



SHAREHOLDER ACTIONS AROUND THE WORLD:

Increased Relevance for Pension Fund Trustees & Asset Management Firms

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One of the key trends for pension fund trustees and asset managers has been the increased focus on shareholder stewardship. Holding public companies and their insiders accountable for certain practices and policies has become an important element of many institutional investors' stewardship approach. When confronted with material corporate misconduct, the best option for investors to recover financial losses is typically through shareholder legal action. Many institutional investors are familiar with securities class actions in the United States, but most importantly and relevant for pension fund trustees and asset managers is that shareholder litigation has gone global. In an increasing number of jurisdictions around the world, collective action mechanisms are available that allow groups of shareholders to pursue claims to recover losses through either litigation or arbitration. Indeed, 2020 saw a significant number of actions brought around the globe in the U.K., Germany, Japan, Australia, and elsewhere. This article will discuss the relevance of global shareholder actions for pension funds and asset managers, including the latest trends and developments. We also will provide an overview of best practices and takeaways that investors should consider to navigate the ever-changing global landscape of securities litigation.

1. Rise of Global Shareholder Litigation

Until approximately a decade ago, almost all shareholder actions were exclusively pursued in the United States¹. In a landmark 2010 ruling, the Supreme Court of the United States handed down an opinion in the *Morrison vs. National Australia Bank* case that created a rare bright line rule. Shareholders could no longer pursue securities fraud claims in U.S. courts if the affected shares were purchased on a non-U.S. exchange. As a result, investors suffering financial losses from fraud or material corporate misconduct that impacted shares traded outside the United States needed to bring any action to recover those financial losses in the country where the company is headquartered, where its shares are listed, or where there is another compelling claim to jurisdiction.

¹ Some shareholder actions were pursued in Canada, Australia, and the Netherlands prior to 2010. The majority of cases, however, were pursued in the United States.

As a result, there has been significant increase in the number of shareholder actions filed in various jurisdictions over the last decade. In the last two years alone, cases have been filed against well-known public companies in the Netherlands, Japan, Germany, Australia, Denmark, Brazil, Switzerland and the United Kingdom. Many cases have also resolved over the last several years and institutional investors have recovered billions of dollars as a result. Some examples (all number in U.S. Dollars) include:

- Ageas SA/NV (Fortis) - Netherlands - **\$1.542 billion**
- The Royal Bank of Scotland Group - U.K. - **\$1.018 billion**
- Storm Financial Limited - Australia - **\$240 million**
- Valeant Pharmaceuticals International Inc. - Canada - **\$94 million**
- Olympus Corporation - Japan - **\$92 million**
- Makhteshim Agan Industries Limited - Israel - **\$44 million**

With a push by many investors for easier access to the courts for seeking to recover financial losses due to corporate wrongdoing, there is an increasing number of jurisdictions that either look to utilize rarely used laws or to develop new legislation. In fact, a number of European Union member states are focusing on passing legislation to allow shareholders to bring collective actions in their courts. In Europe, the European Commission is encouraging member states to provide investors and consumers with an opportunity to recover economic losses from fraud or material corporate misconduct. It is also worth noting that the Covid-19 pandemic has not deterred or slowed down investors from pursuing actions to recover financial losses; recently, institutional investors have brought cases against household names such as Daimler and Wirecard in Germany, Barclays and Standard Chartered in the United Kingdom, and Nissan in Japan.

2. Relevance for Pension Funds and Asset Managers

When global companies such as Royal Bank of Scotland, Volkswagen, Petrobras, Steinhoff International, Nissan Motor Corporation, and Toshiba are alleged to have committed very public and significant frauds resulting in billions of dollars in lost market capitalization, it is not surprising to see that global shareholder litigation has taken on a greater prominence. Each of these actions is being pursued by institutional investors whose portfolios were materially impacted by the alleged frauds. These actions represent the only real option these institutional investors have for a recovery.

In almost all jurisdictions outside the United States investors need to take some proactive steps in order to be able to participate in any recovery achieved from shareholder litigation. In Europe, outside of certain actions brought in the Netherlands, investors need to register their claim in some way at the start of a case or they will not be entitled to any compensation. This holds true for most jurisdictions globally outside of North America. If you do not register your claim at the outset of a case, you are precluded from taking part in any recovery. The significance of this is that all institutional investors should be evaluating whether it makes sense to participate in these cases and when. Otherwise, they run the serious risk of not recovering any money that was lost. For this reason, these opportunities must be evaluated in a timely fashion. Notably, investors that miss participating in these global actions may have to answer uncomfortable questions from their pensioners and unit holders.

3. What to Look Out for when Evaluating Shareholder Recovery Actions

For many pension funds and asset managers participation in shareholder actions is not something they do or consider on a regular basis. As such, we will outline a number of key issues and questions to consider.

Timely Identification of Actions

It is important that institutional investors have service providers and procedures in place to identify in a timely manner all potential actions that may lead to a recovery and which they may be eligible for. A frequent issue that arises in non-U.S. recovery actions is the uncertainty surrounding registration deadlines. Many times advertised deadlines are merely commercial deadlines that have little or nothing to do with actual statutes of limitations (which typically dictate when a claim must be filed or registered). Absent a reliable process for evaluating these potential claims in a timely basis, the risk of missing real opportunities exists. For example, many investors did not participate in the \$1 billion recovery in RBS filed in the U.K. and a number of investors were misled into not properly registering their claims in the massive German action against Volkswagen.

