the precise commencement of this statute of limitations period remains a subject of debate. The prevailing view among most legal commentators is that the statute of limitations begins to run from the date on which the shareholder first becomes aware of the incurred damages.

CANADA

At a Glance…

Legal System	Most Provinces: Common Law Quebec: Civil Law
Statute of Limitations	Most Common Law Province Claims: 2 years Quebec: 3 years Statutory Misrepresentation Claims have a special limitation period
Discovery	Discovery procedures differ among provinces, but all provinces (with the exception of Quebec) require parties to disclose the existence of all relevant documents in their possession, power or control of those documents, and assert whether documents are covered by privilege. Quebec: no general duty to disclose; party seeking documents must specifically identify and request documents from opposition.
Mechanisms for Collective Redress	All provinces in Canada allow for representative actions.
“Loser Pays” System?	Yes.
Opt-In or Opt-Out	Opt-out Jurisdictions: Alberta, Ontario, Quebec, Manitoba, Nova Scotia, Saskatchewan, and Federal Court Hybrid Opt-In/Opt-Out Jurisdictions (dependent on residency of member): British Columbia; New Brunswick; and Newfoundland
Third Party Litigation Funding	Third party litigation funding has generally gained judicial approval across Canada and appears to be growing in popularity.
Important Considerations for Investors	Because most jurisdictions are opt-out, unless an investor has significant losses that would warrant consideration of either a lead role or an opt-out, investors can typically remain passive, wait until a case settles, and then file a claim for proceeds (like they would in the United States). Actions brought in British Columbia, New Brunswick, and Newfoundland may require an investor to opt-in at an earlier stage.

Background

Outside of the United States and Australia, Canada is the most frequently used forum for class actions. The number of actions typically filed in Canada in a given year, however, is much lower than the number of actions filed in the United States. According to NERA’s report *Trends in Canadian Securities Class Actions: 2022 Update*, eight cases were filed in Canada in 2022, ten were filed in 2021, and 15 were filed in in both 2019 and 2020. To date, only a handful of class actions have actually gone to trial in

Canada. Virtually all cases that have succeeded past the class certification stage have been settled.

Canadian class actions frequently follow after a similar class action has been filed in the United States and the outcome of a case in the United States will sometimes influence the outcome of the subsequent class action in Canada. But that trend may be changing. NERA reported that in 2022, only two out of the eight class actions filed in Canada had a parallel U.S. securities class action, and that the other six were unique cases.

Legal System Generally

Canada's legal system consists of both provincial and federal courts. With the exception of Quebec, which is a civil law jurisdiction, all Canadian provinces and territories are common law jurisdictions. Each province and territory within Canada has its own set of rules governing civil procedure and there are variations in the timing and procedure of an action. Trials in Canada may be heard by a judge alone or by a judge and a jury, although jury trials are becoming rare in civil cases and have been completely abolished in Quebec.

Discovery

Discovery procedures generally differ among the provinces. Aside from Quebec, all provinces require parties to disclose the existence of all documents that are in their possession, power, or control that are relevant to the issues in the proceeding, and they must generally assert whether they claim the particular document is privileged. Upon request by opposing counsel, a party must produce all relevant non-privileged documents. In class actions, most discovery occurs after the class certification stage. Prior to class certification, discovery is limited to production of only those documents that are relevant to certification. In class proceedings, only the class representatives are required to produce documents and sit for depositions. In Quebec, there is no general duty to disclose and parties only disclose documents upon which they intend to base their arguments. A party seeking documents from the other party must specifically identify and request a particular document. There is no obligation in Quebec for a party to disclose the existence of a document, even if it is relevant, unless it has been specifically requested.

Cost of Litigation and Attorneys' Fees

Canada is a "loser pays" jurisdiction, although the court has discretion. The rules governing the recovery of fees and costs vary by province. Attorneys are generally permitted to represent clients on the basis of contingency fees; however, the fee must be reasonable, the agreement must be in writing, and the agreement must be approved by the court. Courts across Canada have indicated that third party funding is permitted, but that funding agreements are subject to judicial review and approval in the class action context.

The laws regarding third party litigation funding in Canada continue to evolve, but it appears that third-party funding agreements in Canada must: (1) be transparent and disclosed to the court; (2) be subject to court approval to ensure that there is no abuse or interference with the administration of justice; (3) not compromise or impair the lawyer's duty of loyalty and confidentiality; and (4) not impair the lawyer's judgment and conduct of the litigation on behalf of the class.

Collective Litigation in Canada

All provinces in Canada allow for representative actions. Additionally, the Federal Court of Canada allows for representative actions permitting an individual to commence a proceeding on behalf of a group of persons with similar claims.

A class action brought in any common law province can be brought on behalf of a class of only those domiciled in that province or across multiple provinces. Most cases are typically filed in Ontario. In 2022, six of the eight new cases filed were in Ontario and the other two were filed in British Columbia. For the first time in 20 years, no new cases were filed in Quebec.

There are differences within each province, and plaintiffs can seek different relief in each province. For example, in Alberta, Ontario, Quebec, Manitoba, Nova Scotia, Saskatchewan, and the Federal Court, potential class members are required to opt-out regardless of their place of residence. However, in British Columbia, New Brunswick, and Newfoundland, there is a distinction between resident and nonresident class members. Resident members may opt-out of the class proceedings, but non-residents are not automatically included and instead must opt-in to the action.

In Canada, a class action lawsuit must be certified by a judge before it can proceed. In Federal Court and the common law jurisdictions, like Ontario, the judge will consider whether the case meets the following criteria:

- The claim discloses a cause of action.
- There is an identifiable class of people who have been harmed.
- The claims of the class members raise common issues of law or fact.
- Bringing the case as a class action is the most efficient or preferable way to resolve the claims.
- The proposed representative plaintiff is able to adequately represent the interests of the class members.

Unlike in the United States, Canadian class action lawsuits have not typically required the claims to be typical, or for common issues to predominate over individual issues. The Ontario *Smarter and Stronger Justice Act,* 2020 implemented a new rule that requires that a class proceeding will be considered the preferable procedure for the resolution of common issues only if it is superior to all other means of determining entitlement to relief of class members or addressing the conduct of the defendant and if the common questions of law or fact predominate over any questions affecting only individual class members. There is also no requirement that the class be large. In some provinces, such as British Columbia, a class action can even consist of just two or more people.

The certification process in Quebec is similar to that in the common law provinces, but it is called "authorization" and not "certification." Judges in Quebec use a four-part test to consider whether to authorize a class proceeding: (1) whether the claims of the members raise identical, similar, or related questions of law or fact; (2) whether the facts alleged seem to justify the conclusions sought; (3) whether the composition of the class makes joinder difficult or impracticable; and (4) whether the proposed representative is in a position to represent the members of the class adequately. The Supreme Court of Canada has recently confirmed that the standard for authorizing a class action in Quebec is lower than that in the common law provinces, such as Ontario, for certifying a class proceeding.

Previously, Canada had a lower standard for class certification than the United States. This meant that it was more likely that a class action lawsuit would be certified in Canada. As of 2018, the certification rate for each of the provinces in Canada were the following: 73% in Ontario, 63% in Quebec (71% accounting for appeals), 58% in British Columbia, 59% in Alberta, 44% in Saskatchewan, 40% in Manitoba, and 58% in Newfoundland. However, recent reforms may be changing this. In 2022, motions for class certification were denied in five statutory secondary market cases, and one additional case (which was heard in 2022) was denied class certification in January 2023.

The procedure for appointing a class representative varies by province. In general, Canadian courts have identified the following qualities as being ideal for representative plaintiffs:

- Someone who has sufficient knowledge of the litigation and is sophisticated enough to instruct counsel and make informed decisions.
- Someone who has a real interest in the action.

- Someone who does not have idiosyncrasies that would impact his ability to represent the interests of the class.

In Canada, just as in the United States, institutional investors are considered uniquely qualified to act as the representative plaintiff in securities fraud class actions. In *Smith v. Sino-Forest Corporation*, a carriage motion to determine which of four rival law firms and four proposed Ontario class actions arising against Sino-Forest would proceed. The court rejected the arguments made by Mr. Smith (an individual investor who was seeking to serve as the class representative after losing approximately half of his investment value) to disqualify the institutional investors from serving as class representatives. The court ultimately decided that the case *Labourers v. Sino-Forest* would proceed and that institutional investors would serve as the class representative because:

- The expertise of the institutional investor could lead to a greater likelihood of success for the entire class.
- The expertise of the institutional investor makes it better able to manage class counsel.
- One goal of the *Class Proceedings Act of 1992* is judicial economy, and institutional investors better promote that goal. The court explained that in its view, institutional investors typically have sufficient resources to pursue litigation on their own. This means that the institutional investor is more likely than an individual to opt out of a class action if it is not serving in a representative capacity. However, if an institutional investor serves as a representative party, then it is unable to pursue an opt-out action solely on its own behalf and judicial economy is better preserved.
- Institutional investors are already essentially serving in a representative capacity on behalf of their individual members that number in the thousands.

In Ontario, the recently enacted *Smarter and Stronger Justice Act, 2020* implemented new rules for carriage motions. The new legal provisions in Ontario require the court to consider the following factors in determining carriage:

a) each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory;

b) the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding;

c) the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue; and

d) the funding of each proceeding, including the resources of the solicitor and any applicable third-party funding agreements…and the sufficiency of such funding in the circumstances.

There are also new applicable deadlines for deciding carriage. Carriage motions must now be made within 60 days of the day on which the first proceeding was commenced and it should be heard by the court "as soon as is practicable." The new rules also bar the commencement of proceedings involving the same or similar subject matter without leave of the court if more than 60 days have passed since the existing proceeding was filed.

Additionally, the costs of carriage motions cannot be recovered from class members or defendants.

Given the differences between the laws and procedures within the provinces, it is perhaps no surprise that there will often be multiple class actions filed in multiple Canadian jurisdictions against the same defendant as a result of the same factual basis. Until 2020, Canada did not have anything similar to the U.S. multidistrict litigation ("**MDL**") system that would coordinate and consolidate multiple cases. Class actions often proceeded in multiple jurisdictions simultaneously. In 2020, Ontario adopted the *Smarter and Stronger Justice Act*, *2020* and, among other things, it aimed to address claims that are proceeding in multiple jurisdictions simultaneously. Under this new law, if a class proceeding is commenced in another jurisdiction other than Ontario, and it involves the same or similar subject matter and some or all of the same class members as the action filed in Ontario, then the court will determine whether it would be preferable for some or all of the claims of some or all of the class members to be resolved in the other proceeding(s) instead of the case in Ontario. The act also provides specific guidance for the court to consider in making this decision. Several of the other provinces in Canada are considering amendments to their respective class action legislation that would largely mirror the changes adopted by Ontario through the *Smarter and Stronger Justice Act, 2020*.

Similarly, the courts in Quebec recently demonstrated a deference to the decisions of other provincial courts. In *Bourgeois v. Electronics Arts Inc.,* the Superior Court of Quebec ordered the discontinuation of a proposed class action in Quebec on the basis that a parallel class action, brought in British Columbia on behalf of a national class, had settled. The Quebec Court noted that the settlement in British Columbia was not prejudicial to Quebec residents because the settlement provided for the resolution of the class members' claims on an equal basis, adequate notice of the settlement was provided, and the settlement provided for a bilingual claims administrator based in Quebec. The court also noted that "granting the discontinuance would not undermine the integrity of the justice system but rather would promote the principles of both judicial economy and interprovincial comity."

This transition highlights the fact that the landscape of class actions in Canada is changing and that there is now a greater emphasis on coordination and consolidation of cases. This could be a positive development and it could help to ensure that class actions are more efficient and effective.

Overview of Canada's Securities Laws

Securities class actions in Canada typically cite violations of provincial securities legislation, such as the Ontario Securities Act or the Securities Act of British Columbia, and other statutes that govern securities trading and corporations. Each province and territory's Securities Act creates civil causes of action for various forms of misconduct in securities markets. It creates causes of action both for primary market purchasers for misrepresentations in prospectuses and offering memoranda, as well as for secondary market purchasers for misrepresentations or failures to make timely disclosure of material changes. For example, Parts XXIII and XXIII.1 of the Ontario Securities Act outline the statutory causes of action for primary market misrepresentation and secondary market misrepresentation in Ontario. Similarly, Title VIII of the Quebec Securities Act outlines the civil causes of action for primary and secondary market misrepresentations in Quebec.

To establish primary market misrepresentation, the plaintiff must prove that it purchased a security offered under a prospectus or offering memorandum during the period of distribution, and the offering document contained a misrepresentation. To establish secondary market misrepresentation, the plaintiff must prove that (1) there was a misrepresentation in a document released or a public oral statement made by or on behalf of a public company, or a failure to make timely disclosure of a material change, and (2) the plaintiff acquired or disposed of the company's securities after the misrepresentation or failure to disclose, and before it was publicly corrected.

In addition, purchasers can also advance common law claims such as negligent/fraudulent misrepresentation or of negligence/conspiracy in respect of the issuance or sale of securities to the public. To establish a claim for negligent misrepresentation the plaintiff must prove that: (1) there was a duty of care based on a "special relationship" between the representor and the representee; (2) the representation was false or misleading; (3) the representor acted negligently in making the misrepresentation; (4) the representee reasonably relied upon the misrepresentation; and (5) the reliance was detrimental to the representee, in the sense that harm resulted. To establish a claim of fraudulent misrepresentation the plaintiff must prove that: (1) the representor made a false representation; (2) the representor made the misrepresentation knowing that it was false, or recklessly without caring whether it was true or false; (3) the representor intended that the representee rely on the misrepresentation; and (4) the representee did rely on it in entering into the transaction.

Common law, however, requires individuals to prove reliance by the purchasers on the misrepresentations, while such reliance requirement does not exist under the statutory causes of action. This has generally rendered the statutory claims preferable from plaintiffs' perspectives.

Shareholders can now pursue actions based on alleged misrepresentations made in publicly disclosed documents or oral statements and the failure by a corporation to make timely corrective disclosures. For cases concerning negligent misrepresentation in relation to shares purchased on the secondary market, there is conflicting case law as to whether claimants must prove actual individual reliance or whether a class can proceed under an "efficient market" theory in order to establish that, by purchasing securities, the plaintiffs had relied upon the alleged misrepresentations. Unfortunately, until the appellate court is given an opportunity to weigh in, there will likely continue to be conflicting opinions as to what is required.

Under the Ontario Securities Act, plaintiffs must seek leave to proceed as a class action. In order to obtain leave, the plaintiffs must show: (1) that the action is brought in good faith (which is satisfied by showing that the plaintiffs brought the action with an honest belief that they have an arguable claim); and (2) that there is a reasonable possibility (something more than a de minimis possibility or chance) that the action will be resolved in plaintiffs' favor at trial.

Secondary market claims proceeding under a statutory cause of action are subject to strict damage caps and a specific formula for calculating damages. Those limitations, however, have not yet been reviewed by Canadian courts.

In Quebec, general principles of civil law allow plaintiffs to pursue securities claims alleging misrepresentation. The plaintiff must show that he relied on the misrepresentation and that the reliance resulted in damages. As in Ontario, the law for secondary market liability is unsettled in regards to whether reliance must be demonstrated on an individual basis and whether that requirement is a bar to proceeding as a class action. The law may never need to be settled, however, because in 2007, Quebec adopted the Quebec Securities Act. Investors may pursue a claim under the Quebec Securities Act without establishing that they relied on the misrepresentation and damages are presumed to flow from the misrepresentation. The Quebec Securities Act has not yet been applied by the courts in a class action context.

In addition to the Securities Acts, the Canada Business Corporations Act ("**CBCA**") is a federal law that contains key provisions regarding the fiduciary duties of directors and officers, which are often cited in securities class actions. The Criminal Code of Canada also provides criminal penalties for fraud, market manipulation, and other forms of misconduct that can be the subject of securities class actions.

Additionally, while Canada does not have an equivalent to the U.S. Securities Exchange Act of 1934, securities regulation in Canada is primarily conducted at the provincial level by independent administrative bodies, similar to the U.S. Securities and Exchange Commission, such as the Ontario Securities Commission ("**OSC**"), the British Columbia Securities Commission ("**BCSC**"), and the Alberta Securities Commission ("**ASC**"). These bodies have the power to enforce the securities laws in their provinces and can establish rules and regulations that companies must follow.

Statute of Limitations

Common law claims are governed by the limitation periods that are set by provincial limitation statutes. In most provinces, the relevant limitation period applicable to civil claims is two years from the date that the plaintiff discovered or reasonably could have discovered that it had a claim.

For statutory misrepresentation claims, there is a special limitations period. For statutory primary market claims, the limitations period for seeking rescission is 180 days from the date of purchase of the securities. With respect to damages claims, the limitations period is the earlier of three years from the date of the transaction, or 180 days after the plaintiff acquired knowledge of the facts that give rise to the cause of action. For statutory secondary market claims, the limitations period is three years from the release of the document or statement that contains the misrepresentation, or three years from the failure to make a timely disclosure.

GERMANY

At a Glance…

Legal System	Civil Law
Statute of Limitations	All major sections for securities damage claims (i.e., secondary market disclosure as well as prospectus liability claims) fall under the same relevant general limitation regime of the German Civil Code. The limitation period is three years. The period begins at the end of the calendar year in which the claimant obtained knowledge (or would have obtained knowledge if he had not acted with gross negligence).
Discovery	Until recently there has been no procedure for U.S.-style discovery (apart from a provision designed for antitrust cases). Yet, in the summer of 2024, lawmakers e included a provision similar to the United States' on the "submission of evidence" in Section 17 of the KapMuG, allowing parties in securities cases to request the submission of documents that are "in the possession of the opposing party or a third party and that are necessary for the party filing the claim to conduct the proceeding." It is expected that this "discovery light" provision may have a positive impact on the outcome of future cases in Germany.
Mechanisms for Collective Redress	Joint complaints are the most common approach in securities cases. Group actions, in which injured parties assign their claim to or mandate a special purpose vehicle, are also possible, but much more common in antitrust cases. The KapMuG model case procedure under the Capital Markets Model Case Act is Germany's procedural device for collective redress in securities cases. The task is to provide a resolution of common questions of fact and of law. One can only become a party to a KapMuG model case if one brings an individual lawsuit, which institutional investors usually do not bring separately but by joining forces (i.e., by filing a joint complaint).
"Loser Pays" System?	Yes – the amount is set by court statute and based on the amount in dispute.
Opt-In or Opt-Out	Opt-in
Third Party Litigation Funding	Third-party litigation funding is allowed in Germany.
Important Considerations for Investors	Due to the most recent KapMuG reform, Germany is likely to become more claimant-friendly. Pending cases, though, will keep running under the old KapMuG regime.

Background

For a long time, Germany was in a "deep sleep" regarding securities litigation. This changed abruptly for the first time after Deutsche Telekom went public, creating and marketing a "people's share." In the early 2000s, around 17,000 lawsuits were filed by small investors after Deutsche Telekom AG faced allegations of prospectus liability. In a country that does not recognize opt-out class actions, the multitude of individual lawsuits overwhelmed the Regional Court of Frankfurt am Main. Judges called for the legislature to urgently create a procedure for collective legal protection in Germany, warning that otherwise, the sheer number of lawsuits would be unmanageable. The Deutsche Telekom case was insofar the primary reason for the creation of the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz* or "**KapMuG**"), enacted in 2005.

What is often forgotten today is that KapMuG was primarily designed to relieve the judiciary and not so much to provide a collective redress instrument to the benefit of plaintiffs. Also, institutional investors did not participate in the Telekom proceedings. Thus, the total value of the 17,000 lawsuits was "only" around 100 million euros. Nevertheless, the Telekom case is considered by practitioners in Germany as the "mother" of all KapMuG proceedings and as the starting point for all further collective redress developments in Germany. This is not only because the Telekom case led to the creation of KapMuG, now Germany's number one procedural device for securities litigation, but also due to the duration of the Telekom dispute: it took nearly 20 years after the first lawsuits were filed to reach a settlement, which resulted in almost full compensation for the plaintiffs. In fact, considering accrued interest, the compensation amounted to around double the originally claimed sums.

