

WOLF POPPER

ST
SALEM TRUST
A DIVISION OF ARGENT INSTITUTIONAL TRUST CO.



Roles & Responsibilities Related to Securities Litigation



Fall Trustee School

Sept. 2024



**What Is Securities
Litigation and Why Do
You Need Portfolio
Monitoring?**

What is Securities Litigation? (Pt. I)

- Securities fraud
 - Enron
 - Petrobras
 - Madoff Securities
- Corporate mismanagement
 - Wells Fargo fake accounts



What is Securities Litigation? (Pt. II)

- Corporate transaction / merger & acquisition
 - Majority / Controlling Shareholder cash outs
 - Conflicts of Interest



The Benefits of Portfolio Monitoring

- It informs trustees, fund administrators, staff, consultants and attorneys about:
 - Existing or potential class action litigation in time to participate in a meaningful way
 - Corporate mismanagement and fraud that are damaging (or may damage) your Fund's return on investment
 - Situations where an individual or opt-out action would likely maximize a Fund's loss recovery
- Helps avoid missing deadlines for filing settlement claims
- Helps prevent or minimize losses by allowing your Fund to pursue opportunities to improve corporate governance



Role of the Fiduciary and Institutional Investors

- “Not only is a fiduciary not prohibited from serving as a lead plaintiff, the Secretary believes that a fiduciary has an affirmative duty to determine whether it would be in the interest of the plan participant to do so... It may not only be prudent to initiate litigation, but also a breach of a fiduciary’s duty not to pursue a valid claim.”

U.S .Dept. of Labor, Amicus brief filed in *Bragdon v. Telxon* (N.D. Ohio)

- “Through the PSLRA, Congress has unequivocally expressed its preference for securities fraud litigation to be directed by large institutional investors.”

Chief Judge Buchmeyer, *Gluck v. Cellstar* (N.D. Tex.)

- Average settlement amount increases by 26%-48% when institutional investors are lead plaintiffs



Are There Costs to Funds Acting as Lead Plaintiff in Securities Class Action Litigations?

- No Out-Of-Pocket Costs for Institutional Clients
 - Attorneys advance all litigation-related expenses, including any needed travel by Fund personnel
 - Attorneys fees solely on a contingent basis
- Often Times Minimal Time Burden (With Some Exceptions)
 - Gathering relevant documents
 - Consultations with counsel
 - Attorneys work with Funds to minimize time incurred by Fund personnel



How Many Law Firms Does a Fund Need?

- A law firm can be the monitor, evaluator, and outside litigation counsel to a fund
- Best practice is to engage at least 3-5 firms
 - Some federal court decisions have questioned a client/lawyer “conflict of interest” with only 1 firm performing such roles simultaneously*
 - Funds will gain the benefit of similar or differing analyses
- Funds can rotate the litigation function



**Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC, 616 F. Supp. 2d 461, 464 (S.D.N.Y. 2009)*



**How Does My Custodian
Fit In?**

Custodian Role and Responsibilities (Part I)

- The Custodian records, reports and retains security transactions that are essential to the Securities Litigation industry
 - Transaction records are provided to/accessed by numerous service providers
 - Custodians provide online access to statements for a period of time - usually about two years
 - Statements are then archived and retained in accordance with “general records schedules” - may vary by state.
 - Historical transactional data is required to process settlement claims



Custodian Role and Responsibilities (Part II)

- Custodian should have the ability to support multiple Securities Litigation firms
 - This could include a fallback provision using a third party to record and collect monetary awards
- Custodian should have the flexibility to provide data using various transfer methods
 - This includes online access to download non-editable statements or establishing a secure portal link between the custodian and the securities litigation law firm(s)



Custodian Role and Responsibilities (Part III)

- Data integrity protection is critically important
 - Data transferred should be Read-Only
 - Data should be sent encrypted to the recipient
- The Custodian is intentional & purposeful
 - Data is transferred for a specific narrow purpose and acknowledged
- Changing custodians creates items to consider:
 - Potential breaks in transaction data and data transfer from new custodian
 - Data from prior custodian does not occur automatically



