Labaton Sucharow

The LIAISON

Labaton Sucharow

Contents and EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

Labaton Sucharow is pleased to present *The Liaison: 2023 Year-End Report*. The Firm has been a pioneer in protecting clients' interests in non-U.S. litigation. With more than 20 years of experience abroad and deep relationships with law firms around the world, Labaton Sucharow has a unique perspective on investment-related issues and recovery opportunities outside the United States.

Featured in this edition:

- An overview of the securities class action regime in Canada;
- Recommendations for investors joining UK actions;
- Analysis of a significant bondholder dispute in Switzerland; and
- Global trends in non-U.S. securities actions.

We would be happy to provide more comprehensive assessments and recommendations with regard to any of the topics discussed or highlighted in *The Liaison*.

With Best Regards,

Labaton Sucharow

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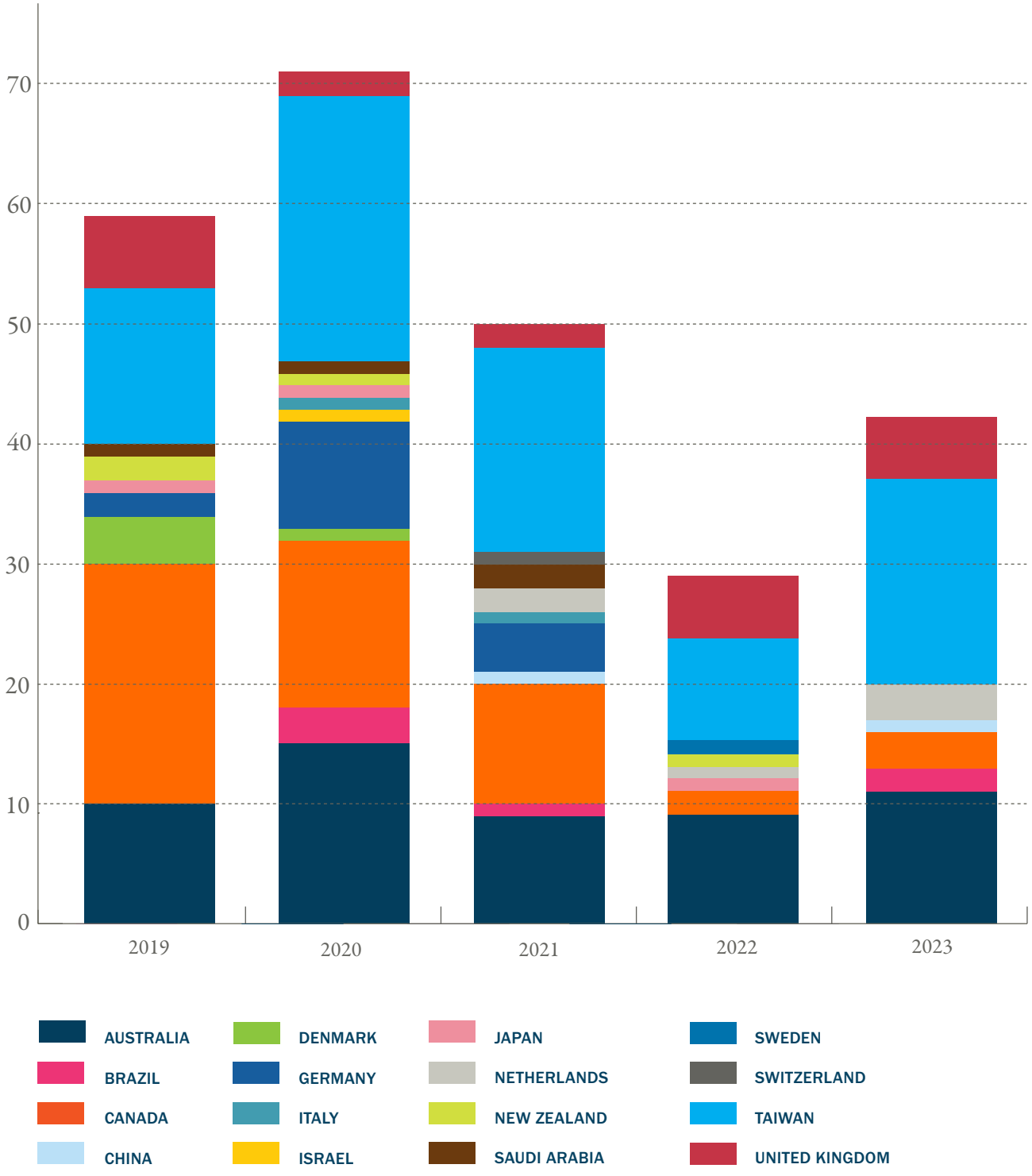
Trends in Non-U.S. SECURITIES CLASS ACTION LITIGATIONS

NON-U.S. SECURITIES LITIGATION FILINGS 2019-2023



*Accurate as of January 9, 2024.

CANADIAN CLASS ACTIONS: LIKE THE U.S. BUT DIFFERENT

For many years, Canada has had a vibrant investor class actions regime with many parallels to its American neighbor. Perhaps most notably, Canada largely follows an opt-out model, where eligible investors are automatically included as part of a class without having to affirmatively register. The Canadian market is a tenth the size of the U.S., and not surprisingly, the total number of class actions there is correspondingly smaller. In 2010, the U.S. Supreme Court issued its decision in *Morrison v. National Australia Bank Ltd.*, which essentially limited U.S. class actions to those whose shares were purchased in the U.S. Some thought this would drive up the number of Canadian actions, since shares purchased on the Toronto and other Canadian exchanges could no longer be included in U.S. actions. But the post-*Morrison* world does not look that different. In 2008, there were 12 Canadian securities class actions, the same number as in 2010.