Although KapMuG has been available as a tool for institutional investors since it entered into force in 2005, it was the financial crisis and the U.S. Supreme Court's decision in *Morrison* (the latter practically cutting back U.S. securities laws' extraterritorial reach), which triggered the first significant waves of lawsuits from institutional investors in Germany, such as against the bank Hypo Real Estate. Since then, the legislature has worked to make securities litigation more streamlined and efficient. As a result, and due to "Dieselgate," the Wirecard accounting fraud, and other corporate scandals, more securities litigation is now occurring in Germany.

Legal System Generally

Germany is a civil law country; however, it operates with more of an adversarial system than the inquisitorial system that is found in many other civil law jurisdictions. There are no juries in civil litigation and instead, career judges, selected by an independent commission on the basis of academic qualifications, will preside over and decide a case. Certain commercial disputes are often heard by the commercial division of a Regional Court (*Landgericht* – "**LG**"), and a panel of one professional judge and two lay judges will decide the case.

Securities cases are brought before the Regional Court, where the defendant is domiciled (due to exclusive jurisdiction), and is typically led by a three-judge panel of career judges. Cases are often referred to specialized panels at the LG. Judgments of the LG can be appealed to the second instance, the Higher Regional Court (*Oberlandesgericht* – "**OLG**"). The OLG reviews the case for legal and (yet to a lesser extent) factual findings of the LG. The third and last instance is the Federal Court of Justice (*Bundesgerichtshof* – "**BGH**"). The BGH only reviews legal issues and does not make any factual determinations.

Oral hearings in securities cases, in all instances and including court decisions and final judgments, are all open to the public. However, only the parties of the dispute may inspect the court files. Public records regarding court files (such as it is provided by PACER in the United States) do not exist in Germany. Third parties that seek access to the court files, must demonstrate a legally recognized interest to view all or part of the records for a particular case.

Discovery

In the German legal system, the concept of discovery, as it is known in the United States, does not exist. Securities cases and disclosure violations typically are about the internal processes within an issuer, so substantiating a claim can become a difficult task without being able to make use of U.S.-style discovery. On the other hand, because discovery is not a part of the German toolbox, the law provides help for claimants in several ways to overcome obstacles. For example, under certain circumstances defendants cannot simply deny alleged facts and the law, and sometimes based on statutes or case law, German law reverses the burden of proof.

Nevertheless, at the very last moment of the legislative process and without a warning (as it was not included in the draft proposal), the lawmakers incorporated in 2024 a provision into the revised section 17 of the KapMuG, which is concerning the "submission of evidence." This new provision allows parties to request the submission of documents held by the opposing party or a third party if those documents are necessary for the claiming party to proceed with the case. The documents requested must be described as precisely as possible, based on information that can be reasonably obtained. This rule is by far less extensive than the discovery process in the United States, where plaintiffs only need to specify a general topic and then all documents related to that topic must be disclosed. It is obvious, though, that German courts have significant discretion in determining what is reasonable. It is expected that claimants will make use of this "discovery light" provision in the future – and by doing so test the waters.

Costs of Litigation and Attorneys' Fees

Germany is a "loser pays" system, and the losing party must reimburse the prevailing party for all attorneys' fees and court costs. While attorneys are free to agree on fees with their client, the minimum fee that an attorney must charge for a particular case and the amount of attorneys' fees that may be reimbursed by the losing party is set by regulation and depends on the monetary value of the dispute. Contingency fees are not allowed and attorneys who are not relying on the statutorily prescribed fees will often charge an hourly rate. There is no prohibition on third party litigation funding in Germany. Especially in antitrust cases, though, in recent years some courts have held that assigning claims to a special purpose vehicle, regularly used by litigation funders, is unlawful. In July 2021, though, the Federal Court of Justice decided, in a landmark decision, that such assignments are consistent with German law and hence, generally allowed.

Overview of Germany's Securities Laws

Because over time it turned out that Germany's general tort law regime did not provide enough protection for investors, the legislature enacted several special liability regimes. While general tort law still applies, the most useful provisions for investors can be found in special laws.

Claims for prospectus liability arise under Section 21 of the Securities Prospectus Act (*Wertpapierprospektgesetz* or "**WpPG**"), Sections 20-22 of the Asset Investment Act (*Vermögensanlagengesetz* or "**VermAnlG**") and Section 306 of the Capital Investment Code (Kapitalanlagegesetzbuch or "**KAGB**"). Securities actions for secondary market liability typically arise under Sections 97 and 98 (formerly Sections 37b and 37c) of the WpHG, accompanied by claims under general tort principles found in Section 826 of the German Civil Code (*Bürgerliches Gesetzbuch* or "**BGB**") and Section 823(2) BGB, in conjunction with a number of so-called protective statutes, such as Section 331 of the German Commercial Coder (*Handelsgesetzbuch* or "**HGB**") or Section 400 of the German Stock Corporation Act (*Aktiengesetz* or "**AktG**").

Sections 97 and 98 of the WpHG are similar to Section 10(b) of the U.S. Securities and Exchange Act of 1934, in that it creates a private cause of action for damages that an investor incurs as a result of false, misleading, or omitted public statements made on the capital markets. In making a claim under the WpHG, a plaintiff need not prove transaction causation (otherwise known as reliance) if the investor is seeking inflation damages, but if the investor is seeking rescission damages, then reliance is required (more detail about the German standard of reliance below).

As an alternative (or as an additional claim), shareholders can bring claims for investment losses against a company and its executives under Section 823(2) of the BGB, which provides a cause of action for the intentional violation of statutory regulations (including the WpHG, but can also be used in conjunction with other statutes). Section 826 is the German "catch-all" residual tort provision that provides for liability when one person intentionally causes injury or damage to another by failing to act with good morals. As good morals is a vague term, the precise scope of Section 826 of the BGB is largely shaped by case law. Tort claims are more difficult to prove than WpHG claims because, among other points to consider, they require a showing that the defendant acted with intent or conditional intent. Tort claims also generally require a showing of transaction causation or reliance.

Germany does not yet recognize the fraud-on-the-market theory that is used to prove reliance in the United States. However, depending on the type of claim, reliance is not as much an obstacle under German law as it is in other jurisdictions. Investors can choose which type of damage they assert, and depending on the type of damage, the causation requirement varies. One option for investors is to pursue the inflation damage claim, which means the compensation for the difference between the inflated price and the hypothetical value of the stock, had the inside information been known to the markets at the time of the purchase. In such a case the investor only has to prove loss causation, i.e., he only has to establish causation between the harmful event and the economic loss, practically eliminating the reliance requirement. Alternatively, if the investor chooses to claim rescission damages, he will have to prove transaction causation, i.e., he must prove that he would not have purchased the stock, had he known about the undisclosed information – which is more difficult to prove than loss causation (and for certain types of investors impossible).

The general limitation period for claims under German law is three years, pursuant to Section 195 of the BGB, beginning at the end of the year in which the claim arose and the claimant became aware (or should have become aware, i.e., without gross negligence) of the facts supporting the claim, including the identity of the defendant.

Under German law, the Regional Court where the defendant is domiciled has the exclusive jurisdiction over any claims made under the WpHG. Plaintiffs must file their complaint and any applications for model case proceedings before the Regional Court with jurisdiction (please refer to the flow chart at the end of this section).

Collective Securities Litigation in Germany

In Germany, there is no real procedure for a class action to proceed, like in the United States. Under the German Constitution, there is a fundamental right to be heard in court. This means that a judge cannot take action with regards to parties who are not actively participating in an action and who were not provided an opportunity to participate. As a result of this constitutional provision, it is highly unlikely that Germany will ever adopt a class action procedure similar to that in the United States. Germany utilizes an "opt-in" system for securities litigation: only claimants who file suit in their own name (or take active steps to join an existing suit) will be able to recover. However, as mentioned before, in the wake of the securities litigation arising out of Deutsche Telekom cases, the legislature enacted the KapMuG, which gives the court system a means of efficiently dealing with securities litigation involving multiple claimants. Further collective redress instruments have evolved in Germany. Yet, these are not of importance nor viable options for institutional investors.

Collective Redress under the KapMuG

Even though claimants must file their own individual complaints (or a joint complaint with numerous investors), the KapMuG provides a mechanism for the court to decide all common legal and factual issues. The common legal and factual issues are decided on the basis of a model case and then the outcome binds all the parties. Under the KapMuG, any investor claiming damages due to violations of the WpHG (i.e., false or misleading information concerning a public market disclosure or a prospectus) may file a complaint and apply to institute a model case proceeding before the appropriate Regional Court. Incidentally, a defendant is also free to submit an application to institute a model case proceeding. If, within a four-month period, a minimum of 10 complaints are filed concerning the same subject matter and applying for a KapMuG model case proceeding, then the Regional Court will refer the matter to the Higher Regional Court which can then initiate a KapMuG model case proceeding by determining the issues and selecting the model case lead plaintiff (please refer to the flow chart at the end of this section).

In deciding which claimant to designate as the model case lead plaintiff, the court will consider numerous factors, including the number of claimants in the case, the amount in controversy, the experience of the law firm(s) representing the claimants, the claimants' suitability to represent all those similarly situated, and whether the proposed model case covers all aspects of the claims asserted by others. Another relevant factor will be the extent to which other claimants consent (or object) to a particular claimant's designation as model case lead plaintiff. The model case lead plaintiff is responsible for overseeing and directing the litigation of the common issues. In a sense, the model claimant serves a role like the lead plaintiff in a U.S. class action, however, instead of representing absent class members, the model plaintiff is representing only those who filed complaints. Those claimants who filed a complaint and whose lawsuits have been ordered "interrupted," but who are not selected as the model case lead plaintiff, are automatically included in the model case proceeding as parties (*Beigeladene*), and their individual cases are stayed pending the outcome of the model case proceeding.

In a sense, the claimants who are not serving as the model case lead plaintiff are similar to passive members of a class in the U.S. class action system, in that they are not required to actively participate in the action. Unlike the United States, however, those claimants are afforded the opportunity, if they so choose, to participate in the model case proceedings by filing briefs and attending hearings. They can have significant influence, yet they do not control or oversee the litigation as much as the model case lead plaintiff, as they are not allowed to oppose/contradict the lead plaintiff.

The Higher Regional Court's task is to provide the model case with a resolution of numerous common questions of fact and of law (so-called establishment objectives or Feststellungsziele) that are of relevance in each lawsuit, yet excluding any individual issues regarding the claimants, such as the proof of transactions or the proof of transaction causation. Its decision is binding for the Regional Court(s) and ideally predetermines the outcome of all individual lawsuits. Additional claimants may continue to file complaints or register their claims (bearing in mind any potential statute of limitations) at any point after the model case is initiated and up until a decision is rendered.

Once the model case reaches judgment (and assuming the decision is in favor of the model case lead plaintiff), all individual cases resume in order to litigate unique factual and legal issues, such as transaction causation and the amount of each claimant's damages. Conversely, if the model claimant reaches a settlement with the defendant, it can apply to have the settlement approved by the court. At that time, each (stayed) plaintiff is given the opportunity to opt-out of the settlement, and if fewer than 30% of all pending but stayed actions/claimants opt out in a 30-day period, then the settlement will be binding on all remaining claimants who did not opt out. Any settlement proceeds are available only to those who previously filed an individual lawsuit that was included in the model case proceedings.

If a claimant files a complaint, their case will also be stayed, if they apply so. A claimant can also register a claim. If one chooses to register a claim and not file a complaint, the registration will toll any applicable statute of limitations. However, the claimant must then convert their registration to an active complaint before the KapMuG reaches a conclusion, if it wants to be bound by the outcome. The advantage in registering a claim versus filing an active complaint is that registration carries with it lower court costs and no adverse cost risk. While all claimants who filed a complaint are responsible for paying a pro-rata share of the costs (including adverse party costs) the model claimant incurs in prosecuting the model case proceedings, claimants who register claims do not have to share in the pro-rata costs and adverse costs risk, but they will face additional costs if they convert to an active complaint (and would be responsible for sharing the model case proceedings cost at that time). As noted above, registering a complaint also carries the risk that an investor will not be included in any settlement or bound by any judgment if they do not convert their case to active before a judgment is reached.

The 2024 KapMuG Reform

The KapMuG, enacted in 2005, was substantially reformed for the first time in 2012, and for a second time in 2024. It remains to be seen how impactful the newest reform will be. But the legislature, in view of the lengthy lifelines of certain securities cases, wanted to make a move forward and provide a better and faster collective redress instrument for the future.

While the main goal was to make the KapMuG better, the new KapMuG leaves more options to investors: they can now choose if they wish to join a KapMuG proceeding or not. Before the newest reform act the Regional Courts stayed all lawsuits ex officio, if the outcome of the case would depend on the Higher Regional Court's decision regarding the establishment objectives. This is not possible anymore. Now it is upon the claimants. When a KapMuG proceeding is initiated, they can choose if they wish to participate or not. So, investors have more strategic options and can even consider pursuing their own individual lawsuit instead. Additionally, the new KapMuG introduces measures to expedite proceedings, addressing a significant issue, since cases have historically taken far too long. Surprisingly, the new KapMuG includes a "discovery light" process. Given that disputes often revolve around internal processes and knowledge, this provision is likely to positively impact both the outcomes and the duration of proceedings. Moreover, the scope of KapMuG has been expanded to explicitly include rating agencies and auditors as potential defendants.

Overall, the 2024 KapMuG reform is a step in the right direction and sends a positive signal to investors. Unfortunately, the reform will not affect major ongoing KapMuG cases in Germany. These will continue under the old KapMuG regime. Thus, the recent legislative changes will only positively impact future cases. The fact that success is possible also under the old KapMuG regimes is evidenced by the settlements worth hundreds of millions of U.S. dollars, reached in recent years.

CASE STUDY

SECURITIES FRAUD LITIGATION

On September 18, 2015, the U.S. Environmental Protection Agency ("EPA") issued a Notice of Violation of the Clean Air Act to Volkswagen AG ("VW") after discovery revealed VW's intentional installment of "defeat device" software in its TDI "clean diesel" engines. VW subsequently admitted that as many as 11 million vehicles contained the "defeat device" which could detect and evade emission testing, switching the car's engine into a cleaner running mode for testing, while allowing cars to operate with increased fuel economy and improved torque and acceleration but with high, illegal levels of pollutants. On-road testing found that some VW cars emitted as much as 40 times the legal pollution limit for nitrogen oxide ("NOx"), a toxic and harmful pollutant. In response to the news of the fraud, the VW common stock price fell from €167.50 on September 16, 2015 to a low of €101.15 on October 2, 2015, resulting in a loss of €66.35 per share or a 39% decline in shareholder value. Over that same period, VW's preferred shares fell more than 45%, from a pre-corrective disclosure price of €169.50 on September 16, 2015, to a low of €92.36 on October 2, 2015. The total market capitalization loss for the shares between September 16 and October 2, 2015, was more than €30 billion.

Investors who had purchased, sold, and held shares of VW common, VW preferred, Porsche preferred, and various VW bonds and suffered losses tied to VW's "defeat device" scandal commenced litigation in Germany. While official numbers are not available, it can be estimated that around 1000 institutional investors and 2000 retail investors have filed complaints (either individually or jointly with other similarly situated investors). The disinformation period ranges from purchases made on June 6, 2008 (first implementation of inadmissible defeat devices), until September 18, 2015 (when the emissions scandal became known to the public).

THE BASES OF THE CLAIMS

The claims arise from various statutes establishing an issuer's liability in the secondary market. In the VW/PSE proceedings, the claims are based on sections 37b and 37c (old version) of the German Securities Trading Act (*Wertpapierhandelsgesetz* or WpHG), alleging a failure to disclose inside information. Additionally, the claims invoke section 823(2) of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB) in conjunction with several protective statutes, namely section 331 of the German Commercial Code (*Handelsgesetzbuch* or HGB), section 400 of the German Stock Corporation Act (*Aktiengesetz* or AktG), and sections 37v and 37w of the WpHG (old versions), collectively alleging the issuance of incorrect and misleading financial statements. Finally, the claims rely on section 826 of the BGB, alleging intentional damage in a manner contrary to public policy. Given the market reaction to VW's admission of fraudulently installing a defeat device in certain diesel model vehicles, investors allege that the information was material and required by German law to be timely disclosed by VW to the market so that investors could adequately assess the financial risks and consequences to the company when making their decisions to invest in the company.

THE BRAUNSCHWEIG MODEL CASE AGAINST VW

The first investor lawsuit in Germany after the VW emissions scandal was filed in October 2015 in the Regional Court of Braunschweig against VW. The plaintiff also applied to refer the matter to the Higher Regional Court ("OLG") to establish a KapMuG model case proceeding. Numerous additional investor lawsuits followed, and on March 14, 2016, a group of 278 institutional investors filed a joint complaint with claims totaling €3.3 billion. On August 5, 2016, the Regional Court of Braunschweig referred the investor claims to the Higher Regional Court, initiating the model case proceeding. Most pending proceedings were subsequently stayed, while others remained pending for quite a while or even remain pending to date. A further wave of lawsuits followed in September 2016 and a last one by the end of 2018 (the dates were due to the statute of limitations).

On March 8, 2017, the Higher Regional Court of Braunschweig appointed the model case lead plaintiff, an institutional investor from Germany with the highest claimed loss. Besides that investors also filed discovery assistance requests pursuant to 28 U.S.C. §1782 against VW's United States subsidiary Volkswagen Group of America, Inc ("VwGoA"), seeking the production of documents for use in the German securities litigation against VW and PSE. In June 2018 the Higher Regional Court of Braunschweig included Porsche SE (the holding company of Volkswagen AG, which is also listed in the stock market) as a party to the model case but limited the establishment objectives to VW's liability. The first oral hearing before the Higher Regional Court of Braunschweig took place in September 2018 and further oral hearings followed throughout the years. Both plaintiffs and defendants have added numerous further establishment objectives, which adds to the complexity. Among the issues to be decided are the issues of whether VW violated German law and whether it is liable to its shareholders for those violations.

A particularly important topic is how to deal in this matter with the concept of "attribution of knowledge" (*Wissenszurechnung*), which is in quite a few aspects different from the "respondeat superior" doctrine – and not as well-explored in detail. VW and PSE defend themselves by stating that the boards of VW and PSE were unaware of the defeat devices and that attributing the knowledge of certain employees to the board is not permissible. Given that Martin Winterkorn was Chairman of the Management Boards of both VW and its majority shareholder PSE from November 25, 2009, to September 23, 2015 (which nearly coincides with the alleged disinformation period), questions about knowledge attribution *within* a group of companies are particularly pertinent. A final ruling is not in sight yet.

THE STUTTGART MODEL CASE AGAINST PSE

Investors who purchased financial instruments of PSE, especially PSE's stock, also filed complaints against PSE in Stuttgart, where PSE is headquartered. The plaintiffs' allegations mirror those in the Braunschweig proceedings against VW, asserting that PSE failed to inform the capital markets about the use of defeat devices in cars produced by its subsidiaries, VW and Porsche AG. The question soon arose whether the Stuttgart lawsuits against PSE should be stayed pending the model case in Braunschweig, or if a separate model case should be conducted in Stuttgart for these claims.

The Regional Court of Stuttgart held that a second KapMuG proceeding (i.e., in parallel to the already pending Braunschweig one) had to be initiated. Hence, the Regional Court of Stuttgart issued orders referring the matter to the Higher Regional Court to address common questions of fact and law regarding PSE's liability. However, the Higher Regional Court declared the orders to be inadmissible. Yet, one of these decisions had been appealed before the Federal Court of Justice (Bundesgerichtshof or "BGH") and the BGH held on July 15, 2020, that another KapMuG model case against PSE is admissible and therefore referred the matter back to the Higer Regional Court of Stuttgart. The BGH explained that, given that the Higher Regional Court of Braunschweig is focused on Volkswagen AG's disclosures while the Higher Regional Court of Stuttgart is addressing those of PSE, it is appropriate to have two separate model case proceedings, even though there are significant overlaps. Despite this decision, PSE will remain a defendant in the proceedings in Braunschweig, but the Higher Regional Court of Braunschweig will only consider whether PSE aided and abetted VW in its wrongful acts.

