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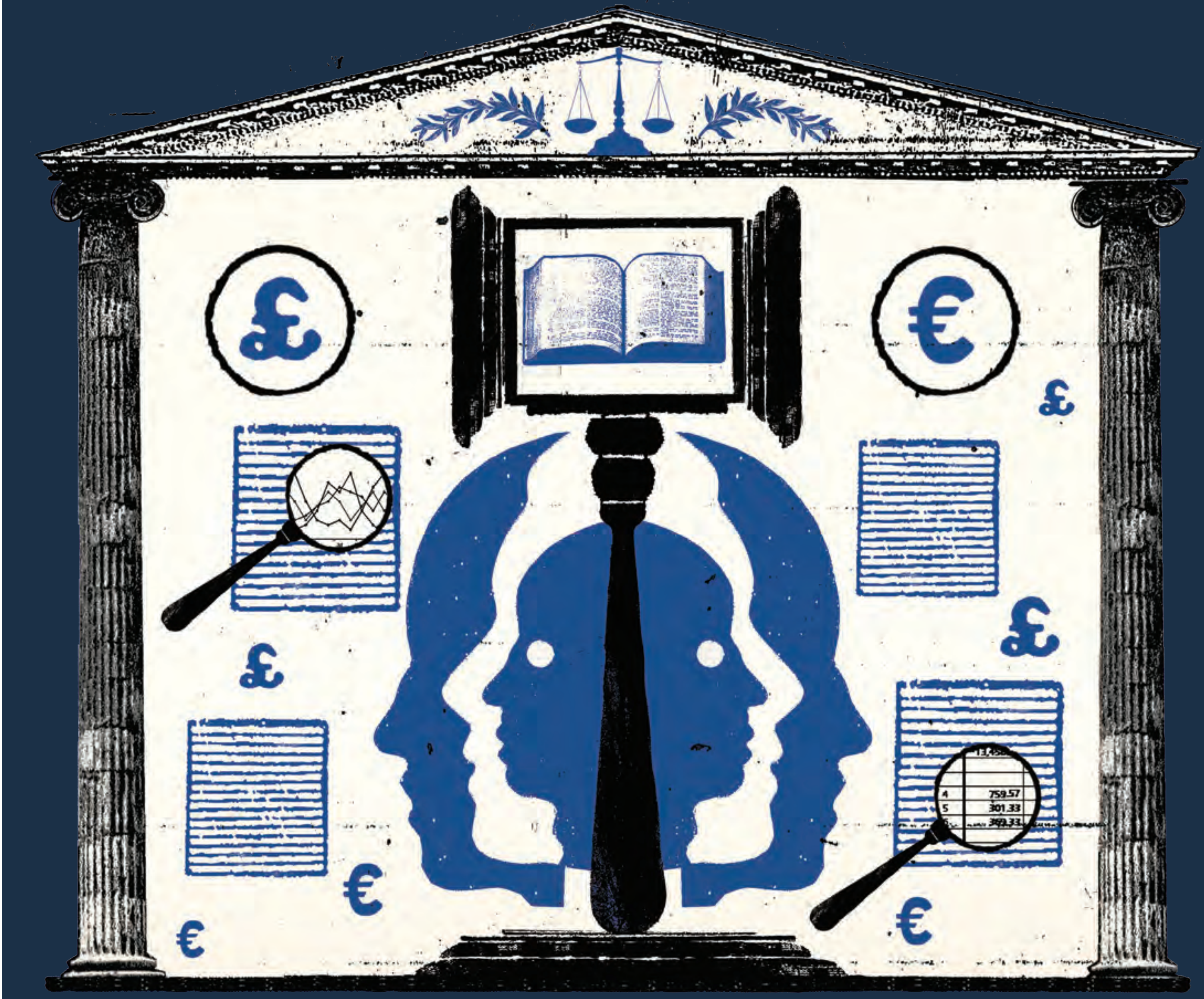

# CLASS ACTIONS & INVESTOR LITIGATION

## A GUIDE FOR PENSION FUNDS AND ASSET MANAGERS

- PASSIVE INVESTORS
- LEAD PLAINTIFF
- EUROPEAN LITIGATION
- LITIGATION FUNDING
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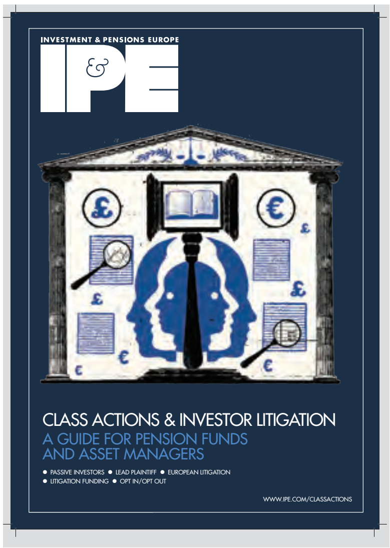
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# Getting the priorities right in pursuit of better corporate behaviour

Greater investor activism and a wave of recent financial scandals has encouraged many European pension funds to become more active. Continued growth in investor litigation outside the US, notably in the UK and the Netherlands, is good news for better governance, both in terms of the protection of pension capital and achieving better behaviour on the part of the investee companies. Investors also want to be seen to be doing the right thing. Altogether this is a sea change compared with the reticence of investors and the courts to challenge bad actors.

While this growth has encouraged new entrants to the international market with specialist firms, mainly from the US, setting up in London and elsewhere bringing additional expertise, the choice this creates is a double-edged sword. A diversity of approach and risk appetite is welcome, but the increase in investor activism has also led to an increase in the number of cold calls from service providers, often lacking transparent fee structures. Investors should be mindful of unscrupulous lawyers presenting dubious cases, although the predominantly opt-in framework for investor litigation in Europe (opt-out is the norm in the US) provides a useful safeguard.

Key to any decision to participate in group litigation is the cost benefit analysis, weighing the time involved for each participating investor as well as the legal costs against the size – and likelihood – of any payout. The figures involved are obtainable and can be used to help give other investors more certainty on what future claims might yield – and over what timespan of litigation – even when claims are settled out of court. As most claims take more than five years from beginning to settlement, investors must also consider the time value of money.

Another important element of the process for investors is whether to take the role of lead plaintiff in view of the additional control and influence that this brings alongside reinforcing the profile of an investor acting for the good of its members and the wider economy.

To help navigate this jungle, there are now dedicated service providers offering shareholder and financial antitrust litigation monitoring, advisory and recovery services, to help institutional investors navigate this process.

Central to their role as stewards of retirement savings, pension funds have a duty of care to scrutinise investments before committing to them. A recent UK High Court case ruled that a claimant can only recover damages if it could prove that it, or a third party or parties on whose advice it relied, had read or heard the published information alleged to contain a misstatement or omission. The dilemma for index-trackers is that they do not alter their portfolio weightings based on the content of such published information. The judgement may also impact active investors if they have weak evidence that they read company disclosures at the time of publication.

A key enabler of investor litigation is the availability of funding. A UK court ruling has rendered litigation funding agreements based on damages unenforceable. Third-party funders have found alternative ways of calculating remuneration. The Civil Justice Council is reviewing litigation funding and legislative safeguards.

These issues and more will be explored in depth in this year's report, which we hope you find interesting and useful.

Finally, my thanks to Caroline Goodman of Institutional Protection, Ivar Eilertsen of Institutional Shareholder Services and Robin Ellison of the College of Lawmakers for their input in the planning of this supplement.

**Martin Hurst, Supplement Editor**

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# Passive investors: price/market reliance and the due diligence question

BY BRENDAN MATON

- UK High Court rules that a claimant can only recover damages if they can prove to have read relevant published information
- Index-trackers do not alter portfolio weightings based on published information
- The judgement may also impact active investors if they have weak evidence that they read company disclosures

Towards the end of October 2024, the High Court in London struck out claims for £335m (€402m) being sought from Barclays for misdemeanours dating back over ten years.

The category of claimants struck out were those reliant on the share price of Barclays. They include Folksam, the Norwegian municipalities' pension fund, KLP and a Deutsche Bank ETF vehicle. Two other categories of claimants, who relied on information such as analysts' recommendations and company disclosures, can pursue their claims.

On the face of it, this latest judgement in Allianz vs Barclays is bad news for passive investors seeking litigation. "Unless this judgment is overturned on appeal, claims made by passive shareholders will generally not be viable," says Adam Brown, a partner at law firm, Simmons & Simmons in London. He clarifies that if passive shareholders can demonstrate that they, or a third party on which they rely, reads company accounts and similar essential information at the time of publication, then they may still have a case.

The dilemma for market-cap index-trackers is that they do not alter their portfolio weightings based on the content of such published information (Folksam had an ESG tilt to its fund but the relevant ESG factors were not ascertained directly from company accounts). In its submission to the court, the KLP fund stated that it was dependent on honest disclosures by all index constituents: "Verdipapirfondet KLP AksjeGlobal Indeks I... intends to demonstrate that the tracker fund industry, and the creation of tracker funds by market participants, operates among other things on the basis that issuers [...] disclose true and accurate information to the market at all relevant times. The Verdipapirfondet KLP AksjeGlobal Indeks I Claimant was set up to operate, and did operate, on this basis."

> "If passive shareholders can demonstrate that they, or a third party on which they rely, reads company accounts and similar essential information at the time of publication, then they may still have a case"
>
> ADAM BROWN

KLP did not identify any individual or specific publications on which it was basing its claim. Its argument did not focus on Barclays but on index constituents in general. This is known in shareholder litigation as price/market reliance. It assumes that markets are efficient.