By 2011, this had only risen to 15, and then, it dropped down to 10 in 2012. Over the most recent decade, that number averaged just over 10 actions per year.[1] In contrast, Australia ranks below Canada in both GDP and stock market capitalization but averaged nearly 15 shareholder class actions per year over the same period.[2] Yet, even though its numbers pale in comparison to the U.S., and are slightly smaller than Australia's, Canada remains one of the most robust jurisdictions for investor actions. Indeed, Canada has a respectable track record of class action settlements, underscoring to investors that it is a litigation market well worth following.

SO PROVINCIAL

Canada has both a federal and provincial system. With the exception of Quebec (which is a civil law jurisdiction), Canadian provinces follow a common law tradition. When it comes to class actions, the governing laws are primarily statutory.[3] The legislatures of each province (apart from Prince Edward Island) have adopted specific class action legislation or have amended existing laws to provide for it. These class action statutes are similar from province to province and are also similar to U.S. class action legislation under the American Rule 23 of the Federal Rules of Civil Procedure. There is also a Canadian federal regime for class actions, which was adopted through amendments to the Federal Courts Rules in 2002.

While Canada has both federal and provincial courts, the vast majority of class actions are filed in provincial superior courts (rather than federal courts), appeals from which go to the Provincial Court of Appeal and then to the Supreme Court of Canada. Unlike the United States, Canada does not have a mechanism for handling multi-jurisdictional litigation. Thus, for example, if a class action is brought in the provincial superior court in Toronto and a parallel action is filed in Vancouver, the federal court does not assume jurisdiction. Instead, the Toronto and Vancouver actions would proceed separately. This can result in inconsistent rulings and additional expenses for the parties, but some coordination between the actions is possible. At the time of class certification, for example, counsel in the Vancouver action could agree to stay its motion pending the certification outcome in the Toronto case.

NOT LIKE THE OTHERS

Although the class action structure is consistent from province to province on many issues, it is not uniform. For example, most provinces follow an opt-out regime like the one used in the United States, where an eligible investor is automatically included unless it specifically opts out. In contrast, a hybrid model is used in Newfoundland and New Brunswick, where class members domiciled outside any of these provinces must affirmatively opt in. Thus, an Ontario resident would need to affirmatively register for a class action brought in Newfoundland. In practice, the lion's share of securities class actions has been brought in the opt-out provinces, so the impact of this hybrid opt-out/opt-in model has been somewhat negligible.

There are also differences between provinces on adverse costs. In Ontario and Quebec (two of the most active jurisdictions for

[1] See Bradley A. Heys, Robert Patton, and Jielei Mao, *Trends in Canadian Securities Class Actions: 2022 Update*, NERA Economic Consulting, March 28, 2023.
[2] See King & Wood Mallesons, *The Review: Class Actions in Australia 2022/2023.*
[3] Canada's three territories (the Yukon, Nunavut, and the Northwest Territories) are omitted from this discussion.

securities class actions), adverse costs can be awarded but only against the representative plaintiff, as opposed to absent class members. Even here, courts have discretion whether to actually award costs against the representative plaintiff, and frequently do not. Indeed, in Quebec adverse costs exclude legal fees and when awarded mostly focus on expert costs. Also, some provinces like Ontario and Quebec have a public class action assistance fund that provides funding to plaintiffs in class actions, which also includes adverse costs protection. In many other provinces, there is a specific prohibition against awarding adverse costs in class actions.

BIG BROTHER DOWN SOUTH

There are many similarities between U.S. and Canadian shareholder class actions, but also notable differences. Case volume stands out as a key, but perhaps it is not a surprising difference considering the wide disparity in the economies and the number of listed companies in the two countries. Over the 10-year period from 2013 through 2022, there was an average of 300 securities class actions filed in the U.S. each year. In contrast, there was an average of 10.2 such actions per year filed in Canada. There have also been a large number of overlapping actions. From 2006 to 2017, for example, 51% of the U.S. cases brought against Canadian companies saw a parallel Canadian proceeding, although this dropped to 36% in the period from 2018 to 2022.[4]

As in the United States, a Canadian action is initiated by filing a statement of claim (equivalent to a U.S. complaint), or in Quebec by a plaintiff filing an application for authorization. If certified, the action commences with one or more persons serving as class representatives. Like its U.S. counterpart, a Canadian class claim will seek damages for misrepresentations or omissions.

The manner in which the leadership structure is set in a Canadian class action has certain obvious similarities to U.S. practice. If two or more competing securities class actions are filed in the same court (*e.g.,* Toronto superior court) alleging the same or similar causes of action, the court must determine which counsel will have "carriage" of (*i.e.,* lead) the action. In these "carriage motions" (similar to a "lead plaintiff" motion in the United States) counsel for each competing action will seek to persuade the court why its action is best suited to lead. The court will consider factors such as litigation strategy, case theory, and the fee arrangements. Once the court selects counsel and the representative plaintiffs, the competing actions in the same court are stayed. Because Canada does not have a "multidistrict litigation" system, however, if a competing action is brought in a *separate* province (*e.g.*, one in Ontario and another in British Columbia), there will not necessarily be a carriage motion or a consolidation of the two actions.