On March 29, 2023, the Higher Regional Court of Stuttgart ruled that the claims for findings against PSE are largely unfounded and justified the dismissal of the plaintiffs' claims by stating that knowledge of events at VW cannot be attributed to its holding company PSE. The plaintiffs have appealed to the BGH, where the matter is pending. Investors remain hopeful that the BGH will issue another landmark ruling similar to its decision on May 25, 2020, when it awarded damages to a consumer who had purchased a diesel vehicle. In that case, the BGH found that VW had breached German tort law, specifically Section 826 of the BGB. This ruling, along with the court's reasoning, sent a strong signal for investor claims as well. The court confirmed that the plaintiff had effectively demonstrated the board's and other key representatives' knowledge, technically by triggering the "secondary burden of proof" principle (sekundäre Darlegungslast) under German law, which is one of the principles that make up for the fact that U.S. style discovery is not available in Germany. Hence, the BGH determined that the board and other employees were aware of the use of defeat devices, and this knowledge was to be attributed to VW as a legal entity. Consequently, the plaintiff was awarded compensation.

THE NEW KAPMUG MODEL CASE PROCEEDING (2024)

Sec. 1-2 KapMuG

INDIVIDUAL LAWSUIT & MODEL CASE APPLICATION

The claimant and/or the defendant in an individual lawsuit apply for a model case proceeding under the KapMuG rules, seeking a declaratory judgment on facts or questions of law (referred to as "establishment objectives").

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Sec. 3-5 KapMuG

ADMISSIBILITY STAGE

The Regional Court decides on the admissibility of a model case proceeding. If the application is deemed admissible, it will be announced in the model case register within three months of the application.

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Sec. 6-8 KapMuG

QUORUM STAGE

With the announcement of an admissible model case application, the respective individual lawsuits are "interrupted." If at least nine additional parties apply for a model case proceeding within six months, the Regional Court orders the referral of the matter to the Higher Regional Court.

(If fewer than nine additional parties apply for a model case proceeding, there is no referral to the Higher Regional Court and no model case proceeding. Instead, the individual lawsuits will continue.)

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Sec. 9 KapMuG

MODEL CASE INITIATION STAGE

The Higher Regional Court initiates the model case proceeding by issuing an order within four months, including:

- A brief description of the facts
- The establishment objectives
- The announcement of the model case lead plaintiff (who must be a claimant from an "interrupted" proceeding)

↓

Sec. 10, 13 KapMuG

FURTHER CLAIMANTS JOINING…

either as parties..: The Regional Court(s) shall stay proceedings upon the claimants' request if the proceedings have not yet been interrupted, but where the ruling in the dispute is likely to depend on the outcome of the model case. This makes one a party to the model case proceedings.

…or as registrants: Within six months after the initiation of the model case, claims can be registered. As a registrant, one is not a party to the model case, and there is no binding effect from the ruling. However, the statute of limitations is suspended.

↓

Sec. 11-12, 14-19, 25 KapMuG

MAIN STAGE: MODEL CASE COUNDUCTED BEFORE THE HIGHER REGIONAL COURT / RULING

Conduct of the model case proceeding before the Higher Regional Court and under specific rules of procedural law, specifically designed for the model case proceeding. The establishment objectives can be expanded during the course of the proceeding, which happens almost always in practice.

↓

Sec. 23-25 KapMuG

APPEAL TO THE FEDERAL COURT OF JUSTICE / RULING

The Federal Court of Justice focuses on legal issues only and does not adjudicate on factual matters. After a final ruling the Regional Court(s) take up the individual lawsuits again. Yet, the Regional Court(s) will only have to deal with few individual questions related to each plaintiff (such as transaction data or – depending on the burden of proof and claim brought – transaction causation). In a typical securities cases the parties usually settle before the case goes back to the Regional Court.

MAIN FEATURES OF THE NEW KAPMUG

- **ACCELERATION**: Various adjustments to KapMuG provisions aim to significantly speed up future model case proceedings.
- **SCOPE**: The scope af application of the new KapMuG has been expanded, including claims against rating agencies and auditors as well as crypto asset custodians.
- **DISCOVERY**: With a new provision on the "submission of evidence" a tool similar to Anglo-American discovery has been established (Sec. 17 KapMuG).

ITALY

At a Glance…

Legal System	Civil Law
Statute of Limitations	Contract Law Actions: 10 years Tort Law Actions: 5 years Prospectus liability claims: 5 years
Discovery	There is no discovery procedure for claimants in civil actions. The onus is on the parties to the litigation to allege and prove the allegations.
Mechanisms for Collective Redress	Opt-in Class Actions Consumer Representative Actions Cumulative Actions Joining Criminal Actions
"Loser Pays" System?	Yes
Opt-In or Opt-Out	Opt-in
Third Party Litigation Funding	Third party litigation funding is a relatively new legal concept but it is now widely used in mass securities litigation.

Legal System Generally

Italy is a civil law jurisdiction based on codified rules that judges must apply to cases presented to them. While case law may be persuasive to a judge, it is not binding. There is no concept of a trial by jury in Italy and all disputes are decided by judges. Mediation is compulsory in all civil actions in Italy regarding banking and securities litigation, except for Consumer Class Actions. Mediation provides parties with the opportunity to potentially settle a case at an earlier stage.

Discovery

There is no discovery procedure for claimants in civil actions. The onus is on the parties to the litigation to allege and prove the allegations and the courts will decide disputes on the basis of the information presented.

In most securities litigation cases, a civil claim is filed simultaneously with the criminal complaint. Civil claimants in a criminal proceeding may use the evidence gathered by the public prosecutor in the subsequent civil trial. In other words, the discovery is obtained by the prosecutor, and civil parties exploit it to support their civil claims for damages.

Cost of Litigation and Attorneys' Fees

In civil litigation, the legal costs incurred are awarded to the winning party unless the trial addressed new issues of law or the court has departed from the existing precedents, or unless the claims have not been entirely upheld (in this scenario the decision must explain the reasons for such decision). In order to determine the amount of the legal fees to be awarded, the judge normally uses professional tariffs. If the action brought by the claimant is frivolous, the court would, in its discretion, fix the fair amount of the compensation of damages due to the defendant.

Under Italian law, contingent fee arrangements are prohibited if they provide that the lawyer's fee consists of a portion of the claim or the thing that is the subject matter of the litigation. In addition, under article 1261 of the Italian Civil Code, lawyers are prohibited from receiving the assignment of the claim brought to court. Lawyers, however, may agree with clients and charge a success fee for their activities.

In the class action context, the losing defendant will be obliged to pay to the representative of the class and the leading counsel a contingent fee determined on the basis of certain parameters, such as the number of members of the class, the complexity of the case, the employment of expert witnesses, the quality of the work done, and the care with which the activities had been carried out.

Third-party litigation funding is permitted in Italy. It is a relatively new legal concept in Italy, but nowadays is widely used, particularly in mass litigation. Litigation funding is expressly mentioned in the EU Directive 2020/1828 introducing a European model for class actions.

In criminal trials, there is no loser-pays, adverse cost risk. Thus, civil claimants in a criminal trial cannot be ordered to pay the defendant's or the civilly responsible party's legal fees in case of acquittal or rejection of the civil claims.

Overview of Italy's Securities Laws

The relevant sources of the securities laws in Italy include EU Directives, domestic law provisions set forth primarily in the Consolidated Law on Finance and the Consolidated Law on Banking, as well as articles contained within the Italian Civil Code, Criminal Code, and the Codes of Civil and Criminal Procedure.

The Italian legal system provides investors with several claims that are aimed at protecting them from any breaches of civil or regulatory obligations, or failures to comply with criminal provisions by market players. The most common claims relating to securities offerings are generally caused by market players' breach of the information duties required by law, including false, inaccurate, or omitted information in a prospectus. The other common claims based on securities laws in Italy include those based on liability for: breaches of the rules of conduct imposed on financial intermediaries; wrongdoings by credit rating agencies; wrongdoings of directors; failure to propose mandatory takeover bids; lack of diligence of auditing companies; and failure to perform the duty of supervision by the supervisory authorities.

Prior to commencing a security claim concerning insurance, banking, and financial agreements, parties must start the mandatory mediation procedure. If the mediation procedure is unsuccessful, then the claim will follow the path set forth in the Italian Code of Civil Procedure. If a claim is contractual in nature the plaintiff is only required to claim that the defendant has failed to comply with the agreement and the defendants must give evidence that it duly performed its obligations. If a claim is tortious in nature, the plaintiff must prove: (1) willful or negligent conduct of the defendant; (2) the damage suffered; and (3) the causal link between the conduct and the damage.

Collective Securities Litigation in Italy

In Italy, there are three mechanisms for pursuing multiparty litigation: opt-in class actions, EU model consumer representative actions, and cumulative actions. None of these mechanisms are similar to the U.S.-style opt-out class actions.

Class Actions

Law 31 was enacted on April 19, 2019, to regulate collective actions to be brought by those persons injured with regard to the same homogenous individual claim. It is a general type of class action entailing an opt-in system. Law 31 does not provide special requirements for the entities entitled to bring collective actions. Even companies, professional investors, unions, consumers, or consumer associations may be class members. The claimant must grant a power of attorney to the lawyer filing the summons, while the class members do not need a lawyer to opt in. The class action may be utilized to seek injunctive reliefs, compensation for damages, or restitution.

The competent court to hear the class action claims is the specialized court of enterprises having jurisdiction over the district where the registered office of the defendant is located. Under Law 31 the Ministry of Justice has set up a special section dedicated to class actions within the portal of digital trials to ensure that the public at large has access to the relevant information concerning all class actions pending in Italy.

It is still unclear whether the class action seeking compensatory damages requires the mandatory filing of a mediation request where mandatorily provided (i.e., securities litigation and banking). Only injunction reliefs are expressly excluded from mediation.

Consumer Representative Actions

The Italian Government has issued Decree No. 28 on March 10, 2023, to implement the EU Directive 2020/1828 on class actions, applicable to violations or damages occurred after June 25, 2023. Decree 28 provides for injunctive reliefs and compensatory reliefs.

Decree 28 provides a new rule concerning the statute of limitation: the pleading filed by the claimant tolls the statute of limitation for all consumers seeking compensation through the class action.

Decree 28 provides an exclusive list of 68 causes of actions that may be pursued through this representative consumer action, which include, *inter alia*: consumer protection; product liability; antitrust private enforcement; ecommerce; pharmaceuticals; data protection; misleading advertising; financial services; distance selling of financial instruments; air travelling; carriage by railways, by bus and by sea; travel agencies and organized tours; labelling and food product safety; utilities; banking and insurance; investment funds; media services; roaming; payment services; consumer credit; residential housing; medical appliances; financial prospectuses; and discriminations.

Decree 28 provides a special regime of class actions that may be brought only by registered consumer associations. The consumer association acting on behalf of the consumers does not need a power of attorney from the consumers. Decree 28 provides that only consumer associations are eligible to be designated as qualified entities for the purpose of bringing domestic or cross-border representative actions.

To bring cross border actions qualified consumer associations must:

- have a non-profit-making character, be independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in bringing any representative action;
- have appointed a supervisory board to prevent conflict of interests:
- in the event of funding by third parties, must have established procedures to prevent such influence as well as to prevent conflicts of interest between themselves, their funding providers, and the interests of consumers;
- own a web site to publish their activities and interests;
- be duly enrolled in a special list held by the Ministry of the Economic Development.

Cumulative Actions

In a cumulative action, multiple plaintiffs may all grant a single attorney the ability to act on their behalf against a single defendant. In this type of case every plaintiff must sign an individual Power of Attorney. Each plaintiff still maintains individual rights in the action and the case is not decided on the basis of a lead plaintiff.

Mediation is required in cumulative actions and an action for securities litigation that proceeded as a cumulative action would undergo mediation before proceeding to a trial.

Joining Criminal Actions

In Italy it is also possible to join criminal proceedings as a civil party and seek compensation. Pursuant to Article 185 of the Italian Criminal Code, persons who have committed a crime that has caused damage, whether pecuniary or non-pecuniary, may be required to pay compensation to the damaged party. Further, Article 74 of the Italian Code of Criminal Procedure provides victims of such crimes the right to join proceedings against the accused in a criminal trial as a civil party.

In order to join a criminal proceeding as a civil party, the injured party must file a digital statement for joining the proceeding with the Digital Registry of the proceeding court and must include the following information: (1) the personal details of the individual or the name of the association or organization who joins the proceedings as a civil party and the personal details of his legal representative; (2) the personal details of the accused person against whom the civil action is brought or the other personal indications that may be used to identify him; (3) the first and last name of the lawyer and reference to the letter of attorney; (4) the list of reasons justifying the request, i.e., the civil party must prove (i) the damages suffered by the conduct of the accused and (ii) the causal link between the conduct of the accused and said damages; and (5) the signature of the lawyer.

The injured party may join the criminal proceedings as a civil party up until the preliminary hearing, or until the required actions provided by Article 484 have been carried out.

A civil action joined to criminal proceedings can be extinguished in two ways. First, the public prosecutor, the defendant, a party liable under civil law, or the court itself may submit a motion to exclude a civil party from the criminal proceedings. Second, the civil action may be withdrawn by the civil party.

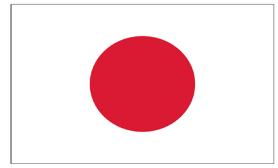
At the end of the criminal proceedings, the criminal court will either assess the injury and award damages, or it may make a finding that there is a right to damages and refer the parties to the civil courts in order to determine the amount of damages owed.

Statute of Limitations

In general, the limitations period for actions based on breach of contract is ten years, and the limitations period for actions based on tort is five years from the moment that the event occurred or the claimant should have reasonably become aware of the damage. The Consolidated Law on Finance also specifically indicates that the limitations period for prospectus liability claims is five years. In the event that a civil breach also amounts to a crime, and the applicable criminal law provides a longer statute of limitations, then the longer criminal statute of limitations will apply to the civil action(s).

According to article 2953 of the Italian Civil Code, "[t]he claims for which the law prescribes a statute of limitation shorter than ten years are subject to a statute of limitation of 10 years when they have been ascertained with a final judgment of conviction."

JAPAN



At a Glance…

Legal System	Civil Law
Statute of Limitations	Financial Instruments and Exchange Act Claims: 2 years from learning the defendant made a material false statement or omitted material information from a statement in its annual or quarterly reports, or 5 years from the publication of the annual or quarterly report, whichever is sooner. Civil Code Claims: 3 years from the time when a claimant becomes aware of the claim, or 20 years from the time of the tortious act, whichever is sooner.
Discovery	No general duty to disclose; party seeking documents may file a motion to request the courts to order disclosure, but must specifically identify documents and prove that they fall into the requirements outlined in the Code of Civil Procedure.
Mechanisms for Collective Redress	No general class action system. Two procedural mechanisms for group actions: joinder and representative actions
"Loser Pays" System?	Yes (loser pays court fees and other litigation costs of a prevailing party, but not the attorneys' fees of the prevailing party)
Opt-In or Opt-Out	N/A
Third Party Litigation Funding	Permissible
Important Considerations For Investors	The legal standing of the plaintiffs has recently been a focus of the court in shareholder litigation. Investors should be prepared to produce documentation regarding their legal existence under the laws of the country where they are organized and existing. Investors should also be prepared to prove the chain of custody and explain the nature of their relationship with their custodian (including potentially providing copies of the relevant custody agreement).

Background

Japan used to be a country that emphasized pre-dispute regulation, but in recent years it has begun to shift to a system of deregulation and free competition. Accordingly, the country is attempting to make changes to the way litigation operates, and the number of lawsuits filed is on the rise. After the adoption of the Financial Instruments and Exchange Act (the "**FIEA**") in 2004, securities litigation began to gain momentum among Japanese investors, but it was not until the high-profile accounting scandal at Olympus Corporation in 2011 that investors from around the globe began looking to Japan to pursue legal recourse for investment losses they suffered as a result of securities fraud. Numerous institutional investors filed suit in Japan against Olympus as a result of an accounting scandal, and the action on behalf of one group of investors announced a settlement in 2014 for 11 billion yen (approximately $92 million). Another action on behalf of another group of investors subsequently settled in 2016 for an undisclosed sum. After the successful resolutions of shareholder cases against Olympus, and in light of a number of additional alleged (or admitted) frauds at a number of Japanese companies, Japan continues to be a prominent jurisdiction for shareholder litigation. Please see Olympus case study at the end of this section.

Legal System Generally

Japan is a civil law country, but unlike many civil law countries that utilize the inquisitorial system, it operates in an adversarial manner. Judges are present at all stages of a proceeding, including when the plaintiff appears in court to state the complaint and when the defendant responds. There are no jury trials in civil cases in Japan, and compared to other countries, overall rates of civil litigation are low because of a cultural aversion to litigation and a proclivity for resolving disputes through settlement. More than half of all cases filed are resolved through settlement proceedings and judges often use their authority to advise parties to settle.

Discovery

Japan does not have a system of pretrial discovery like in the United States. Japanese attorneys do not have the power to compel production of documents or testimony of witnesses or parties. However, the Japanese Code of Civil Procedure provides rules concerning the production of documents and evidence, and it outlines parameters for when and how a party may petition the court (by filing a motion) to order the counterparty or third parties to produce certain documents. If a party does not comply with the court's order to produce certain documents, then the court may make adverse inferences against the party that failed to produce the documents. Thus, Japanese attorneys must typically rely on either voluntary cooperation or the intervention of the court. Although most evidence gathering is done after trial commences, there are some methods of procuring evidence informally through attorneys at earlier stages.

Costs of Litigation and Attorneys' Fees

Japan is a "loser pays" system and the court fees and other litigation costs of the prevailing party are paid by the losing party. Attorneys' fees are not considered costs and each party is responsible for paying their own attorneys' fees. There is no cap on the amount of court fees that a losing party must pay and judges will often award an amount equivalent to about 10% of the amount of damages awarded to the prevailing party as a guideline for the amount of costs to charge the losing party. However, the judge is free to use discretion and will make an award by considering the specific circumstances in each case.

When non-Japanese persons or entities from countries that have not concluded a relevant treaty with Japan act as plaintiffs in litigation, the defendant can request that the plaintiff be required to pay a security for costs deposit. This deposit ensures funds are available to cover any potential adverse cost award. If the plaintiff prevails or the case settles, the security deposit is returned. Similarly, any amount exceeding the adverse costs awarded by the court will be refunded.

Japanese attorneys are permitted to charge purely contingency fees, however, in practice that type of fee arrangement is not as typical as in some other jurisdictions.

Japan currently has no legislation or regulations prohibiting third-party funding and it is, therefore, considered permissible. In recent years third-party funding has successfully been employed in shareholder litigation.

Court costs and stamp duties are set by statute and depend upon the amount in controversy. In joint proceedings, the court costs and other costs and fees are generally shared among the group.

Proving Standing to Pursue Claims

To commence litigation as a plaintiff in a civil suit in Japan, a party must have legal standing. Proving legal standing in Japan requires meeting the conditions outlined in either Article 28 or 29 of the Code of Civil Procedure. As a result, Japanese courts are particularly interested in certain details about investors, such as the type of legal entity they are, where they are incorporated, their status under the laws of their home country, and who represents or manages them.

Generally, individuals or legal entities based in a foreign country are eligible to be a party if they can provide proof of their legal existence in that country (such as a certificate of incorporation or registration from the relevant authority). Other types of entities, like associations or foundations, often need to meet additional requirements to demonstrate their eligibility to participate in the case.