Some judgements endorse price/market reliance, including the findings in the groundbreaking ESG case in the US, Ramirez vs Exxon, from 2018. However, just as market efficiency is a moot point among investors, so neither the UK nor US judiciary has yet reached a settled

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consensus. As an example, a later iteration of Ramirez vs Exxon saw the judgement swing the other way against price/market reliance.

The judge in Allianz vs Barclays travelled in that latter direction. This is the argument as summarised by Helen Davies, one of the barristers representing Barclays in the case: “A claimant could only recover damages [...] it if could prove that it, or a third party or parties on whose advice it relied, had read or heard the published information alleged to contain a misstatement or omission.”

Andrew Hill, a partner at Fox Williams, says that ever since he led a case in the UK against Tesco in 2014, the question of whether passive shareholders were on equal footing with active shareholders when seeking compensation had been in the air. “We have had index-tracking clients contacting us since the Allianz judgement,” he adds. Hill doesn't believe this latest judgement closes the door on passive investors joining claims. He noted that this was the first UK judgement to look at paragraphs three and five of Schedule 10a of the Financial Services And Markets Act. He believes that paragraph five – which puts no onus on shareholders to act or analyse company information in order to merit compensation – supports claims by passive investors.

> “The threshold of proving reliance is lower in other European jurisdictions than in the UK”
>
> JOERI KLEIN

ANDREW HILL, PARTNER, FOX WILLIAMS

This judgement is likely to be appealed. Regardless of that outcome, the consequences may be limited to investor litigation against UK-listed companies. According to Joeri Klein, co-head of group-wide investment recovery cases at litigation funder, Deminor, the threshold of proving reliance is lower in other European jurisdictions than in the UK. He feels that the latest judgement in Allianz vs Barclays will be less relevant for litigation elsewhere in Europe.

Brown, however, notes that the judgement may also impact active investors if they have weak evidence that they read company disclosures at the time of publication. This could be for salient reasons such as the portfolio manager at the time no longer being available. “It is therefore crucial for active investors to keep records of their investment decision rationale, so that they can advance a claim and meet the reliance hurdle,” he says. ■

# Control, influence and accountability

BY HUGO GREENHALGH

- Greater investor activism and a wave of recent financial scandals have encouraged many European pension funds to become more active, particularly in terms of stepping up as lead plaintiffs in US litigation
- Becoming a lead plaintiff is about taking an active lead role on behalf of the other class members in conjunction with the lead counsel
- The decision to become a lead or co-lead plaintiff is one based on the fundamental principle of accountability and achieving recourse

Institutional investors are not known, historically, for being active investors, preferring instead to allow their long-term investment horizons to ride out any short-term blips.

Now, however, numerous experts note that a move towards greater investor activism combined with a wave of recent financial scandals has seen a welter of European pension funds becoming more active, particularly in terms of stepping up as lead plaintiffs in US litigation.

"I would say most of our clients have long-term investment horizons and have adopted active ownership principles to manage their portfolios," says Jeroen van Kwawegen, a partner at global law firm Bernstein Litowitz Berger & Grossmann (BLBG).

"The second thing that has also played a role in institutional investors becoming more active is the number of scandals."

Van Kwawegen cites the 2008-09 financial crisis, the numerous scandals that hit Royal Bank of Scotland in recent years, and 'Dieselgate', which saw German carmaker Volkswagen found guilty of installing software in their diesel cars to circumvent emissions tests.

"Institutional investors [have been] confronted with situations where there were pretty egregious scandals," van Kwawegen adds.

The US sees most of the securities class action suits each year. According to the Pensions and Lifetime Savings Association's 2022 'Global Securities Litigation: Made Simple Guide', published in association with global law firm Kessler Topaz Meltzer Check (KTMC), "there was a steady rise in the number of filings from 2012 until the onset of the COVID pandemic".

DARREN CHECK, PARTNER, KTMC

In the US alone, the pre-COVID years of 2017, 2018 and 2019, saw roughly 425 cases filed each year. Outside the US, the report notes that "in the last two years alone, cases were filed against well-known public companies in the Netherlands, Japan, Germany, Australia, Denmark, Brazil, Switzerland and the UK".

"It's very apparent, if you just look at the motions that are being filed in cases, that there's been a significant increase in investors globally [moving to litigation], not just from Europe, but certainly there's been more from Europe than anywhere else," says Darren Check, a partner at KTMC.

> "Becoming a lead plaintiff is about taking an active lead role on behalf of the other class members in conjunction with the lead counsel"
>
> DANIEL SUMMERFIELD

"We're seeing investors in Asia and Australia and other places become involved as well. But certainly the largest increase has been in Europe."

## Duty calls

In December last year, Norges Bank Investment Management (NBIM), which runs Norway's NOK18.87trn (€1.6trn) Government Pension Fund Global, became co-lead plaintiff with AP7, the Swedish state pension fund, in the Silicon Valley Bank case (SVB).

SVB, which specialised in lending to the US tech sector, collapsed in 2023, following a bank run. According to the Federal Reserve's official report into the affair, the bank failed "because of a textbook case of mismanagement by the bank", leading to the 2023 action led by NBIM and AP7.

NBIM was unavailable for comment but referred IPE to the company's statement made at the time.

"I see it as our duty to take legal action to both maximise our recoveries after the SVB collapse and to signal that this is not acceptable market behaviour," Nicolai Tangen, chief executive of NBIM said.

AP7 said it was bound by similar

NG-TERM
SHORT-TERM

motives. The fund was also unavailable for further comment but stated at the time that legal actions were "one of AP7's ownership tools to protect the interests of our savers".

The fund added: "AP7 takes advantage of the opportunity to pursue litigation through class actions against companies that have violated the law or acted against the interests of shareholders negatively affecting the share price."

Yet while this sort of litigation is becoming more frequent, it is not standard, other European pension funds say.

In December last year, Alecta, Sweden's largest pension fund, announced it had been appointed to lead a class-action lawsuit in the US related to First Republic Bank.

At the time, it was estimated that Alecta had lost almost $680m following the collapse of the California-based wealth manager in March that year.

A spokesman for Alecta said it did not have a particular stance on the issue, as this had happened very few times in the Swedish pension provider's history. Any decision to move forward with litigation has been very case specific – as were the benefits – he added.

> "But sometimes the portfolio manager [says], 'No, they lied to me'. And that's a powerful incentive to hold people accountable"
>
> JEROEN VAN KWAWEGEN

## Power to decide

Those benefits are manifest – not least in terms of the possible settlements at stake. In the US alone, investors received a record $7.9bn in settlements in 2023 – up by $600m from the previous year.

Outside the US, one notable – and sizeable – case was the €1.43bn settlement won in 2022 by institutional and retail investors against Steinhoff International Holdings. The multinational holding company, which was listed both in Germany and South Africa, had admitted to accounting manipulations in 2017 and was finally liquidated in 2023.

JEROEN VAN KWAWEGEN, PARTNER, GLOBAL LAW FIRM BERNSTEIN LITOWITZ BERGER & GROSSMANN (BLBG)

[Becoming a lead plaintiff] is about taking an active lead role on behalf of the other class members in conjunction with the lead counsel," explains Daniel Summerfield, director of ESG and UK client services at global law firm Pomerantz.

"You can be involved in the key decisions in terms of how the case is run."

And, perhaps most critically, it also comes with the right to decide when to settle – and for how much, Summerfield adds. "You are in charge of deciding when to settle, at what point you settle, and also whether or not you are going to bring about any other settlements, such as non-financial settlements, by which I mean corporate governance reforms."

Unsurprisingly, this has led to a rash of US litigation firms opening offices in Europe to attempt to capitalise on the rise in more active European pension fund investors.

Check at KTMC says there has "certainly been a push by US firms to market their services to European investors" but he adds a caveat. "I don't think many have opened meaningful offices," he says. "They have PO boxes or whatever you would call them; they have an address and a consultant, maybe. But what I would say is that the institutional community in Europe knows who the serious law firms are and the most important."

Ultimately, the decision to become a lead – or co-lead – plaintiff is one based on the fundamental principle of accountability – and achieving recourse, says van Kwawegen at BLBG.

"The final benefit is that people in the organisation, the portfolio managers, know that they were lied to," he says.

Van Kwawegen says he recognises the internal conversations that would have taken place before reaching the decision to become more actively involved.

He says: "Many times portfolio managers are thinking, 'Should we do this? Should we not do this?'

"But sometimes the portfolio manager [says], 'No, they lied to me'. And that's a powerful incentive to hold people accountable." ■

CASE STUDY

# Merseyside: Looking after one's own benefits the wider economy

BY BRENDAN MATON

The £10bn (€12bn) Merseyside Pension Fund has long been recognised as an active asset owner that takes its responsibilities as a shareholder seriously.

One major success in conjunction with other shareholders in Starbucks was to get the coffee company at the table with the Workers United trade union to discuss the right to collective bargaining. Merseyside and others had tabled a motion at Starbucks 2023 AGM that refusing employees the right to associate as a trade union conflicted with Starbucks' policy on human rights.

In a case brought against UK-listed pharmaceutical company, Indivior plc and its former parent, Reckitt Benckiser Group, Merseyside Pension Fund's administering authority, Wirral Council, is now leading the way by bringing novel representative legal action on behalf of hundreds of institutional investors which seeks to hold Indivior to account for a lack of transparency.