With respect to class certification, the threshold in Canada is also lower than in the U.S., as there are no predominance or numerosity requirements, no requirement to show that the representative parties' claims and defenses are typical of the class, and no discovery prior to the certification hearing. To

[4] *Id.* at 1.

certify a class in Canada, the plaintiff needs to show that (i) the pleadings disclose a cause of action, (ii) there is an identifiable class of two or more members, (ii) there are common issues between the members, (iv) a class action proceeding is the preferable route, and (v) a representative plaintiff can fairly and adequately represent the interests of the class. In Quebec, the threshold is even lower. For example, there is no requirement that a class action be a preferable procedure, the plaintiff is only required to bring an "arguable case," and the defendant is not allowed to submit evidence to oppose authorization or to cross-examine the representative plaintiff unless permitted by the court. Unlike the U.S. practice of a jury trial, Canadian class actions are tried before a judge.

IF I'M NOT CANADIAN, WHY SHOULD I CARE?

Institutions that invest in Canadian-listed companies can be impacted by securities class actions in Canada, whether they are domiciled there or not. One of the benefits of the Canadian class action system is that it is essentially an opt out process like the United States. Thus, for example, when an institution invests in a Toronto, Montreal, or Vancouver-listed company that is sued for securities fraud, it can claim its share of any monies recovered without having to affirmatively opt in, as it would be required to do in the United Kingdom, Germany, Japan, and most other jurisdictions. Canadian actions are also essentially risk free, as adverse costs do not apply to absent class members, and there is no reliance claim to support, as there is in some UK actions. Hoewever, these benefits are meaningless to institutions who do not have a process in place to claim settlement monies they are entitled to. Some claims recovery specialists (like custodian banks) have a process for automatically filing claim forms in opt-out jurisdictions like Canada, while others focus exclusively on U.S. actions. Thus, it is important to know what your provider is covering and ensure it includes Canada. Settlements of securities actions there pale in comparison to the volume and amount of U.S. actions, but they have been consistent over the past fifteen years, and investors wishing to recover all they are entitled to will want to take note.

HOW TO STREAMLINE STANDING AND RELIANCE REQUIREMENTS IN UK INVESTOR LITIGATION

After an investor joins a non-U.S. action, its role is largely passive and there is little else to do but wait for a potential settlement. In UK actions, however, there are two issues that can require a small time investment from a claimant: standing and reliance. Standing means not only substantiating that you are the proper party to bring the claim but also that you are correctly named in the claim form. Although primarily a focus in UK litigation, standing issues arise in other jurisdictions as well, notably Germany and Sweden, while reliance remains, for the most part, relegated to certain UK-based claims. For investors wishing to keep their role in overseas litigation as passive as possible, there are ways of managing standing and reliance issues to limit their time investment.

GET CUSTODIAN BANKS IN LINE

U.S. investors are often puzzled by the need to demonstrate standing when they join certain non-U.S. actions. Standing challenges are something an institutional investor rarely faces in American litigation. But defendants in overseas actions have increasingly used standing challenges to narrow or even eliminate an investor's claim. Most notably in the UK, where defendants who are unable to mount a serious merits challenge have tried to attack procedurally. The first thing they demand is something entirely uncontroversial: a certification from the claimant's custodian bank, verifying that the claimant purchased the shares in question. This is an objectively reasonable demand, and most courts will insist on compliance. Yet, for such a simple request, certain custodian banks have begun to balk or even refuse to comply – even when that non-compliance will doom their client's ability to recover any monies from the lawsuit. One way to manage this is for the claimant to demand that its custodian comply in a timely manner. Custodian banks work for institutional investors, and these investors have joined an overseas action in order to fulfull their fiduciary duties. Mandatory compliance should also be built into the custodian agreement. This will help ensure the custodian (or the sub-custodian, when relevant) is obligated to provide a certification, even for actions where the trades occurred long ago.

SAVE YOUR STANDING DOCUMENTATION

Claimants are next asked to demonstrate that they are the proper party. This can be evidenced through articles of incorporation, a charter or statutes showing how an institution was established, trust agreements, annual reports, financial statements, or any relevant document that demonstrates who the claimant is. The pedantic nature of this requirement can sometimes baffle and overwhelm a claimant. For example, in a German litigation several years ago, one of the largest U.S. state pension funds – widely known globally – was required to provide its charter demonstrating that it did, in fact, exist. The good news for investors is that once this type of documentation is collected in one non-U.S. action, it can often be used to substantiate standing in another, even in a different jurisdiction. To that end, Labaton Sucharow keeps this documentation on file so that if a client joins another non-U.S. action, it can generally produce the same evidence without having to bother the client.

CALL ME BY THE RIGHT NAME

Another part of the standing requirement is ensuring a claimant is accurately named in the claim form. External managers handle day-to-day investment decision-making on behalf of many investors, but they do not hold title to the shares, meaning an external manager would rarely be the proper claimant. Then who is? In most non-U.S. actions, an institution has generally been free to dictate without objection how it wanted to be named. For example, a U.S. state fund might be named as the State Retirement System. But in many UK actions, defendants have begun to challenge the naming conventions. This has forced funders and overseas counsel to insist that a claimant named must be able to show (i) legal or beneficial ownership in the shares and (ii) the capacity to enter into legal proceedings. For example, if the relevant statutes or laws governing a state

retirement system stipulate that it is the board, rather than the system itself, that has the power to sue, the board may need to be named as the "Board of Directors of the State Retirement System, in its capacity as trustee of the System." Business trusts often stipulate that title to shares purchased vest in the trustees. If so, it is the trustees who have the capacity to bring legal proceedings on behalf of the trust. Thus, the claimant would be named as "[individual trustee names], acting solely in their capacity as trustees of the Trust." Because board members and trustees are not named in their personal capacities, the risk of personal liability does not arise.

