The Bulletin is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay

FULLY INFORMED

KESSLER TOPAZ WINS $148 MILLION FOR FORMER DOLE STOCKHOLDERS

Michael C. Wagner, Esquire

As reported in our Spring 2015 newsletter, Kessler Topaz conducted a nine-day trial earlier this year in the Delaware Court of Chancery, as co-lead counsel on behalf of Dole Food Company's former public stockholders. On August 27, 2015, Vice Chancellor J. Travis Laster issued the Court's post-trial opinion and delivered a victory to the stockholders.

The Court concluded that David Murdock, Dole's long-time controlling stockholder, and C. Michael Carter, Dole's former chief operating officer and long-time general counsel, are liable for engineering Murdock's unfair 2013 buyout of Dole's public stockholders. The Court awarded the stockholders $2.74 per share, or approximately $148 million in total, plus pre-and-post judgment interest. Kessler Topaz partner Michael Wagner and associate Justin Reliford led the firm's trial team in the case.

In a detailed 108-page opinion, Vice Chancellor Laster concluded that Murdock and Carter are jointly responsible for the harm caused to Dole's former stockholders. Among other

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HIGHLIGHTS

Kessler Topaz Wins $148 Million for Former Dole Stockholders

BNYM Settles Forex Claims For $504 Million In Restitution To Its Domestic Custodial Clients

Academic Study Recognizes Kessler Topaz as a Top Merger Litigation Firm

Kessler Topaz Recovers $10.75 Million For Former Stockholders Of GFI Group

BNYM SETTLES FOREX CLAIMS FOR $504 MILLION IN RESTITUTION TO ITS DOMESTIC CUSTODIAL CLIENTS

Sharan Nirmul, Esquire

On September 24, 2015, Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York approved a class action settlement between the Bank of New York Mellon ("BNY Mellon") and 1,218 of its domestic custodial clients who used the Bank's automated foreign exchange service, called "standing instructions," from 1999 through 2012. Kessler Topaz served as the court-appointed lead class counsel in the litigation. Through the settlement, the Bank's custodial clients will recover $504 million in hidden foreign exchange fees that BNY Mellon charged them over the 13-year class period.

The settlement follows four years of highly contested litigation which Kessler

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KESSLER TOPAZ MELTZER CHECK LLP

KESSLER TOPAZ RECOVERS $10.75 MILLION FOR FORMER STOCKHOLDERS OF GFI GROUP

Justin Reliford, Esquire

Stockholders voted overwhelmingly against the deal with CME.

Following a corporate takeover battle, Kessler Topaz, acting as co-lead counsel for public stockholders, recently negotiated a $10.75 million cash settlement to resolve breach of fiduciary duty claims against former directors and officers of GFI Group Inc. ("GFI") in a case that was scheduled for trial later this year in the Delaware Court of Chancery. The $10.75 million settlement, which remains subject to court approval, ensures that current and former GFI stockholders will receive total compensation for their shares greater than the highest price offered during a contentious bidding war for the company.

GFI is an institutional wholesale brokerage and trade execution services company, essentially an intermediary in transactions involving some of Wall Street's largest investment banks. GFI also had other businesses, principally software products that provide specialized trading platforms for institutional investors. The saga for corporate control began in July 2014, when GFI announced a proposed merger with the Chicago Mercantile Exchange ("CME") valued at $4.55 per share.

As alleged by the GFI stockholder-plaintiffs, the proposed merger price was inadequate and resulted from a conflicted sales process designed to benefit certain management insiders at the expense of public stockholders. In the proposed deal with CME, immediately following the merger of GFI and CME, CME would sell GFI's brokerage business to a consortium of GFI insiders that included founder Michael Gooch and CEO Collin Heffron, who were also GFI directors. Gooch and Heffron controlled Jersey Partners Inc. ("JPI"), which was GFI's largest stockholder at the time of the merger announcement, holding approximately 37% of GFI's stock. This 37% block of GFI stock provided JPI (and Gooch and Heffron, by

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10 YEARS REMOVED FROM COX & THOMAS: A SURVEY OF THE CLAIMS FILING LANDSCAPE FOR U.S. AND NON-U.S. SECURITIES LITIGATION RECOVERIES

Jonathan R. Davidson, Esquire & Emily Christiansen, Esquire

According to NERA Economic Consulting, between 2010 and 2014 alone, $26.8 billion dollars in securities class action settlement and judgment proceeds were made available to investors. In recent *Bulletin* articles, we have examined the claims administration process in securities class action settlements — the most important step of the process for institutional investors (when not actively litigating a case and serving as a fiduciary for the class) with regard to securities fraud class actions. This has included a review of the systems and best practices that institutional investors have implemented for recovering settlement proceeds, as well as the issues investors face in the complex claims administration process. As Q4 2015 approaches, we survey the current claims administration landscape, take a look at some recent, notable developments, and provide an overview of how the global institutional investor community is navigating this challenging and important area.

As has been widely cited for years within the shareholder litigation community, in 2005, Professors James D. Cox and Randall S. Thomas released a groundbreaking paper in the Stanford Law Review entitled, "Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements." In their study, Professors Cox and Thomas compared the list of shareholders who traded stock in various companies during a class period with the list of institutions who filed claims in a securities fraud settlement concerning the same company and the same class period. The results were astounding– on average only twenty eight percent (28%)

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KESSLER TOPAZ SUCCESSFULLY CERTIFIES CLASS OF FINANCIAL INSTITUTIONS IN LANDMARK DATA BREACH OPINION

Andrew N. Dodemaide, Esquire

In recent years, large-scale data breaches at major retail stores have become a too-common source of distress for consumers. Since 2007, hackers have stolen the credit and debit card data of millions of customers who made purchases at, among others, stores operated by TJX Companies, Inc., The Home Depot, Inc., and Target Corporation. Although plaintiffs have historically faced significant challenges in asserting claims against the companies that have failed to adequately insulate customer information from theft, three important opinions reflect a growing trend in plaintiffs' favor.

On September 15, 2015, the court hearing *In re Target Corporation Customer Data Security Breach Litigation*, No. 14-md-02522 (D. Minn.) certified a nationwide class of financial institutions that issued payment cards compromised in a data breach of Target computer systems. See No. 14-md-02522, Dkt. No. 589 (D. Minn. September 15, 2015). In addition, the court certified Kessler Topaz as Co-Class Counsel. The *Target* case arose from the breach of Target's computer systems in late 2013, allowing hackers to gain "virtually unfettered access" to the system and extract the financial information of more than 40 million customers. *See id.* at *1. The financial institution plaintiffs in the *Target* case issued payment cards such as credit and debit cards to customers who used those cards at Target stores while the 2013 data breach was taking place. They brought claims against Target for negligence and violations of Minnesota's Plastic Security Card Act, Minn. Stat. § 325E.64, in connection with the losses they incurred in notifying customers of the breach, reissuing cards, and reimbursing customers for fraudulent transactions, among other things. In a reasoned opinion rejecting multiple arguments by Target as to why a class of institutions should not be certified, the District Court held that the institutions' claims satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and that certification is therefore appropriate. Notably, the court cited Target's own practice of reissuing cards as one of its reasons for granting class certification. *See id.* at 7-8 ("What Target suggests is that, because there was no requirement to act, financial institutions should have done nothing in the face of dire alerts regarding the data

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ACADEMIC STUDY RECOGNIZES KESSLER TOPAZ AS A TOP MERGER LITIGATION FIRM

Michael C. Wagner, Esquire

In an article to be published in the forthcoming issue of the American Law and Economics Review, three academic scholars used a statistical analysis to conclude that Kessler Topaz is among the top five plaintiff's law firms in merger litigation. The study sought to analyze whether plaintiffs' counsel had any measurable effect on the outcomes of shareholder M&A litigation. The authors concluded that plaintiffs' counsel in fact did correlate meaningfully with the type of results achieved in such cases, and that Kessler Topaz was among a select group of five firms which, statistically, "is significantly and positively associated with a higher probability of lawsuit success."