Unlike the Starbucks motion, the Indivior and Reckitt case is about responsible stewardship and shareholder redress, including financial compensation for damage to share value caused by failing to disclose serious wrongdoing to the market in a timely manner. Indivior and Reckitt have already paid huge fines and settlements in the US (including to regulatory authorities and US States) in relation to a fraudulent 'product hopping' scheme aimed at deceiving physicians and patients regarding Suboxone, a drug for treating opioid addiction. Indivior's share price crashed 74% following publication of the Grand Jury indictment in 2019 and approximately US$2bn was paid out by the companies. Indivior pleaded guilty to felony charges and its former CEO, Shaun Thaxter, went to prison for his part in the wrongdoing.

> "Once there has been a judgment establishing that the market has been misled, investors will likely feel more justified in seeking redress"
>
> CHARLIE MORRIS

So, as often is the case, shareholder litigation follows regulatory punishment.

Wirral Council is working with specialist shareholder collective redress business, Woodsford, to seek accountability and compensation. Owen Thorne, investment manager for Merseyside, described shareholder litigation as one more element in the stewardship toolbox.

Woodsford CIO, Charlie Morris, notes that such actions constitute an important and recognised form of collective escalated engagement by shareholders with their investee companies. As well as helping to fulfil the obligation of a responsible fiduciary to recover losses, Morris says that such actions are also an effective form of private regulation that promote good corporate behaviour, which is fundamental to a thriving economy.

The current dispute in Wirral vs Indivior and Reckitt is less about the amount of money to be reclaimed but rather whether such actions can be brought by one investor as a representative of others (rather than all investors having to be parties to the litigation).

There are various requirements for this kind of representative action, including that the representative and the represented persons have to have the 'same interest' in the outcome. A recent judgment, in Lloyd vs Google, found that this requirement is met where there are divergent interests among the represented persons so long as there is no actual conflict of interests between them. Reckitt and Indivior have conceded that the 'same interest' test has been met in Wirral's case but asked the court to dismiss the action on discretionary grounds.

In Wirral vs Indivior, Wirral is seeking in a first stage of proceedings to establish liability via a representative claim, to be followed by determination in a subsequent stage of whether the represented investors are individually entitled to compensation.

This is known in such litigation as bifurcation: common issues first; individual issues second. Morris describes bifurcation as cost-efficient as it avoids significant expense that would be wasted if spent prior to liability being established. Early determination of liability will also allow investors to make more informed decisions about whether to participate in such actions. "Once there has been a judgment establishing that the market has been misled, investors will likely feel more justified in seeking redress," says Morris.

In the Indivior and Reckitt case, unfortunately, the judge at first instance decided to dismiss Wirral's innovative approach, ruling instead that every investor should be a named claimant (in a group rather than representative action). In June, however, Wirral was given leave to appeal the verdict with the appeal due to be heard by the Court of Appeal this month (December 2024) with judgment likely to follow early 2025. ■

KESSLERTOPAZ
MELTZERCHECK LLP
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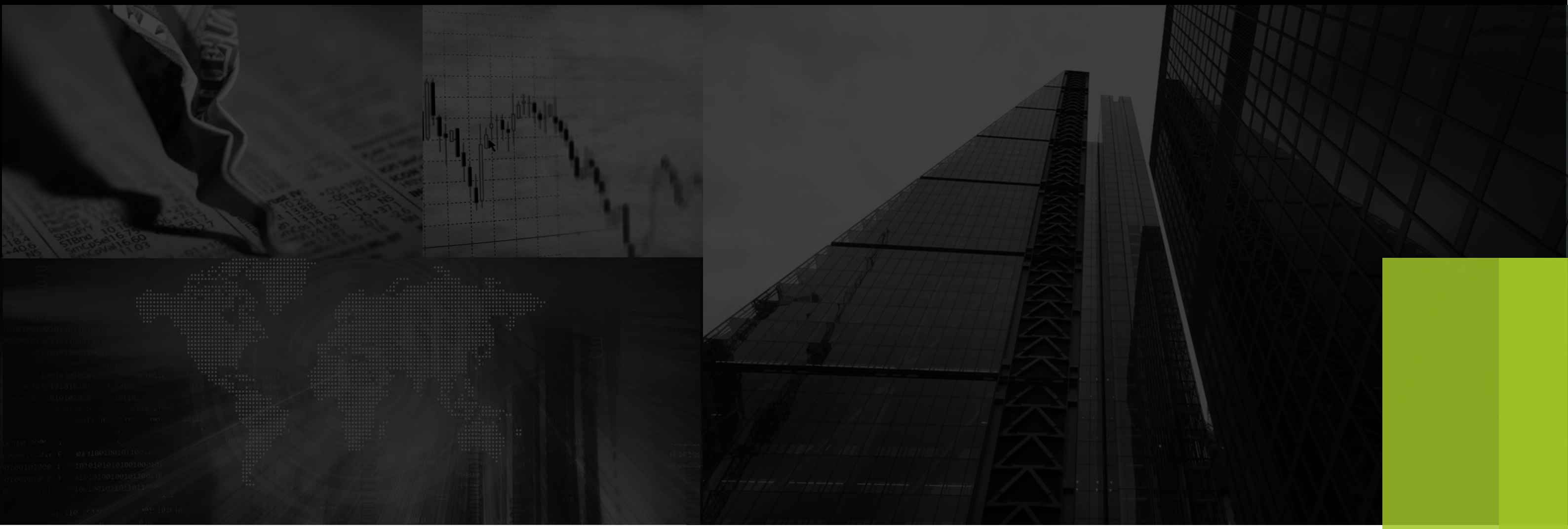

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# Finding the right service provider to allow you to get what you want out of shareholder litigation

**Authors:**

Darren J. Check, Esquire

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The shareholder litigation landscape for institutional investors is vast and more complex than ever. The days of fulfilling your fiduciary responsibilities to your pensioners, unit holders, or other constituents by simply filing claims in U.S. securities class action settlements are long gone. Now, investors are confronted with whether and how best to pursue shareholder and antitrust claims in different class, group and collective actions filed around the world.

As the number of countries in which actions are filed continues to grow, so does their complexity. In some instances, claims against the same company for the same behavior are being brought simultaneously in different jurisdictions. This has resulted in opportunities for litigation funders to enter the marketplace promoting varying price points for investors to consider. Because nearly all actions filed outside the United States require investors to proactively join them at the beginning, rather than wait until a resolution is reached, it is imperative that global investors remain current and positioned to act quickly. In addition, the challenges to register or prove standing in shareholder and antitrust actions are not insignificant; in many jurisdictions, copious amounts of supporting documentation are necessary.

The danger for investors is missing out on opportunities to recover substantial losses. As the number of cases filed around the world grows, so does the magnitude of the recoveries. Recently, there were two actions that resolved resulting in payouts greater than $1 billion (€940m) each for global investors. It is worth noting, however, that pursuing or participating in any and all shareholder litigation should not be the default for any institutional investor. Rather, that is a decision that requires timely and proper analysis and consideration.

Litigation is now often utilised as a powerful and valuable tool for stewardship by many investors. There is another universe of cases that, until recently, most institutional investors were not all that familiar with. Historically, the Delaware Court of Chancery served as a forum for investors to seek to change corporate behavior or bring money back to a company's coffers. These derivative or corporate governance actions have grown into a key tool for shareholders in holding companies and their insiders accountable when they commit fraud or material misconduct. Outside the United States, mainly in Europe, there is a small, but growing, number of legal actions brought by shareholders, as well as environmental and advocacy groups, related to climate change.

As a result, institutional investors importantly must decide what they want to get out of shareholder litigation. There are essentially three options: (1) The bare minimum, which includes filing claims in shareholder litigation settlements in the United States and the minimal number of jurisdictions that allow fully passive participation; (2) Filing settlement claims as a passive participant, but also actively joining certain actions around the world, such as Germany, Japan and United Kingdom, where it is necessary to affirmatively register or file a claim; or (3) Taking an active role as a plaintiff or representative party in shareholder actions, such as serving as a lead plaintiff in a U.S. Federal securities class action or in a corporate governance class action in a state court.

Of course, not every investor is the same and very few investors fit neatly into only one box when it comes to shareholder litigation. Views on asset recovery, shareholder engagement, and litigation in general are

often different and can change over time. For example, an investor may experience a financial loss resulting from fraud which is so large that it feels compelled to take action; or possibly a company in its portfolio begins engaging in behaviour that is antithetical to other engagement work it is doing in areas such as the environment or child labour.

So, here is the question:  How do institutional investors with complex structures and global investments ensure they are aware of all of the opportunities and options that are out there?  Relying on custodians and third-party claims filers is no longer a reasonable solution for global investors. Those providers simply are not positioned to provide real-time details on claim opportunities outside the United States and are not experts to guide clients on how best to recover assets lost to fraud or corporate mismanagement. The importance for finding a provider that can identify real and possible claims, analyse different opportunities, and provide legal opinions and support is invaluable in this complex environment. While it is true that investors looking to do only the bare minimum, then a third-party filer may be a reasonable solution (for claims filed in the United States). But, for global investors that are focused on covering the global landscape in which they invest, those investors are best served in finding a provider that can meet all of their needs. Global investors should be looking for the following when seeking a provider:

- A service that provides comprehensive portfolio monitoring and claims filing covering both U.S. and non-U.S. shareholder and antitrust litigation, and that will also file claims in U.S. bankruptcies that involve shareholder class actions.
- All services should be provided under a single contingency fee or annual subscription rate, no extra costs for certain types of claims filing or advice on non-U.S. litigation.
- A service that provides the above with legal advice on shareholder and antitrust litigation. Your provider needs deep experience not only in monitoring and claims filing, but ideally also litigating cases around the globe.
- A robust and user-friendly online platform to easily track all types of actions and recoveries with customisable reporting.
- A service that does all work in-house. Large global institutional investors should be weary of services that outsource work that involves their sensitive data.
- Data security is a must for any external provider. Your shareholder litigation service provider should have IT security measures that meet or exceed what you would expect from a custodian.