In the UK, there have been two cases that have underscored the increased importance of properly naming a claimant from the start. The first was the 2021 decision in *Various Claimants v. G4S plc* [2021] EHWC 524 ("*G4S*"). This decision involved a bit of a tortured procedural issue. When a claim is filed in a UK proceeding, the claimants have at least four months to serve it on the defendant, and it is this service (rather than the filing of the claim) that commences the litigation. In *G4S*, claimants' counsel sought to add additional claimants after filing but before service. Historically, this practice had raised few eyebrows. But in *G4S*, Justice Mann surprised many by not only denying claimants the ability to do this but also holding that even claimants who were part of the claim from the start could still be stricken out if the court deemed they were named improperly. It was this prong of the *G4S* decision – which essentially said that a claimant had to be properly named from the start – that caused English counsel and litigation funders in subsequent cases to become hyper-focused on ensuring the naming conventions were airtight. In other words, prior to *G4S*, a funder might have been amenable to allowing a pension fund simply to be listed the way it had in litigations in other jurisdictions. Post-*G4S*, however, most funders and English counsel have been unwilling to risk a similar outcome and have thus undertaken a rigorous process to determine the most accurate way to name each claimant under English law, irrespective of how they had been named elsewhere. This stricter scrutiny post-*G4S* has sometimes proved to be a challenging endeavor. For example, a U.S. state pension system may be composed of several different pension funds. If each purchased the shares in question, can the system represent each of the funds, or are these entities required to act as separate claimants? And if only one of the funds purchased the shares, can the system still be named rather than the fund? When it comes to certain U.S. statutory trusts, funders considering English trust law have insisted that the trustees themselves be named, in their capacities as trustees, even if the trust litigated in its own name in the U.S. In addition, conflicts have arisen between the name under which a pension fund regularly operates and the way its custodian bank identifies its ownership. In a post-*G4S* world, these and other standing issues have begun to receive extreme scrutiny in an effort to ensure that a claimant is correctly named from the get-go.

BARCLAYS TEMPERS G4S

After *G4S*, litigation funders and English counsel have remained fairly insistent on undertaking a rigorous pre-filing investigation to determine the correct way to name a claimant, not wanting to

run the risk that the claimant would be struck out or found time barred and unable to amend. But there was some good news recently in the *Barclays* investor action (also pending in London's High Court). There, the judge took a less strict approach than had been followed in *G4S*. In *Barclays,* (*Various Claimants v. Barclays* [2023] EWHC 2015), the defendant argued that a number of claimants had been wrongly named in the initial filing and that they should not be allowed to amend their claim to correct this, as the statute of limitations had run by then. In response, claimants' counsel argued that *G4S* was essentially punitive in not allowing claimants to amend and inconsistent with other English case law.

In the end, the *Barclays* court chose not to follow *G4S* and concluded that Barclays was not prejudiced, as it was aware of the claimants before the limitations period expired, even if some may have been incorrectly named. The *Barclays* judge was bothered by the number of claimants that had been improperly named according to English law and the delay this caused to the orderly flow of the proceedings, pointing to the opinion by Justice Hildyard in *Manning and Napier Fund Inc v. Tesco plc* that adding claimants in a group action should arise out of an "orderly and careful assessment. . . ." Helpfully, the court concluded that the errors in the naming conventions for most of the claimants were insignificant enough that the defendant was sufficiently aware of their identities. And while claimants were essentially given the benefit of the doubt here, the lesson litigation funders and English counsel will likely take away is that it continues to be vital to ensure a claimant is properly named from the start. For claimants, the good news is that after they have gone through this process once, they will likely be named the same way in other non-U.S. litigations. In other words, there is no need to reinvent the wheel for each new case.

RELIED ON WHAT?

Beyond standing, proving reliance remains the other issue in UK investor litigation that can occasionally become a time burden on a claimant. Reliance applies to claims brought under Section 90A of the Financial Services and Markets Act 2000. Section 90A covers false statements made in the after-market (*e.g.*, in annual reports, financial statements, and press releases) and is akin to the U.S. Section 10b of the Exchange Act. Most of the investor actions brought in the UK thus far have been under Section 90A (*e.g., Tesco, G4S, Standard Chartered, RSA, Barclays*, and *Serco*). Thus, the reliance issue remains highly relevant.

For investors wanting to know exactly what they must do – and what burden they must shoulder – in proving a reliance-based claim in the UK, English law has been fairly unsettled, and thus unhelpful. Section 90A is silent on the matter, and unlike in the U.S., there have been few court opinions to provide clarification. Indeed, the only court opinion on what is required to prove reliance under Section 90A is the *Autonomy* case,[5] issued in the spring of 2022. There, Justice Hildyard (who also oversaw the *Tesco* investor litigation) reviewed reliance outside the context of a traditional claimant investor action. The court used a stricter direct reliance standard, holding that a claimant must have relied on a specific statement rather than on a broader

[5] *ACL Netherlands BV & Ors v. Lynch & Anor* [2022] EWHC 1178 (Ch) (judgement of Hildyard J, May 17, 2022).

document (*i.e.*, reliance on a specific statement in an annual report and not the annual report itself), that it was consciously aware of the misstatement (*i.e.*, that it actually reviewed it), and that the misstatement induced it to enter into the transaction. Importantly, *Autonomy* is not binding on other judges and is distinguishable as it did not involve an investor group action.

