

Class actions guide: Seeking justice



Taking the lead

David Adams explores the use of class actions by pension funds seeking redress for losses due to inept or illegal corporate behaviour and why some schemes are taking on a leading role within this process

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Expanding the toolbox: Securities litigation as a mode of corporate engagement

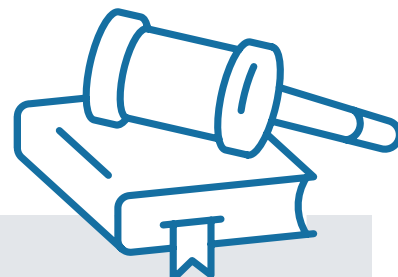
Pomerantz LLP partners, Jennifer Pafiti and Daniel Summerfield, explore how class actions can be used to hold companies and their management to account

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Company Profile



POMERANTZ LLP

History

Pomerantz LLP is the oldest law firm in the world dedicated to championing investor rights. Founded in 1936 by the pioneering class action attorney Abe Pomerantz, the firm represents institutional investors and asset managers worldwide. With over USD 9 trillion in combined client assets, Pomerantz's proprietary portfolio monitoring service, PomTrack®, monitors, analyses, and reports on clients' portfolio losses that may be attributable to securities fraud, quickly providing our clients the knowledge and tools with which to make informed and timely decisions.

Global Expertise

The firm has offices in New York, Chicago, Los Angeles, Paris, London, and Tel Aviv and partners with a network of law firms and litigation funders worldwide to advise our clients on the most suitable path to recover monies lost due to corporate misconduct and securities fraud. Our global team includes attorneys with decades of experience, financial analysts, and fraud investigators. Integral to the team is Dr. Daniel Summerfield, Director of ESG and UK client services. Prior to joining Pomerantz, Dr. Summerfield was an executive at Universities Superannuation Scheme, the UK's largest private pension fund, for 20 years, first as Head of Responsible Investment and then as Head of Corporate Affairs. Jennifer Pafiti, Partner and Head of Client Services, has a base in both the Firm's Los Angeles and London offices. She is dually qualified to practice law in the United States and United Kingdom.

Results

In 2018 Pomerantz's achieved a USD 3 billion settlement for defrauded investors in Brazil's state-run oil company, Petrobras, which remains the largest securities class action settlement in over a decade. Beyond numerous other record-breaking financial recoveries for investors, Pomerantz deploys novel legal theories to expand global shareholder rights via litigation, while effecting meaningful corporate governance reforms to address issues of workplace safety, sexual harassment, and other ESG matters, during the settlement process.

OVERVIEW

Taking the lead

Use of class actions by investors seeking redress for losses due to inept or illegal corporate behaviour has spread beyond the borders of the US legal system into European jurisdictions. David Adams finds out why – and why some pension funds are playing a leading role

WRITTEN BY DAVID ADAMS, A FREELANCE JOURNALIST



Every investment involves risk, but also trust; those investing on behalf of pension funds and their members must believe that businesses in which they invest will be run sensibly and ethically. If that turns out not to be the case, investors may then choose to put their trust in legal processes instead, by participating in or leading a class action.

For example, in December 2023, AP7 in Sweden and Norges Bank Investment Management (NBIM) in Norway were named as co-lead plaintiffs in a class action against Silicon Valley Bank (SVB). The allegation at the heart of this case is typical of many: That SVB executives misrepresented and concealed financial and liquidity problems within the bank prior to its collapse, resulting in significant losses for investors.

Other class actions in which AP7 has already participated include a case brought against Chinese company Luckin Coffee, which resulted in a payment of USD 187.5 million to

affected investors participating in the class action. In a statement to be published in its forthcoming annual and sustainability report, AP7 says it uses class actions “against companies that have misled shareholders or influenced the share price negatively... primarily to draw attention to and deter the companies from irregularities, but also to compensate the shareholders”.

“The majority of cases usually result in a settlement,” the statement continues, noting that to date this has led to payments of more than USD 15 million to its savers, while “regulations are applied... to ensure AP7 is not liable for costs”. At the end of 2023, AP7 was involved in 17 class actions.

The number of shareholder-driven class actions grew by 34 per cent during the two years up to Q3 2023, according to research supported by the International Securities Services Association (ISSA), alongside The ValueExchange, Goal Group, FIS and Proximity. It predicts further growth of 33 per cent during the next two years, including 44 per cent growth in Europe.

A spokesperson for AP7 tells *European Pensions*: “It is positive to see more institutional owners being active owners through class actions, since it is primarily a tool to set standards for all companies to act correctly by clearly deterring them from irregularities.”

Legal distinctions

Use of class actions has also been boosted by legal changes in some jurisdictions, including the passing of the EU Representative Actions Directive (RAD) in 2020; and use of the Act on Redress of Mass Damages in Collective Action (WAMCA) regime in the Netherlands. Law firms in some countries in Europe can now use a similar business model to that long used by US law firms:

Proactively identifying instances where a fall in shareholding values may be linked to poor or malign governance; then contacting investors that may have been affected, and suggesting they participate in or lead a class action.