Institutional investors are increasingly looking for better solutions to help them identify and analyse claims and actions around the world in a timely manner. The goal should not be to file more actions; rather, the goal should be to find a solution that enables investors to make real-time decisions, informed by legal guidance, on whether, where and how to best proceed. In the past, solutions that catered to investors only interested in filing claim forms in US settlements was enough. Now, global investors have heightened responsibility to utilise solutions that are designed and intended to protect investors wherever they invest (in the United States and around the world).

# Investor litigation outside the US on the rise

BY NIAMH SMITH

- Shareholder litigation is spreading globally following a 2010 US Supreme Court ruling and in the UK due to the introduction of 'opt-out' mass claims
- There is increasing competition from new law firms and litigation fundsers entering the field
- A lack of cases reaching full trial and judgement in the UK means the jurisidction remains essentially untested

Class-action lawsuits have been a staple of the litigation landscape in the US for decades, but this trend is now spreading, with investor litigation on the rise across the UK and Europe. In fact, the UK's litigation funding market, valued at £2.2bn (€2.65bn), is now the world's second largest, behind the US, according to Clifford Chance.

The global increase in shareholder litigation in recent years can be traced in part to the 2010 case Morrison vs National Australia Bank, in which the US Supreme Court ruled the Securities Exchange Act of 1934's Section 10(b) does not apply to foreign plaintiffs suing foreign and American defendants for securities traded on foreign exchanges. These foreign investors, having been excluded from the US courts, began exploring options for bringing claims in the jurisdictions where they acquired the securities.

The growth in class-action filings in the UK is also partly driven by the introduction of 'opt-out' mass claims in England and Wales. This is a practice commonly used in the US, where claimants can bring a claim on behalf of an entire class without needing the explicit consent or even knowledge of each individual class member.

The continued growth in investor litigation outside the US has encouraged new entrants to the international market, including law firms and litigation funders, broadening options for claimants and influencing how firms operate, as well as which cases reach the courts.

ANDREW HERRING, LITIGATION PARTNER, PINSENT MASONS

## The impact of greater choice

As more players enter the market, competition between law firms and funders looking to bring cases has intensified and provided investors with more choice.

Richard Hornshaw, head of international disputes at Akin Gump, says that the increasing number of funders and law firms is helpful for claimants, as it promotes competition and allows for the introduction of new ideas.

> "There's likely to be a very large group of potential claimant investors who have invested in a publicly listed company being targeted by competing proposals from different law firms and funders"
>
> ANDREW HERRING

However, he also warns that even though not all new entrants will offer the same service, investors who are novice in this field may not understand nuanced differences. "It presents investors with the challenge of choosing between funders and firms in circumstances in which the offerings may look similar or the important details may be difficult to compare," he says.

Andrew Herring, litigation partner at Pinsent Masons, agrees that even though increased competition in the market could be beneficial, choosing the right law firm might be difficult.

"I'm a great believer in choice in the market and competition being a good thing for clients, but the issue is these claims are very complex and differ significantly from jurisdiction to jurisdiction, so potential claimants and defendants really need to be speaking with specialist lawyers to run them," he says.

Consequently, Herring notes, some potential claimants might select a law firm that is not as specialised in the relevant field as they may like. "There's likely to be a very large group of potential claimant investors who have invested in a publicly

> "Since no securities cases have reached trial in the UK, and there are few examples in the EU, it remains difficult to predict how a court will assess the quantum of the loss"
>
> JEREMY MARSHALL

listed company being targeted by competing proposals from different law firms and funders," he says. "The challenge then is how the institutional investors undertake their due diligence to decide which horse to back in that situation."

Helpfully, there are now dedicated service providers, which provide shareholder and financial antitrust litigation monitoring, advisory and recovery services, to help institutional investors navigate this process.

Jeremy Marshall, CIO at Winward, says that a fragmented market is not helpful for shareholders if the case is relatively small, because a funder will only look to fund a securities claim if it can be certain that the level of loss is sufficient to support the investment. "Since no securities cases have reached trial in the UK, and there are few examples in the EU, it remains difficult to predict how a court will assess the quantum of the loss," he says. "But funders will assume the lowest level of recovery, so sometimes too many initiatives lead to the situation that the claim just does not get off the ground."

## New entrants' additions to the market

With more entrants in the market, the question remains as to whether these new players increase choice. Hornshaw says that the new entrants, which are mostly but not exclusively US firms and funders, do bring a new dynamic both in terms of the experience from their home markets, their approach and risk appetites. "There are a number of areas where their practical experience can be brought to bear, for example at the outset of the case with book-building and at the conclusion around the practicalities of distribution of recoveries," he says.

JEREMY MARSHALL, CHIEF INVESTMENT OFFICER, WINWARD

Herring cautions that while funders continually seek different ways to finance cases, which spurs innovation, they remain limited because of factors such as their lending ratio of costs to damages. He says that since securities litigation claims under the UK's Financial Services and Markets Act have been available for over 15 years, much innovation has already occurred, making it increasingly challenging to introduce new strategies as time goes on.

## Understanding the market

Marshall says several non-US cases have been brought and most have settled. For example, the cases of financial health misrepresentation and accounting misstatement brought against Royal Bank of Scotland and Tesco respectively, both settled in England. Meanwhile, the Volkswagen emissions scandal case in Germany is ongoing.

However, he notes that the UK and EU securities litigation markets are not as mature as in the US, and that the differences in maturity between the US market and other markets are not well understood, especially by investors seeking to bring cases. "Although it has grown fast, the market in the UK is still relatively immature and there is still a real lack of cases that have reached the stage of a full trial and judgment. So, to that extent, investor litigation in the UK could be said not to be really well understood even within the UK," he says.

The lack of maturity has also created some key points of difference in legal theories and procedures. For example, the requirement in the UK to establish causation and the possibility of intrusive orders for disclosure and cross-examination of witnesses is not applicable in the US.

"Historically, these differences have not been well understood, although that picture is beginning to change," Marshall says. "I think the main movers in this space today remain UK firms and funders but, with the number of new entrants, this may well start to change." ■

# To divest, or not to divest? A key question for investors seeking to promote sustainability goals

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Environmental, social and governance ("ESG") concerns increasingly drive major investment decisions by institutional and retail investors alike. The strategy for investing in companies that already prioritize ESG goals is clear, but the strategy for investing in other organizations is more complicated.

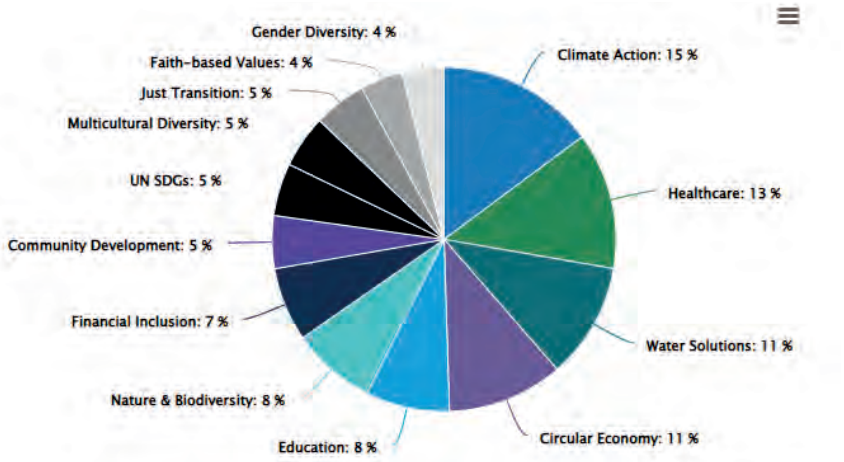
When considering an investment in an organization that is not currently promoting ESG practices (or not ***sufficiently*** promoting ESG practices), investors face two options: divest or retain their investment. This article examines the pros and cons of each approach based on recent research and examples and, ultimately, argues that investors can effectuate a greater impact on organizations when they maintain their investments and take an active role in driving internal change.