A subsequent opinion by Justice Miles in the *RSA* action provided additional insight, but its broader impact for now is more limited. In *RSA*, the defendant sought to dismiss certain claims as time-barred. In undertaking its analysis, the court found the relevant claimants could not have been put on notice of the alleged fraud (and thus that their claims were not time-barred). It noted that there was no evidentiary consensus on the ways in which institutional investors monitor their investments and that even more proactive investors could not be assumed to review official market announcements. He also noted that the level of diligence that could reasonably be expected in discovering fraud might differ between active investors and passive index funds. The *RSA* opinion is relevant on the issue of reliance because some of the same points made by the court – *e.g.*, on how information regarding public companies' wrongdoing is "absorbed" by the market and reflected in their share prices – can be made in asserting the level of detail that must be shown in proving reliance. Having the court in *RSA* acknowledge that investors base their investment decisions on a wide range of information sources may make it harder for a defendant to argue that the only way investors can demonstrate reliance is by pointing to a particular piece of published information within an annual report or financial statement. While nothing in English case law yet embraces the U.S.-style fraud-on-the-market form of reliance, the *RSA* opinion at least provides a steppingstone for the broader acceptance of the practical reality of investor decision making. It suggests an acknowledgement that investors use a broader array of sources in making their decisions, including a company's share price, and various analyses of core company information (such as annual reports and financial statements). While not there yet, *RSA* may forecast a time when English courts come closer to the American-style fraud-on-the-market reliance.

HOW IS RELIANCE DEMONSTRATED?

Because English courts have yet to create a body of case law clarifying this issue, English counsel have been left to determine where each claimant in a group action falls on the reliance spectrum, often dividing them into tranches. Those able to show direct reliance are put in one tranche, those showing more indirect reliance would be placed in another, while purely passive investors, such as those whose purchases were pursuant to an index or tracker fund, would be placed in yet another. One thing remains clear: UK actions do not involve U.S.-style discovery (and there are no depositions).

Before placing them in a particular tranche, various questions must be asked of the claimant or its external manager. The threshold question is whether the investment was active or passive. If active, the next step has generally been to respond to a brief questionnaire, where the claimant is asked what,

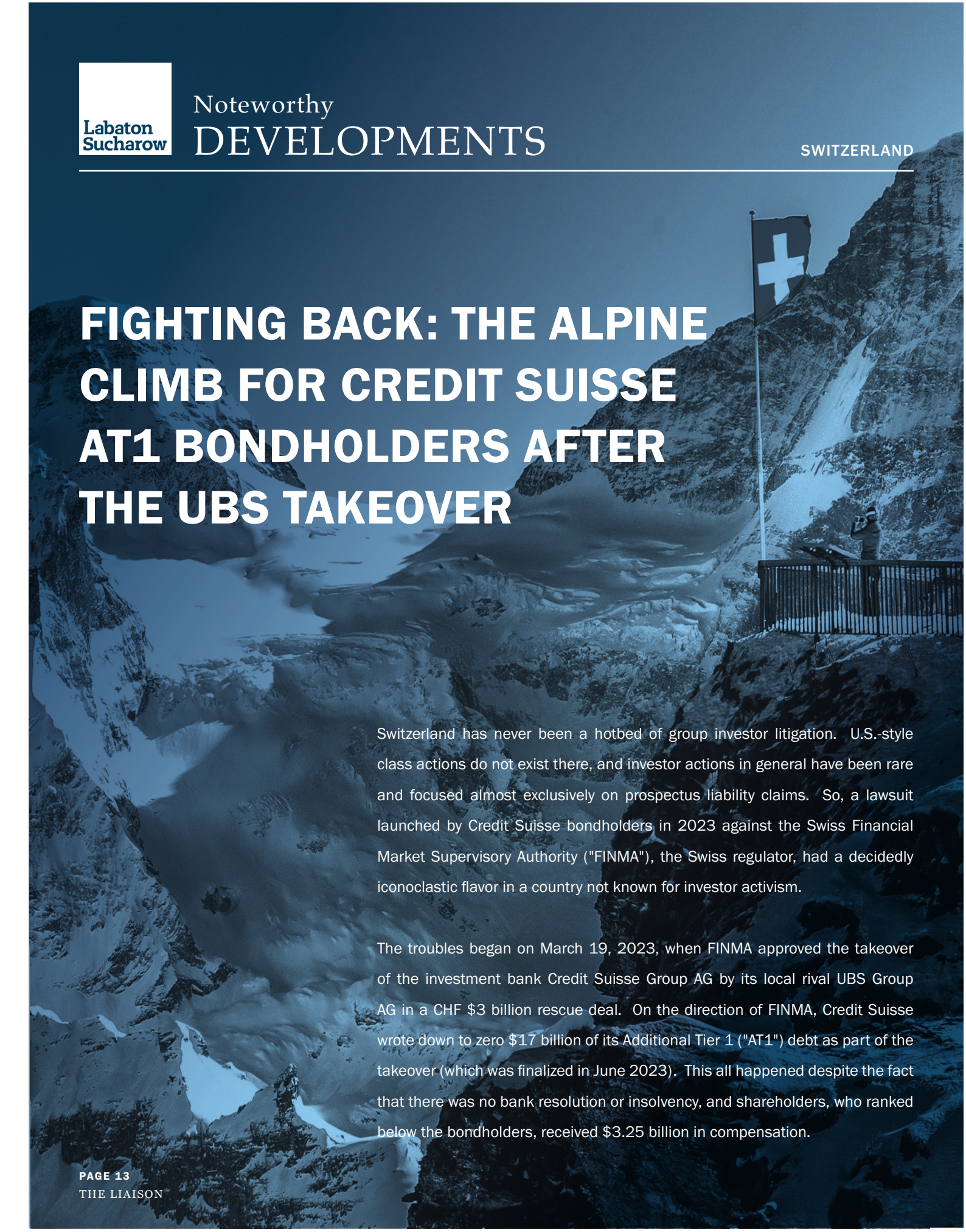
if anything, the manager reviewed or analyzed prior to the decision to purchase the shares. One way to minimize a claimant's time is to work with English counsel to substantially narrow any questionnaire, ferreting out the information that is really needed, versus what counsel would ideally like. This is a process Labaton Sucharow undertakes for its clients in each action and can mean the difference between an eight-page questionnaire and a one or two-page version. Once this information is gathered, the current trend is to try to have the court evaluate reliance claims through test cases. Each side would be permitted to select a small sample number from the broader claimant group who would then be subjected to more detailed discovery (but not depositions) regarding the nature of their reliance. By using the test case method, most claimants are not required to do anything more to substantiate their reliance than respond to the brief questionnaire.