In shareholder litigation, courts also examine whether the investor purchased and held shares through a custodian or another intermediary, and the nature of the relationship between the investor and the intermediary. Recently, courts have focused on whether the shares were held in trust with a custodian and on determining whether the custodian or the investor has the legal standing to pursue the claim. As of this writing, this issue of standing is being decided by several courts, including one case before the appellate court.

Investors interested in pursuing legal action in Japan should seek proper legal guidance and ensure they have sufficient evidence in advance to prove they meet the legal standing requirements to proceed with their claims.

Overview of Japan's Securities Laws

Shareholders can typically bring actions in Japan for allegations of violations of the FIEA and for violations of the Japanese Civil Code ("**JCC**"). The FIEA is particularly designed to cover accounting fraud cases but also covers prospectus liability and other material misrepresentations, omissions, or false statements made by a company. Litigation under the FIEA allows investors to bring a claim in Japanese civil courts for damages that result from false material statements or material omissions made in quarterly or annual reports.

Unlike claims in the United States or many other countries, investors do not need to prove either scienter (that the company made deliberate misstatements or omissions) or reliance on the misstatements. That makes claims under the FIEA very attractive and strong. Article 21 of the FIEA provides that when an annual or quarterly report "contains any false statement on important matters or lacks a statement on important matters that should be stated or on a material fact that is necessary for avoiding misunderstanding [the company] shall be held liable to compensate damage sustained by persons who have acquired the Securities issued by [the company] without knowing of the existence of the fake statement or lack of such statement." Essentially, under Article 21, investors may successfully assert a claim by furnishing proof of (1) falsity, (2) materiality, and (3) loss causation.

The JCC provides for general tort liability. Article 709 is a general tort provision, stating that "[a] person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence." A plaintiff suing under Article 709 must demonstrate (1) the defendant's intentional or negligent wrongdoing (i.e., the illegal act), and (2) that the wrongdoing caused damage to the plaintiff (i.e., loss causation). The Japanese Supreme Court has held that investors who have incurred losses due to false statements or misrepresentations made by issuers may rely upon Article 709 to recover those losses.

Collective Securities Litigation in Japan

Japan does not currently have a class action system, but it does have two procedural mechanisms that allow for group litigation: joinder and representative actions. Joinder and representative actions do not allow for actions of the magnitude of the typical U.S. class action, but they do allow for a wider array of group actions. Japan also allows for consumer group actions, but those actions may only be brought by qualified consumer groups and are not relevant for investors seeking to bring a securities fraud action.

Joinder of Claims

Joinder of claims proceedings are the predominant method used to bring multiparty actions in Japan. Joinder is a procedure that allows for the consolidation of claims between several parties into one single combined action. The Japanese Code of Civil Procedure provides that when the rights or liabilities for an action are common to more than one person or when actions are based on the same facts or laws, then the individuals may join together as co-litigants to either pursue or defend against a claim. Each party must give its authorization to be part of the proceeding. Typically, this type of group action only involves a small number of parties, but it is not unheard of to have several hundred people join together in an action. An action in joinder can only be commenced when it can be demonstrated that each individual lawsuit is economically viable.

In joinder, a limited number of lawyers will typically act jointly for the parties. In practice, the co-litigants will form one group and hire common lawyer(s). Documents appointing a lawyer have to be executed by each party. Because the lawyers are representatives of all parties, each individual party is not required to appear in court. This multiparty action is maintained at the discretion of the court and the court can decide at any point to separate the claims if it decides that there are significant dissimilarities in the proceeding. Even if the court does not elect to separate the claims, there is no guarantee that the judgment will be the same for each party joined as a co-litigant. Even after joining in a multiparty claim, each party retains a right to settle their individual claim, withdraw, or appeal a judgment independently of the other co-litigants. Throughout the litigation procedure, each co-litigant's actions are seen as independent of and do not affect the other co-litigants.

Litigation costs per person decrease with joinder because the court fees are based on the amount in controversy. As an example: an individual claimant with alleged damages of 1 million yen would pay court fees in the amount of 10,000 yen (inclusive of the stamp duty). In comparison, if 100 people joined as co-litigants and each alleged 1 million yen in damages, for a total of 100 million yen in damages, the court fee would only be a total of 320,000 yen, or 3,200 yen per person.

Parties are also able to share all other litigation-related costs including expert and witness fees, postage, and attorneys' fees.

Representative Actions

The Japanese Code of Civil Procedure provides that a number of individuals appoint one or more representatives to commence a proceeding on behalf of everyone. The group of people sharing the representative must share common interests. According to precedent, common interests include: (1) where the purposes, obligations, or liabilities of an action are common to more than one person; and (2) where the claim or defense is based on the same facts or laws. The representative party must be chosen from amongst the parties with a shared claim or defense. Once parties have chosen a representative, the parties will be withdrawn from the proceedings, but the judgment will still pertain to them. Representatives have to be explicitly authorized by each represented party. Parties do not, however, actually have to initiate an individual complaint in court. Identifying and acquiring authorizations from potential parties limits the number of parties that can participate. Once the representative has been selected, the representative has the right to select a lawyer.

A new party can join the representative action if he can demonstrate that he shares a common interest in the claim. There are no restrictions or limitations on a party's ability to either withdraw from the group action or change the representative.

A representative is free to withdraw from litigation or enter into a settlement agreement at their discretion. The decision or settlement agreement will, however, be shared by all represented parties.

Statute of Limitations

The statute of limitations for claims in Japan often varies depending on the type of case. The limitations periods for claims under Article 21 of the FIEA and Article 709 of the JCC are governed by the specific time limits set forth in the texts of the FIEA and JCC, respectively.

Claims under Article 21 of the FIEA must be made within two (2) years of the date when the investor knew or was capable of knowing that the quarterly or annual report omitted material information or contained false material statements. The claim must also be made within five (5) years of the day when the annual or quarterly report was published.

Claims pursuant to Article 709 of the JCC, must be made either three (3) years from the time when a claimant becomes aware of the claim and the identity of the perpetrator, or twenty (20) years from the time of the tortious act, whichever is sooner.

CASE STUDY

OLYMPUS

SECURITIES FRAUD LITIGATION

In 2011, former Olympus CEO and whistleblower Michael Woodford, who had been appointed to the position just months earlier in April, began raising concerns about the company's accounting practices. He discovered that Olympus may have misrepresented its financial reports, falsely inflating the amounts of its consolidated net assets. On October 11, 2011, Woodford emailed the other directors, questioning the accuracy of the financial disclosures. Just three days later, on October 14, he was abruptly removed from his position by a board resolution. Following his dismissal, Woodford went public with the information, alerting the media. Initially, Olympus denied the allegations, but on November 8, the company admitted to concealing significant investment losses for nearly two decades by falsely attributing them to the costs of certain M&A transactions.

On December 6, 2011, Olympus released the findings of an independent third-party committee, which had been commissioned on November 1. The report confirmed significant accounting discrepancies and revealed that the actual investment losses exceeded 110 billion yen. On December 14, Olympus amended its previous annual and quarterly reports and made them public. Following the disclosure of the false statements, Olympus's common stock price plummeted from 2,482 yen on October 13, 2011, to 734 yen on November 8, and to 1,041 yen on December 15, 2011. At its peak, this represented a loss of 1,784 yen per share, or a 66% decline in shareholder value.

Investors who had purchased, sold, and held shares of Olympus common suffered losses tied to Olympus's accounting scandal commenced litigation in Japan. Olympus disclosed that more than 150 investors filed complaints (either individually or jointly with other similarly situated investors). The complaints alleged claims against Olympus under §21 of the Financial Instruments & Exchange Act (FIEA), which holds that if an annual or quarterly report "contains any false statement on important matters or lacks a statement on important matters that should be stated, or omits a material fact necessary to avoid misunderstanding," the company is liable for damages sustained by individuals who acquired its securities without knowledge of the false or missing information. Additionally, claims were brought under §709 of the Japanese Civil Code (JCC), which provides that a person who intentionally or negligently infringes on the rights or legally protected interests of others is liable to compensate for any resulting damages. Investors argued that Olympus's prolonged cover-up of its significant investment losses was material information required by Japanese law to be disclosed to the market, allowing investors to properly assess the financial risks when deciding to invest in the company.

PROCEEDINGS

Based on Olympus' disclosures, several groups of investors commenced litigation by filing complaints with the Tokyo District Court and the Osaka District Court. The main issues in these cases were causation and damages, as Olympus had already admitted that several of its quarterly and annual reports contained false statements, making liability undisputed.

On March 27, 2015, the Tokyo District Court ruled in favor of a group of investors seeking 111 million yen in damages, ordering Olympus to pay approximately 48 million yen under §21 of the FIEA. In another case, on June 29, 2016, the Osaka High Court found that Olympus was liable to pay another group of investors about 20 million yen under §709 of the JCC.

Other investor cases were resolved through settlements. For instance, in March 2015, following a two-day mediation, Olympus paid 11 billion yen to a group of 86 non-Japanese institutional investors represented by KTMC and several other U.S.-based law firms, working alongside local Japanese counsel. At the time, this was one of the largest securities-fraud recoveries in Japan. In July 2016, Olympus paid 19 billion yen to six Japanese trust banks that had claimed approximately 28 billion yen in damages. In December 2016, Olympus paid 4 billion yen to 61 foreign investors who had sought around 9 billion

THE

NETHERLANDS

At a Glance…

Legal System	Civil Law
Statute of Limitations	A claim for damages is subject to a limitation period of five years (article 3:310 of the Dutch Civil Code). The five-year limitation period starts running when the claimant becomes aware of both the damage and the responsible party. However, claims must also be brought within 20 years after the event that causes the damage. These limitations can be interrupted by, among other things, serving a written notice on the defendant. In collective actions, a representative organization acting can also interrupt the limitation period.
Discovery	There is no U.S.-style procedure for pre-trial discovery or disclosure. However, there are various ways to collect evidence. A claimant can initiate disclosure proceedings on the basis of article 843a of the DCCP, in which a claimant seeks an order from the court that the defendant must disclose certain written documents. Evidence can also be collected by engaging an expert or hearing witnesses. Initiating Inquiry Proceedings before the Enterprise Chamber can sometimes be used in shareholder cases to obtain evidence that can later be used in follow-on damages claims.
Mechanisms for Collective Redress	• WAMCA – allows a representative organization to claim monetary damages in a collective action. • Group actions – injured parties assign their claim to or mandate a special purpose vehicle. • WCAM – requires voluntary settlement between the parties, but then can be used to make the settlement binding and enforceable against the parties (and absent class members).
"Loser Pays" System?	The Netherlands has a "loser pays" system. However, the successful party is entitled to recover only a small portion of the actual costs.
Opt-In or Opt-Out	• An opt-out regime applies to Dutch class members in WAMCA proceedings. An opt-in regime generally applies to non-Dutch class members, which means that non-Dutch class members must opt-in if they wish to be bound by the outcome of proceedings. However, the Dutch court can decide that the opt-out regime also applies to non-Dutch class members, if requested by a party. • Settlements reached under the WCAM are opt-out proceedings. • Group actions are opt-in.
Third Party Litigation Funding	Third party litigation funding is allowed in the Netherlands, subject to certain regulations.
Important Considerations for Investors	The Netherlands has a claimant-friendly climate for (international) securities claims.

Background

In the immediate aftermath of the *Morrison* decision, many attorneys and commentators predicted that the Netherlands would become a sort of haven for global securities class actions because of the Dutch procedural mechanism known as the Dutch Act on the Collective Settlement of Mass Claims (*Wet Collectieve Afwikkeling Massaschade*, or "**WCAM**"). The WCAM allows parties to a dispute to negotiate a settlement and then apply to the Amsterdam Court of Appeals to have the settlement declared legally binding on all similarly situated members (the "**class**") who did not opt-out.

Building on the foundation laid by the WCAM, the Netherlands further expanded its framework for collective actions with the introduction of a new procedural mechanism in 2020: the Act on Collective Settlement of Mass Damages Claims (*Wet afwikkeling massaschade in collectieve actie*, or "**WAMCA"**). The WAMCA introduces the possibility for representative organizations to claim damages in a class action. The court can then award damages in its judgment, which was only previously possible: (1) if the parties have reached a collective settlement under the WCAM; (2) by initiating claims for individual damages after the representative organization had obtained a declaratory judgement under 3:305a (old) of the Dutch Civil Code ("**DCC**"); or (3) in a case involving the bundling of claims, in which injured parties assign or mandate a special purpose vehicle ("**SPV**").

The WAMCA applies to collective actions that started on or after January 1, 2020, and that relate to events that took place on or after November 15, 2016.

The WCAM, WAMCA (both discussed in more detail below), and the bundling of claims, are effective mechanisms for investors seeking monetary relief on a class-wide basis. The introduction of the WAMCA has further enhanced the Netherlands' attractiveness as a jurisdiction for filing collective claims. However, the WAMCA may not always be the ideal mechanism for shareholders in every case due to its strict admissibility criteria.

That said, depending on the specific circumstances and available collective redress mechanisms, the Netherlands can still be an optimal choice for a group of investors pursuing legal action.

Legal System Generally

The Netherlands is a civil law country, which means actions at law typically arise under the DCC (e.g., an action arises when a person commits an act prohibited by the DCC), other statutes and regulations, or under a dispute stemming from a contractual agreement between the parties. Unlike other civil law countries, the Dutch legal process is adversarial in nature and not inquisitorial. Judges play a more passive role and the parties (if self-representing, which is allowed in certain disputes) or their attorneys are responsible for presenting the evidence and arguing in support of their position. There is no trial by jury. Civil cases are decided by one appointed judge or a panel of three appointed judges, depending on the complexity of the case.

The Netherlands is divided into eleven districts with eleven district courts. Civil proceedings are typically brought before the judge(s) in the district where there is jurisdiction. Generally, jurisdiction is conferred depending on the circumstances and may be based on things like, *inter alia*, the place of residence of the defendant, an agreement between the parties, or the type of contract. There are certain courts that have exclusive jurisdiction over particular types of actions. For example, settlement requests stemming from the WCAM are the exclusive jurisdiction of the Amsterdam Court of Appeals.

Decisions of the district courts may be appealed to one of four courts of appeals. The court of appeals will review both the factual and legal findings of the district court. On appeal, a three-judge panel will review the case. After the judgment of the court of appeals is issued, a party may appeal to the Supreme Court. The Supreme Court is a court of cassation and it will only review the legal interpretation of the court of appeals and not any of the facts in dispute.

Parties can also submit a matter to the Netherlands Commercial Court ("**NCC**") based in Amsterdam in cases where: (1) the Amsterdam District Court or Amsterdam Court of Appeals has jurisdiction; (2) the parties have expressly agreed in writing that proceedings will be in English before the NCC; (3) the action is a civil or commercial matter within the parties' autonomy; and (4) the matter concerns an international dispute.

Discovery

There is no real procedure for pre-trial discovery as there is in the United States. Parties may voluntarily produce documentation in support of their position or the court may order the parties to provide certain documents. If a party refuses to comply with the court's order, a consequence may be that the court either "draws any conclusions it deems appropriate" or shifts the burden of proof to the non-complying party. Pre-judgment attachments are allowed and can be obtained relatively easy. It is an effective tool to preserve evidence. However, "fishing expeditions" are not allowed and generally, requests to the court to compel the production of documents are limited to specific documents that are already known to exist.

The Netherlands does not have depositions like those used in the United States. In a witness examination in Dutch proceedings, the witness is in principle examined by the judge. Both lawyers and parties involved may ask the witness questions, however, there is no real cross-examination. One may also choose to bring in an expert at the hearing, which can answer questions from the court.

Inquiry Proceedings

Detailed information concerning facts and circumstances of a potential case may also be learned via Inquiry Proceedings (*enquêteprocedure*). Inquiry Proceedings are proceedings that are used to investigate the affairs and course of action of a company for potential mismanagement. According to the DCC, the company itself, labor unions, the public prosecutor, members of an association, a cooperative, or a mutual insurance company, and shareholders/depositary receipt holders who meet the criteria laid down in article 2:346 DCC have the right to initiate Inquiry Proceedings. This right also belongs to those to whom the authority has been granted to do so by the articles of association of or by agreement with the company.

Inquiry Proceedings can only be commenced before the Enterprise Chamber (which has a panel of five judges), an independent division within The Amsterdam Court of Appeals (*Ondernemingskamer*), after submitting an application. The application is a formal document that must contain specific information, including the name and address of the company, a description of what information is sought, and the foundation for the inquiry. The applicant is free to attach any documents to the application in support of the request. Upon receiving the application, if there are well-founded reasons to doubt that a company's policies or conduct are in conformity with the law, the Enterprise Chamber may first order an inquiry and appoint an inspector. The Enterprise Chamber can also order immediate temporary measures, such as the suspension of a director, the appointment of a temporary director or supervisory director with special authorities, suspension of a corporate resolution, suspension of voting powers, change of authorities of the company's bodies, or transfer of shares.

Investigators conducting the investigation are typically scholars, lawyers, or auditors, and they investigate and create a report on the policies and conduct of the company and, if applicable, the responsible individual(s). That report provides a foundation for either the company or its shareholders to address the problems independently or for the Enterprise Chamber to order specific measures including, but not limited to, the annulment of resolutions, suspension or dismissal of board members, and the temporary appointment of new board members.

The Enterprise Chamber has no authority to determine liability and award damages because determining liability and awarding damages is left to the courts of first instance. However, the reported findings from the proceeding may be used as evidence in subsequent litigation to establish liability and damages. The report's findings are not binding on the court of first instance, but courts typically consider it persuasive evidence.

Costs of Litigation and Attorneys' Fees

Lawyers' and experts' fees are the primary costs in civil litigation. The Netherlands has a "loser pays" system in which the successful party is entitled to recover both attorneys' fees and legal expenses that were reasonably incurred. Generally, the attorneys' fees awarded by the court represent only a small portion of the actual costs because the court utilizes fixed figures based upon factors such as the amount in dispute and the number of court-related activities that occurred. Dutch attorneys are prohibited by the rules of ethics from taking cases on a contingency fee basis that depend entirely on the outcome of the case (except in case of personal injury claims). Court fees are also capped. The costs of litigation in the Netherlands are therefore typically lower than in other jurisdictions, especially compared to common law jurisdictions. However, the WAMCA contains a provision allowing for higher adverse costs if a party can demonstrate that the claim was unfounded and the principles of reasonableness and fairness do not preclude it.

Litigation is typically funded through legal insurance or litigation funding. In collective actions, representative organizations may also fund litigation through membership fees, donations and crowdfunding. In the WCAM context, attorneys' fees and other court costs are frequently negotiated with defendants as part of the settlement terms, or foundation members agree in advance with a litigation funder to pay a portion of any recovery in exchange for the litigation funder covering all costs and expenses incurred as part of the litigation.

Third Party Litigation Funding

Third party litigation funding is allowed in the Netherlands. Proceedings in which international institutional investors seek compensation from a Dutch listed company in connection with securities fraud are often financed by third party litigation funders.

Litigation funding in collective actions is regulated under Article 3:305a of the Dutch Civil Code (DCC), which includes provisions governing the relationship between foundations and third party funders. Additionally, as detailed further below, WAMCA proceedings have introduced stricter criteria for reviewing third party litigation funding agreements. At the European level, the European Parliament has also published a proposal to regulate third party litigation funders.

Despite the regulations on third party litigation funding, investors should not be discouraged from using litigation funding in WAMCA proceedings in the Netherlands. Experienced Dutch counsel can help navigate the regulations and ensure that any funding is in compliance with the law.

Overview of Securities Laws

There are five primary laws that regulate the Dutch securities market: (1) the Financial Supervision Act (*Wet op het financieel toezicht*, or "**Wft**"); (2) the Act on the Supervision of Financial reporting (*Wet toezicht financiële verslaggeving*); (3) the Dutch Securities Depositary Act, (*Wet giraal effectenverkeer*);[1] (4) the Act on Prevention of Money Laundering and Financing of Terrorism (*Wet ter voorkoming van Witwassen en Financieren van Terrorisme*); and (5) the Public Offers Decision (*Besluit Openbare Biedingen*).