## Background

Over the past seven years, investors have increasingly selected their investments based on environmental, social, and governance goals.[1] ESG broadly stands for sustainable corporate practices and policies relating to critical global issues like climate change, fair labor standards, and sufficient internal controls. Under the ESG framework, corporations are held to a set of standards related to their sustainability efforts which allow investors to assess each corporation's ESG impact.[2]

Investors increasingly rely on these standards, and prioritize corporate sustainability, when making

**Top sustainable investing themes ranked**

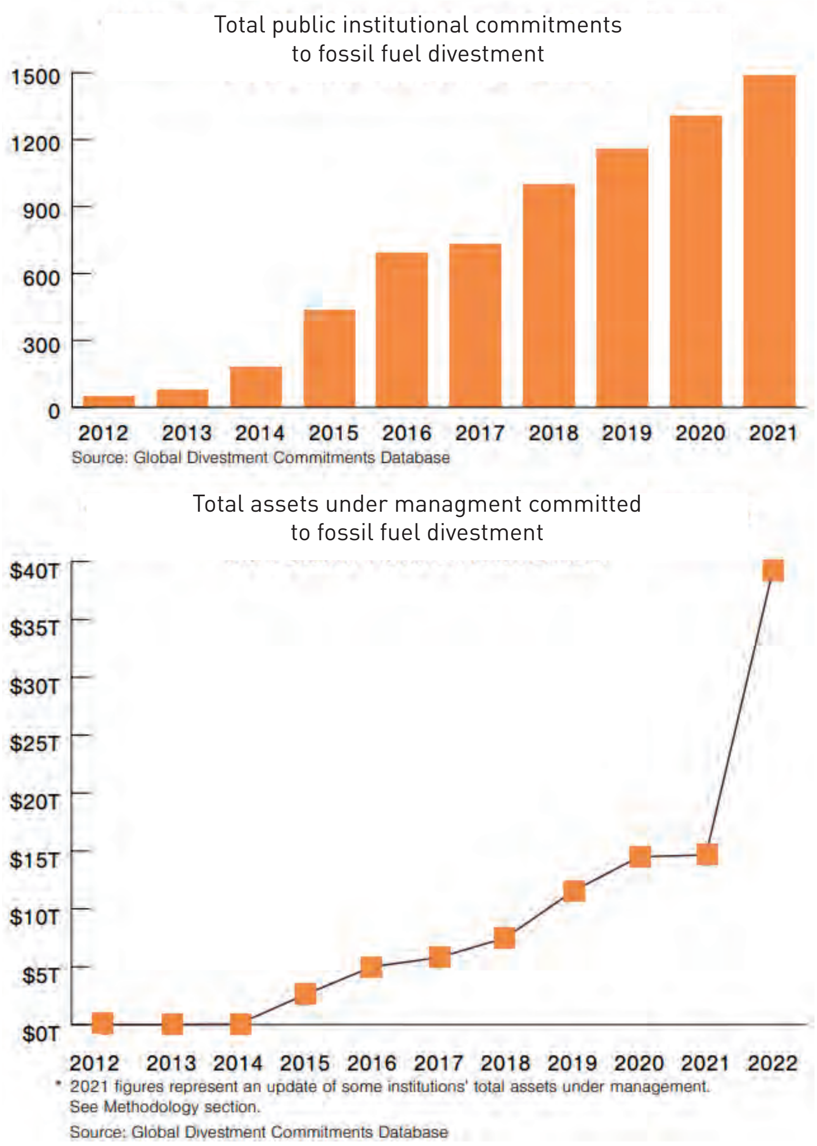


Source: Morgan Stanley Institute for Sustainable Investing, January 2024 investment decisions. This marked increase has been confirmed by several recent studies. For example, in January 2024, Morgan Stanley published a report containing the results of an investor survey which found that “more than half of investors say they plan to increase sustainable investments in the next 12 months.”[3] The same study concluded that climate action was among the most important of the concerns to investors.[4]

The Institute for Energy Economics and Financial Analysis issued a report in June 2024 that confirmed “inflows into sustainable [investment] funds remain strong, especially in Europe.”[5] In a May 2024 study, ISS-Corporate similarly identified high shareholder interest in governance goals within the U.S.[6]

The global rise of ESG-driven investing has prompted institutions and investors to consider the efficacy of various investment strategies in advancing their ESG aims. These considerations beg the question: what strategy has the greater impact on corporations, divestment or retention?

**Growth in divestment commitments**


Total public institutional commitments to fossil fuel divestment

Source: Global Divestment Commitments Database

Total assets under managment committed to fossil fuel divestment

* 2021 figures represent an update of some institutions' total assets under management. See Methodology section.

Source: Global Divestment Commitments Database

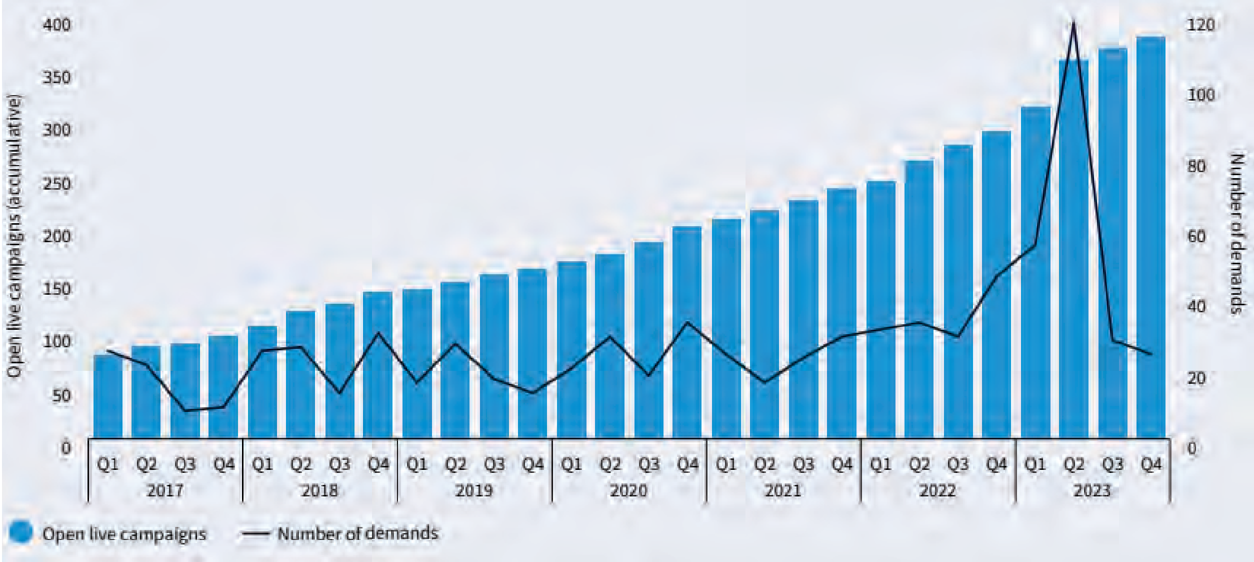
### The Divestment Approach

As investors consider various strategies for enhancing corporations’ commitment to ESG practices, divestment appears to be an obvious option. CNN defines divestment as the practice of “sell[ing] off [] shares of a company to avoid complicity in activities [investors] deem unethical or harmful.”[7] At its core, the goal of this strategy is to signal to corporations that their continued engagement in such practices will result in a loss of shareholder funds.[8] Consider for example, a large institutional investor invested in a variety of publicly traded corporations. If a corporation were found to be engaging in corrupt practices, the institutional investor may vehemently disagree with the company’s corrupt and illegal activities. In order to demonstrate the institution’s disagreement, the institutional investor could sell off all of its shares (in some cases totaling millions of dollars) to send a clear message that the institution would not stand idly by as the corrupt practices continue.

Calls for the implementation of this divestment strategy were widely publicized in 2024—particularly on college campuses. That is, students called upon their universities to divest from various corporations associated with poor environmental standards.

A group of students at Columbia University, known as “Sunrise Columbia,” are working to fight the climate crisis and have called for complete divestment from fossil fuel companies. To support their calls for divestment, the students cited

Live campaigns in Europe



Source: Activist Investing in Europe 2024

to several points in the University's history where officials divested from organizations that failed to align with the University's mission. As another example, in 2015, Columbia University made the decision to divest from the private prison industry in the wake of student protests, and in 2017 the University made a similar divestment decision to cut ties with companies generating over 35 percent of their revenue from thermal coal production. Now, students are pointing to these examples to call for complete divestment from fossil fuel companies.[10]

Harvard University faced similar calls for divestment in 2021 when the Climate Defense Project, together with local officials, faculty, and alumni, filed a complaint against the University alleging that its continued investment in fossil fuel companies violated its fiduciary duty.[11]

Universities are not the only institutions willing to divest from organizations like fossil fuel companies. Indeed, a joint report by the Institute for Energy Economics and Financial Analysis, Stand.earth, C40, and the Wallace Global Fund found that 1,485 institutions involving $39 trillion in assets have publicly committed to divesting from fossil fuel companies.

## Does Divestment Have Investors' Desired Effect?

As evidenced by the above examples, the divestment strategy has gained traction among many investors and institutions. Even so, several experts question the true impact of divestment in reshaping organizations' commitment to ESG practices.

One working paper, *The Impact of Investing*, published in 2021, concluded that divestment does not have the desired effect that ESG-minded investors are seeking.[13] Mainly, the paper found that too few investors were divesting from the at-issue organizations to have a significant impact—meaning that, in most cases, organizations could continue on with existing practices without feeling compelled to change. In addition to eliminating shareholders' voices in calls for change, divestment also consolidates ownership into the hands of the remaining investors who are likely indifferent to concerns about climate change or other critical issues.[14]

While seemingly attractive on its face, divestment may not have the desired impact unless the level of divestment is significant enough to hinder a company's overall financial structure. Bill Gates acknowledged this reality in 2019 when he stated that "[d]ivestment, to date, probably has reduced about zero tons of emissions. It's not like you've capital-starved [the companies] making steel and gasoline."[15]

## Retaining Investments To Promote Internal Change

While divestment has not had the full, desired effect, investors do have an alternative strategy: maintain their investments and push for change. At first glance, such a strategy may appear counterintuitive, but research and industry examples demonstrate that investors have made significant progress by advocating for change within organizations—*i.e.,* in their capacity as shareholders. Indeed, when analyzing this strategy, Harvard Business School senior lecturer Mark

Kramer stated "[i]f you want to do impact investing with publicly traded securities, you have to be actively engaged with management."[16]

Shareholders are uniquely positioned to engage with management due to several specific rights which legally allow them to vote on company proposals, raise concerns about corporate management and advocate for solutions.[17] In the case of divestment, investors relinquish these key rights upon the sale of their shares. However, when investors maintain their shares, they may utilize these privileges to advance ESG aims.