OPTING OUT OF RELIANCE

Even though the reliance burden remains relatively small, an investor may still want to balance the limited burden of having to establish reliance with the amount of its loss. The higher the loss, the more willing most investors will be to undertake the effort of, for example, filling out a short questionnaire. Because there are some external managers who will simply refuse to respond to any questions, and will therefore jeopardize their own client's claim, Labaton Sucharow negotiates, as a matter of course, a reliance "opt out" for its clients in UK actions. Normally, when an investor joins a UK action, it agrees by contract to assist in the prosecution of its claim. Failure to do so can result in breach of the agreement with the litigation funder. With Labaton Sucharow's reliance opt out, however, a client has the ability to decline to prosecute its claim – *e.g.*, to decline to have the relevant manager complete the questionnaire – without fear of being in breach of the funding agreement or being subjected to paying the funder for its costs in advancing the claim. Although invoking the reliance opt out will generally impair an investor's reliance claim, it won't necessarily destroy it. Moreover, it gives a claimant the freedom to determine when, if ever, it no longer wants to participate in prosecuting the reliance portion of its claim.

Standing and reliance remain the two areas of a UK action that potentially require input from a claimant and have the potential to become a mild time drag. However, both can be streamlined. Documents that substantiate a claimant's standing can often be used from one action to the next. Therefore, Labaton Sucharow preserves these records to alleviate the need to go back to the client for these materials in other actions. The way a claimant is named can now largely be made consistent from action to action, without having to revisit the analysis. When it comes to reliance, a claimant's obligations remain somewhat murky and can vary from one action to another. With the reliance opt out negotiated by Labaton Sucharow for its clients, however, they at least have the peace of mind to know that they can determine when the benefits of assisting in the prosecution of the claim are outweighed by the burdens of doing so.

FIGHTING BACK: THE ALPINE CLIMB FOR CREDIT SUISSE AT1 BONDHOLDERS AFTER THE UBS TAKEOVER



Switzerland has never been a hotbed of group investor litigation. U.S.-style class actions do not exist there, and investor actions in general have been rare and focused almost exclusively on prospectus liability claims. So, a lawsuit launched by Credit Suisse bondholders in 2023 against the Swiss Financial Market Supervisory Authority ("FINMA"), the Swiss regulator, had a decidedly iconoclastic flavor in a country not known for investor activism.

The troubles began on March 19, 2023, when FINMA approved the takeover of the investment bank Credit Suisse Group AG by its local rival UBS Group AG in a CHF $3 billion rescue deal. On the direction of FINMA, Credit Suisse wrote down to zero $17 billion of its Additional Tier 1 ("AT1") debt as part of the takeover (which was finalized in June 2023). This all happened despite the fact that there was no bank resolution or insolvency, and shareholders, who ranked below the bondholders, received $3.25 billion in compensation.

In response to the forced write down, a group of AT1 bondholders, ranging from asset managers to pension funds to high-net-worth individuals, initiated proceedings against FINMA in the Swiss Federal Administrative Court. The AT1 bondholders are claiming approximately $4.5 billion in damages, in what is one of the largest bondholder disputes to impact a sovereign nation, with hints of the Argentine debt crisis, where creditors were ultimately paid $9.3 billion in 2016 .

ATTACKING THE REGULATORS

The proceedings launched against FINMA in April 2023 are unusual in that the defendant is the Swiss regulator. The case was brought in the Swiss Federal Administrative Court in St. Gallen, which adjudicates on constitutional and administrative disputes. Investor actions in Switzerland are not common. There is no Swiss equivalent to, for example, the U.S.' Securities Exchange Act of 1934 or the UK's Section 90A of the Financial Services and Markets Act 2000. Without a general anti-fraud provision, claims under Swiss law have tended to focus on prospectus liability and ensuring the appropriate disclosures in offering documents. Article 69 of the Financial Services Act (FinSA) provides the statutory basis for prospectus liability claims. But claims arising in the secondary market can also run afoul of FinSA. There, however, challenges may exist in establishing a causal link between the offering and the secondary purchase if there is a significant gap between the two.

Launching a claim under Article 69 of FinSA has many of the same pleading requirements as the U.S.' Securities Act of 1933. For example, the alleged false and misleading statement must be material and both transaction causation and loss causation must be demonstrated. In contrast to the simple strict liability standard under U.S. law, however, Article 69 requires a showing of willfulness or negligence. The Swiss Supreme Court has lifted the crux of the U.S.' fraud-on-the-market doctrine, noting that actual reliance need not be shown if the secondary market is an efficient one and that an investor can assume the price of a security reflects the information available in the original prospectus.