Analyzing 1,739 lawsuits arising from corporate mergers from 2003-2012, professors Randall Thomas, C.N.V. Krishnan and Steven Davidoff Solomon found that Kessler Topaz, as a "topmost firm," adopts "more aggressive litigation strategies" that "produce statistically significantly superior results" for stockholders, such as "settlements with significant dollar consideration or settlements amending the terms of the merger agreement." "In other words, contrary to conventional wisdom and theory, not all plaintiffs' law firms are alike" when it comes to merger litigation, and Kessler Topaz is "more careful" in screening potential cases and "less likely to have their cases dismissed," the authors concluded. The firm is honored to be recognized by these scholars as a leader in merger litigation.

KESSLER TOPAZ COMMENCES LITIGATION CHALLENGING ISSUANCES OF NON-VOTING STOCK

Matthew A. Goldstein, Esquire

The litigation shows Kessler Topaz's willingness and ability to litigate cases to protect minority stockholders.

Recently, Kessler Topaz commenced litigation challenging the issuances of new classes of non-voting stock of two public companies, Under Armour, Inc. ("Under Armour") and Zillow Group, Inc. ("Zillow Group"). The issuance of a new class of non-voting stock unfairly entrenches in power each company's founders and majority stockholders and causes each company's public stockholders serious economic harm. This article provides an overview of the litigation and the efforts Kessler Topaz is taking to recover for the minority stockholders the damages they will suffer in connection with the stock issuances.

UNDER ARMOUR, INC.

Representing one of the firm's institutional clients and serving as co-lead Class Counsel, Kessler Topaz lawyers in August 2015 filed a class action and derivative complaint against Under Armour's board of directors, including Under Armour's founder, Chairman and CEO Kevin A. Plank. Mr. Plank is Under Armour's majority stockholder, beneficially owning 66.5% of the total voting power of all outstanding shares of Under Armour Class A and Class B stock. Class A stock is entitled to one vote per share and Class B stock is entitled to ten votes per share. On June 15, 2015, Under Armour announced that its board of directors had approved a new class of non-voting common stock ("Class C stock") to be issued as a dividend to the holders of outstanding shares of Class A and Class B stock. Class C stock is substantially identical to Class A stock, except the Class C stock has no voting rights. In effect, the dividend amounts to a 2-for-1 stock split, with the issuance of one share of Class C stock for each outstanding share of Class A stock and Class B stock. The issuance of Class C stock is intended to, and will, entrench Mr. Plank in power by allowing him to sell Class C stock without affecting his voting control over Under Armour.

Kessler Topaz argues that because it has no voting rights, the Class C stock will, based on precedent, trade at a discount to Class A stock, and thereby reduce the value of stock held by the current Class A stockholders other than Mr. Plank. Because Mr. Plank holds only 0.04% of the Class A stock and the overwhelming majority of his stockholdings are in Class B stock, he will not suffer the same economic harm as Under Armour's public stockholders, on whose behalf the litigation is brought. The parties have agreed that Under Armour will not issue the Class C stock until judgment is rendered on plaintiffs' claims and becomes final for purposes of appeal. An expedited trial on the merits is currently scheduled for November 2015. The case is *In re: Under Armour S'holder Litig.*, Case No. 24-C-15-003240 (Baltimore City Cir. Ct).

ZILLOW GROUP, INC.

In July 2015, Kessler Topaz lawyers filed a class action on behalf of the one of the firm's institutional clients against Zillow Group's controlling stockholders Richard N. Barton and Lloyd D. Frink. Messrs. Barton and Frink beneficially own 54.4% of the total voting power of all outstanding shares of Class A stock, which is entitled to one vote per share, and Class B stock, which is entitled to ten votes per share. On July 21, 2015, Zillow Group announced that the board of directors had approved the issuance of non-voting Class C stock as a dividend to the holders of outstanding shares of Class A and Class B stock. In effect, the dividend amounts to a 3-for-1 stock split, with the issuance of two shares of Class C stock for each outstanding share of Class A and Class B stock, and will entrench Messrs. Barton and Frink in power.

Like in Under Armour, Kessler Topaz alleges that since the Class C stock trades at a discount to the Class A stock, it reduces the value of the stock held by the current Class A stockholders other than Messrs. Barton and Frink, who hold relatively few shares of Class A stock. The Class C stock began trading on August 3, 2015 and Zillow Group issued the dividend on August 14, 2015. Since that date, the Class C stock has consistently traded at a discount to the Class A stock, reaching a discount of approximately 4.7% on September 11, 2015. A trial on the merits is currently scheduled for July 2016. The case is *Elder v. Barton, et al.*, No. 15-2-18005-3 (King Ct. Sup. Ct).

KESSLER TOPAZ'S LITIGATION EFFORTS

Through the actions involving Under Armour

and Zillow Group, Kessler Topaz seeks to recover for the public Class A stockholders damages in connection with the stock issuances, specifically, the damages suffered as a result of the reduction in value of the Class A shares. Kessler Topaz has researched the issues surrounding the stock issuances, filed high quality complaints and has vigorously prosecuted both actions. The litigation shows Kessler Topaz's willingness and ability to litigate cases to protect minority stockholders.

KESSLER TOPAZ RECOVERS $10.75 MILLION FOR FORMER STOCKHOLDERS OF GFI GROUP

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extension) with an effective veto over any merger transaction, because such transactions required approval by two-thirds of GFI's shares. The stockholders alleged that Gooch and Heffron used JPI's voting power to leverage a sweetheart deal in which they would acquire the GFI's brokerage business at a steep discount to its true value.

As plaintiffs alleged, Gooch and Heffron further impeded the work of a "Special Committee" of outside directors formed by GFI's board of directors to negotiate the transaction with CME and evaluate other strategic alternatives on behalf of GFI. Gooch and Heffron, for their part, refused to sell JPI's shares of GFI to any party but CME and would not support any transaction that did not result in the management consortium's acquisition of the brokerage business. Gooch and Heffron went so far as to enter into a voting agreement with CME that prevented JPI from supporting any alternative deal for a full year, even if the remaining GFI stockholders voted down the proposed merger with CME.

Yet BGC Partners, Inc. ("BGC"), a competitor of GFI, came forward with a higher offer for GFI in September 2014. That offer did not contemplate Gooch, Heffron and the management consortium acquiring GFI's brokerage business. A bidding war ensued, with escalating bids by BGC forcing CME and the management consortium to raise their offer. BGC's highest offer for the Company was a $6.20 per share all-cash offer that CME and the management consortium could not match. As plaintiffs alleged, Gooch and Heffron forced the GFI Board to reject this offer and move forward with a stockholder vote on a proposed merger with CME at $5.85 per share. By the time of the stockholder vote, BGC had withdrawn its $6.20 per share offer in favor of a lower $6.10 per share offer, which still represented materially higher consideration than CME and the management consortium were able to offer GFI's public stockholders.