This strategy gained significant media attention in 2024 when Engine No. 1, a small hedge fund aimed at fighting climate change,[18] engaged in activist activities in an effort to create long term change at ExxonMobil—initiating a battle for board seats. However, Engine No. 1 is just one example of many institutions engaging in activist investing that vary by form and degree of hostility. For example, in 2023, German investment institution, Union Investment, was key in initiating seven activist campaigns against German companies. European shareholders have continued to follow suit evidenced by their increasing engagement in activist efforts.[19]

In addition to taking an activist role, shareholders of publicly traded U.S. corporations may avail themselves of other rights. For example, in some cases, it makes sense for shareholders to utilize U.S. investor protection laws that compel engagement rather than simply encouraging it. Many Fortune 500 companies are incorporated in the jurisdiction of Delaware in the U.S. to take advantage of a robust set of laws that have developed for corporate governance. Because these major companies are subject to Delaware law, investors may initiate engagement with U.S. corporations via various jurisprudence in Delaware laws developed to effectuate good governance. Specifically, Delaware General Corporation Law Section 220 provides investors with the ability to access corporate books and records to, among other things, investigate breaches of fiduciary duty, suspected corporate wrongdoing, mismanagement, or governance shortfalls. Thus, in the event that collective shareholder action and corporate communications prove ineffective, investors can demand direct documentation by the company. This documentation will allow the asset manager to better understand each company's ESG practices and sustainability efforts and will help engagement efforts because investors will then be armed with relevant company documents. Through a Section 220 demand, asset managers can directly investigate ESG practices and sustainability efforts, engage with companies on these issues and then propose and negotiate specific corporate initiatives or reforms to address these issues. And, beyond investigations, investors are afforded the opportunity to engage in litigation as needed to compel reforms.

With these avenues for engagement and effective change, the case for the retention strategy is becoming increasingly strong in both the U.S. and Europe. Shareholders' continued investment and involvement in these efforts will drive meaningful internal change to promote sustainability efforts worldwide and continue to preserve, and in many cases, drive up shareholder value.

[1] *See* Ramnath N. Iyer, *ESG Investing, Steady Growth Amidst Adversity*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS (June 10, 2024), https://ieefa.org/resources/esg-investing-steady-growth-amidst-adversity#:~:text=Environmental%2C%20social%2C%20and%20governance%20(,remain%20strong%2C%20especially%20in%20Europe.

[2] *See* Tom Krantz & Alexandra Jonker, *What is Environmental, Social and Governance (ESG)?*, IBM: TOPICS (Jan. 24, 2024), https://www.ibm.com/topics/environmental-social-and-governance

[3] *Individual Investors' Interest in Sustainability is on the Rise*, MORGAN STANLEY: INSTITUTE FOR SUSTAINABLE INVESTING (Jan. 26, 2024), https://www.morganstanley.com/ideas/sustainable-investing-on-the-rise

[4] *See id*.

[5] Ramnath N. Iyer, *ESG Investing, Steady Growth Amidst Adversity*, INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS (June 10, 2024), https://ieefa.org/resources/esg-investing-steady-growth-amidst-adversity#:~:text=Environmental%2C%20social%2C%20and%20governance%20(,remain%20strong%2C%20especially%20in%20Europe.

[6] *See* Jun Frank, *Pro-ESG Shareholder Proposals Regaining Momentum in 2024*, ISS-CORPORATE (May 22, 2024), https://www.iss-corporate.com/library/pro-esg-shareholder-proposals-regaining-momentum-in-2024/

[7] Nicole Goodkind, *What is Divestment? And Does it Work?*, CNN: BUSINESS (Apr. 28, 2024, 7:30 AM), https://www.cnn.com/2024/04/28/investing/stocks-lookahead-divestment-college-protests/index.html#:~:text=That%20action%20is%20intended%20not,activists%20targeting%20endowments%20during%20demonstrations.

[8] *See id*.

[9] *See* Sunrise Columbia, *Divestment Unites Us, From Environmental Justice to a Free Palestine*, COLUMBIA SPECTATOR (Mar. 28, 2024, 6:47 PM), https://www.columbiaspectator.com/opinion/2024/03/08/divestment-unites-us-from-environmental-justice-to-a-free-palestine/.

[10] *See id*.

[11] *Invest Divest 2021: A Decade of Progress Towards a Just Climate Future*, DIVESTINVEST (Oct. 26, 2021), https://www.divestinvest.org/wp-content/uploads/2021/10/Divest-Invest-Program-FINAL10-26_B.pdf.

[12] *See id*.

[13] *See* Jonathan B. Berk & Jules H. Van Binsbergen, *The Impact of Investing*, STANFORD GRADUATE SCHOOL OF BUSINESS: FACULTY & RESEARCH (Aug. 27, 2011), https://www.gsb.stanford.edu/faculty-research/working-papers/impact-impact-investing.

[14] *See* Adam Aston, *Why Divestment Doesn't Work — and Just Won't Die*, TRELLIS (Jul. 24, 2024), https://trellis.net/article/why-divestment-doesnt-work-and-just-wont-die/

[15] *Id*.

[16] Lane Lambert, *ESG Activists Met the Moment at ExxonMobil, But Did They Succeed?*, HARVARD BUSINESS SCHOOL: WORKING KNOWLEDGE (Feb. 16, 2023), https://hbswk.hbs.edu/item/esg-activists-met-the-moment-at-exxon-mobil-but-did-they-succeed.

[17] *See* generally Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j; Securities Act of 1933, Section 11, 15 U.S.C. §77k; 8 Del. C. § 220. ]

[18] *See* Lane Lambert, *ESG Activists Met the Moment at ExxonMobil, But Did They Succeed?*, HARVARD BUSINESS SCHOOL: WORKING KNOWLEDGE (Feb. 16, 2023), https://hbswk.hbs.edu/item/esg-activists-met-the-moment-at-exxon-mobil-but-did-they-succeed

[19] *Activist Investing in Europe 2024*, Skadden & Mergermarket (2024), https://www.skadden.com/-/media/files/publications/2024/02/the-informed-board/activist_investing_in_europe_2024.pdf?rev=8d8a6aa2daa74afab28ba9d57542cef2&hash=5EA5FB36851012F9D8D19F06DAD9AB30.

# UK group litigation funding: Devil in the detail

BY GAIL MOSS

- A UK court ruling has rendered litigation funding agreements in England and Wales based on damages unenforceable
- Third-party funders have found alternative ways of calculating remuneration
- The Civil Justice Council is reviewing litigation funding and legislative safeguards

Third-party litigation funding (TPLF) has become a key 'must-have' for opt-in group litigation in Europe, but in July 2023 the UK Supreme Court made a ruling that potentially threw a spanner in the works for such funding used in UK lawsuits.

A case was brought on behalf of buyers of commercial trucks against the manufacturer, US company PACCAR, claiming they had suffered loss because of a cartel which the EU Commission had found to have operated between major truck manufacturers. However, the Supreme Court upheld PACCAR's defence that as the return for the litigation funders was contingent on the level of damages awarded to the claimants, the funding agreement constituted a so-called damages-based agreement (DBA).

In order to be enforceable, DBAs must follow the restrictions imposed by the 2013 DBA Regulations. But funding agreements do not generally comply with these regulations; consequently the Supreme Court ruled that these agreements were largely unenforceable, which threw the UK industry into chaos. In March 2024 the then Conservative government introduced the Litigation Funding Agreements (Enforceability) Bill, intended to restore the situation before the Supreme Court ruling, in which litigation funding agreements were distinct from damages-based agreements and not subject to DBA regulations. However, the intended law was not enacted before July's general election and change of government, leaving the legal status of litigation funding in limbo.

> "Since the Supreme Court's decision in PACCAR put an end to funders taking a percentage of damages, funding returns have most often been calculated as a multiple of the amount of capital invested by the funder"
>
> TOM STEINDLER

Before any new legislation is proposed in the UK, the new Labour government will wait for the results of an ongoing review of TPLF being carried out by the Civil Justice Council (CJC). This includes considering regulatory safeguards for claimants amid concerns stemming from the PACCAR judgement, and the CJC is set to report by summer 2025, although an interim report was published on 31 October 2024. A Ministry of Justice (MoJ) spokesperson says: "Third-party litigation funding plays a critical role in ensuring access to justice, but concerns have been raised about the need for greater regulation and safeguards for claimants. The CJC's review will help inform the government's approach to potential reforms and legislation." The (paused) bill applies only to England and Wales, as does the CJC review. Litigation funding is a devolved matter in Scotland and Northern Ireland.

## Sea change

So where does this leave litigation funding? The Association of Litigation Funders (ALF) is an independent body which has been charged by the MoJ with delivering self-regulation of litigation funding in England and Wales. This includes a code of conduct for members, setting out

standards of practice and behaviour. Susan Dunn, ALF chair, says that funders now fund claims on one of two bases: "Non-recourse lending is typically used for single cases, ie, only paid if the case is successful and money is recovered. Alternatively, under a recourse arrangement the lender provides an interest-bearing credit facility to enable the law firm to fund either books of cases or funding for growth of their practice."