The Wft contains many provisions similar to provisions in the United States securities laws. For instance, listed companies in the Netherlands are subject to a continuous disclosure obligation,

[1] This particular law relates to the book-entry and delivery of securities. As such, it primarily relates to post-trade clearing houses or clearing brokers like Euroclear.

requiring them to disclose price-sensitive information or any information likely to materially impact the price (including non-public facts or information). Additionally, there is liability for the contents of a prospectus and restrictions on insider trading.[2] Breaches of the Dutch securities laws, and more specifically the Wft, can lead to a company being criminally and administratively sanctioned.

Generally, a company's liability is based on general tort law (article 6:162 DCC) but errors, defaults, or unlawful acts that are breaches of the Wft and any of its related regulations also give rise to causes of action. Under Dutch tort law, issuers can be liable for misstatements made in a prospectus, periodic reports, and any ad hoc information the company published. Article 6:194 DCC provides that anyone who issues a statement about products or services is acting wrongfully towards another party if the statement is misleading in any way. In pursuing a claim for a false or misleading statement, there is no requirement that investors prove scienter. That is, the investors do not need to demonstrate that the company acted with any intent or knowledge of the wrongdoing. Dutch law presumes that if misstatements were made in any of the company's filings, the directors, executive management, and board members are responsible for them, and the burden is on the defendant to prove that the statements are not attributable to him.

In order to pursue a viable claim, Dutch Law requires proof of causation. Causation in this context requires both "cause in fact" (that the damages occurred as a result of the defendant's action; in the securities context, that means proving that the share price at the time of purchase or sale was inflated as a result of defendant's actions) and legal cause (in the securities context, that inquiry typically centers around reliance: did the investor rely upon the defendant's misstatement or omission in making its investment decision?).

Dutch law does not require an investor to show specific reliance. Instead, the Netherlands has adopted a theory that is similar to the United States' "fraud-on-the-market" doctrine. In the Dutch Supreme Court's notable decision in the *World Online* case, the Court acknowledged that savvy investors are guided by a multitude of sources of information and that proving reliance or causation from a misstatement or omission to a specific investment decision could be impracticable. In recognizing this, the court established a presumption of causation between the misleading statement and the investment decision. As a result, there is no direct proof of reliance required and it may be sufficient for an investor to claim that he would have bought the shares at a lower price.

Collective Securities Litigation in the Netherlands

In the Netherlands, there are different mechanisms that allow for the resolution of collective securities claims: (1) the 3:305a (old) DCC regime; (2) the collective settlement regime under the WCAM; (3) the bundling of claims, in which injured parties assign or mandate a SPV; and (4) the WAMCA. Although sometimes argued differently, none of these are akin to the U.S.-style class action. The 3:305a (old) DCC regime can be used to request a declaratory judgment on liability or an injunction, however, it cannot be used to pursue claims for damages. The WCAM regime requires the voluntary settlement between the parties, and the WAMCA regime, in which it is possible to claim damages, is subject to strict admissibility criteria. What follows is an explanation of the WCAM and the WAMCA mechanisms.

The WCAM

The WCAM is an act that entered into force on July 27, 2005. The WCAM was designed solely for the purpose of making settlement agreements binding and enforceable against parties (and absent class members). In order to fall under the purview of the act, the settlement must deal with either damages caused by a singular incident or a series of similar

[2] Including the prospectus requirements outlined in the EU Prospectus Regulation (Regulation (EU) 2017/1129).

incidents. This act does not contain any mechanism by which a court can determine liability. If one party wishes to incentivize another party to negotiate a settlement, they must use either the collective action proceedings under article 3:305a (old) DCC (if applicable), the WAMCA, the bundling of claims (in which injured parties assign or mandate a SPV), individual damage claims, publicity, litigation in another country, or some other means.

Once a settlement has been reached, the representative organization submits the settlement to the Amsterdam Court of Appeals and seeks to have the agreement declared binding and enforceable upon all interested persons (that is those that would be part of the class). The class members must have all suffered a loss as a result of the same facts or circumstances. Once the Amsterdam Court of Appeals receives the settlement agreement and application to declare it binding, it sets a deadline for class members to object to the terms of the settlement if any wish to do so. The Amsterdam Court of Appeals then reviews the application and renders a decision. If the court approves the settlement, the settlement is binding and enforceable against all class members (unless a class member took steps to "opt-out" of the class). Any class member who does not choose to opt out is eligible to share in any proceeds from the settlement, and, even if they chose not to pursue their portion of the proceeds, they are prohibited from bringing or continuing any legal action against the defendant that concerns the same facts or circumstances.

CASE STUDIES

Shell

A securities case with a defined class of 500,000 worldwide (except for U.S.-based) investors. The case concerned financial damages suffered by investors as a result of misleading information by Shell in relation to certain of its oil and gas reserves in 2004. The settlement of $352.6 million was approved in 2009 and was declared binding on all non-U.S. investors.

Vedior

A securities action on behalf of 2,000 members who sold their stock on the day rumors started to spread about merger talks between Vedior and Randstad. The Dutch Association of Shareholders, also known as the Vereniging van Effectenbezitters, or VEB, alleged that Vedior failed to timely inform the market of the merger talks and, as a result, there were investors who were denied the benefit of the higher share price that was available after the news was disclosed. On July 15, 2009, the court declared the €4.25 million settlement agreement binding.

CONVERIUM CAPITAL

A securities action with a defined class of about 12,000 members resident in the Netherlands, the U.K., and Switzerland. This action was brought by two associations in the Netherlands over alleged misrepresentations made by two Swiss Companies (Scor Holding AG and Zurich Financial Services, Ltd.) in relation to their financial situations. The settlement of $58.4 million was approved in 2012.

ageas

On July 13, 2018, the Amsterdam Court of Appeals approved the €1.3 billion ($1.5 billion) settlement of a series of shareholder claims against Fortis in the wake of the global financial crisis. The settlement had first been announced in March 2016 by Ageas, Fortis's successor.

STEINHOFF INTERNATIONAL HOLDINGS N.V.

On September 23, 2021, the Amsterdam District Court approved a global settlement between institutional investors, including the South African civil servants' pension fund PIC and Steinhoff. On February 15, 2022, the South African High Court also approved the global settlement plan. The settlement concerned Steinhoff's misrepresentation of financial affairs, and amounted to €1.4 billion ($1.6 billion). This is the second largest settlement against a European issuer accused of securities fraud. The settlement was not reached through the WCAM, but through (1) restructuring proceedings (suspension of payments) in the Netherlands under the newly enacted law *Wet homologatie onderhands akkoord* and (2) a scheme of arrangement under section 55 of the South African Companies Act to implement the restructuring in South Africa.

The WAMCA

The WAMCA has been in place since January 1, 2020, and applies to all collective actions commenced on or after January 1, 2020, that relate to events that took place on or after November 15, 2016. There is no limitation on the type of claims (e.g., consumer, shareholder, or environmental) that can be pursued under this new mechanism.

The WAMCA provides that a representative organization may pursue a collective action to establish the liability of a defendant, to obtain other declaratory relief, or claim damages, as long as the claim is to protect "similar interests" of its members or other persons. A representative organization may not have its own direct financial interest in the claim—its interests in pursuing the claim can be merely to further objectives in its governing documents (e.g., seeking to defend the rights of its members).

A representative organization includes either a foundation (*stichting*) or an association (*vereniging*). A foundation is a legal entity that has no existing or set members and that may be set up solely for the purpose of pursuing a collective action or settlement (e.g., foundations were established in both the *Fortis* and *Shell* securities cases in order to pursue collective remedies). An association, on the other hand, is a legal entity which has members and aims to achieve a specific purpose (e.g., the *VEB*). Both foundations and associations must be not-for-profit legal entities, must be legally independent, and subjected to internal oversight of its governance. Directors involved in the establishment of the foundation or association and their successors are not allowed to have a direct or indirect profit motive that is realized through the foundation or association.

To pursue a collective action, the representative organization files a complaint to establish the liability of a defendant, or seek damages or other declaratory relief. Since the WAMCA allows for collective damages, the representative organization is subject to stricter admissibility requirements. The WAMCA introduces a system in which these admissibility criteria are decided upon first. Only after a representative organization is deemed admissible in terms of the WAMCA will the merits of the case be judged.

Admissibility criteria for actions under the WAMCA include, *inter alia*:

1. The representative organization must uphold the interests of the injured parties according to its articles of association.
2. The collective action must serve to protect similar interests. This means that it must be possible to combine the interests that the legal actions seek to protect.
3. The representative organization needs to meet strict quality requirements regarding governance and financing so that the interests of the injured parties are sufficiently safeguarded by the representative organization.
4. The safeguard requirement also requires that the representative organization is "sufficiently representative in terms of its constituency."
5. The directors involved in the formation of the representative organization, and their successors, may not have a direct or indirect profit motive that is realized through the representative organization.
6. The representative organization must have attempted negotiations or consultations with the defendant prior to initiating legal action, with a minimum period of two weeks from the defendant's receipt of the letter requesting consultations and stating the claim.
7. There must be a "sufficiently close connection" with the jurisdiction of the Netherlands.

These regulations aim to ensure an effective and fair process in representing collective interests through organizational entities. However, they are also quite strict and therefore a collective action under the

WAMCA might be riskier (financially and procedurally).

As mentioned in the Discovery section, if Inquiry Proceedings were pursued, the representative organization may use evidence and the report of findings from the Inquiry Proceedings as evidence of a defendant's wrongdoing.

Where there are multiple competing proceedings initiated by different representative organizations under the WAMCA, the court appoints the one it deems most suitable as the lead representative organization for all of the defined class members. The lead representative organization needs to demonstrate expertise, has a sufficient number of claimants supporting them, and needs to be sufficiently capitalized.

Most cases under the WAMCA are based on an "opt-out" mechanism when it concerns Dutch class members. Foreign class members in general need to "opt-in" to the collective action.

When the WAMCA was initially proposed, there were concerns about whether it would introduce U.S.-style class actions in The Netherlands. However, in the nearly five years since its implementation, it appears that this has not been the case. While the WAMCA does permit collective damage claims, the somewhat stringent admissibility requirements have proven to be a hurdle for successfully pursuing claims. Parties can now effectively claim damages from other parties without their voluntary cooperation, as was previously required under the WAMCA settlement procedure.

Advantages of Securities Litigation in the Netherlands

The Netherlands has now been a popular jurisdiction for pursuing international (collective) security claims for over fifteen years. The main factors contributing to the success of securities litigation in the Netherlands, include:

- The low costs of initiating litigation and the low adverse costs in the Netherlands.
- The plaintiff friendly climate.
- The (relative) speed of the proceedings.
- The option to conduct proceedings in English.
- The fact that Dutch courts often find international jurisdiction over non-Dutch parties.
- Dutch law provides for different mechanisms for collective redress and collective settlement proceedings.
- The use of third party litigation funding.

SOUTH AFRICA

At a Glance…

Legal System	Mixed (Civil and Common Law)
Statute of Limitations	Under the Companies Act 2008, no more than three years after the act or omission causing the complaint, or if it was a continuous practice, three years after the practice ceased. The statute of limitations for claims under the Financial Markets Act 2012 is not explicitly defined and may vary depending on the specific cause of action. However, it is generally understood to be three years, aligned with similar provisions in other financial regulations. The limitation period for tort claims related to misrepresentation can vary depending on the jurisdiction and the specific circumstances of the case. It is generally around three years from the date the misrepresentation was discovered or reasonably should have been discovered, but it could be longer in cases of fraud or concealment.
Discovery	More limited procedure than U.S. discovery processes. Parties exchange sworn affidavits detailing all relevant documents and evidence in their possession and any evidence not disclosed in the affidavits are typically inadmissible at trial. There are no depositions in South African discovery.
Mechanisms for Collective Redress	South Africa's legal framework does not currently have a comprehensive class action regime for securities fraud claims, although class actions are permissible in other areas of law. The availability and specific procedures for such actions are still evolving through court decisions.
"Loser Pays" System?	Yes – however, the specific amount of attorneys' fees and other costs awarded is determined by the court and may not cover the full expenses incurred by the prevailing party.
Opt-In or Opt-Out	The procedural framework for class actions in South Africa is still developing, with ongoing uncertainty regarding whether an opt-in or opt-out model will ultimately prevail.
Third Party Litigation Funding	Third party funding is allowed, as is adverse cost insurance. Contingency fees are also permitted, subject to certain guidelines.
Important Considerations For Investors	Class actions for securities fraud, particularly those involving pure economic loss, face significant legal hurdles and are unlikely to be successful.

Legal System Generally

South Africa has a mixed legal system that incorporates elements of both civil and common law. The courts in South Africa include: various specialized courts (such as tax courts, divorce courts, etc.); Magistrates' Courts (which are the court of first instance for civil cases with a value of less than R200,000 and less serious criminal offenses); High Courts (which are the court of first instance for serious criminal offenses, civil matters with a value greater than R200,000, and matters involving a person's status, as well as the court of first appeal for cases from the Magistrates' Courts); the Supreme Court of Appeal (which exclusively hears appeals from the High Courts and serves as the final court of appeal for all non-constitutional matters); and the Constitutional Court (the highest court, which possesses sole authority to adjudicate the constitutionality of laws and decisions rendered by lower courts).

High Court cases of original jurisdiction are typically heard by a single judge, while appellate cases require a panel of at least two judges. At the Supreme Court of Appeal, panels of three to five judges decide all cases by a simple majority. The Constitutional Court is comprised of eleven judges who hear and decide all cases brought before the court.

High Court proceedings are public. The court has discretion to make certain proceedings confidential, but in practice, this is rarely done. All pleadings and documents filed during the course of the proceedings are deemed public.

Proceedings are generally adversarial with all parties represented by counsel. Judges may question witnesses and counsel, but their role is adjudicative and counsel bears the primary responsibility for presenting arguments and evidence to the court.

Discovery

South Africa's document production and evidentiary discovery process differs significantly from that of the United States and other jurisdictions that allow for broader fact-finding. Parties to litigation may make requests for documents and all parties are required to provide a sworn affidavit detailing all relevant documentation and evidence in their possession (or that were previously in the party's possession) relating to the action. Following this disclosure, opposing parties may inspect and photocopy any listed items. Notably, absent special circumstances and court approval, any evidence not included in the discovery affidavit is generally inadmissible at trial. Failure by a party to participate in the discovery process or produce relevant evidence can result in a default judgment against the non-compliant party. However, certain categories of documents deemed privileged (e.g., attorney/client privilege, marital privilege, privilege against self-incrimination, etc.) need not be produced, but must be listed in the affidavit along with the basis for claiming the privilege. Unlike many other jurisdictions, depositions are not part of South Africa's discovery process.

Costs of Litigation and Attorneys' Fees

Attorneys' fees are negotiated between the attorney and the client, but are most frequently based on an hourly rate. Contingency fees are permitted subject to guidelines outlined by the Law Society and the Contingency Fees Act No. 66 of 1997. Upon initiating litigation, parties must pay court fees based on a set schedule, determined by the amount in dispute. Third party funding is allowed as is adverse cost insurance.

South Africa is a "loser pays" system and, as a general rule, the prevailing party is entitled to reimbursement of their legal costs. However, the court determines the amount of attorneys' fees and other costs awarded, which may not cover the full expenses incurred by the prevailing party. Additionally, the court has discretion to award costs or adjust the amount of any award based on various factors, including the merits of the case, the proportion of arguments won or lost, and the conduct of the parties throughout the proceedings.

Class Actions in South Africa

Section 38(c) of South Africa's Constitution expressly allows for the use of class actions. The Constitution, however, does not set out any guidelines or procedures for how a class action is to proceed. The procedures and requirements governing class actions have, therefore, been established by case precedent.

Class actions have most frequently been used in South Africa in order to enforce constitutional rights. Class actions concerning other statutory or contractual rights are very much in their infancy. The rules of civil procedure in the Magistrates' courts, the High Courts, and the Supreme Court of Appeal do not include any guidelines or instructions for class actions. Given the lack of clear procedures and limited case precedent, it is uncertain whether class actions in South Africa will follow an opt-out or opt-in procedure.

In the limited decisions available, South African courts have taken a broad approach to defining the class and determining who has standing to assert the claims on behalf of the class. Some judges have determined that a class action can only be commenced when (1) the class is so large that utilizing joinder for all would-be class members would be impractical, (2) there are common questions of law and fact to be decided on behalf of all class members, (3) the claims of the applicant(s) are typical of the claims of other class members, and (4) the applicant(s) and their legal counsel will adequately represent the class. However, the rules of civil procedure of the Magistrates' Courts, the High Courts, and the Supreme Court of Appeal provide that joinder is the only mechanism for an interested party to join an existing case. There is no existing procedural step that allows the court to formally recognize a class and allow a representative to litigate on behalf of all those who have not formally joined the action. Accordingly, unless a judge independently decides to recognize a class, all would-be class members effectively need to opt-in and be formally joined to the action.

If a judge does decide to recognize a class, notice must be served on all would-be class members in order to inform them that they will be bound by the outcome of the case, unless they choose to opt-out. However, as with other aspects of class action procedures in South Africa, there are no established rules or guidelines regarding the specific form, timing, or scope of this required notice.

Overview of South Africa's Securities Laws

South Africa's securities are primarily regulated by the Companies Act 2008 ("Companies Act") and the Financial Markets Act 2012 ("FMA"). The Companies Act governs continuous disclosure obligations, prospectuses, and imposes civil liability for false statements or omissions of material information that may affect the value of a security or create a false appearance of demand for a security. The FMA contains provisions regarding insider trading, market manipulation, and false or deceptive trade practices, providing avenues for both criminal and civil actions against those who violate its provisions.

Investors can also potentially pursue actions for misrepresentations made by companies as a common law tort claim without reference to a specific statutory provision. In order to prove a tort claim for misrepresentation, an investor must prove that the company (or individual) committed an act (e.g., a misrepresentation or omission) due to either negligence or intent, that was wrongful, and that was the factual and legal cause of loss or damages that were suffered by the investor(s). In practice proving all of these elements can be difficult. It appears that investors could be required to prove that reliance on particular statements (or lack of statements) caused them to make certain investment decisions that resulted in a loss. It does not appear that South African law currently recognizes a "fraud-on-the-market" presumption of reliance like the United States. It also can be complicated to demonstrate or calculate the loss that results from any misrepresentations or omissions.

Collective Securities Litigation in South Africa

Although South Africa's securities laws provide avenues for investors to seek redress for misrepresentations or misleading disclosures, the viability of collective securities litigation, particularly in the context of securities fraud, remains limited. While there was previously some uncertainty surrounding this issue, the landmark case of *De Bruyn v Steinhoff International Holdings N.V. and Others (29290/2018) [2020] ZAGPJHC 145*, the first shareholder class action brought for certification before South African courts, has provided significant clarity, solidifying the position that class actions for pure economic loss are unlikely to succeed.

In *De Bruyn*, the High Court reaffirmed the long-standing principle that causing pure economic loss is not, in itself, sufficient to establish a valid claim under South African law. Instead, the aggrieved party must demonstrate both the infringement of a legally recognized right or interest and a direct causal link between the alleged wrongdoing and their loss. Furthermore, the High Court emphasized the distinction between duties owed to the company and those owed to shareholders, noting that directors primarily owe a fiduciary duty to the company itself, not directly to shareholders (absent a special relationship). As such, shareholders generally cannot sue directors directly for losses reflected in the company's share price ("reflective loss"), and must instead rely on the company to pursue such claims through derivative action.

While the court acknowledged that there may be limited circumstances where directors may be held directly liable to shareholders, this would require demonstrating a separate breach of duty owed specifically to the shareholder, rather than to the company, and that the breach directly caused a personal financial loss. However, proving that directors owe a distinct legal duty to shareholders, separate from their duties to the company, can be a significant hurdle.