Stockholders voted overwhelmingly against the deal with CME. Gooch and Heffron, however, would still not agree to a transaction with BGC. In a press release issued after the stockholder vote, GFI management stated that it would begin exploring alternative transactions for the company, notwithstanding BGC's pending $6.10 per share tender offer. The Special Committee, however well-intentioned, appeared powerless to overcome Gooch and Heffron's self-interest.

The stockholder litigation became the forum for the Special Committee to seek judicial intervention to counter Gooch and Heffron's intransigence. As the outside directors would later disclose to the Court and to stockholders in SEC filings, the Special Committee had never agreed to reinstitute a corporate sales process and, instead, wanted to secure a transaction with BGC at $6.10 per share. The Special Committee further demanded that JPI (i.e., Gooch and Heffron) independently pay an extra $0.10 per share to every stockholder who lost out on BGC's higher $6.20 per share offer. Plaintiffs secured an expedited trial on their breach of fiduciary duty claims in the hope of forcing Gooch and Heffron to comply with the Special Committee's demands.

Facing a trial that would bring to light a number of unflattering facts known only to the litigants, the conflicted directors eventually agreed to pursue a tender offer transaction with BGC at $6.10 per share. Gooch and Heffron, however, refused to make stockholders whole for losing out on BGC's higher $6.20 per share offer. Plaintiffs agreed to postpone the expedited trial in exchange for the public disclosure of the Special Committee's disagreement with management's press release and an agreement by Gooch and Heffron to allow the Special Committee to participate in negotiations with BGC.

Plaintiffs continued to press their claims, believing they had a strong case for liability, as stockholders would have received more for their shares had Gooch and Heffron not prioritized their interests over the interests of GFI's public stockholders. The Delaware Court of Chancery scheduled a trial for the fall of 2015. With the threat of a trial still looming and their depositions scheduled, Gooch and Heffron ultimately agreed to a settlement that will make stockholders whole for the value they lost when the GFI Board failed to agree to BGC's $6.20 per share offer. The settlement likewise removed the voting agreement tail that prevented JPI from agreeing to an alternative transaction for a 12-month period following the negative stockholder vote on the CME deal.

The $10.75 million settlement fund will provide stockholders with even more than $0.10 per share and will not be reduced for an award of counsel fees. Thus, as a result of the litigation, GFI stockholders will receive total compensation for their shares even higher than BGC's highest offer of $6.20 per share. In short, the stockholder plaintiffs and their counsel achieved what the Special Committee could not achieve by itself – maximum value for GFI public stockholders' shares. The Court has scheduled a hearing for November 24, 2015 to consider whether to approve the settlement.

FOREIGN INVESTING POST *MORRISON VS. NATIONAL AUSTRALIA BANK*: BUYERS BE AWARE!

Michael D. Herrera *(Reprint courtesy of the State Association of County Retirement Systems (SACRS)*

Michael D. Herrera is Senior Counsel to the Los Angeles County Employees Retirement Association where he serves as principal legal advisor to the fund's Board of Retirement, Board of Investments, officers and more than 360 employees. He frequently speaks and writes on various topics related to public pension law, fiduciary duty and investments, and is widely-recognized for his work in the area of securities litigation and corporate governance. He currently also serves on the Executive Board of the National Association of Public Pension Attorneys, and the Advisory Board of the Institutional Investments Forum.

> **"October: This is one of the peculiarly dangerous months to speculate in stocks.The others are July, January, September, April, November, May, March, June, December, August and February."**
>
> **- Mark Twain**

Five years ago, the United States Supreme Court decided a case that garnered little attention outside of legal academia and the securities litigation bar. As it turns out, the Supreme Court's decision in *Morrison v. Nat'l Australia Bank*[1] has had a far greater reach and, sadly, more devastating impact on U.S. investors than expected. As a result, as Mark Twain keenly observed, investing abroad is indeed a risky endeavor, regardless of the month in which it is done.

Questions having to do with how and where pension fund trustees choose to invest fund assets are best put to their *investment* professionals. But as another famous American, Benjamin Franklin, famously observed, "an investment in knowledge always pays the best interest." This article will therefore discuss the legal challenges and risks U.S. investors continue to face in connection with recovering foreign investment losses stemming from wrongdoing post *Morrison*, options pension funds and other institutional investors are considering to limit the risk, and, finally, the status of efforts to undo or limit its impact.[2]

MORRISON AND THE FALLOUT

In *Morrison*, the Supreme Court reversed decades of precedent, exposing the foreign investments of U.S. investors to new and unfamiliar risks. Prior to *Morrison*, defrauded investors could seek to recover foreign investment losses in federal court via the antifraud provisions of the U.S. securities laws, namely, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"),[3] and Rule 10b-5 thereunder,[4] provided the wrongdoing occurred within the U.S. (the "Conduct Test"), or had a substantial effect on U.S. markets or citizens (the "Effects Test"). In *Morrison*, the Supreme Court rejected these tests in favor of a transactional test focusing simply on whether the investor purchased the security in the U.S. As a result, investors who purchase securities outside the U.S. or on a foreign exchange now find themselves stripped of those legal protections long considered fundamental and sound.

Not surprisingly, the fallout from *Morrison* has been widespread. Courts throughout the country have applied the decision with gusto to dismiss a wide variety of investor claims.[5] This has caused defrauded investors to consider other means by which to recover foreign investment losses, such as state and foreign actions, with the latter becoming an increasingly popular option among sophisticated funds.[6] This rise in interest and focus on alternative strategies stems from the fact that while a board's recovery options may have changed, its duty to safeguard fund assets and pursue valid claims has not.

A FIDUCIARY'S DUTY

Boards operating and governed under the County Employees Retirement Law of 1937 (the "CERL")[7] have broad discretion with regard to the investments of the fund.[8] Indeed, boards must diversify fund investments "so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly prudent not to do so."[9] Taken together, these provisions enable boards to follow "modern portfolio theory", which essentially provides that no investment is imprudent *per se*. Rather, all investments, even risky ones, can and must

be viewed with an eye toward the portfolio as a whole to determine if they are prudent.

Of course, a board's discretion is not unfettered. It must discharge its duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims."[10] Its duty to safeguard fund assets is thus paramount, and manifests in a number of ways including, among other things, the duty to recover monies owing to the fund. This issue typically arises when a fund discovers it has under collected member contributions or overpaid benefits.[11] But it can apply equally to the fund's investment losses.

An investment loss stemming from wrongdoing can give rise to a claim to recover monies owing to the fund since it is, after all, an asset of the fund.[12] As with overpaid benefits and underpaid contributions, a board must therefore make every reasonable effort to pursue a valid claim.[13] The United States Department of Labor affirmed this principle more than a decade ago in the context of securities litigation when it stated that "not only is a fiduciary not prohibited from serving as lead plaintiff [in a federal securities class action], the Secretary believes that a fiduciary has an affirmative duty to *determine whether it would be in the interest of the plan participants to do so*."[14] [Emphasis added.]

Thus, a board charged with safeguarding fund assets is not required to blindly file or join a securities action in which it may have an interest, but to identify and make an informed decision as to whether it would be in the fund's best overall interest to do so. In 2011, for example, the Los Angeles County Employees Retirement Association ("LACERA") revised its longstanding securities litigation policy in the wake of *Morrison* to ensure its continued ability to identify, evaluate and monitor securities actions in which the fund has an interest, both within the U.S. and abroad, and to pursue claims when and in a manner the board determines is in the overall best interest of the fund.[15] Funds throughout the country have adopted similar "global" policies to ensure the best interests of those funds are similarly protected.[16]

RECOVERING FUND LOSSES: WHEN THE GOING GETS TOUGH!