“The law firm assumes all risks, pays all costs and does all the legwork,” Grant & Eisenhofer attorney, Guus Warringa, who works with institutional investor clients, says. “Your involvement [*as an institutional investor*] is pretty minimal and your risk is minimal. Only in the event of a success does the law firm get paid. If you do it prudently it’s definitely worth the limited effort you might put in.”

Pomerantz director of ESG and UK client services, Daniel Summerfield, says the legal firm has worked on more than 300 cases of this kind during the past eight years, in more than 25 countries. At the time of writing it is acting for institutional investors, including pension funds, in 37 cases.

However, many European pension funds continue to participate in class actions within the US system. Differing legal and regulatory conditions mean it may be more difficult to do so in Europe. In part this is because some countries are EU members but others are not; and not all EU member states have yet transposed the RAD into their national legal systems.

Another problem is the concept of ‘reliance’ – in some jurisdictions a plaintiff/claimant has to prove that investors relied on the truth of specific statements made by a business before investments were made. Again, the US system is currently more likely to favour the plaintiff than are courts in Europe.

Responsible actions

But even if the legal or regulatory framework in a specific country

discourages participation in class actions, pension fund trustees and managers in almost every country are still willing to consider participating and even leading these actions.

“I think the reason European pension funds are participating is that they feel, and rightly so, that they have a duty to their members to do the right thing,” says Warringa.

In addition, while the legal processes involved may be complex, the process is now easier thanks to the development of technology-based solutions by service providers like Goal Group.

“We work with clients including

“I THINK THE REASON EUROPEAN PENSION FUNDS ARE PARTICIPATING IS THAT THEY FEEL, AND RIGHTLY SO, I THINK, THAT THEY HAVE A DUTY TO THEIR MEMBERS TO DO THE RIGHT THING”

pension funds to analyse data, identify opportunities and file claims,” says Goal Group chief revenue officer, Vicky Dean.

But in some jurisdictions, such as the UK, the costs involved in pursuing some class actions may be prohibitive for some pension funds. “In the UK and other jurisdictions it’s a ‘loser pays’ regime,” Summerfield explains. Another option is to use third-party litigation funding (TPLF). US Market Advisors Law Group managing attorney, David Abel, who works with litigation funders, as well as pension funds participating in class actions, says TPLF providers are seeking to build long-term relationships with investors.

EU member states will see further regulation of TPLF in future; the

European Parliament voted in favour of new regulations in 2022, but the European Commission is gathering more detailed evidence on the operations of the industry and the need for regulation first.

Taking action on ESG

One reason some pension funds are keen to lead class actions is the number of cases that are brought not just to seek lost returns, but to deliver broader socially and environmentally positive outcomes.

There has certainly been an increase in numbers of class actions linked in some way to ESG issues. They include cases intended to force businesses to reduce carbon emissions more quickly; and others based on allegations of companies failing to fulfil climate or other ESG-related pledges, or making insufficient disclosures regarding climate risks.

Warringa notes that there are multiple class actions linked to environmental or social issues underway in the UK, the Netherlands, Germany, France and the Nordic countries. He also expects to see pension funds and NGOs working together in the future.

We are also likely to see more use of class actions linked to misuse of data, often if a business has made public statements about the strength and quality of data management and security processes, only for these to be shown to be inadequate in reality, risking or resulting in reduced shareholder value. It is difficult to find anyone who does not expect all of these trends to continue.

“With the extension of [*investors’ rights to pursue class actions*], the intervention of litigation funders; and with ESG now more engrained in how companies operate and in decision-making processes for pension funds, I think that will at least keep steady, if not increase, the volume of litigation,” says Abel.

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Expanding the toolbox: Securities litigation as a mode of corporate engagement

WRITTEN BY JENNIFER PAFITI AND DR. DANIEL SUMMERFIELD



Jennifer Pafiti



Dr. Daniel
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After careful consideration of where and how to invest, shareholders will undoubtedly be concerned to discover that a company in which they invest is being sued for securities fraud. Nevertheless, when companies have lied or suppressed information material to the share price, investors may have the option to sue to recover the decline in their investment.

How and where they sue will depend on a number of factors. The United States has, without doubt, the most robust class action system in the world. Investors can recover losses by remaining passive class members or by pursuing their own, individual actions. Federal laws in the U.S. have produced significant recoveries for shareholders who, without these securities laws, may have recovered nothing.

Litigation can also be a sharper tool for institutional investors to use when “softer” methods of corporate engagement fall short. In addition to monetary recoveries, shareholder litigation has introduced and addressed significant corporate governance reforms and ESG concerns, thus giving shareholders who wish to remain invested in the defendant company some reassurance that the wrongs will not

be repeated. In recent years, investors in Europe and the U.K. have begun to follow this trend and are pushing securities litigation in promising new directions.

The power of securities litigation to effect changes in corporate governance should not be underestimated. For example, when Pomerantz LLP prevailed in a securities litigation in the U.S. against *Petróleo Brasileiro S.A.–Petrobras*¹, it secured a record-breaking \$3 billion recovery on behalf of defrauded investors. However, the benefits to shareholders did not end there. During litigation, Pomerantz commissioned several robust, independent corporate governance reports on Petrobras that contained a number of recommendations, some of which were implemented by the company.