This decision has far-reaching implications for securities litigation in South Africa. While individual shareholders may still pursue claims against companies or directors under limited circumstances, the absence of a viable class action mechanism for pure economic loss claims presents challenges in seeking redress for securities fraud.

CASE STUDY

STEINHOFF SCANDAL:
A CROSS-BORDER CASE STUDY
IN COLLECTIVE SECURITIES LITIGATION

In December 2017, Steinhoff International ("Steinhoff"), a multinational retail holding company dual-listed in Germany and South Africa with headquarters in the Netherlands, revealed accounting irregularities that spanned decades and decimated its stock value by over 80%. This triggered a complex legal battleground as investors sought to recover their losses, grappling with the unique challenges and advantages of different jurisdictions. The resulting litigation became a transnational affair, as investors had to choose between pursuing legal action in Germany, the Netherlands, or South Africa. Each jurisdiction offered distinct advantages and disadvantages, requiring a thorough evaluation of legal frameworks, procedural mechanisms, and potential risks.

JURISDICTIONAL CONSIDERATIONS:
SOUTH AFRICA, GERMANY,
& THE NETHERLANDS

<u>**South Africa**</u>: Given its significant ties to Steinhoff through its operations and primary listing on the Johannesburg Stock Exchange, initially seemed a logical choice for investors. However, the country's class action framework was relatively underdeveloped, lacking the established procedures and precedents found in other jurisdictions. Although the South African Constitution permits class actions, its lack of specific procedural guidelines created potential

complexities for investors seeking to utilize this mechanism.

Additionally, there was significant uncertainty surrounding the viability of class actions for pure economic loss. This uncertainty was later confirmed in 2020 when the High Court confirmed that shareholders cannot sue directors directly for reflective losses (losses reflected in the company's share price) and would instead need to rely on the company to pursue such claims, typically through derivative actions. Furthermore, there were concerns about potential corruption risks within the South African legal system. These factors collectively made South Africa a less attractive option for investors seeking swift and comprehensive redress.

Germany: While offering the KapMuG "model case" proceeding as a potential avenue for collective redress, presented several drawbacks. Limited discovery mechanisms would have hindered the extensive fact-finding efforts required. Moreover, under the Brussels Recast Regulation, which governs jurisdiction in civil and commercial matters within the European Union, the German courts' jurisdiction over non-resident defendants like Steinhoff was questionable as the regulation generally favors the courts of the defendant's domicile (in this case, the Netherlands). This meant that jurisdiction in Germany was likely limited to German investors and claims arising after Steinhoff's secondary listing on the Frankfurt Stock Exchange in 2015. Additionally, German litigation tended to be slower and less predictable compared to other jurisdictions, posing further challenges for investors seeking timely resolution.

The Netherlands: In light of the limitations and uncertainties present in other jurisdictions, emerged as the most favorable option for investors due to several compelling factors. Firstly, the Dutch courts possessed a strong claim to jurisdiction, as Steinhoff International Holdings N.V., the ultimate holding company, was incorporated and headquartered in the Netherlands. This established general jurisdiction under the Brussels Recast Regulation, meaning that the Dutch courts could hear any claim against Steinhoff, regardless of where the investor was located or where the shares were traded. Moreover, the "anchor defendant" theory, which allows related claims to be brought against other defendants in the same jurisdiction as the primary defendant, enabled the inclusion of other potential defendants, such as auditors and banks, in Dutch proceedings, streamlining the litigation process and increasing the potential for comprehensive recovery.

Crucially, Dutch law provided viable causes of action for investors, including claims under Dutch general tort law, which—unlike in some other jurisdictions—did not require proof of intent or knowledge of wrongdoing by the company, thus lowering the burden of proof for investors seeking redress. Additionally, Dutch law extended auditor liability to third parties like shareholders, further strengthening potential claims against those involved in the alleged fraud. The Dutch legal system also offered robust fact-finding and evidence-gathering mechanisms, including pre-trial discovery procedures, which would have been essential for building a strong case in a securities fraud litigation as vast and intricate as Steinhoff's. Finally, the Dutch collective action procedure, similar to the opt-out model in the U.S., allowed for broad participation and potentially higher recoveries for investors.

RESOLUTION: THE DUTCH SETTLEMENT

The strategic advantages of the Dutch jurisdiction ultimately proved decisive, with investors opting to consolidate their claims in the Netherlands. This led to a global settlement in September 2021, wherein the District Court of Amsterdam approved a substantial €1.43 billion (approximately $1.62 billion) settlement on behalf of shareholders, financial creditors, and others impacted by the Steinhoff scandal.

While the Amsterdam court's approval was a significant step, the settlement also required approval and sanction by the South African High Court through parallel S155 proceedings aimed at resolving various disputes arising from Steinhoff's accounting irregularities. In January 2022, the South African court granted its approval, paving the way for the settlement's implementation and bringing a degree of closure to the multi-jurisdictional saga.

Overall, Steinhoff highlights the intricacies of cross-border securities litigation, where the choice of jurisdiction can significantly impact the success of investor claims, requiring careful consideration of legal frameworks, procedural mechanisms, and potential risks. The Steinhoff settlement, while a testament to the perseverance of investors and the collaborative efforts involved in navigating such a complex landscape, also underscores the importance of strategic decision-making in international securities litigation to maximize potential recoveries.

SOUTH KOREA

At a Glance…

Legal System	Civil Law
Statute of Limitations	Generally, the earlier of either: a) one year from the date the claimant became aware of the unlawful act; or b) three years from the date of the defendant's alleged unlawful act. Actions for insider trading, market manipulation, or other securities-related frauds must be brought by the earlier of either: a) two years from the date the claimant became aware of the unlawful act; or b) five years from the date of the defendant's alleged unlawful act.
Discovery	No procedure for U.S.-style discovery. Once litigation has commenced, a party can apply to the court for an order for the production of certain specifically identified documents. However, the court does not have any effective mechanism available to enforce compliance.
Mechanisms for Collective Redress	South Korea adopted a U.S.-style class action regime for certain securities fraud related claims.
"Loser Pays" System?	Yes – the amount is set by a statutory scale and the costs are typically a fraction of the actual attorneys' fees in the case.
Opt-In or Opt-Out	Opt-out
Third Party Litigation Funding	Third party litigation funding is not allowed. The Attorney-at-Law Act provides that fees and other profits earned through the provision of legal services cannot be shared with non-attorneys. However, unlike many other jurisdictions, attorneys in South Korea may charge contingency fees, and so law firms representing class members in securities class actions will typically cover all costs.
Important Considerations For Investors	South Korea also has a procedural mechanism for group litigation in which each victim may participate as a plaintiff.

Background

South Korea is somewhat of an anomaly in that it is a civil law jurisdiction that has an opt-out system for securities class actions. In 2005, in response to a number of large accounting-related frauds at South Korean companies in the early 2000s, South Korea adopted a class action mechanism solely for the purpose or prosecuting securities-related frauds. In the first four years after the passage of the law, no class actions were filed. Beginning in 2009, shareholders began to avail themselves of the system and since that time, a total of sixteen securities class actions have been filed. At the time of publication, six of the sixteen cases had successfully resolved in settlements, nine were in progress, and one had been dismissed.

Legal System Generally

South Korea is a civil law country that is similar to many European systems (Germany in particular). The South Korean Constitution, adopted in 1948, was influenced by the U.S. Constitution and recent legislation (such as the Korean Securities-Related Class Action Act) has often been modeled on the U.S. system. The courts in South Korea include: municipal courts (which exercise jurisdiction over small claims and misdemeanors); 18 District Courts that serve as the courts of first instance for most civil and criminal matters; courts with specialized jurisdiction including the Family Court and the Administrative Court; six High Courts (the appellate level courts); the Supreme Court of South Korea (the highest level of appellate review for most civil and criminal cases); and the Constitutional Court of South Korea (whose jurisdiction is limited to questions related to assessing the constitutionality of various laws). There are no juries in civil cases in South Korea; all civil cases are decided by either a single judge or a panel of three judges. Limited advisory juries were introduced for criminal cases in 2008, but the judges still determine all questions of fact and law. Judges are nominated by the Chief Justice of the Republic of Korea and are confirmed by a council of the Justices of the Supreme Court. Judges serve terms of 10 years and may be re-appointed. Justices to the Supreme Court or the Constitutional Court are each appointed in a separate nomination process and have different terms of service compared to the lower courts.

Civil litigation begins when a plaintiff files a complaint with the court setting out the alleged facts and violations of the law, as well as the remedy sought. Once the complaint is filed with the court, the court will serve the defendant with the complaint. The defendant is then required to file a written answer to the complaint within 30 days after the complaint is served. The parties then exchange briefs and supporting documents under the supervision of the court during the pre-trial period. Once the pre-trial period concludes, the judge sets a date for the trial. Trials are public and conducted orally in front of the judge(s). After the conclusion of the trial, the judge(s) will render a judgment. After the judgment is rendered, the losing party has 14 days to appeal the judgment before it becomes final.

Discovery

Unlike the United States, South Korea does not have a discovery mechanism. No disclosure of documents can be sought prior to commencing litigation. Once litigation has commenced, a party can seek the production of certain documents by applying to the court for an order. To do so, the party needs to specifically identify the documents sought. However, even if the court orders a party to produce certain documents or evidence, there is no effective sanction or mechanism that will force a party to comply with the court's order. As an example, in an accounting fraud related securities class action commenced in October 2013, against GS Engineering & Construction, the court ordered the defendant to produce emails and other correspondence between the accounting firm and the project clients, but the defendant never complied with the court's order. There was no mechanism available for either the court or the plaintiff to enforce the disclosure order.[1]

Costs of Litigation and Attorneys' Fees

Legal costs can be significant in South Korea. The plaintiff is required to pay a filing fee at the inception of a case, which is calculated by reference to the damages alleged by the plaintiff.

Unlike in many other jurisdictions, there are no prohibitions or restrictions on attorneys charging contingency fees. Class members in securities class actions will not typically be required to pay any out-of-pocket expenses because the law firm representing the lead plaintiff will cover the costs in exchange for a contingency fee. Some law firms may

[1] Despite the difficulties with discovery, the GS Engineering & Construction case did eventually resolve in a settlement.

charge the lead plaintiff a low upfront fee. In the securities class action context, the lead plaintiff and its counsel must agree to any fee. After the resolution of the case, the court must also approve the fee that the plaintiff's attorney will receive, and the court has the authority to reduce the amount the attorney is ultimately paid from any award or settlement after considering factors like the complexity of the case, the amount of time spent on the case (including the time spent on various briefs and the quality of those briefs), and the total amount awarded and distributed to class members.

South Korea is a "loser pays" jurisdiction and the losing party will often be required to pay for the prevailing party's costs. The amount of costs is set by a statutory scale and such costs often are only a fraction of the actual attorneys' fees in a case. The amount of any adverse costs awarded is up to the discretion of the court. Where the outcome of a particular case is divided, the court will apportion the costs between the parties. Law firms that are representing a lead plaintiff in a class action will frequently cover this adverse cost risk. This means that even where a particular potential action has strong legal and factual claims underlying it, it may only be commenced if there is a law firm willing to assume the adverse cost risk. That, and the fact that there are no effective mechanisms for obtaining evidence to prove a claim, may be why the number of securities class actions that have been pursued in South Korea remains relatively low.

There is no third-party litigation funding in South Korea because the Attorney-at-Law Act provides that fees and other profits earned through the provision of legal services cannot be shared with a non-attorney.

Overview of South Korea's Securities Laws

Substantive Process

Securities are governed by the Financial Investment Services and Capital Markets Act (the "**Capital Markets Act**"). The Capital Markets Act contains specific provisions prohibiting insider trading and market manipulation, as well as provisions regarding required timing and content of all disclosures. As an example, the Capital Markets Act stipulates that if a person who has acquired or disposed of securities issued by a reporting corporation suffers a loss due to a false, misleading, or omitted statement of material information, then *any* person involved in the publication of the report (and the directors of the reporting corporation at the time of publication) are liable to the shareholder for the loss suffered. The reporting corporation or any person who is facing potential liability can avoid culpability if they can prove that they were unaware of the false, misleading, or omitted statement despite exercising due diligence. Similarly, if the claimant had knowledge of the false, misleading, or omitted material information at the time it acquired or disposed of the securities, then the defendant will not be liable.

Actions for the false or misleading disclosure must be brought by the earlier of either: (1) one year from the date the claimant became aware of the unlawful act; or (2) three years from the date of the defendant's alleged unlawful act (i.e., the date of the false or misleading disclosure). Actions for insider trading, market manipulation, or other securities frauds must be brought by the earlier date of either: (1) two years from the date the claimant became aware of the unlawful act; or (2) five years from the date of the defendant's alleged unlawful act.

Damages

The Capital Markets Act includes specific provisions regarding damages available for specific securities fraud violations. For example, for violations of the disclosure obligations and accounting fraud claims, damages are presumed to be the difference between the purchase price paid by the claimant in acquiring the security and either the market price as of the close of the proceedings or, if the claimant disposed of the security prior to the close of the court proceedings, the sale price. The defendant can attempt to mitigate damages by proving that all or a portion of the damages are due to market factors and not related to the disclosure violations or discovery of accounting fraud. There are no punitive damages available, but a claimant is entitled to interest on damages. Interest accrues at a rate of 5% per annum from the date on which the alleged wrongful act occurred and 12% per annum from the date on which the complaint is served on the defendant. The court has discretion to adjust the applicable interest rates where it deems it appropriate.

Securities Class Actions in South Korea

With the passage of the Securities-Related Class Action Act on January 1, 2005 (the "**Securities Act**"), South Korea adopted a U.S.-style class action regime solely for the prosecution of securities fraud related claims. Although the mechanism is an opt-out mechanism and includes many of the procedural elements of U.S. securities class actions (such as class certification and lead plaintiff appointment), there are also some differences as to how each of those stages operates.

If a class action is commenced, all potential victims who fall under the definition of the class become members of the action unless they opt-out of the case. Class actions, however, are limited to specific claims for losses that arise from, or in connection with, trading in securities that are listed on the Korea Exchange (KRX) or the Korea Securities Dealers Automated Quotation (KOSDAQ). There are four main types of securities frauds that can give rise to an action: (1) false statements, omissions, or failure to include information in the company's registration statement or issued prospectuses; (2) false statements, omissions, or failure to include information in the company's quarterly, semi-annual, or annual reports; (3) insider trading, market manipulation, or other securities frauds; and (4) accounting fraud.

Any person (including individuals who are not domiciled or residing in South Korea) who suffered damages in relation to securities traded on a Korean Exchange due to a defendant's alleged misconduct can be a claimant and, through legal counsel, can file a petition in court. Claims cannot be assigned to third parties for the purpose of a lawsuit and only the injured party may file a claim. Once a class action is filed by one or more class members, the court issues a public notice of filing and any person wishing to be a lead plaintiff must submit an application to the court within 30 days of the public notice. The court will then appoint a lead plaintiff who can fairly and adequately represent the interests of all class members. The court will determine the adequacy of a would-be lead plaintiff and its counsel and ensure that neither the lead plaintiff nor the lead attorney has participated as a lead in three or more securities class actions in the prior three years. The court will also disqualify any attorney from acting in the proceedings if it determines that the attorney owned a security subject to the class action or if the attorney has any other monetary interest directly in the securities.

In order for a securities class action to proceed, the court must certify the class based on the following requirements: (1) the class definition must apply to at least fifty shareholders; (2) the class must hold at least 0.01% of all outstanding shares issued by the company; (3) the court must determine that the class action mechanism is the most adequate and efficient means to protect the rights and interests of all class members; and (4) there must be factual and legal issues that are common to all class members. The court will question the applicant and would-be defendant and review the case dockets before determining whether to certify the class. In a recent South Korean Supreme Court case, the Court held that its inquiry at the class certification stage should be limited to determining whether the standards for class certification are met and that the courts should not evaluate whether the defendant is liable for the damage alleged.

After the court issues its class certification decision, either party can appeal. Technically, a defendant can appeal the decision twice (once to the appellate level court and then to the Supreme Court) at the class certification stage, and this can add substantial delay to the overall length of the proceedings. Generally, it takes a number of months for the court to certify a class, but the class certification stage has taken more than three years in some past cases where there were appeals of the lower court's decision. If the court declines to certify a class (and the lead plaintiff does not successfully appeal), individual claimants are not precluded from filing separate lawsuits over the same subject against the defendant.

Following appointment of a lead plaintiff/lead counsel and class certification, cases follow the general civil procedure that is used in all litigation in South Korea. Securities class actions (after the court certifies the action and moves to the merits of the dispute) can take two or more years to reach a resolution. Any decision to stop the case before a decision on the merits (by withdrawing the complaint/petition), any settlement, or any other major action that could impact the rights of all absent class members, requires the court's approval, and the court will give absent class members an opportunity to be heard before rendering a decision.

If a class action reaches a settlement that is court approved or reaches a judgment, it will be binding on all class members unless a class member filed a declaration of exclusion with the court. Any individual who falls within the class definition and who did not file a declaration of exclusion is eligible to receive proceeds from any settlement or judgement. The lead plaintiff is responsible for enforcing the court judgment against the defendant but may ask the court to appoint a distributor to distribute any proceeds among all class members.

SWEDEN

At a Glance…

Legal System	Civil Law
Statute of Limitations	If the claim is under general tort law, there is no specific rule on a statute of limitations as regards the shareholder's claim. Instead, the general rule of a ten-year statute of limitations (from the time when a party became aware of an act that could give rise to damages) applies. A claim under the 2005 Companies Act, which is not based on a crime, must be brought within five years from the end of the financial year where the action or decision was made.
Discovery	No procedure for U.S.-style discovery. Any evidence, written or oral, must be submitted/reported to the court in advance. A party that knows or suspects that the counterparty is in the possession of specific evidence may demand the court to order the counterparty to disclose such evidence.
Mechanisms for Collective Redress	No specific U.S.-style regulation exists in Sweden. There are certain provisions under EU regulations regarding prospectus liability.
"Loser Pays" System?	Yes, as a main rule, the losing party will have to pay its and its counterparty's legal fees, which shall be fair and reasonable. Ultimately, the court decides what is fair and reasonable.
Opt-In or Opt-Out	Opt-in. Only applicants that have filed demands to the court, which claims are accumulated into one case, are bound by a ruling or a settlement.
Third Party Litigation Funding	There are no rules regarding third party funding. Use of so-called litigation companies (i.e., companies to which the claim is being transferred prior to the litigation) may, under certain circumstances, result in liability for the owners of the company.
Important Considerations For Investors	In Sweden, a claim for damages must be legally grounded in the 1972 Tort Act or the 2005 Companies Act.

Background

Sweden is a civil law country where most lawmaking power is vested in the legislature. Accordingly, the courts resolve legal disputes by reference to (in order of relative weight given): statutes, preparatory works, case law, and legal doctrine. There is no discovery in Sweden, unlike the United States, because parties must provide the evidence on which they intend to rely. A party may, however, request documents in possession of the other party or a third party and may seek the assistance of the court if they encounter resistance.

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Legal System Generally

Sweden, like many European countries, is a "loser pays" system and the losing party is responsible for paying the prevailing party's reasonable legal costs. Reasonable legal costs can include attorneys' fees, the party's own work and loss of time, fees for witnesses and experts, and court costs. As a main rule attorneys are not allowed to represent clients on a contingency fee basis except in some limited circumstances. Although, as discussed in more detail below, attorneys can assume some of the financial risk in a class action context by covering the representative plaintiff's (or group of plaintiffs') legal costs until completion of the litigation.

Effective January 2003, Sweden enacted the Swedish Group Proceedings Act (the "**Act**"). The Act makes it possible for a plaintiff to bring an action as the representative of a group of several persons or entities. Every type of claim that can be brought against a party in a civil case may be pursued as a group action under the Act except for cases concerning freedom of speech or freedom of the press, or those cases which must be appealed before a special court, such as the Labor Court or Market Court. Groups may bring actions to seek any type of relief including, but not limited to, declaratory judgments, payment of damages, and judgments ordering specific performance.