Historically, the majority of fraud cases by U.S. investors were brought in federal court under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which are the principal statutory weapons against fraud available to private investors. Under *Morrison*, defrauded investors can no longer assert or rely on them to recover losses on securities purchased abroad, even if the alleged wrongdoing occurs entirely within the U.S. The following sections will therefore discuss options still available to defrauded investors, and some of the risks and challenges associated with them.

STATE LAW CLAIMS

In *Morrison's* aftermath, defrauded investors are increasingly looking to state law claims as a way to recoup foreign investment losses. This is because, while *Morrison* holds that the Exchange Act lacks extraterritorial application, it says nothing about the continued applicability of state fraud claims to foreign investment losses. From a state's perspective, it should not matter whether the defendant is a citizen of a different state or country; either way, it is an out-of-state defendant. Investors should therefore still be able to bring state common law and statutory fraud claims, among others, against out-of-state defendants under the laws of the state where the plaintiff resides, or the laws of the state where the defendant(s) committed the wrongful acts.

Of course, there are significant obstacles to pleading state law claims. In particular, common law fraud claims

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Institutional Investor FORUMS

7TH ANNUAL

Evolving Fiduciary Obligations of Institutional Investors

FEBRUARY 16, 2016 | OMNI SHOREHAM HOTEL | WASHINGTON, D.C.

Keynote Speaker

Chuck Todd

NBC News Political Director
and Host of *Meet the Press*

In conjunction with co-host Kessler Topaz Meltzer & Check LLP, and with the essential input of an Advisory Board of your peers, we will offer a thorough overview of the landscape within which legal advisors are operating to fulfill their obligations as fiduciaries and shareholders, and in turn, how they may better leverage strategies and objectives within this environment.

Proposed Topics for Discussion:

- The regulatory trap: Transparency in private equity - what should managers be reporting?
- Management fees in private equity and private deals and the impact of the SEC's ongoing decisions
- What is the value proposition of sustainability - how do you define it so that you can do it?
- The latest GASB reporting standards - how can you satisfy the reporting requirements and protect the plan?
- Foreign securities litigation: How can investors address their fiduciary duty to pursue recovery when the rules are uncertain?
- Emphasizing action: Is an incremental approach the answer when it comes to engagement?
- The outcomes of prominent securities litigation cases of the past 12 months and the consequences for plans
- What are the top priorities when it comes to governance practices and policies?
- The Petrobras Securities Fraud Litigation
- The Dole Food Company Litigation

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BNYM SETTLES SETTLES FOREX CLAIMS FOR $504 MILLION IN RESTITUTION TO ITS DOMESTIC CUSTODIAL CLIENTS

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Topaz commenced in March 2011 on behalf of the Southeastern Pennsylvania Transportation Authority ("SEPTA"), and a similarly situated class of BNY Mellon custodial clients. The plaintiffs' claims stemmed from the Bank's contractual promises to its custodial customers who used standing instructions that the service would, among other things, provide "best execution," "the best rates of the day," "extremely competitive" market-based rates for foreign exchange transactions, and that these services would be provided "free of charge." In fact, the opposite was true. In executing foreign exchange transactions for standing instruction clients, BNY Mellon would execute client transactions at the prevailing interbank market rate and then wait to observe the entire day's interbank trading range for that particular currency pair, select the least advantageous rate of the trading day, and assign its clients this second disadvantageous rate. The spread between the rate assigned to the client and actual rate achieved in the market would be pocketed by the Bank as pure, riskless, profit. Because BNYM's clients did not know when in the trading day BNY Mellon executed FX transactions through the standing instruction program, and since the assigned rate fell within the trading day, there was no reason to suspect that their FX rates were not "best execution." The rates, instead, were orchestrated to maximize BNY Mellon's profits.

BNY Mellon's practices came to light through a whistleblower who filed statutory claims on behalf of a number of public pension funds in Virginia, California, Massachusetts and New York who used Bank of New York as their custodian. The whistleblower's claims were unsealed in early 2011. SEPTA, a long-standing custodial client of BNY Mellon, through KTMC, conducted a statistical analysis of the rates it had achieved through Mellon and Bank of New York's standing instruction service, and the results of the analysis revealed that SEPTA's FX rates, over time, were heavily skewed towards the worst rates of the interbank trading range for the day. This strongly suggested that BNY and Mellon, together with the post merger entity, BNY Mellon, were manipulating the foreign exchange rates obtained through the standing instruction service to the detriment of all their custodial clients. In March 2011, SEPTA brought the first nationwide class action suit against BNY Mellon and its predecessor entities for breach of contract and breach of fiduciary duty in the U.S. District Court for the Eastern District of Pennsylvania.

By June 2012, several actions had

"The rates, instead, were orchestrated to maximize BNY Mellon's profits."

been commenced against BNY Mellon arising from its standing instruction service, including civil fraud claims by the U.S. Attorney for the Southern District of New York and state fraud claims by the New York Attorney General. Other civil class actions were proceeding in California and Ohio, and these actions were transferred to the Southern District of New York and consolidated with SEPTA's case (the "Customer Class Cases"). All these cases were ultimately coordinated for discovery before Judge Kaplan in the U.S. District Court for the Southern District of New York. What followed from this coordination was an unprecedented collaboration between the United States Attorney, the New York Attorney General and the private plaintiffs, steered by Kessler Topaz and its co-counsel. BNY Mellon mounted an aggressive defense of its highly lucrative FX practices, which included filing counterclaims against SEPTA and the other plaintiffs in the litigation, seeking attorneys' fees for defending not only SEPTA claims, but the claims brought by the U.S. Attorney and NYAG, and, as explained below, pursuing onerous discovery against plaintiffs and third party investment managers, consultants and putative class members.

Over the course of the litigation, the parties and third parties exchanged in excess of 28 million pages of documents and took 110 depositions of parties and non-parties. There were several discovery motions filed by the parties, including motions for protective orders by Plaintiffs to attempt to limit BNY Mellon's discovery onslaught against third parties. BNY Mellon's central defense of the case focused on whether an industry standard existed for "best execution" in foreign exchange and whether class members could be unified under a common theory of harm or contract. To this end, Defendants conducted over 30 depositions of plaintiffs and their agents, and an additional 24 depositions of third parties. Judge Kaplan characterized BNY Mellon's defense of the case as "scorched earth." Meanwhile, Plaintiffs had to stitch together a coherent theory of contractual and fiduciary breach that spanned a period of 13 years over three different corporate entities, across FX trading and sales desks in three countries (U.S., U.K. and Belgium). In developing their proof, Plaintiffs deposed over 56 BNY Mellon current and former employees, retained several experts and prepared expert reports, and were poised to commence class certification briefing at the time the case settlement.