Because the AT1 bondholder action did not involve a prospectus, it cannot follow the Article 69 route and, therefore, has initially been brought against the regulator in the Swiss Federal Administrative Court. Around the time of the takeover, the Swiss government had issued an emergency ordinance that explicitly expanded FINMA's powers, which it then used to order Credit Suisse to cancel the $17 billion of convertible AT1 bonds on March 19, 2023. The AT1 bondholders now argue the government arbitrarily enacted this legislation to effectively expropriate the AT1 bondholders' economic rights. This alleged expropriation was particularly galling considering Credit Suisse shareholders are lower in the pecking order but were still given $3.25 billion worth of UBS shares.

The AT1 bondholder action seeks to formally repeal FINMA's decision. It does not argue that FINMA acted without authority or that the government's emergency ordinance was somehow illegal. Rather, the bondholders argue the government's actions

were unconstitutional, as they were undertaken without due process. They contend FINMA was obliged under Articles 5 and 9 of the Swiss constitution to arrive at a decision "in good faith and in a non-arbitrary manner" and that it failed to do so. Bondholders also argue that Article 36, paragraph 3, was violated, which stipulates that "any restrictions on fundamental rights must be proportionate." Because the right to property is a fundamental right under Swiss law, and because shareholders were compensated and bondholders were not, the bondholders contend that restrictions on their rights were not proportionate.

LITIGATION PRESSURE ON VARIOUS FRONTS

London-based Pallas Partners LLP ("Pallas") is one of the law firms prosecuting the action against FINMA. Fiona Huntriss, a partner at Pallas helping to lead the charge in this litigation, notes that the vast majority of her firm's clients held their interests in the AT1s prior to write-down, and therefore, their litigation strategy is being driven by those holders and not distressed players. One aspect of this strategy is to seek reinstatement of the AT1s in the Swiss Federal Administrative Court. That proceeding is taking place on a confidential basis, which means the identities of the participating claimants is not public information. The court in St. Gallen has already decided that holders are entitled to receive a copy of the court file relating to the write-down, although the documents have not yet been provided. This may include details about the decision making ahead of Credit Suisse's takeover by UBS, and information regarding why FINMA and the Swiss government concluded such a takeover was the only viable option and what conditions they agreed to in order to secure UBS's participation. One of the advantages of the St. Gallen court is that it does not rely solely on evidence submitted by claimants and can itself demand documentation and testimony from the government and from FINMA.

Importantly, the Swiss Federal Administrative Court is not the only venue for bondholder redress here. Switzerland does not have a class action structure, but group opt-in proceedings are possible. Pallas intends to initiate such proceedings against UBS (as successor to Credit Suisse) before the Zurich Commercial Court to challenge the write-down. The claims will seek monetary compensation to reflect (amongst other measures) the principal amount of the AT1s. Pallas also plans to take ancillary steps to seek further information and discovery from key stakeholders, to bolster their arguments in the two proceedings. These steps are likely to take place outside of Switzerland, based on the location of those key stakeholders. The aim of these various efforts is to maximize pressure on UBS in order to find a consensual settlement or, if that's not possible, to litigate the matter to a successful conclusion. Either way, the proceedings are expected to continue through at least 2024. Other bondholder groups could also pursue claims against Credit Suisse directors for misleading the market in the days ahead of the bank's near-collapse. International arbitration proceedings are also possible.

HOLD ON TIGHT

Pallas' AT1 bondholder litigation in Switzerland is proceeding on a fully funded, no win-no fee basis, and remains open to new

claimants for the time being. But this litigation against FINMA, and the expected claims against UBS and possibly Credit Suisse directors, is different than what investors have encountered in group opt in actions in the UK, the Netherlands, Germany, and elsewhere in Europe. Investor group actions in Switzerland are rare, and the laws protecting claimants are comparatively underdeveloped. These deficiencies, plus the nature of the UBS takeover of Credit Suisse, require counsel to utilize unique litigation strategies to reach a successful outcome. This won't involve having to prove reliance or run the risk of paying adverse costs, but these strategies are not guaranteed and could take some time to reach fruition. Impacted investors may be well advised to jump on this Alpine litigation adventure, but they should also be prepared for a bit of a climb.

Labaton Sucharow

Newly ANNOUNCED MATTER

ENGLAND AND WALES

ENTAIN PLC (ENGLAND AND WALES)