Tom Steindler, managing director, Exton Advisors explains that "generally, a litigation funder's return is payable from damages awarded by the court. But the funder cannot pursue the claimants or their lawyers to recoup their investment if the claim is unsuccessful. Since the Supreme Court's decision in PACCAR put an end to funders taking a percentage of damages, funding returns have most often been calculated as a multiple of the amount of capital invested by the funder. We have also seen other metrics introduced, such as internal rate of return." Steindler notes that since PACCAR, there has been a period of widespread renegotiation of funding agreements across the market: "The market has adapted and found ways of dealing with the effect of the ruling." He points out that the position is different in continental European jurisdictions such as the Netherlands, France, Germany, Portugal, Denmark and Sweden, where some funders do seek a percentage of damages.

Zachary Sananes, a commercial litigation partner at Stewarts, says: "By now, most market participants will have taken adequate steps following PACCAR to ensure the enforceability of their current funding arrangements – whether by contractual amendment or taking pre-emptive legal measures." He warns that unless the Bill is re-introduced and passed, or there is broader guidance arising from the CJC's review, it seems likely that the status quo will be maintained, though with an increased degree of caution. "This will result in restricted pricing options and a lack of innovation to try and reduce costs, given the legal uncertainty of what might come next. These limitations may well make some cases effectively unfundable, or only at a price that is unacceptable to the prospective funded party."

ZACHARY SANANES, COMMERCIAL LITIGATION PARTNER, STEWARTS

> "Inhibitive regulation – such as the introduction of caps in respect of funder returns – has more potential downsides than advantages"
>
> ZACHARY SANANES

Dunn observes some fallout from this: "The evidence shows there has been a definite slowdown in the number of cases being funded due to the uncertainty being caused by PACCAR. It is in no one's interests that legitimate cases can't proceed only due to lack of funding."

## Charting a course

So is PACCAR still likely to be reversed? Dunn believes so. “The bill had cross-party support and has only not been passed so far because of the early calling of the election. The need for the bill is still very clear as the industry has seen bad actors on both the defence and claimant side seeking to use PACCAR solely to defeat funding to get rid of legitimate claims, which benefits no one other than the defendant.”

Robin Ellison, chairman of the Cambridge Colleges Pension Scheme, thinks not: “My understanding is that it is merely an irritant and that no-one is waiting for law reform. It is now public policy that litigation funding offers access to remedies that few could afford before. I struggle to see what additional protection to the public any regulator/regulation could afford. There’s competition and innovation in the market and the courts are closely involved by definition, so there’s transparency.”

In its interim report, the CJC does not make recommendations but examines different approaches to regulation, the relationship between TPLF and costs, and outlines other litigation funding options available. These include legal expenses insurance, conditional fee agreements and DBAs, as well as crowdfunding and civil legal aid. The report is open for consultation until 31 January 2025. “The one move which we think would be a huge mistake would be to place caps on funders’ fees,” says Dunn. “This would only reduce the number of claims funders will opt to fund, as they will become even more conservative about the likely claim values and budgets of cases.” Sananes agrees: “Inhibitive regulation – such as the introduction of caps in respect of funder returns – has more potential downsides than advantages.”

> “It is in no one's interests that legitimate cases can't proceed only due to lack of funding”
>
> SUSAN DUNN

SUSAN DUNN, CHAIR, ALF

In August 2024, the European Law Institute (ELI) published its report Principles Governing the Third-Party Funding of Litigation. This specifically rejected the introduction of prescriptive regulation on the basis that it is unlikely to be appropriate across the board, given the vast difference in cases and the entities or people involved. It suggested that regulation “is only appropriate where there is an identifiable problem or market failure”, and that a “light touch” approach was therefore suitable. In the UK meanwhile, as Sananes explains, “the prevailing view [...] appears to be that we are some way short of a formal regulatory model being imposed and we have not yet experienced the kind of ‘market failure’ which might justify such an approach. Rather, there seems to be a preferred middle-ground towards ‘light-touch’ regulation, which promotes a commitment to general guiding principles and the ongoing development of best practice.”

Steindler points out that “the report provides some guidance on issues which need to be taken into account by claimants and their legal representatives before entering into a TPLF agreement. However, while it is a useful resource, it does not have a direct impact on securities group actions. That said, it will be interesting to see how approaches to the regulation to TPLF evolve across Europe in the coming years, and whether the ELI’s conclusions are shared by the European Commission and member states.” ■

## How litigation funding works in the Netherlands

In The Netherlands, third-party litigation funding (TPLF) is permitted by law and is a growing field, particularly for mass claims lawsuits and arbitration. While no public entities conduct oversight over TPLF, the professional rules of conduct applicable to lawyers do impose certain restrictions on the remuneration arrangements. A ‘no cure, no pay’ arrangement, or an arrangement under which the lawyer’s remuneration is defined as a part of the value of a judgment or award, is generally prohibited, although success fees are permitted, provided they cover costs. These restrictions do not extend to third-party litigation funders, so far as these funders do not act as counsel representing the funded party. As a result, third-party litigation funding constitutes a growing area, particularly for arbitration and class actions.

A major driver has been the Act on the Resolution of Mass Damages in Collective Action (WAMCA), in force from 1 January 2020, and resulting in an upsurge in class actions filed in the Netherlands by foundations or associations set up to file claims on behalf of investors.

The law revolutionised the Dutch collective action regime by allowing claims for monetary damages on an opt-out basis for those class members domiciled in the Netherlands. However, where third-party funders are involved in cases initiated by a claim vehicle under this law, the Dutch Civil Code (DCC) requires that the interests of class members should be sufficiently secured for the claim vehicle to be admissible.

To secure the interest of class members, the DCC requires that, in a TPLF arrangement, those represented by the claim vehicle must have appropriate and effective mechanisms to participate in the decision-making of the claim vehicle. The claim vehicle itself should also have sufficient funds to pursue the claim while retaining sufficient control over the collective action, ie, the third-party litigation funder may not have a decisive influence over the claim or control the lawsuit. Once a collective action has been initiated, Dutch members of the class may choose to opt out after the court has appointed an exclusive representative and, if a settlement is reached, after the court has approved the settlement agreement. A judgement in the collective proceedings will be binding on all members who have not opted out. Class members residing outside The Netherlands are only bound by the collective action if they expressly opt in.

All in all, it seems as if the litigation funding industry – and class actions – will continue to thrive in the Netherlands. Even so, it is likely to be a while before any payout rivals the landmark €1.3bn settlement approved in 2018 between Ageas – the successor company to the Fortis financial services group – and organisations claiming for financial losses arising from the group’s collapse in 2008. ■

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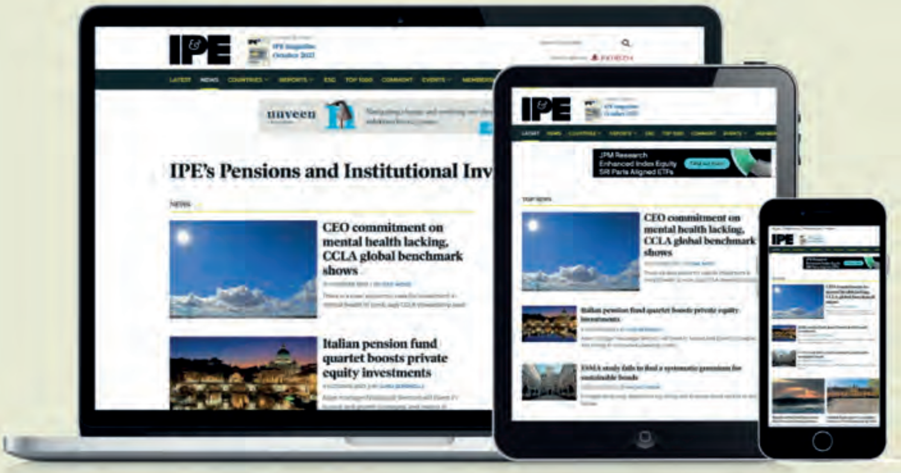
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# Securities litigation: the view from our institutional clients

BY CAROLINE GOODMAN

Over the last year we have continued to see a steady stream of new group investor actions brought across Europe, arising from serious alleged governance failures. We have also seen more law firms and litigation funders enter this space, resulting in yet more competing actions for investors to consider, often across jurisdictions. As group investor cases are predominantly opt-in, law firms and funders effectively compete to sign up those investors with relevant losses.

This has spawned a multitude of strategies for mustering investors and the last year has seen this extending to several law firms and funders wanting investors to commit to a portfolio of future actions. No one seems in any doubt that there will continue to be numerous governance failures and resulting investor litigation.

We have, meanwhile, also seen some cases resolved. Unlike the well-trodden path of US class actions, opt-in litigation can take some years, depending on the jurisdiction and process. Many suits are, perhaps unsurprisingly, settling before trial, leaving much untested by the courts and many issues open.

Much broader questions have opened this year too. With the reversal of PACCAR, stopped in May by the UK's general election, the Civil Justice Council launched a review of litigation funding. Our institutional clients, representing a very significant block of assets, wholeheartedly welcome raising the bar on practices in this area, although they note that certain well-publicised critics, often backed by corporate interests, have latched onto the review to paint the sector (and by extension, securities litigation) as little more than ambulance chasing.

Similarly, ESG continues to come under fire from some, perhaps similar, quarters. With talk of some institutions pulling back on ESG commitments, you might expect investors to be less focused on holding companies to account through the legal system. But, among our clients at least, this couldn't be further from the truth, even for those in markets like the US that are facing political headwinds.