In February 2015, following a three-day mediation before the Honorable Layn Phillips (Ret.) a highly-respected, experienced mediator and retired federal judge, the parties reached an agreement to settle all claims asserted in the Customer Class Cases for $335 million, subject to Court approval ("Settlement"). Simultaneously with the

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10 YEARS REMOVED FROM COX & THOMAS: A SURVEY OF THE CLAIMS FILING LANDSCAPE FOR U.S. AND NON-U.S. SECURITIES LITIGATION RECOVERIES

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There are essentially three options available to institutional investors seeking outside assistance with the claims filing process relating to U.S. securities class action settlements.

of eligible institutional investors filed claims in settlements. Institutional investors owe a fiduciary duty to their plan participants to take reasonable steps to recover monies owed to their funds. Yet despite this fiduciary duty, the amounts of money at stake, and an ever-increasing array of options of services available to help institutional investors recover settlement dollars, claims filing participation rates remain low. A decade has passed and the claims filing participation rates are still not much better than they were in 2005. In fact, current estimates compiled from statistics from NERA Economic Consulting and Cornerstone Research suggest that only thirty five percent (35%) of eligible institutional investors file claims in U.S. settlements. The low U.S. claims filing rates and changes in the legal and regulatory landscape (including the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*, which now requires investors to pursue a recovery outside the United States for securities fraud losses stemming from shares traded on non-U.S. markets) mean that institutional investors are still leaving billions of dollars on the table. With numerous options available for claims filing services, why is so much money still going unclaimed?

There are essentially three options available to institutional investors seeking outside assistance with the claims filing process relating to U.S. securities class action settlements: 1) contracting with their custodial bank to file claims, 2) retaining a third-party claims filing service, or 3) retaining a law firm to assist with monitoring and claims filing. While all three are viable options to assist institutional investors with the claims administration process, they each present certain considerations.

CLAIMS FILING BY CUSTODIAN

Most U.S. based institutional investors utilize their custodial bank to file claims. Investors outside the U.S. appear less likely to utilize their custodial bank although it is unclear whether that is because their custodians are typically based outside the U.S. and do not offer the service, whether investors outside the U.S. are still unaware of how the U.S. class action system operates (and consequently are still unaware of their eligibility to file claims), or some other reason that may explain non-U.S. investors' general reluctance to participate in securities class action settlements via their custodial bank. There are certainly many advantages to using a custodial bank for claims filing, including the custodian's access to relevant transaction data. Utilizing custodians for claims filing, however, can also present certain challenges.

- Custodians process a large volume of claims and as a result, may miss key requirements on particular claim forms. For example, we have observed instances where a custodian did not realize that a particular securities class action settlement allowed investors to make claims for ***both*** purchases and holdings within a given class period. Accordingly, the custodian filed a claim only for the purchases and consequently the shareholder did not recover for their holdings that stemmed from pre-class period purchases. Further, in settlements related to particularly complicated cases that involve a number of companies and securities, there have been instances where custodians have missed filing claims for one or more eligible securities.
- When investors switch from one custodian to another and a class period in a case spans the time of the custodial transition, the custodians may not be aware of the investors' eligibility to file a claim or may each have insufficient data to file a complete claim.
- Some custodians are now outsourcing the claims filing service to third party administrators, which present other considerations (see *Claims Filing by Third Party* below for further discussion).
- Some custodians are unable to offer detailed or customized claims reporting that informs investors of what claims were filed (or when a claim was not filed, the reason(s) why).
- Inability of custodians to answer questions about a particular claim or to provide legal advice.
- Inability of custodians to provide assistance with recovering losses related to securities purchased on non-U.S. markets (see *Special Considerations for Seeking Recoveries Outside the*

U.S. below for further discussion). In fact, many custodians will send notifications to investors alerting them to the fact that they purchased securities in the relevant non-U.S. company without regard to whether the investor has losses or is otherwise eligible to participate in the non-U.S. jurisdiction action.

CLAIMS FILING BY THIRD-PARTY

A number of third-party claims filing services have cropped up in recent years, presenting investors with an ever-increasing number of claims filing options. However, not all third-party filers are equal in terms of the depth and quality of services they provide.

- Third-party claims filing services tend to be the most expensive claims filing option available to investors — charging, on average, 20-30% of a claim recovery in exchange for their services.
- Some third-party servicers cater more to retail investors and are not as accustomed to handling institutional investor claims. This can be particularly problematic when an institutional investor manages more than one fund and would need to file multiple claims in one settlement.
- The third-party claims administrator market is rather fluid and companies frequently go out of business, merge, and either acquire or are acquired by other companies.
- Many third-party claims filing services have professional investor ownership and the company may ultimately be most concerned with their core practice of maximizing their return on investment.
- Other third-party claims filing services are a small part of a larger company that primarily offers services or goods unrelated to securities class actions or the legal field generally. A number of these servicers provide marketing or investment advisory services and may attempt to sell ancillary products or services.
- Although some third-party filers tout their ability to assist investors with non-U.S. recoveries, they are often unable to do more than provide investors with contact information for the attorneys in the local jurisdiction who are pursuing the case. Additionally, they are unable to inform investors about the shareholder litigation legal structure in a particular jurisdiction, or advise them as to the risks involved in the case, the costs they may incur in pursuing the action, and whether it ultimately makes sense for investors to participate (see *Special Considerations for Seeking Recoveries Outside the U.S.* on page 14 for further discussion).

CLAIMS FILING BY LAW FIRM

Unlike custodial banks and third-party filers, law firms have the ability to file accurate claims forms on behalf of institutional investors, as well as provide legal advice on securities cases worldwide (a particular benefit to institutional investors for cases that are unique or require more active participation, such as cases in non-U.S. jurisdictions that require investors to opt-in.) Engaging a law firm can also allow an investor the option to take a more active role, including seeking lead plaintiff appointment or choosing to opt-out of a particular case should the investor's losses merit doing so. Further, because law firms are involved in the prosecution of securities class action claims, they may be in a stronger position to understand what is required on a particular claim form and should be able to avoid making some of the mistakes sometimes seen in claims filed by custodians and third-party filers. Law firms are also better equipped to provide customized and more detailed reporting regarding claim recoveries.

As law firms in the securities litigation field provide portfolio monitoring services at no cost, an investor looking to engage a law firm

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KESSLER TOPAZ SUCCESSFULLY CERTIFIES CLASS OF FINANCIAL INSTITUTIONS IN LANDMARK DATA BREACH OPINION

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breach issued by the card-issuing companies and by Target itself and the known potential consequences for the institutions' customers. The absurdity of this suggestion is evident from the fact that Target itself reissued all of its [store-branded] cards, both debit and credit, in the weeks after the breach."). The *Target* certification order represents the first time that a nationwide class of financial institutions has been certified in a data breach case, providing financial institutions an important means to recover their losses.

The *Target* case follows a recent trend of courts expanding victims' rights in data breach cases. For example, on July 20, 2015, the Seventh Circuit issued an opinion in *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), explaining that consumers whose card data have been stolen have standing under Article III of the U.S. Constitution to sue in federal court, even if their stolen information has not yet been fraudulently used.[1] That opinion reflects an important shift in how courts apply Constitutional standing principles in data breach litigation, and will allow customers to bring claims following a data breach. Similarly, on August 24, 2015, the Third Circuit issued a decision in *FTC v. Wyndham Worldwide Co.*, ___ F.3d ___, 2015 WL 4998121 (3d Cir. August 24, 2015) recognizing that the Federal Trade Commission ("FTC") has the power to regulate companies' cybersecurity practices under the "unfair practices" prong of the Federal Trade Commission Act, 15 U.S.C. § 45 (the "FTC Act"). The *Wyndham* opinion is critical in that it puts companies on notice that they may be subject to an action by the FTC if they fail to adequately protect customer data.