Under the Act, there are three types of group actions that may be commenced: private group actions, organization actions, or public group actions. Private group actions are those actions brought by an individual or legal entity, or group of individuals or legal entities, that have a legal claim. Organization actions are those brought by nonprofit associations which, according to their charters, protect consumer or wage-earner interests in disputes between consumers and a business operator regarding any goods, services, or other utility that the business operator offers to consumers. A public group action can only be initiated by an authority that, taking into consideration the subject of dispute, is suitable to represent the members of the group. The Government decides which authorities are allowed to institute public group actions.

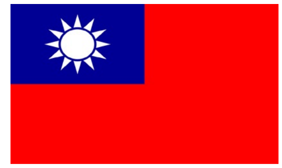
To commence a group proceeding, a plaintiff either submits an application for summons to the competent court or a plaintiff in ongoing proceedings submits a written application requesting the case be converted to a group proceeding. In the application, the plaintiff must provide details about the group to which the action relates, the facts or circumstances common to the group members, the circumstances known to the plaintiff that might vary among group members, and the important facts or circumstances which weigh heavily in favor of handling the particular action as a group action as opposed to an individual action. The plaintiff must also define the group with sufficient detail to allow the court to decide whether it may properly notify all group members. In general, all the names and addresses of group members are provided, however, it is possible to proceed without this information if the names and addresses are deemed unnecessary for resolving the dispute. These requirements exist because the court is tasked with determining whether to allow the particular action to proceed as a group action. In addition, the court shall also notify all group members about the time within which a potential group member must let the court know that such potential group member would like to be part of the group. By failing to notify the court within the specified time, such potential group member shall be deemed to have opted out of the group. Under the Act, a group action may only be allowed if: (1) the action is based on facts and circumstances that are common to or similar among the group members; (2) the group proceeding does not inappropriately favor some claims of the members of the group that differ substantially from other claims; (3) the larger part of the claims covered by the potential group proceeding cannot equally well be pursued by the members of the group (e.g., pilot cases or cumulation of cases); (4) the group is appropriately defined; and (5) the plaintiff, taking into consideration the plaintiff's interest in the substantive matter, the plaintiff's financial capacity to bring a group action, and the circumstances generally, is appropriate to represent the members of the group in the case.

Sweden has an opt-in system, which means that a group member must affirmatively act by a deadline prescribed by the court and indicate to the court that he wishes to be included in the proceedings. The court carries the burden of informing all potential group members of an action either individually by mail or via publication in newspapers. The court may also order either the plaintiff or defendant to furnish the information to the group members if that is likely to be the most efficient means. The party who is ordered by the court to notify potential group members is entitled to reimbursement of the expenses for notifying potential group member from public funds.

The representative plaintiff plays an important role in the litigation and should provide all group members the information and the opportunity to provide feedback on important matters affecting the litigation, provided this can take place without inconvenience. The representative plaintiff has the authority to enter into a settlement with the defendant, but that settlement must be confirmed by a judgment of the court. The representative plaintiff, not the group members, is the party responsible for the defendant's reasonable legal costs if the litigation is unsuccessful. To alleviate the financial burden of covering both its own legal costs and potentially covering the defendant's legal costs, Swedish law provides for risk agreements that allow the representative plaintiff's legal counsel (who must be a member of the Swedish Bar) to cover some of the plaintiff's legal costs. The legal counsel may not, however, assume the risk of paying the defendant's legal costs. This type of arrangement is different than a contingency fee arrangement in that the counsel's right to fees may not be based solely on the value of the dispute. Instead, the agreement provides for both the counsel's normal fee and an additional fee if the litigation is successful.

Generally, group members are not responsible for any of the legal costs or financial risks of the litigation. Only if the outcome of the litigation is in the group's favor and the defendant is unable to reimburse the representative plaintiff's legal costs are the group members responsible for reimbursing the representative plaintiff's legal costs up to the amount of the judgment.

TAIWAN



At a Glance…

Legal System	Civil Law
Statute of Limitations	Under the Securities Exchange Law, claims must be brought no more than two years from the date on which the shareholder became aware of the misrepresentation or fraud, or five years from the date of the offer/issue/ trading of the securities.
Discovery	No U.S.-style discovery; parties must make a motion to the court for evidence and judges have discretion to grant or deny requests.
Mechanisms for Collective Redress	- Opt-in group actions: in which multiple claimants with similar claims file a joint lawsuit and opt-in to participate. - GSO-initiated actions: in which government-sanctioned organizations initiate actions on behalf of affected parties, primarily in securities and consumer protection cases.
"Loser Pays" System?	Yes – however, the prevailing party cannot recover attorneys' fees in lower courts; only in Supreme Court appeals. There are also limits on the amount of attorneys' fees that may be included in litigation expense calculations.
Opt-In or Opt-Out	Opt-in for group actions; GSO-initiated actions require registration.
Third Party Litigation Funding	Third party funding is allowed; however, GSO-initiated actions often cover costs of litigation in exchange for a contingency fee upon success.
Important Considerations For Investors	Class actions are relatively rare and GSO-led actions are more common, particularly for securities cases.

Legal System Generally

Taiwan is a civil law country. There are no juries. Proceedings are overseen and adjudicated by judges who primarily look to Taiwan's constitution, codes, statutes, and ordinances, as opposed to case precedent, when rendering a decision. Judges in Taiwan do, however, consult case precedent as a reference.

There are three levels of courts in Taiwan. District Courts are the courts of first instance and all fact-finding and evidence gathering must occur at the District Court level. After the District Court renders a decision, the losing party may appeal to the High Court, and finally to the Supreme Court for the final judgment.

Discovery

The plaintiffs usually have the burden of proof in a case and there is no U.S.-style discovery mechanism or duty of the defendant to disclose or provide information. Instead, as in many civil law jurisdictions, parties seeking evidence must make a motion to the court to request any documentation or witness examinations from the opposing party (or any third party). Judges may also request evidence from either party (or any relevant third party) or launch an investigation on their own accord without a motion being made by either party. Once a motion has been made by a party, the judge has discretion to grant or deny the motion for discovery. If the judge issues an order for a party to produce documents or testimony, and the opposing party fails to comply with the order, then the judge may make a negative inference against the party from whom the evidence was sought.

There are no statutory restrictions on the types of evidence that are considered admissible. A party may submit (if in their possession) or request (if not in their possession) any relevant evidence. That evidence must be presented to the court of first instance if it is to be considered, and it is up to the judges to determine the probative value of what is submitted. Either party or the judge may seek expert testimony on any given matter. Witnesses and experts deliver evidence through in-court testimony.

Costs of Litigation and Attorneys' Fees

When commencing litigation or filing an appeal, the plaintiff or appellant must pay court costs that are proportional to the monetary value of the claim. The court costs for filing a complaint are typically about 0.6% to 1% of the monetary claim value. Court costs for filing an appeal are usually about 1.5 times the amount of the initial court costs. Courts will dismiss actions for failure to pay court costs. In addition to court costs, the defendant may petition the court to require a bond be paid on behalf of any foreign plaintiff (that is any plaintiff that does not at least have an office or legal presence in Taiwan). The bond amount may be equivalent to approximately 3% of the total amount claimed.

Attorneys in Taiwan charge fees based on a negotiated agreement with the client. The negotiated fees may be a flat rate, hourly charges, or, in civil matters, an attorney can represent a client on a contingency fee basis. Contingency fees are only prohibited for criminal, family law, and juvenile matters.

Taiwan is a "loser pays" jurisdiction and the prevailing party may recover court fees, costs, and expenses incurred in prosecuting the case. However, the prevailing party cannot recover their attorneys' fees if they prevail in the court of first instance or the first level appeal. Attorneys' fees are only recoverable if a party prevails in an appeal before the Supreme Court. There is also a maximum allowance for attorneys' fees that may be included in the litigation expenses to be paid by the losing party.

In group litigation, costs are shared among the members of the group or class by agreement made by all the involved parties. There is no provision for the court to manage the costs incurred or allocate the costs among all group members.

Third party litigation funding is permitted. Additionally, in actions initiated by government-sanctioned organizations, participating claimants are not responsible for any out-of-pocket payments because the costs and fees typically are covered by the organization in exchange for a contingency fee, if the action is successful.

Collective Litigation in Taiwan

Although some procedural mechanisms for group or class actions have existed since 1994 (when the Consumers Protection Act was enacted, and empowered consumer protection groups to bring litigation on behalf of groups of at least 20 consumers), class actions remain relatively rare in Taiwan. Most class actions that have been initiated are in the areas of securities or shareholder litigation, environmental protection, or consumer protection. This appears to be a legacy of the fact that the initial class action mechanisms were category-specific and limited to consumer protection (beginning in 1994) and investor protection (beginning in 2002). It was not until a 2003 amendment to the Code of Civil Procedure that a broad-based mechanism was adopted to make class or group actions available to all disputes, not just consumer and investor disputes.

Taiwan offers two types of procedural mechanisms that are akin to a class action. The first is an opt-in group action where multiple claimants whose claims all arise from the same "public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind" may file a suit and then, by motion or consent of the claimants and with the court's approval, the court appoints an attorney as a representative of the group and issues a public notice for other impacted claimants to join the action. Under the second procedural mechanism, which is somewhat unique to Taiwan, actions are initiated by government-sanctioned organizations ("**GSOs**") instead of private parties. The GSO-led actions were originally established within the confines of specific areas of law, including the Consumer Protection Act and the Securities Investor and Futures Trader Protection Act, but now any GSO that is legally established may bring these group claims as long as they are in the public interest.

Opt-In Group Actions

Taiwan's Civil Code allows multiple plaintiffs to file one joint lawsuit. This mechanism is similar to joinder. Claimants are not automatically included and instead need to take certain steps or opt-in to the action in order to be included in the case. In order to file a group action, the plaintiffs' claims must all be against the same defendant(s) and must be based on common facts and law. There are no criteria that restrict who can initiate the group proceedings. The class members generally decide together who will serve as the representative of the action in court.

If, after a number of plaintiffs join together to bring an action and the action is certified by the court as a class, and if the class representative or other interested claimants petition the court, the court will publicize the action through the government gazette and media in order to notify potential claimants that they have an opportunity to participate. The court may also seek to publicize the action without an application being made by the representative or other interested claimants but, in that case, the court must obtain the consent of the representative before publicizing the case. The notification to would-be claimants typically contains a 20-day notice period in which the would-be claimants must act to join the case.

Once a group case is up and running, the case operates like any other civil litigation in Taiwan. The representative submits evidence in support of the common allegations of fact and law and the defendant submits evidence in rebuttal. On average it takes about four to eight months to get to a trial.[1] After the trial, if the judge issues a decision in favor of the plaintiffs, the judge can assess damages for the class of plaintiffs in one of two ways: (1) independently assess the damages owed to each and every plaintiff; or (2) the members of the class can agree on an amount to be allocated to each member and then the class representative can petition the court for a lump sum judgment so that the court need not engage in the exercise of assessing damages on an individual basis.

GSO-Initiated Securities Actions

The Securities Investors and Futures Traders Protection Act (the "**Act**") was adopted on July 17, 2002, and became effective on January 1, 2003. The Act established the Securities and Futures Investors Protection Center (the "**SFIPC**" or the "**Center**") as a GSO to provide mediation and litigation services on behalf of investors that have disputes with listed companies. In addition, the Center manages a protection fund to compensate investors if a securities or commodities firm is unable to do so due to financial difficulties. This protection fund is funded by required monthly contributions from a variety of organizations, including the Taiwan Stock Exchange, the Taiwan Futures Exchange, the GreTai Securities Market, and various securities and futures firms.

[1] It should be noted that so far there have not been that many class actions in Taiwan, making it is unclear whether the average duration of a case will be greater when there is more complex litigation.

The SFIPC was established as a GSO to become the legal source to protect investors and pursue litigation on their behalf when there are allegations that a company has committed securities fraud. The SFIPC is authorized to file class action lawsuits or commence arbitration under its name as an authorized representative of investors who suffered a loss. According to the Act, "the protection institution may bring an action or submit a matter to arbitration in its own name with respect to a single securities or futures matter injurious to a majority of securities investors or futures traders, after having been so empowered by not less than 20 securities investors or futures traders." Having the SFIPC serve as the representative ensures that companies are held accountable for fraudulent behavior and that investors receive compensation. Taiwan's securities markets are dominated by individual investors who do not typically have the resources to file lawsuits for their losses, however, both institutional and individual investors are able to participate in SFIPC-filed actions on a cost-free basis. Having a GSO responsible for shareholder actions allows for procedural and cost efficiency. Additionally, in many instances, such as where there are allegations of insider trading or other criminal behavior, the SFIPC's case is brought in conjunction with any criminal proceedings. If the criminal prosecution does not result in a guilty verdict, then the SFIPC case will also likely fail.

In order for the SFIPC to initiate an action, there must be at least 20 investors who have suffered damages and who register and assign their claim to the Center. When the SFIPC believes there is a case meriting action, it will issue a public notice on its website and invite investors to register to participate in the recovery effort. If there are at least 20 investors who are impacted and who register to participate, the Center will commence a lawsuit or arbitration in its own name. Investors who register are not bound to continue with the case until its conclusion. The Act recognizes the right of claimants to withdraw their claims at any time. And if an investor chooses to withdraw, the withdrawal will not preclude the Center from continuing to litigate on behalf of the other investors, even if the registered number drops below 20.

Determining whether an investor suffered a loss in a case proposed by the SFIPC in Taiwan can sometimes be quite difficult, and it is often a much different exercise than calculating losses in U.S. class actions. Many cases in Taiwan center on allegations of insider trading and damages in those cases are limited to those who traded opposite the insider (for example buying shares on the date an insider sold shares) on specific days. The class periods for insider trading cases are also quite different and, instead of running for a concurrent stretch of time, there will be a series of listed dates on which the insider traded. Estimating damages for insider trading cases is not typically possible because the damages will depend on the amount that the court determines the defendant(s)' trading influenced the market price on each given day. For this reason, it may be worthwhile for investors who have traded opposite an insider to participate in the action—especially if the opposite trading volume is significant.

The Center is forbidden by law from asking for any form of out-of-pocket payment towards the litigation costs. The SFIPC operates on a contingency basis and, if there is compensation recovered from the litigation or arbitration, the Center is allowed to first deduct costs and expenses from the award before distributing compensation to each of the registered investors. If the case is unsuccessful, the participating investors are responsible for neither the upfront costs the SFIPC incurred, nor the costs incurred by the defendants that would normally be payable to defendants under Taiwan's "loser pays" system; the adverse cost risk is covered by the SFIPC. Although registering investors are not responsible for the costs, the SFIPC benefits from some cost reductions that were granted to it by law. For example, the court fees charged on any SFIPC-filed action are capped and any claimed damages that are greater than NT$30 million are assessed court fees based on a set claim value of NT$30 million.

The SFIPC is the most robust and successful GSO in Taiwan. It has initiated the greatest number of cases[2] and enjoyed many successes on behalf of shareholders. One of the Center's most well-known cases was against the company Procomp Informatics ("**Procomp**"). In 2004, it was discovered that the chairperson and managers of Procomp had made misleading statements about the company's financial condition in order to bolster its 1999 listing application. Even after the company was successfully listed in Taiwan, Procomp continued to manipulate its accounting records and make fraudulent representations in its financial statements. After the public learned of the scandal, over ten thousand investors authorized the SFIPC to file a lawsuit. The SFIPC commenced litigation and the court issued a judgment against the chairperson, managers, board of directors, and supervisors of Procomp, and in favor of investors who had suffered losses due to trading Procomp's stocks between 1999 and 2004.

Securities Laws in Taiwan

Many shareholder actions in Taiwan arise under the Securities Exchange Law ("**SEL**"). The SEL regulates the offer, issue, and trade of securities. Under the SEL, a company or its officers can be held liable for damages by shareholders for misrepresentations, or fraudulent or misleading acts that are made during the offer, issue, private placement or trading of securities, or for any fraudulent or misleading statements that are made within any financial reports, prospectuses, or other required continuous disclosure documents provided by the issuers or underwriters of the securities. The statute of limitations for bringing damage claims under the SEL is two years from the date on which the shareholder became aware of the misrepresentation or fraud, or five years from the date of the offer, issue, or trading of the securities.

[2] As of March 2018 the Center had registered investors and recovered at least partial compensation funds for 59 cases.

THE

UNITED KINGDOM

At a Glance…

Legal System	Common Law
Statute of Limitations	6 years
Discovery	In the UK, there are mechanisms for obtaining evidence and information from the other party, but they differ from those in the U.S. While depositions technically exist, they are used only in limited situations. Most witness evidence, especially in shareholder litigation, is produced in writing through witness statements, typically prepared in consultation with the parties' lawyers. Discovery for claimants usually involves the production of relevant documents, such as memos or emails.
Mechanisms for Collective Redress	- Group Litigation Order - Representative Action
"Loser Pays" System?	Yes
Opt-In or Opt-Out	- Opt-in multi-party claims are most commonly used for large-scale shareholder claims and consumer claims. - Opt-out actions are available to claimants in the Competition Appeals Tribunal which focuses on anti-trust claims.
Third Party Litigation Funding	UK attorneys are permitted to represent clients on a contingency fee basis known as a "damages-based agreement". Traditional third-party litigation funding is also permitted and used.
Important Considerations for Investors	- The UK is a "loser pays" jurisdiction and the amount that the losing party is required to pay is based on the actual costs of litigation and can therefore be quite expensive. "After the event" or "ATE" insurance is typically available and can help guard against any potential cost risk for participating investors but amount of coverage and terms should be reviewed. - Recent case law regarding the requirements for proving reliance and asserting "dishonest delay" claims mean that investors should carefully evaluate potential cases and the litigation strategy of the group(s) organizing and prosecuting potential cases.

Background

The United Kingdom comprises several judicial systems, one in England and Wales, and separate systems in Scotland and Northern Ireland.

The United Kingdom[1] is primarily a common law system. Legislation is enacted by Parliament and the judiciary is responsible for interpreting and applying legislation and following judicial precedent.

[1] For this section, references to the United Kingdom are to the laws and procedures of England & Wales only.

Overview of Collective Redress

Collective redress (or group or class) actions are becoming commonplace in the United Kingdom, but the regime is less developed than its United States and Australian counterparts.

Opt-out group actions are available to claimants in the Competition Appeals Tribunal, which focuses on competition law (anti-trust) claims. Opt-in class actions are more commonly used for other types of group actions, such as large-scale shareholder claims (also known as securities litigation) and consumer claims (such as data breach or product liability claims).

The U.K. judiciary is becoming increasingly accustomed to managing group actions (with several key judgments handed down in the last 12 months), particularly in respect of securities litigation. Momentum is building across all forms of collective redress in the United Kingdom, and as clear trends are emerging on the case management and settlement fronts, the number of collective redress actions brought in the United Kingdom each year is predicted to grow substantially.

Procedural differences in the United Kingdom (as compared to the United States) may mean some claims require more claimant involvement (on evidential points, if they reach the later stages of formal proceedings) but, by the same token, U.K. claims are expected to yield higher recoveries. In the United Kingdom to date (with more than a decade of track record), all securities group actions have settled (albeit the terms of those settlements are usually confidential, which makes direct comparisons difficult).

Funding and Insurance

Funding

U.K. lawyers are permitted to represent clients on a contingency basis (similar to the United States), via "no-win, no-fee" damages-based agreements ("**DBA**"), which involves the law firm taking a percentage of claim proceeds (whether court awarded damages or a settlement sum) as payment for legal services and expenses. DBAs are increasingly common for group or class action work in the United Kingdom, and law firm pricing structures are also evolving to ensure that claimants participating in U.K. actions receive a greater proportion of claim proceeds.

Traditional third-party litigation funding is permitted in the United Kingdom, but following the Supreme Court's decision in *PACCAR*[2], it is anticipated that funders will increasingly move in favor of financing lawyers' DBA engagements (in return for a share of the lawyers' revenue from the claim) rather than contracting directly with claimants. This trend marks a significant step towards alignment of commercial interests between claimants, their lawyers and other financial stakeholders in litigation.