TICKER: ENT

ISIN: IM00B5VQMV65

SEDOL: B5VQMV6

RELEVANT PERIOD: 2013 to December 31, 2023

ACTION TYPE: Opt-in Group Action

STATUS: Not Filed Yet

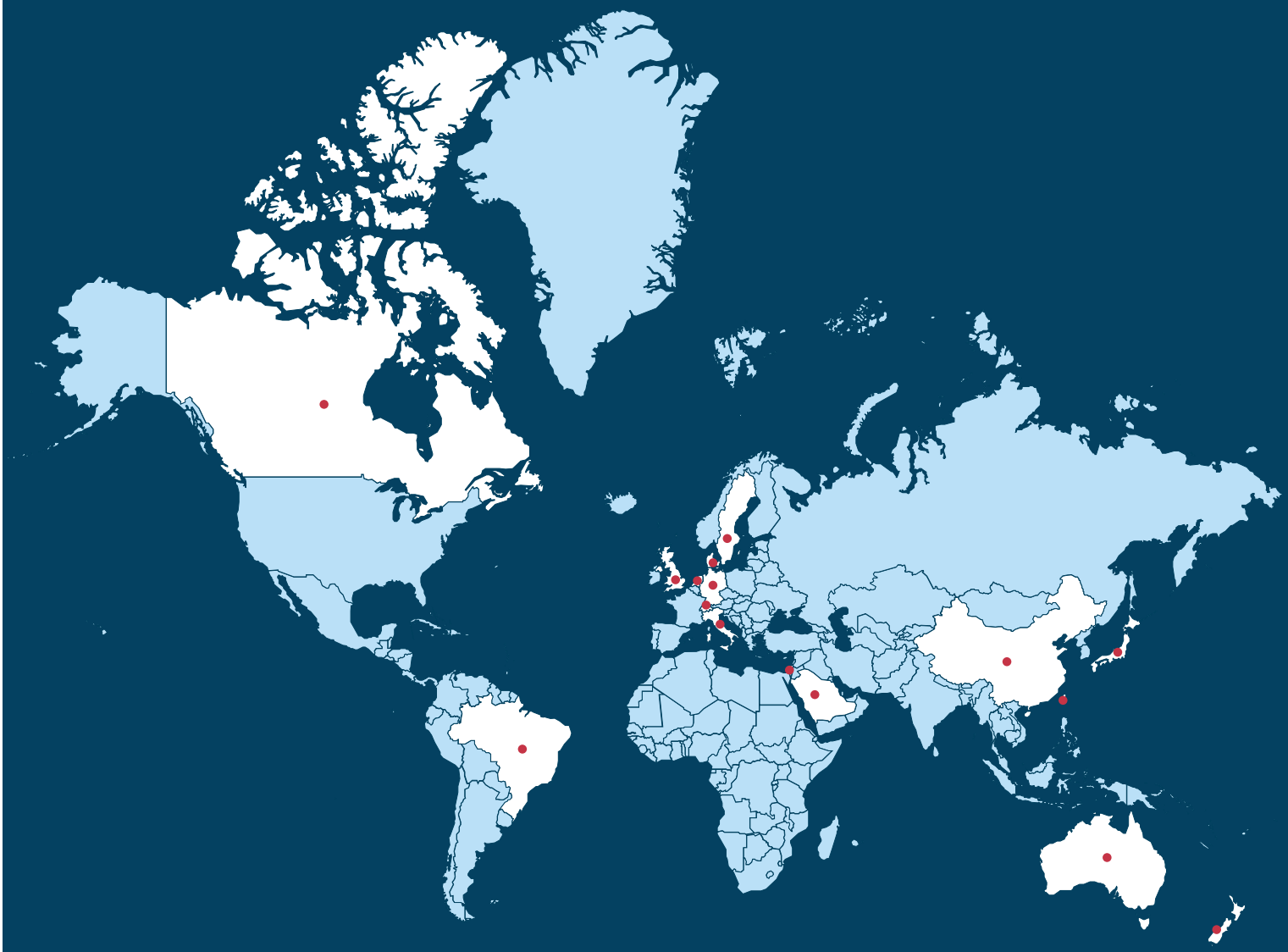
An action is being organized against international sports betting and gambling company Entain plc (formerly GVC Holdings plc) ("Entain") in England and Wales over its alleged involvement in bribery offenses at its former Turkish betting business, Sportingbet, which Entain owned between 2011 and 2017. The probe, originally launched by the UK's tax authority His Majesty's Revenue and Customs ("HMRC") in 2019 into "potential corporate offending" by Sportingbet and later handled by the UK's public prosecutor the Crown Prosecution Service (the "CPS"), alleged that Entain failed to take steps to stop people from taking part in bribes that ultimately benefitted the company.

At the end of 2023, Entain announced that it had reached a Deferred Prosecution Agreement ("DPA") with the CPS and that it had agreed to pay a financial penalty plus disgorgement of profits in the amount of £585 million, plus £20 million to charity, and to pay £10 million to the costs of HMRC and the CPS. On December 13, 2023, Entain's CEO Jette Nygaard-Andersen stepped down and was replaced by Non-Executive Director Stella David on an interim basis. Following these revelations, Entain's share price fell substantially, damaging investors.

Labaton Sucharow would be happy to discuss with you the specifics of the investigation into Entain plc and investors' options for recovery abroad.

Labaton Sucharow

Global LITIGATION SNAPSHOT



SECURITIES ACTIONS ARE PENDING IN THE FOLLOWING NON-U.S. JURISDICTIONS:

- AUSTRALIA
- BRAZIL
- CANADA
- CHINA
- DENMARK
- GERMANY
- ISRAEL
- ITALY
- JAPAN
- NETHERLANDS
- NEW ZEALAND
- SAUDI ARABIA
- SWEDEN
- SWITZERLAND
- TAIWAN
- UNITED KINGDOM

CONTACT US

LABATON SUCHAROW'S NON-U.S. SECURITIES LITIGATION PRACTICE IS DEDICATED TO ANALYZING POTENTIAL CLAIMS IN INTERNATIONAL JURISDICTIONS AND OFFERING ADVICE ON THE RISKS AND BENEFITS OF PROCEEDING WITH LITIGATION IN NON-U.S. FORUMS.

OUR LAWYERS ARE AVAILABLE TO ADDRESS ANY QUESTIONS YOU MAY HAVE REGARDING NON-U.S. SECURITIES LITIGATION. PLEASE CONTACT THE LABATON SUCHAROW LAWYER WITH WHOM YOU USUALLY WORK OR A MEMBER OF OUR NON-U.S. LITIGATION TEAM.

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THANK YOU