Over the past two years, defendants in data breach cases have cited the U.S. Supreme Court's decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), which held that allegations of future injury can establish Article III standing only if that injury is "certainly impending," and that "allegations of *possible* future injury are not sufficient." 133 S. Ct. at 1147 (emphasis added). Although *Clapper* did not arise from a data breach, certain courts have read the case to mean that data breach victims cannot sue for the loss of their information until their information has actually been fraudulently used. *See, e.g., In re Barnes & Noble Pin Pad Litigation*, 2013 U.S. Dist. LEXIS 125730, at *8 (N.D. Ill. Sept. 3, 2013) (citing *Clapper* and stating that "[m]erely

[1] Article III limits the power of federal courts to hear only certain "cases" and "controversies." *See Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1146 (2013). One corollary of that provision is to require that plaintiffs suffer an injury that is "concrete, particularized, and actual or imminent" before they have standing to bring claims in federal court. Id. at 1147.

alleging an increased risk of identity theft or fraud is insufficient to establish standing").

The *Neiman Marcus* case represents an important departure from this approach to *Clapper*. The *Neiman Marcus* case arose from the theft of approximately 350,000 credit card numbers from customers of the high-end department store between July 2013 and October 2013, causing approximately 9,200 of those customers to find fraudulent charges on their accounts. Neiman Marcus reimbursed its customers for the fraudulent charges, and offered credit-monitoring services to all 350,000 customers whose information was stolen. A class action complaint was thereafter filed against the company, alleging claims for negligence, breach of implied contract, unfair and deceptive business practices, and violations of multiple state data breach laws, *inter alia*, on behalf of the 350,000 customers whose credit card information was stolen. Neiman Marcus argued that the plaintiffs in that case lacked standing under *Clapper* because it had reimbursed the members of the class whose information had already been fraudulently used, and the remainder of the class had not yet been victims of identity theft.

The Seventh Circuit rejected Neiman Marcus's position, noting that "Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur." *Neiman Marcus*, 794 F.3d at 693 (quoting *Clapper*, 133 S. Ct. at 1147). In addition, the Seventh Circuit observed that requiring plaintiffs to wait until the threatened harm materialized "would create a different problem: the more time that passes between a data breach and an instance of identity theft, the more latitude a defendant has to argue that the identity theft is not fairly traceable to the defendant's data breach." *Id*. (internal quotation marks and citation omitted). As for customers who had already been reimbursed by Neiman Marcus for fraudulent charges, the court recognized that further "unreimbursed fraudulent charges and identity theft may happen in the future," and so those plaintiffs could maintain their claims in spite of the reimbursement. *Id*. at 692. Moreover, in regard to the likelihood that fraudulent charges would be incurred by class members, the Court aptly stated that "[p]resumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." *Id*. In this vein, the court held that costs incurred by class members to obtain identity-theft protection are also "easily qualifie[d] as a concrete injury" because, under *Clapper*, such mitigation expenses constitute a compensable injury where the risk being mitigated is imminent. *Id*. at 694. Thus, the court reasoned, "it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach" such that the plaintiffs had standing to bring claims against the company. *Id*. at 693.

"it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach"

Separately, in the *Wyndham* case, Wyndham Worldwide Corp. ("Wyndham") suffered three serious data breaches in 2008 and 2009, in which hackers stole the personal and financial data of more than 619,000 consumers, leading to more than $10.6 million in fraudulent charges. See 2015 WL 4998121, at *1. The FTC brought an action against Wyndham for alleged unfair practices that made customers vulnerable to the attack, including, *inter alia*: storing consumer payment card information in clear unencrypted readable text; failing to use firewalls; failing to adequately restrict the access of third-party vendors to the company's servers; and failing to take reasonable measures to detect and prevent unauthorized access to the company's computer network. In fact, Wyndham did not even learn of the hacks until 2010 when a credit card company received complaints from cardholders. Despite these failures, Wyndham had advertised to customers that it maintained "industry standard" practices to safeguard customer financial information. Based on this conduct, the FTC alleged in its action that Wyndham's cyber-security practices "unreasonably and unnecessarily exposed consumers' personal data to unauthorized access and theft" and constituted an unfair business practice in violation of the FTC Act.

Wyndham argued first that the FTC's should be dismissed because the FTC Act's definition of "unfair" practices does not include Wyndham's alleged cyber-security failings. The court began with the basic three-part test for determining whether a practice is unfair: (i) the practice causes or is likely to cause substantial injury to consumers; (ii) the injury cannot reasonably be avoided by consumers; and (iii) the injury is not outweighed by countervailing benefits to consumers or competition. *Wyndham*, 2015 WL 4998121, at *5. Wyndham asserted that these elements alone are not sufficient to make a claim under the FTC Act, and that the FTC must also show that the practice was "unethical. " The court rejected Wyndham's argument as inconsistent with Supreme Court precedent, but nevertheless found that the argument was moot in Wyndham's situation because "[a] company does not act equitably when it publishes a privacy policy to attract customers who are concerned about data privacy, fails to make good on that promise by investing inadequate resources in cybersecurity, exposes its unsuspecting customers to substantial financial injury, and retains

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KESSLER TOPAZ SUCCESSFULLY CERTIFIES CLASS OF FINANCIAL INSTITUTIONS IN LANDMARK DATA BREACH OPINION

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These cases represent a turning point in the way courts approach certain important issues in data breach cases.

the profits of their business." *Id*. at 5. The court also rejected a separate argument by Wyndham that a company's practices cannot be unfair when the company itself is a victim of hacking, because Wyndham "offer[ed] no reasoning or authority" to support that position, and in addition "the FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs." *Id*. at 6. Lastly, the court rejected Wyndham's argument that the history of the FTC Act demonstrated Congress's intent that the Act not apply to companies' cybersecurity practices. *Id*. at 7-9. Thus, although the court did not make an ultimate determination as to whether Wyndham committed unfair practices in violation of the FTC Act, the Third Circuit rejected Wyndham's assertion that "its conduct cannot be unfair," and allowed the FTC's action to proceed. *Id*. at 9.

These cases represent a turning point in the way courts approach certain important issues in data breach cases. Critically, the District Court's landmark certification order in *Target* establishes that nationwide classes of financial institutions are able to obtain relief from companies on a class-wide basis for the disclosure of sensitive data. Additionally, the Seventh Circuit's opinion in *Neiman Marcus* assures investors that they do not need to wait until after their financial information has been fraudulently used before bringing an action against the company that failed to adequately protect their data. This will help ensure that customers are properly compensated for their losses and companies are held accountable for their actions. Finally, the Third Circuit's opinion in *Wyndham* puts companies on notice that they will face a potential action by the FTC if their data protection procedures fail to properly safeguard customer information. Taken together, the cases reflect a growing trend in favor of plaintiffs in data breach litigation and more firmly incentivize companies to ensure that they have robust data protection practices in place. ■

10 YEARS REMOVED FROM COX & THOMAS: A SURVEY OF THE CLAIMS FILING LANDSCAPE FOR U.S. AND NON-U.S. SECURITIES LITIGATION RECOVERIES

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for claims administration assistance should similarly expect their fund will not incur a cost for a law firm to file claims, nor concede any portion of their recovery in securities class action settlements as payment to the law firm. But while retaining a law firm to file claims and monitor can be beneficial to an investor, using a law firm for these services may also present a unique set of challenges.

- Some institutional investors may have policies that require them to generally only seek to recover money from securities class action settlements as a passive class member rather than by serving as the lead plaintiff or assuming a more active role. Engaging a law firm that prosecutes securities fraud cases may be seen to be somewhat at odds with such a policy.
- Not all law firms are created equal and some may offer greater depth and quality of services than others – both in terms of claims filing accuracy as well as substantive reporting to the investor.