While this will take time to play out, one thing is certain: for institutional investors, securities litigation is not about lawyers chasing ambulances, but upholding corporations to strong governance standards and protecting end-beneficiaries. These are responsibilities that institutions we work with around the world take very seriously and, regardless of outside pressure, they only participate having carefully weighed up their different options.

> "Securities litigation is not about lawyers chasing ambulances, but upholding corporations to strong governance standards and protecting end-beneficiaries"

There are four clear themes coming through our current conversations with investors.

### Appetite for redress continues to grow – with good reason

Given how relatively new collective investor litigation is in Europe, the volume of actions with genuine merit is striking.

The opt-in case structure inherently prevents frivolous lawsuits. Prospective cases undergo detailed due diligence to secure third-party funding: loss analysis is provided by experts and King's Counsel, or other legal heavyweights called on for independent opinion on merits and likelihood of success. Opt-in litigation experts like us undertake considerable analysis and evaluation to ensure institutions have everything they need to make informed judgments on which, if any, actions to join. Each case is built from the ground up and must meet a substantial bookbuild of investor interest before it can commence.

In other words, the whole structure

is designed to reject spurious litigation at the earliest stage. Most investors now understand this and recognise that opt-in investor actions require serious attention.

## The impetus for participation is two-fold

Investors, certainly those we work for, take these decisions seriously too and consider carefully the motivation for joining each legal action. There are two key drivers.

Financial recovery is arguably the most obvious. Every case starts with very substantial investor loss. And recoveries can be considerable. For pension schemes this translates to increasing future member retirement pots, which alone means that pursuing recovery is fundamentally the right thing to do.

Over and above this, there is a genuine desire among investors to call out corporate wrongdoing. Investor actions are inherently failures of governance, and a successful outcome not only sets a strong example for the company and wider market, but also improves long-term investment performance. This is providing a strong impetus for investors to act, perhaps stronger now than that for financial recovery. This alone makes participation worthwhile.

## Litigation – part of investor stewardship

Tying in with the above, for asset managers in particular there is now an expectation to have robust processes around investor litigation. While it certainly does not replace engagement, investors increasingly recognise the role of litigation in the overall stewardship toolkit as a necessary means to encourage good corporate behaviour and deter bad.

Attitudes are shifting and, like engagement, it is no longer acceptable for these activities to take place behind closed doors. Larger institutional investors feel they have a duty to be seen as 'good corporate citizens', to be publicly holding companies to account on behalf of smaller investors and, in line with stewardship duty, contributing to building stronger more resilient businesses that should translate to more success and stronger investment returns.

## A resource issue?

As the number of opt-in cases brought across multiple jurisdictions continues to grow, even the biggest institutional investors are finding it hard to find the right resource internally to properly assess and respond to the barrage of cases outside the US.

While it is very easy to join a case without assessment or negotiation, and even easier if a third party signs you up on the same basis, it is becoming increasingly clear that this is not advisable.

The need for merits analysis and financial modelling of loss and recovery expectations requires consideration before signing legal participation documents. This demands different expertise and processes than US class action processing: the devil is absolutely in the detail. Most investors are recognising that outsourcing this work, while leaving core legal decisions in-house, is more efficient.

Although we have seen an increase in service providers offering opt-in litigation services alongside US class action services, they should not be viewed as homogenous or interchangeable; there is a significant gulf in terms of the level of expertise and commercial relationships that drive them. Investors are acknowledging they need experts in this field, to act as their partner, not those who treat clients as a commodity to be appended to any action.

## The future

Securities litigation is not being taken lightly and for responsible long-term investors, it looks set to become a more central part of the governance framework. This will only become more significant as pressure builds from those keen to prioritise investing in companies with sound governance practices alongside the need to generate returns.

With several cases close to resolution, it is apparent that the terms of participation are key and require scrutiny. We are devoting much time to this, to support our clients in demanding the highest possible standards from all of those involved in this industry.

As institutional investors navigate the evolving landscape of global corporate governance, securities litigation looks set to play a stronger role in ensuring public companies are held accountable. The investor actions that continue to be brought amply demonstrate that the market cannot be left to regulate itself. Institutions understand the need to remain focused on the purpose of collective investor litigation, but must also ensure they have the right resource to scrutinise terms of engagement. ■

*Caroline Goodman is founder and CEO of Institutional Protection*

# Weighing the costs and benefits of making a claim

BY BRENDAN MATON

- The Netherlands is growing in significance as a forum for shareholder litigation
- Dutch institutions do not have to opt in from the start, giving them more time to assess cases
- Local investors can be sceptical about litigation funders and intransparent fees

ABN-Amro, Airbus, ING, Petrobras and Stellantis are among the major corporations defending class action lawsuits in the Dutch courts. They are likely to be joined by Philips within the next 12 months.

The Netherlands is second to the UK in the European league table of such litigation, especially when it comes to investor-related cases. It accounted for 18% of the entire class actions market in 2023, up from 10% four years earlier, according to CMS.

Moreover, the Netherlands has seen the two largest-ever securities-related settlements on the Continent: Fortis/Ageas in 2018 (€1.3bn) and household goods conglomerate, Steinhoff in 2022 (€1.4bn). "These two settlements are regarded as big successes for institutional investors seeking redress for losses caused by corporate wrongdoing," says Joeri Klein, co-head of group-wide investment recovery cases at Deminor, a long-standing litigation funder.

As in other continental jurisdictions, however, the Netherlands is still developing ways to improve options for shareholders, stakeholders and consumers to seek legal redress while avoiding excessive commercialism from third-party funders of litigation.

Under the WAMCA legislation of 2020, for example, Dutch institutional investors do not have to join an opt-in action from the start. This is the same as in the US, but unusual in continental Europe. It gives investors more time and information to decide whether the process will be worth joining. Another factor, notes Caroline Goodman, CEO of Institutional Protection, is that most Dutch cases reach a settlement out of court. This is pragmatic but at the same time restricts the development of case law on the topic.

> "When we started litigation funding fifteen years ago, there was one or two other providers. For the upcoming Philips case, I know of at least eight. There may be more"
>
> JOERI KLEIN

## Striking a balance

Litigation funders, meanwhile, are increasingly setting up claimant foundations themselves. In the Netherlands, such foundations are the most common entity for collecting and managing group claims. Having established the foundation, the litigation funders then enter into funding agreements with it. This kind of practice is beyond what most nearby countries promote. But according to CMS, judicial attitudes on such arrangements in the Netherlands have become increasingly critical. This is more in the spirit of the Voss report of 2022 to the EU Parliament, which wanted definite checks and balances on litigation funding, such as a ceiling of 40% of any payout going to a third-party funder.

While Dutch institutional investors have spearheaded class actions, especially in the US, they too can be sceptical about the motivations of third parties. One industry wide pension fund investment manager, who declined to be named, says that the number of cold calls from law firms was on the rise. He was dissuaded

from responding to such calls by the intransparency of the fee structure. "Some activities are outsourced to a third party, in which case we end up paying substantial fees just to a broker type of service, rather than actual legal services," he says.

Klein says he understood why scepticism persists among institutional investors. "When we started litigation funding fifteen years ago, there were one or two other providers. For the upcoming Philips case, I know of at least eight. There may be more."

On the one hand, this affords a luxury to institutional investors. "They can bargain if there are multiple offers," notes Klein. But at the same time, he recognises that some Dutch pension funds might have just one person inhouse dealing with all kinds of legal issues, not just securities litigation. "These institutional investors thus might have the desire to earn financial redress; and be seen by their members correcting wrong-doing," he said. "But they sometimes do not have the capacity to perform due diligence on all the offers and requests."

Then comes the issue of the time-value of money. Klein reckons that as a type of claimant, institutional investors are among the best at understanding the value of one euro in their portfolio now versus one euro in five years' time. They are not as emotional in pursuit of justice as other types of claimant. This is important in a realm of legal process where most claims take more than five years from beginning to settlement, and there are often several moments when a settlement can take place. "Both sides trade uncertainty for certainty," says Klein. "Our job as a litigation funder is never to invest in a case that won't end in a recovery."

## Managing expectations

He admits, however, that there have been cases where investors have been disappointed in the end. The pension fund manager that IPE spoke to says that holding a stock for the duration of a case could adversely affect total portfolio investment performance. That is one disadvantage. Klein adds that there is the cost of time spent monitoring events over the years. While there is no fee to pay litigation funders without a win (unless the litigation funder becomes insolvent), there is the expense of that time, over several years, which could have been spent on other activities.

JOERI KLEIN, CO-HEAD OF GROUPWIDE INVESTMENT RECOVERY CASES, DEMINOR

Finally, there is the payout itself, which could be lower than initially forecast. Again, the time-value of money needs to be calculated here – an exercise made harder by the fact that legal cases are not for a fixed period of time. But Klein emphasises that sometimes there is more at stake than the size of the payout involved. He says that some institutional investors put their name to a claim as lead plaintiff so as to be seen to be doing the right thing. Then, when the payout is low, they feel the wrong kind of publicity has been generated.

Is there means of modelling likely pay-offs in order to better manage expectations? Goodman says that modelling is part of the service offered by Institutional Protection. Even when claims are settled out of court, she says that the figures involved are obtainable and can be used to help give other investors more certainty on what future claims might yield – and over what timespan of litigation.

"Joining or leading a claim merits due deliberation by any asset owner, but I consider the Netherlands to be one of the best jurisdictions in Europe to effectively redress collective shareholders' claims," concludes Klein. ■

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