Settlement Claims Management

- Academic studies show a majority of institutional investors did NOT file claims in class action settlements*
- Research has shown that proper claims filing should result in recoveries of 1 to 1.5 basis points every year, on average



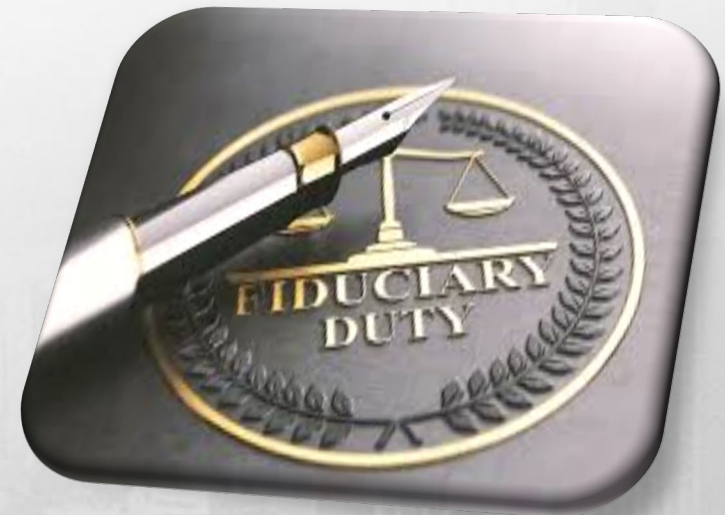
* See, e.g., James D. Cox and Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 Stan L. Rev. 411, 424 (2005)

A photograph of white chess pieces on a checkered board, arranged in a line from left to right. The pieces include a pawn, several pawns, a knight, a bishop, a rook, and a king. The text is overlaid on the center of the image.

What about the General Counsel?

General Counsel Role (Part I)

- The GC acts as a gatekeeper and trusted sounding board to advise the Board of Trustees
 - Acts as a liaison between the Board of Trustees and fund monitoring firms retained by the Fund
 - Assist in identifying appropriate law firms to provide portfolio monitoring / securities litigation services
 - **Potential Case Evaluation.** Analyze and work with the Board of Trustees and potential Securities Litigation firm to evaluate and determine if the case has merit and possibly recommend to the Board of Trustees to attempt to act as a lead plaintiff and take a more active role in the litigation or remain as a passive member to the class.



General Counsel Role (Part II)

- **Review of Class Action Filings/Claims.** The GC along with the Board of Trustees monitor the Custodian's/Securities Litigation firms activities regarding the filing and settlement of securities class action claims.
- **Assistance in Lead Plaintiff Actions.** Should a Fund be designated as Lead Plaintiff, then the GC accompanies a Trustee to any possible deposition(s), assists in preparation for deposition(s), review of draft pleadings, court filings, discovery requests, may appear in court along with the fund monitoring firm (if necessary) and advises/assists the Board of Trustees and their staff (e.g. Plan Administrator) throughout the litigation process.



General Counsel Role (Part III)

- **Participation in Settlement.** GC and Board of Trustees take reasonable steps to see that timely claims are submitted on behalf of the Fund in all appropriate securities class action settlements.
- **Report to the Board.** GC updates and reports to the Board of Trustees regarding cases that are being monitored and keeps the Board apprised of any unusual or extraordinary events as they may occur.



Role of Outside Litigation Counsel



**a/k/a “Monitoring
Counsel”**

Outside Litigation Counsel Role

- Identifies opportunities to recover losses
- Informs clients of issues impacting their holdings
- Recommends course of action
- Represents Fund in litigation



Two bald eagles are perched on a weathered log in a snowy mountain landscape. The eagles have white heads and necks, and dark brown bodies. They are looking towards the camera. The background shows snow-capped mountains and a blue sky.

**Knowledge + Policies +
Trusted Providers =
Fiduciary Duties Fulfilled**

Thank You!

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