SPECIAL CONSIDERATIONS FOR SEEKING RECOVERIES OUTSIDE THE U.S.

As has been discussed widely within the shareholder community, in recent years the legal and regulatory landscape related to shareholder rights has changed drastically. In 2010, the U.S. Supreme Court issued a landmark opinion in *Morrison v. National Australia Bank Ltd.*, which foreclosed the ability of shareholders to litigate in the U.S. in order to recover for losses stemming from securities purchased on non-U.S. markets. In the aftermath of *Morrison*, there has been a pronounced increase in securities fraud-related litigation in jurisdictions around the world – with over 100 cases now pending in 13 countries outside the United States. As a result, investors must now evaluate their options for recovery of losses related to securities purchased on non-U.S. markets.

Recovering funds outside the United States can be much more challenging because investors often need to take proactive steps to "opt-in" and actively participate in a case in order to have

a chance at any recovery. Each non-U.S. jurisdiction operates differently and for investors, there may be risks associated in joining litigation. For example, many jurisdictions outside the U.S. are "loser pays" jurisdictions and investors who pursue litigation in that jurisdiction could end up being held responsible for paying the defendants' attorney fees and court costs if the litigation is unsuccessful. Evaluating shareholder litigation outside the U.S. and adequately weighing all the options can be time consuming for investors.

When it comes to seeking assistance with the often arduous process of recovering money outside the U.S., there are fewer service provider options available to institutional investors. Many custodians are unwilling and/or unable to handle non-U.S. claims and will instead merely notify an investor of a case, that may or may not impact them, exists. Like custodians, some third-party claims filing services are also unable to assist investors with non-U.S. claims. Other third-parties purport to offer services related to non-U.S. litigation, however, their services may be limited to informing investors about the case and providing the contact information for the litigation funder or local counsel pursuing the claim in that jurisdiction. With the exception of claims in Canada (which is an opt-out jurisdiction that operates much like the U.S.) and some cases in Australia (when the action proceeds as an opt-out), third-party filers are not able to act on an investor's behalf and register the investor to participate in a given claim because doing so would impact shareholders' substantive rights and require a power of attorney. Further, neither third-party filers nor custodians are equipped to advise investors of alternative options available to them or help them choose the best course of action for a particular case. For example, there have been several recent instances of parallel litigation – that is, litigation concerning the same company and the same legal and factual issues proceeding in two or more jurisdictions. Neither a third-party filer nor a custodial bank is able to provide legal guidance to investors in determining which of two or more parallel actions may be their best option.

By any objective standard, law firms actively engaged in the global shareholder litigation field offer the most comprehensive services to investors when it comes to pursuing claims outside the U.S. A law firm that is experienced in prosecuting shareholder litigation in non-U.S. jurisdictions and that devotes resources to researching and following legal developments around the globe can assist shareholders in evaluating the merits of a non-U.S. case, help investors understand their avenues to potential recovery, advise them of the risks and benefits, and can ultimately assist an investor in joining any litigation as well as help with the claims administration process should there be a positive result in the action.

CONCLUSION

Without question, it has been a roller-coaster ride in the shareholder litigation world since Professors Cox and Thomas released their initial research on claims administration. Shareholders have achieved landmark settlements in cases stemming from the tech bubble and the financial crisis. A number of challenges to investor rights were contested before the U.S. Supreme Court – some, like *Morrison*, which have significantly altered the shareholder litigation landscape, and others, such as *Halliburton Co. v. Erica P. John Fund, Inc.*, where shareholders were fortunate to prevail and their rights with respect to securities class actions were left largely intact. Despite all the challenges and modifications to shareholder rights and securities fraud litigation, shareholder claims filing rates remain largely unchanged.

We have observed the global institutional investor community take significant strides in the wake of *Morrison* to put proper systems in place to track and manage the non-U.S. jurisdiction shareholder litigation impacting their portfolios. Similarly, we have seen institutional investors, particularly U.S. investors, take steps to shore-up their claims filing practice for U.S. actions. Our hope is for this trend to continue, and that institutional investors will continue to lean on their service providers for more detailed reporting in this area to help them verify their members' money is not being left on the table. And ultimately, that the next ten years will reveal a marked increase in participation rates for the institutional investor community in securities class action recoveries. ■

FOREIGN INVESTING POST *MORRISON VS. NATIONAL AUSTRALIA BANK*: BUYERS BE AWARE!

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typically do not recognize the fraud-on-the-market presumption of reliance. Plaintiffs must therefore be prepared to plead direct reliance, which can be an onerous task. Also, although many states' securities fraud statutes include a presumption of reliance or eliminate the requirement altogether, these laws can present their own unique obstacles. For example, many require a direct relationship or connection between plaintiff and defendant. Consequently, while there are exceptions, investors who purchase their shares on the open market may have difficulty satisfying this requirement.

FOREIGN ACTIONS

Where state law claims (or other non-federal securities claims) are not a viable option, the only available option to recover losses on foreign investments post *Morrison* may be to bring suit outside the U.S. While most of the world's securities class actions and settlements currently occur in the U.S., the global expansion of investor actions continues. Canada, Australia, and several European countries have become new hotspots for securities litigation, with Asian countries beginning to implement similar systems. Mexico began allowing class actions for the first time in 2012.[17] As a result, involvement in foreign actions is becoming an increasingly popular option among sophisticated investors, including many public pension funds.

Of course, investors will face significant hurdles when pursuing claims in foreign jurisdictions. For example, foreign jurisdictions generally do not allow the type of contingency fee arrangements commonly employed in the U.S. As a result, cases are funded by professional, third party "litigation funders" who finance the case, hire counsel, and take on the risk of loss if the case is not successful. In return, they earn a percentage of the recovery if the case is successful, much like contingency fee arrangements in the U.S., but at percentages typically much higher. Most foreign jurisdictions also employ what's called a "loser pay" requirement wherein the losing party can be required, subject to court approval, to compensate the prevailing party for their costs and attorneys' fees in connection with the action.

Moreover, unlike in the U.S. where defrauded investors can remain passive members of a class action and receive their pro rata share of the recovery simply by submitting a timely claim, most foreign jurisdictions require that investors "opt-in" to the action in order to participate and share in the recovery. This "opt-in" process requires action early in the process, and can involve the payment of a registration or subscription fee. Not surprisingly, funds that have adopted "global" policies like LACERA and the Massachusetts

Pension Reserves Investment Board, for example, utilize dedicated outside counsel and/or a third party monitoring service to assist in identifying and evaluating potential foreign actions.[18]

EFFORTS TO UNDO OR LIMIT MORRISON

Not long after *Morrison* was decided, Congress acted with uncharacteristic speed to restore the ability of the U.S. Securities and Exchange Commission ("SEC") and the U.S. Department of Justice to bring enforcement actions involving transnational fraud under the *pre-Morrison* Conduct and Effects Tests. Institutional investors, including LACERA and other U.S. public pension funds, urged the SEC to recommend that Congress restore this same right to institutional investors as part of the Commission's report to Congress as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

Inexplicably, when the SEC issued its report, it did not recommend that Congress extend this right to defrauded U.S. investors. This shortcoming prompted SEC Commissioner Luis Aguilar to issue a scathing letter of dissent to congress in which he warned of the "immense and irreparable investor harm that has resulted, and will continue to result, due to *Morrison v. National Australia Bank*." In it, Commissioner Aguilar offers a sobering observation of the harm to be borne by investors as a result of *Morrison*. He states, "In the United States we have a strong belief that, whether rich or poor, we are all entitled to our day in court. Sadly, for many American investors this is no longer true." Unfortunately, neither Congress nor the SEC appear ready, willing or able to address *Morrison* any time soon.