Insurance

The judicial system in the United Kingdom usually operates on a "loser pays" basis (often referred to as adverse costs), meaning that a successful party to the action may recover a proportion of its legal costs from an unsuccessful opponent. The power to award legal costs is fully within the discretion of the court (and the loser pays principle can be displaced by bad conduct and/or tactical settlement offers).

Adverse cost liability is usually joint and several in multi-party claims, but the U.K. courts have occasionally ordered that liability be joint and proportionate (to the value of each claimant's claim). The scope of liability for the risk of adverse costs can be determined early in the proceedings (and before liability on the merits of the claim itself has been determined) on the application of a party.

To address the loser pays principle, U.K. lawyers usually procure insurance (against the risk of paying the opponent's legal costs), known as "after the event" adverse costs insurance or "ATE" insurance.

[2] *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28.

Typically, the U.K. lawyers will be the policyholders of the ATE insurance and the claimants will be named as the insured parties. It is common for multiple claimant groups to bring proceedings against the same defendant on the same subject matter and separately insure their groups, which results in the adverse costs risk being over insured. Sharing or consolidation of ATE coverage between claimant groups is likely to occur more frequently as the practice area matures.

As with third-party funding and the increased use of DBAs, new insurance pricing structures in the United Kingdom are moving towards success-based premium models (as opposed to expensive upfront premia), which (again) helps to align the commercial objectives of all parties on the claimant-side of litigation. Further, to offer complete protection to claimants, some third-party funders offer to indemnify any exposure to adverse costs that might accrue in excess of the limit of indemnity under an ATE policy.

Defendants faced with strong claims have tried to weaponize the "loser pays" principle in a cynical attempt to stifle meritorious claims. This tactic involves applying to the court for an order for "security for costs" (which means the claimants (or their litigation funder) can be ordered to pay money to the court early in the proceedings to cover the defendant's likely legal costs during the litigation). ATE insurance is often used to respond to a security for costs threat.

Securities Litigation

Applicable Law

The Financial Services and Markets Act 2000 ("**FSMA**") is the primary legislation that regulates financial services and markets in the United Kingdom.

FSMA provides a route to compensation for claimants (i.e., investors/shareholders) to recover losses suffered as a result of publicly listed companies:

(1) making untrue or misleading statements in or omissions from listing particulars ("**Prospectus Claims**") – section 90 of FSMA;

(2) delaying publishing information ("**Delay Claims**") – section 90A of and paragraph 5 of Schedule 10A to FSMA; and

(3) making untrue or misleading statements in or omissions from published information where a shareholder relied upon that published information ("**Omission/Misstatement Claims**") – section 90A of and paragraph 3 of Schedule 10A to FSMA.

Prospectus Claims and Delay Claims <u>do not</u> require claimants to prove reliance.

Omission/Misstatement Claims <u>do</u> require some proof of reliance (but the standard and scope of that evidence is the subject of debate between practitioners). U.K. lawyers are developing various litigation strategies to reduce or remove the burden on claimants in this regard.

While Prospectus Claims are based on negligence principles, Delay Claims and Omission and Misstatement Claims are based on the well-established U.K. law of deceit (fraud), which widens the scope for claimants' damages to include all losses (e.g., trading costs) resulting from the offending act (failing to tell the truth on time). In most cases, the fraud measure of damages is likely to be more generous to claimants than equivalent damages measures in other jurisdictions.

Prospectus Claims

Section 90 of FSMA states that:

(1) Any person responsible for listing particulars [including prospectuses] is liable to pay compensation to a person who has—

(a) acquired securities to which the particulars apply; and

> (b) *suffered loss in respect of them as a result of—*
>
> > (i) *any untrue or misleading statement in the particulars; or*
> >
> > (ii) *the omission from the particulars of any matter required to be included…*

Notably, a claimant bringing a claim under section 90 of FSMA need only demonstrate that they suffered loss because of the misstatement or omission. A claimant (or their lawyer) does not need to prove dishonesty on the part of those responsible for the listing particulars, nor does reliance need to be established for the claim to succeed (as was common ground in the *RBS Rights Issue Litigation*).

Common defenses to Prospectus Claims focus on:

(1) denying that the omission or misstatement occurred (or was material to an investor making an informed assessment of the securities); and

(2) the defendant's reasonable belief that a statement was true and not misleading or an omission was properly made (the "reasonable belief defense").

Prospectus Claims are by their nature less common than other types of securities claims. Other types of claims (Delay Claims and Omission/Misstatement Claims) focus on *ad hoc* published information (or the lack thereof), for example, updates posted to the Registered News Service ("**RNS**") of the London Stock Exchange or annual financial reports.

Delay Claims

Delay Claims are likely to be appropriate in most cases where the issuers' underlying wrongdoing is not an isolated incident and subsequent published information from the issuer fails to disclose the truth (or full truth) on multiple occasions.

Paragraph 5 of Schedule 10A of FSMA states that:

> (1) An issuer of securities to which this Schedule applies is liable to pay compensation to a person who—
>
> > (a) *acquires, continues to hold or disposes of the securities, and*
> >
> > (b) *suffers loss in respect of the securities as a result of delay by the issuer in publishing information to which this Schedule applies.*
>
> (2) The issuer is liable only if a person discharging managerial responsibilities within the issuer acted dishonestly in delaying the publication of the information.

The key ingredients of the cause of action are therefore:

(1) liability to pay compensation sits with the issuer (i.e., the listed company) of the securities (i.e., shares);

(2) the claimant must have acquired, held or disposed of shares;

(3) the claimant suffered loss as a result of delay by the issuer in publishing information; and

(4) a person discharging managerial responsibility (e.g., statutory director or de facto or shadow director) acted dishonestly in delaying publication (the *scienter*).

Importantly, there is no express requirement to prove reliance in Delay Claims (which contrasts with requirements of Omissions/Misstatement Claims). Naturally, if the issuer delayed publication of an underlying wrongdoing, then there was nothing for a claimant to have read and relied upon until a corrective disclosure or publication was made.

Whether intentionally or not, the Delay Claim route to compensation appears to be designed with so-called "passive" or "index-linked" investors in mind.

These claimants do not generally consider information published on the RNS, for example.

Securities claims in the United Kingdom have more recently focused on egregious wrongdoing (such as bribery, corruption, accounting fraud, modern slavery, etc.) that has been kept secret or denied for an extended period. That is to say, the information pertaining to the wrongdoing has not been published to the market when it should have been (it is delayed, often substantially, and sometimes even permanently suppressed). Helpfully, U.K. claims are commonly rooted in convictions or prosecutions pursued by authorities in the United Kingdom (such as the Serious Fraud Office) or in the United States (such as the Department of Justice) and, therefore, the prospects of proving wrongdoing and its absence from published information are strong. By way of example:

(1) in 2022, Delay Claims filed against Glencore PLC concerned information about bribery in Africa and South America being delayed by at least 11 years (2011 to 2022);

(2) in 2023, Delay Claims filed against Petrofac Limited concerned information about bribery in the Middle East being delayed for at least ten years (2011 to 2021); and

(3) in 2024, Delay Claims filed against Boohoo Group PLC concerned information about forced labor and unlawful working conditions being delayed for at least nine years (2014 to 2023).

The recent prevalence of Delay Claims alleging long periods of undisclosed wrongdoing highlights how FSMA can potentially protect investors (as a deterrent for wrongdoers and compensatory regime for those wronged) where errant issuers' business models are likely to be deeply flawed.

However, a recent judgment on a strike-out application by the defendant, Barclays, in *Allianz & Others v. Barclays plc*[3] (the "*Barclays Judgment*") clarified that for claimants pursuing delay claims, the right to bring a claim arises only when a listed company has actually published a statement or made an announcement, albeit belatedly. As Justice Leech explained, "*Schedule 10A does not impose liability on the Bank for misleading statements or omissions or delay unless and until it has published information to which Schedule 10A applies.*"

This ruling clarifies that neither the publication of a material news story about a listed company, nor an announcement regarding the initiation or conclusion of an investigation by a regulatory or other authority, triggers the right for an investor to bring a "dishonest delay" claim. It also clarifies that it is insufficient to plead that there is a continuing delay in publishing when information remains unpublished by the company itself.

Some commentators have argued that Justice Leech's interpretation could allow issuers to avoid liability by simply refraining from ever publishing a correction or other pertinent information. Other commentators, while recognizing the potential for listing companies to exploit this ruling if left uncontested and unclarified by higher courts, suggest that delay claims are still viable and that claimant attorneys need to simply take more care in adequately pleading delay claims. Those commentators highlight the fact that the claimant attorneys in the *Barclays Judgment* asserted that the delay clock was still running (because Barclays had not made any corrective disclosure or publication) and therefore essentially defeated their own claims.

The *Barclays Judgment* was issued by a court of first instance on an interim application (and was not a final decision following a trial). The parties to the dispute ultimately settled the matter before the legal holdings could be reviewed and clarified by an appellate court. There will likely be further developments and clarity as additional judges consider other currently-pending dishonest delay claims over the coming years.

[3] *Allianz Fund Multi-Strategy Trust & Ors v Barclays plc* [2024] EWHC 2710

Omissions/Misstatement Claims

Paragraph 3 of Schedule 10A to FSMA states that:

(1) An issuer of securities to which this Schedule applies is liable to pay compensation to a person who—

> (a) *acquires, continues to hold or disposes of the securities in reliance on published information to which this Schedule applies, and*
>
> (b) *suffers loss in respect of the securities as a result of—*
>
> > (i) *any untrue or misleading statement in that published information, or*
> >
> > (ii) *the omission from that published information of any matter required to be included in it.*

(2) The issuer is liable in respect of an untrue or misleading statement only if a person discharging managerial responsibilities within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading.

(3) The issuer is liable in respect of the omission of any matter required to be included in published information only if a person discharging managerial responsibilities within the issuer knew the omission to be a dishonest concealment of a material fact.

(4) A loss is not regarded as suffered as a result of the statement or omission unless the person suffering it acquired, continued to hold or disposed of the relevant securities—

> (a) *in reliance on the information in question, and*
>
> (b) *at a time when, and in circumstances in which, it was reasonable for him to rely on it.*

As is apparent from the FSMA extract above, the cause of action for Omission/Misstatement Claims comprises more elements for claimants to address (than is the case with Delay Claims).

The key distinguishing factor of Omission/Misstatement Claims is that claimants may need to prove that they relied upon something published by the issuer. This might mean more active involvement in proceedings for claimants pursuing such claims (albeit it is likely that only a sample of claimants from within a group of claimants might be selected to do so).

Omission/Misstatement Claims are therefore likely to be appropriate where claimants such as actively managed funds or value investors did (in fact) rely upon something published by the issuer (and a Delay Claim is unavailable). Omission/Misstatements Claims are, by their nature, more likely to follow isolated incidents where published information has shortcomings (e.g., one set of misleading annual financial statements), albeit they may also be argued in the alternative in other scenarios.

In *Autonomy* [4] the English High Court confirmed that, like other deceit-based claims in U.K. law, there will be a presumption that the claimant was influenced by a false statement.

The recent *Barclays Judgment* dismissed 241 claims brought by passive index fund-based investors and clarified the requirements for proving reliance. Justice Leech indicated that UK courts may accept evidence of indirect reliance but rejected the notion of claims based solely on "price." He further acknowledged, however, that reliance on factors beyond price alone is likely to be acceptable to the Court.

[4] *Autonomy & Others v Lynch & Ors* [2022] EWHC 1178 (Ch)

Justice Leech explained: *"It may well be argued that there is no real reason of policy or principle to draw the line between the Claimant who relied on a broker's report or a 'buy' recommendation (which were based on published information) and a Claimant who relied solely on a movement in price (which was also influenced by that same information). That may be so, but it is clear that this is where [the legislature] chose to draw the line, and that line must be respected."*

He also left open the possibility that claimants using AI or algorithm-driven investment strategies could succeed in misstatement or omission claims, provided they plead and produce evidence demonstrating that the index-tracking fund(s) they invested in incorporate published information—or that omitted information would have been material and influenced a different decision. As Justice Leech noted: "…[a Partner on the claimants' legal team] gave no evidence to that effect in [her fifth witness statement]. If the methodology of any of the Tracker Funds had involved a human fund manager considering the Bank's published information or, indeed, even an AI or computer assessment of that published information, those funds had ample opportunity to adduce evidence to this effect."

Some commentators have argued that this ruling effectively ends any chance for passive investors to obtain redress, even when an issuer is found liable for publishing false information. Others, however, emphasize the key points discussed above: that the evidence required to prove reliance need not be extensive and that index investors may still succeed if they can show that a "buy" rating was based on factors beyond price alone. Since the Barclays Judgment was not clarified on appeal—due to a settlement before an appeal could be launched—further clarity is needed. It will be crucial for claimant attorneys handling various pending cases to carefully consider how they plead and present proof. Additionally, it will be important to monitor the outcomes of those cases and how UK courts further address the *reliance issue*, as well as to watch for any new legislation Parliament may adopt in an effort to ensure passive investors have an equal opportunity to obtain redress. Regardless of the ultimate outcome, investors should carefully assess the strategy of the UK attorneys prosecuting a case and how reliance may be proven.

Claimants that intend to prove reliance tend to produce evidence in the following categories:

(1) internal investment recommendations and memoranda (redacted to remove irrelevant or commercially sensitive material);

(2) notes, explanations and communications from portfolio managers; and

(3) internal reports to the claimants' own investors (e.g., monthly or quarterly updates) on portfolio performance (again with redactions applied).

Where claimants can provide reliance evidence (or voluntary information that illustrates the quality of evidence that might be forthcoming in trial), defendants are inclined to engage more readily in settlement discussions (and, it follows, settlement targets should be higher and resolutions reached sooner if evidence is volunteered early in the litigation process).

Court Procedure for Opt-In Claims

For securities claims in the United Kingdom there is no court procedure akin to the opt-out class action regimes that exist in the United States, Canada and Australia.[5] Instead, there are several alternative procedural mechanisms that securities claims may utilize before the U.K. courts, such as:

(1) standard multi-party actions, where claimants opt-in and are named on the same court documents ("**Multi-Party Claims**");

[5] Only the U.K. competition law regime permits opt-out claims to proceed in certain instances, which is beyond the scope of this chapter (and more relevant to consumers).

(2) Group Litigation Orders ("**GLO**"), where the court combines claims that give rise to common or related issues of fact or law (any party can apply for a GLO and the court can order a GLO of its own volition)[6] (but where claimants are still named on what is known as the GLO Register); and

(3) representative proceedings pursuant to Rule 19.8 of the Civil Procedure Rules 1998 ("**Representative Claims**") where a lead claimant (or claimants) prosecutes the claim on behalf of a larger group with similar characteristics or the same interests (but where the represented persons do <u>not</u> need to be named).

Notably, proceedings may be commenced as Multi-Party Claims and claimants can subsequently apply for GLO status or for proceedings to be transferred to and move forward as Representative Claims. So far, Multi-Party Claims are most common.

A key procedural battleground in all such claims (whether Multi-Party Claims, GLOs or Representative Claims) concerns the order in which issues should be tried. Claimants naturally prefer to have defendant-side issues (as to the underlying wrongdoing and liability) determined at a first trial, before any claimant-related issues (e.g., reliance (if needed), causation and loss) are considered at a second trial. Such bifurcation is logical because if the defendant is cleared of wrongdoing there is no need for any party to incur costs dealing with causation and loss points, nor for the Court's time to be taken up dealing with such (redundant) issues.

Recent examples of the courts' bifurcation of issues are:

(1) May 2024, in *Various Claimants v Glencore Plc* (not yet reported), Bryan J ordered (with the consent of the claimants and the defendants) a split trial where individual claimant side issues were reserved for trial two and where all defendant side issues were reserved for trial one, together with only a few issues of principle / statutory interpretation in trial one, such as the extent of the "aftermarket", whether reliance is required for Prospectus Claims (which has never before been suggested by a defendant and is absent from the legislation), whether prospectuses can also be counted as "published information" for section 90A claims and how to calculate the length of periods of delay.

(2) In April 2024, in *Various Claimants v Standard Chartered*[7], Green J ordered a split trial process that requires defendant-side issues and some "common reliance" issues (which refers to points of law and facts that can be dealt with by expert evidence such as price reliance) to be determined in trial one. Claimant-side issues of individual reliance (if applicable), causation and quantum will be determined in trial two.

(3) In July 2022, in *Various Claimants v Serco Group Plc*[8], Falk J ordered a split trial where defendant-side issues (whether there was fraud, content and omissions from published information, delay, PDMR knowledge, etc.) were tried first and claimant side (or "individual") issues would be determined at a second trial, following her own decision a month earlier in *Various Claimants v G4S*[9] where a similar split was ordered.

[6] GLOs permit claimants to retain their own law firms despite the claims being consolidated. The process often results in law firms agreeing (or being ordered) to share the work involved in prosecuting the claims.
[7] [2024] EWHC 1108 (Ch D)
[8] [2022] EWHC 2052 (Ch)
[9] [2022] EWHC 1742 (Ch)

(4) In February 2022, in *Allianz Global Investors GmbH & others v RSA Insurance Group Plc*[10], Miles J (revisiting an early case management order he had made) ordered bifurcation on the basis that only defendant-side issues would be determined in trial one and all claimant issues would be determined in trial two.

Judicial commentary in the above cases made clear that claimants wishing to secure favorable bifurcation of the issues in proceedings should not wait for limitation deadlines before commencing their claims. Judges were eager to highlight that long delays before starting litigation meant that defendants might be prejudiced (as evidence becomes less available with the passage of time) and it would be harder to order split trials in those circumstances.

Representative Claims have received mixed judicial treatment since they were first tried in securities cases against Reckitt Benckiser Plc and Indivior Plc and against Glencore Plc in September 2022, and the current state of the law is unclear as to whether Representative Claims are a viable option for claimant groups. Two recent court decisions in point appear hard to reconcile (although this should be clarified later in 2024):

(1) In December 2023, in *Wirral Council v Reckitt/Indivior PLC*[11], Green J ruled that Wirral Council could not act as a representative claimant and that this Representative Claim should be struck out, largely based on a concern that this procedure would fetter the Court's case management powers. In May 2024, Wirral Council obtained permission to appeal the decision of Green J to the Court of Appeal and it is expected that this appeal will be heard between October and December 2024.

(2) In January 2024, in *Commission Recovery Ltd v Marks & Clerk LLP*[12], the Court of Appeal refused to overturn the judgment of Knowles J, who did not grant the defendant's application to strike out this Representative Claim on the grounds that there was "no absence of same interest" between the representative claimant and the representative parties. The Court of Appeal agreed that the members of the class had the "same interest", as there was no relevant conflict of interest between them. In March 2024, the Supreme Court refused to grant the defendant a further appeal, and trial of the claim is now due to take place in 2025.

Where Next?

Claimants and U.K. lawyers will be closely monitoring the following developments:

(1) Whether other U.K. courts follow the Barclays decision or further address the reliance issue. Additionally, it will be important to watch whether Parliament shows interest in debating or adopting new legislation to ensure passive investors have an equal opportunity for redress.

(2) Whether the Court of Appeal, in the Wirral Council appeal on Representative Claims, seizes the opportunity to reaffirm—as it did in Commission Recovery—that the procedure is available to claimants with shared interests in securities litigation claims.

Overall, sentiment in the United Kingdom strongly suggests that securities group litigation will continue to develop and move in a more claimant-friendly direction.

[10] Unreported.
[11] [2023] EWHC 3114 (Comm)
[12] [2024] EWCA Civ 9

280 King of Prussia Road
Radnor, PA 19087
T. 610-667-7706
F. 610-667-7056
info@ktmc.com

One Sansome Street, Suite 1850
San Francisco, CA 94104
T. 415-400-3000
F. 415-400-3001
info@ktmc.com

www.ktmc.com