Adequate Legal Guidance

A key feature of most shareholder actions filed outside the United States is that investors need to actively sign up or register for these cases. The greatest challenge for investors is trying to navigate around the different jurisdictions' rules, practices and laws. There is not one coherent legal regime for dealing with collective shareholder actions around the world. As such, investors must inform themselves about how to protect their rights and interests in each jurisdiction in which they have investments. Similarly, they must understand and weigh the risks and costs associated with participating in every action filed around the globe. It is worthwhile to emphasize that most actions filed outside the United States do not require a significant amount of work on the part of each claimant (investor). However, there are jurisdictions where there will be demands for investor and/or custodial confirmations and documentary support for investments and, as a result, participation in these cases may be time consuming.

Make Sure Potential Risks Are Covered

In nearly all shareholder actions filed outside the United States, participating investors are generally protected from any downside risk by the litigation funders and/or insurance policies purchased by funders which guarantee to pay the fees of the opposing attorneys and any adverse costs awarded. Potential adverse costs can vary dramatically from jurisdiction to jurisdiction based the respective laws in place as well as factors like length of litigation, general hourly rates of attorneys, among others. It is therefore incumbent on investors to be comfortable with whom they are dealing with when it comes to the local lawyers and the litigation funders. Pertinent questions regarding the experience level of the funders and local lawyers, whether the funders are sufficiently capitalized or that the insurance in place properly covers the risk, and whether there is a track record for working with the funders and/or lawyers

are all important and appropriate considerations. Investors either need to do their own diligence on each potential action or have a reliable advisor and process in place that provides this information regularly. Investors that do not evaluate these opportunities will be missing out on viable opportunities to recover material assets lost when there is fraud or corporate wrongdoing to do that work for them.

4. Best Practices for Handling Shareholder Actions

The landscape for global shareholder actions continues to grow in both the number of actions filed and the number of jurisdictions in which actions are brought. Furthermore, it is anticipated that this trend will continue for the foreseeable future. There are currently a number of jurisdictions considering new legislation to provide easier access to the courts for shareholders looking to recover losses as a result of fraud. In addition, attorneys are finding new ways to utilize legislation already on the books to bring these actions.

What follows below are suggested best practices for institutional investors with respect to shareholder litigation.

- **Litigation Policy**

A detailed written policy outlining how shareholder litigation is handled is an invaluable tool for investors. A useful litigation policy will address under what circumstances active participation for interest, type of industry the corporate defendant is engaged, the nature of the alleged wrongdoing (strength of claims), ability to recover (is there a threat of insolvency by the company), work required by the claimants, adverse costs risk, etc. It is often helpful to build financial thresholds and other meaningful factors into a litigation policy; however, it makes sense to allow for some flexibility as there may be opportunities worth pursuing that may not always fall within a pre-determined set of parameters.

- **Make Sure You Are Being Notified About Relevant Shareholder Recovery Actions in a Timely Manner**

There are a wide array of services available for informing investors about shareholder actions. Some investors rely on their custodians or a third-party provider for these services. There are some investors who retain a law firm that specializes in representing shareholders. Notably, not all services are created equal. Investors should ensure that they utilize a service that is capable of (i) identifying all actions on a global basis in a timely manner, (ii) properly analyzing all cases including providing (legal) advice regarding how best to proceed in all jurisdictions, and (iii) filing all necessary settlement claims and registration documents.

- **Consider Your Options When Signing Up for a Shareholder Action**

It is quite common in non-U.S. shareholder actions that investors will be faced with multiple investor groups pursuing the same claims. When this occurs, a decision will need to be made on whether to join

the action as well as which group to join. The various competing groups frequently have slightly different claims and litigation strategies, different relevant periods, different financial structures, and, of course, different local attorneys and litigation funders. For example, recently, in an action brought against Danske Bank in Denmark, there were five different groups pursuing recoveries with wildly different class periods and different local law firms and litigation funders. Decisions on which claimant group offers the most benefits or risk are not easily dissected. It is important for investors to be well positioned so that they may receive thorough and detailed analyses and guidance in making a decision of this magnitude.

- **Decide What You Want To Achieve From Shareholder Litigation**

Understanding the work that will be required and the possible outcomes will help guide you with what you want to achieve. The focus of virtually all shareholder actions filed around the world is to recover monetary compensation, but a key tool is to hold companies and their insiders accountable when they commit fraud or material misconduct. These scenarios are not typically resolved through dialogue and engagement, or by exercising voting rights. Instead, many institutional investors' active pursuit of and participation in shareholder actions has become an essential part of their stewardship framework.



Disclaimer:

This article is intended to provide a background on shareholder class action litigation around the world and the relevance for pension fund trustees and asset management firms. However, it is not intended as a substitute for legal advice with your chosen counsel or your discussions with counsel as to the merits of each particular action you may consider. The purpose of this article is to provide general information only. Nothing herein constitutes legal advice, and prior results are no guarantee of similar outcomes in the future.