

Building a class action toolbox for investors

BY CHARLOTTE MOORE

- Some countries offer more straightforward procedures than others
- The UK Stewardship Code recently added the principle that institutional investors need to add escalation to a pension scheme's engagement with companies
- Schemes need to establish a proper process to monitor the class action cases being brought in the US which opts them in, as well as looking at which cases have been settled
- In Europe, most of the cases being pursued are not seeking corporate governance reforms. By contrast, in the US, there are a growing number of pension schemes that are pursuing corporate governance cases

As class actions have started to play an increasingly important role in good governance for UK and European pensions funds, the need to establish best practice in the field is growing.

Daniel Summerfield, ESG director and co-head of the London office of US law firm Pomerantz says that the Netherlands and Germany are at the head of the curve in Europe in facilitating access to securities class actions for small and large investors. He notes that English courts also seem increasingly willing to take active steps to consider these cases. "It's still a fairly immature market in the UK but it is changing."

Easier to pursue

In 2010, the Supreme Court case *Morrison vs. National Australia Bank* clarified the extraterritorial reach of US securities laws. The decision held that US securities laws generally apply only to securities transactions that occur within the US; if not, the case in question would have to be pursued in the relevant jurisdiction.

In addition, it has become easier for investors to pursue class action cases in the UK. However, in the UK, un-

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like in the US, investors still face the risk that if they lose, they will have to pay not only their costs but also those of the defendant.

To mitigate against this risk, third-party litigation financing has been developed. "A pretty deep liquid funding sector has developed over the last decade with assets of £1.5bn (€1.7bn) in 2018 compared with £180m in 2009," says Summerfield.

Geographical Differences

There can also be more scope to pursue such cases in other European jurisdictions. Arshad Khan, a solicitor at law firm Sackers, says: "Different countries might give better or more specialised access

rules to litigation of multi-national defendants."

For example, claimants based in Spain, Portugal, France or Germany can pitch their claim in the jurisdiction in which suits them.

Khan says: "As long as there is sufficient nexus between the defendant's activities and the asset owners' losses as a result of, for example, shares being traded on that country's exchange, then a case can be brought."

Pressure for action grows

As UK pension schemes become more willing to pursue this type of litigation, the creation of the Local Government Pension Schemes (LGPS) pooled funds has added momentum.

Eric Belfi, senior partner at Labaton Sucharow LLP, says: "The consolidation of the UK local government pension schemes into large investment pools means schemes have a much larger stake in public equities." He adds that this provides an opportunity for pools to be more actively involved in European and US securities cases.

In addition, regulation is pushing UK pension schemes to be more active responsible investors. "The Stewardship Code recently added the principle that institutional investors

need to add escalation to a pension scheme's engagement with companies," Belfi says.

In other words, Belfi explains, the regulators want schemes not only to talk to companies but to escalate their actions if they feel corporates are not improving their behaviour.

SFDR legislation in the European Union requires that the higher the ranking of the fund – for example, Article 9 rather than Article 8 – the more the asset manager must take into account the fund's sustainability including the impact of its constituent investments on the environment.

Belfi says: "This is driving asset owners and managers to be more proactive corporate citizens which means pursuing litigation when traditional engagement fails."

He adds that all these factors are ratcheting up the pressure on pension schemes to be more active in pursuing cases.

Implementing best practice

Given these changes, pension scheme best practice needs to evolve. Summerfield says: "Large schemes should at the very least have a portfolio monitoring system in place."

This is particularly important in the US, where an investor is automatically opted into any class action lawsuit which is being pursued in that jurisdiction, if it held the stock during the relevant dates. Schemes need to establish a proper process to monitor the class action cases being brought, as well as looking at which cases have been settled. There is also an increasing need to ensure the monitoring system tracks global cases. "If eligible, the scheme can claim any relevant settlements," says Summerfield..

Most cases being brought in the US are where investors are seeking financial redress from a securities violation due to fraud, for example.

There are a number of organisations providing this service. Legal firms have relationships with custodian banks. "It's not a good idea to rely solely on custodians to do this on institutional investors' behalf – it's not their area of expertise," says Summerfield. "As long as the requisite approval is given by our pension scheme clients, we will have access to their transactions and can monitor when settlements are made and claim on behalf of our clients," he adds.



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ESG DIRECTOR AND CO-
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Some pension schemes are already doing this. "Some of our clients are informed about class actions going on in the US or Europe as well as other parts of the world and have the option of joining these cases," says Khan of Sackers.

A longer-term view

In Europe, most of the cases being pursued are traditional securities fraud cases that only seek financial recovery and are not seeking corporate governance reforms.

In contrast, in the US, there are a growing number of pension schemes that are pursuing corporate governance cases.

For example, Labaton Sucharow represented the Employees' Retirement System of Rhode Island in a notable matter against the clothing company Guess. Belfi says that it was able to achieve a significant monetary

settlement and the implementation of robust corporate governance reforms. He adds: "We recently saw several large European investors file a corporate governance case against the board of directors of Fox Corporation for breach of fiduciary claim stemming from the \$787.5m (€723m) settlement with Dominion Voting Systems. With the emphasis on funds being good corporate stewards, we are seeing an increased involvement by European funds in US corporate governance cases."

Precedence

Not only is it easier to pursue class action suits in the US but the large number of these cases mean there is an abundance of case law. Khan says: "This precedence makes it much easier to assess whether new cases have the potential to win substantive damages or not which reduces the risk and uncertainty of bringing a new case to court."

In contrast, not only are the number of cases in the UK much smaller but the details of those cases which are settled are kept confidential. Even if it is unlikely that we will see groups of pension schemes bringing many more class action cases to court in the UK, there is still the potential for trustees to take advantage of cases in the US, Europe and other jurisdictions. ■



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