Similarly, in the resolution of a securities class action in the U.S. last year, Pomerantz achieved a settlement representing 50 per cent of recoverable damages for investors in Deutsche Bank AG. The suit concerned alleged failures in the bank’s “know your customer” procedures that allowed accused sex offender Jeffrey Epstein to avoid any meaningful due diligence and continue doing business with – and making money for – the bank. Via this successful litigation, investors held the bank to account for failures in corporate governance and sent a message to other companies that shareholders will not tolerate businesses that overlook credible accusations of sexual misconduct.

In our globalised world, as investors look to overseas markets for investment opportunities, they want to ensure that appropriate

¹ Both authors of this article played integral roles in the *Petrobras* litigation: Ms. Pafiti as a litigator, and Dr. Summerfield in his former position as Head of Responsible Investment at the UK’s Universities Superannuation Scheme, the lead plaintiff in the case.

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systems are in place to protect these investments. European and U.K. funds are increasingly looking to securities litigation as an additional process to hold companies and their management to account. However, there are several challenges to initiating these actions beyond the U.S.

One is that, while in the U.S. any investor that suffered damages after purchasing eligible securities during the relevant class period may participate in a securities class action without registering as a plaintiff, in most European and U.K. jurisdictions, investors must proactively register, or “opt in,” to take part.

Another challenge to litigating securities actions in Europe and the U.K. is the fee structure. In the U.S., there is no direct cost for plaintiffs to participate in such litigation (the costs are borne by the class) and – win or lose – a defendant’s legal fees are never a plaintiff’s responsibility. In contrast, most European and U.K. jurisdictions have a “loser-pays” system where investor plaintiffs may be on the hook for hefty legal fees if they don’t prevail in court. To address this deterrent to litigation, a growing field of third-party litigation funders has sprung up to assume financial responsibility in exchange for a percentage of any potential recovery.

There also remain cultural barriers for European and U.K. funds regarding securities class actions. Many of these funds tend to have a more conservative approach, and as such may be reticent to appear litigious. However, this barrier is beginning to erode in the face of one of the emerging roles for securities litigation: promoting ESG initiatives and addressing shortfalls in corporate governance and corporate behaviour. Such litigation has been successful in the U.S., as seen in Pomerantz’s cases against Deutsche Bank and Petrosbras, discussed above.

In Europe and the U.K., one of the

top ESG concerns is climate change. The past five years have seen the adoption of numerous climate-focused regulatory and reporting requirements. As a result, there has been an uptick in litigation taking companies to task for “greenwashing,” or misleading the public and investors about their sustainability initiatives.

These cases cover various types of misinformation, including challenges to corporate climate commitments, claims about product attributes, overstated investments or support for climate action and failure to disclose climate risks. Pension funds can help ensure that companies are held to account for their disclosures through securities litigation.

**“THE UNITED STATES HAS,
WITHOUT DOUBT, THE MOST
ROBUST CLASS ACTION
SYSTEM IN THE WORLD”**

Since the *Morrison* ruling in 2010, when the U.S. Supreme Court ruled that U.S. securities laws generally apply only to securities transactions that occur within the U.S., Pomerantz is increasingly advising clients on a number of potential securities litigation cases in overseas jurisdictions. ESG issues play a role in many of these cases.

Examples include a case in the Netherlands against ING Groep N.V. alleging that the company failed to disclose that its systems were insufficient to identify and prevent money laundering, terrorist financing and other corrupt practices; and a case in Sweden against Telefonaktiebolaget LM Ericsson alleging that the company made tens of millions of dollars in suspicious payments to the terrorist group ISIS over nearly a decade to maintain its

business in Iraq, as well as making suspicious payments to a number of other countries.

It should also be noted there are moves afoot to reform the U.K.’s listing rules which may lead to a dilution of shareholder rights and protections – a potential development that institutional investors should be closely watching. Few funds have the infrastructure to effectively monitor – and quickly respond to – the ever-shifting landscape of securities class actions on a global scale. One solution is to subscribe to a portfolio monitoring service, such as the PomTrack® system offered by Pomerantz, which cross references a fund’s holdings with daily class action reports to keep track of global actions in which losses suffered by a fund may be attributable to fraud. Overseeing combined client assets in excess of \$9 trillion, PomTrack® represents one of the most comprehensive services of its kind. For funds that are just beginning to explore securities class actions, portfolio monitoring is a good way to gauge the available benefits.

In our globalised world, funds that look only to their own markets for new investments will invariably be left behind. The same is true for approaches towards corporate engagement. As new challenges arise and ESG moves to the centre of discussions around corporate citizenship, it is more important than ever for funds to have a diverse array of tools at their disposal to engage with companies they invest in. As the example of the U.S. has shown, and as funds in Europe and the U.K. are discovering, securities litigation is one of the sharpest tools in the box for funds looking to fulfill their fiduciary duty and advocate for a more sustainable future for their global investments, and in turn, pension fund beneficiaries.