CONCLUSION - GOT POLICY?

Unless and until something is done to undo or limit *Morrison*, U.S. investors will continue to look to state and foreign actions as a way to recover foreign investment losses stemming from wrongdoing. Of course, whether or not to pursue such an action is not a decision a pension board can make lightly or in advance. Rather, as a fiduciary, the board must consider the facts, weigh the benefits and risks, and consider its options under the circumstances of a particular case. Accordingly, whether it ultimately makes sense for a fund to pursue such a strategy, having a policy and procedures in place is essential to perform the thoughtful analysis necessary to make a timely, well-informed decision. After all, as all good fiduciaries know, we're often judged not just by *what* we decide to do, but *how* we decide to do it. ■

ENDNOTES

[1] *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869 (2010) ("*Morrison*").

[2] This article is not intended to convey or constitute legal advice, and is not a substitute for obtaining legal advice from your own qualified attorney. You should not act upon any information contained in this article without first seeking qualified professional counsel on your specific matter.

[3] 15 U.S.C. § 78a et seq.

[4] 17 C.F.R. § 240.10b-5.

[5] *See, e.g., In re Petrobras Sec. Litig.*, No.1:14-cv-09662(JSR) (S.D.N.Y.); *In re BP p.l.c. Sec. Litig.*, 2012 WL 432611, at *68 (S.D. Tex. Feb. 13, 2012); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 531 (S.D.N.Y. 2011); *In re BP*, 2012 WL 432611, at *68; *In re UBS*, 2011 WL 4059356, at *8.

[6] *See, e.g.*, Kevin LaCroix, *Plaintiffs' Lawyers Pursue Non-U.S. Securities Litigation Alternatives After Morrison*, The D&O Diary (Jan. 11, 2011).

[7] Set forth at Govt. Code § 31450 et seq.

[8] *See* Govt. Code § 31594 ("It is the intent of the Legislature ... to allow the board of any retirement system ... to invest in any form or type of investment deemed prudent by the board pursuant to the requirements of Section 31595 ...This will increase the flexibility and range of investment choices available to these retirement systems, while ensuring protection of the interest of their beneficiaries.")

[9] Cal. Const., Article XVI, § 17(d); Govt. Code § 31595(c). All references to "§ 17" in this article are to Article XVI, Section 17 of the California Constitution.

[10] § 17(c); Govt. Code § 31595(b).

[11] *See, e.g., City of Oakland v. Oakland Police & Fire Retirement System*, 224 Cal. App.4th 210 (2014); *In re Retirement Cases*, 110 Cal.App.4th 426 (2003); *County of Marin. Assn. of Firefighters v. Marin County Employees Retirement Assn.*, 30 Cal.App.4th 1638 (1994); *Barrett v. Stanislaus County Employees Retirement Assn.*, 189 Cal.App.3d 1593 (1987).

[12] § 17(a) ("The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.")

[13] *See, e.g., Harris v. Koenig*, 815 F.Supp.2d 26 (2011) (The duties of loyalty and prudence include the "duty to take reasonable steps to realize on claims held in trust."). *See also* Restatement 2nd of Trusts § 177 ("trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust.").

[14] Secretary of Labor's Memorandum of Law as Amicus Curiae in Support of the Florida State Board of Administration's Appointment as lead plaintiff in *In re Telxon Corp. Sec. Litig.*, 67 F.Supp.2d 803 (N.D. Ohio, 1999).

[15] LACERA has recovered over $66.5 million in securities class action recoveries since first adopting its securities litigation policy in 2001, which includes recoveries obtained through its active involvement and successful prosecution of securities actions, as well as its claims filing efforts.

[16] *Morrison Four Years Later: Its Impact, Potential Approaches, and Practical Tips*, The NAPPA Report (April 2014).

[17] *Living in a Post-Morrison World: How to Protect Your Assets Against Securities Fraud*, The NAPPA Morrison Working Group (June 2012).

[18] See Footnote 17, *supra.*

KESSLER TOPAZ WINS $148 MILLION FOR FORMER DOLE STOCKHOLDERS

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“acted improperly by favoring Murdock and treating him as the bank’s real client in transactions before the [buyout], even when Deutsche Bank was officially representing Dole.”

things, the Court found that Murdock and Carter “primed the market for the freeze-out by driving down Dole’s stock price” and provided the company’s outside directors with “knowingly false” information and intended to “mislead the board for Mr. Murdock’s benefit.” By doing so, Murdock and Carter deprived Dole’s outside directors “of the ability to negotiate [against Murdock] on a fully informed basis and potentially say no” to the buyout. Additionally, the Court held, “Murdock and Carter likewise deprived the stockholders of their ability to consider the [buyout] on a fully informed basis and potentially vote it down.” Murdock and Carter’s conduct, the Court ruled, “demonstrated that their actions were not innocent or inadvertent, but rather intentional and in bad faith.”

Based on Murdock and Carter’s conduct, as proved at trial, the Court found that both fiduciaries had breached the duty of loyalty that they owed to Dole’s public stockholders. The award of $2.74 per share, the Court reasoned, was appropriate to ameliorate the harm that Murdock and Carter inflicted on the public stockholders and “eliminate the ability of the defendants to profit” from their wrongful conduct.

The Court also found that Murdock’s financial advisors at Deutsche Bank – which had also been the company’s long-time financial advisors – “acted improperly by favoring Murdock and treating him as the bank’s real client in transactions before the [buyout], even when Deutsche Bank was officially representing Dole.” While the Court did not ultimately find that Deutsche Bank owes money to Dole’s former stockholders along with Murdock and Carter, the Court largely accepted the stockholders’ version of events, presented at trial, of how Murdock and Carter, assisted in several respects by Deutsche Bank, short-changed the public stockholders in the 2013 buyout.

This $148 million recovery for stockholders represents the second-largest post-trial verdict ever in merger litigation, behind only Kessler Topaz’s landmark 2011 $2 billion verdict in *In re Southern Peru*.

BNYM SETTLES FOREX CLAIMS FOR $504 MILLION IN RESTITUTION TO ITS DOMESTIC CUSTODIAL CLIENTS

(continued from page 9)

settlement of the Customer Class Cases, the U.S. Attorney reached a settlement of $167.5 million with BNY Mellon as well as remedial relief including the termination of certain officers associated with the unlawful conduct at issue in the litigation. The New York AG also reached a $167.5 million settlement with BNY Mellon and agreed to contribute $155 million of that recovery to the Customer Class. Separately, the Department of Labor which had been investigating BNY Mellon’s conduct, but which had not separately brought suit, reached a $14 million accord with BNY Mellon and agreed to contribute the entire recovery to those members of the Customer Class which were ERISA funds. In sum total, the Settlement resulted in a gross recovery to the Customer Class of $504 million. The recovery amounts to 35% of the revenues that BNY Mellon and its predecessors earned on standing instructions over the 13 year class period.

The settlement is a historic result on many fronts. As Judge Kaplan observed at the final approval hearing held on September 24, 2015, the case served as a “model for federal and state cooperation.” The average net recovery by Customer Class Members is $400,000, with more than 100 class members receiving net recoveries in excess of $1,000,000. Moreover, through the commencement of litigation, BNY Mellon was compelled to overhaul its foreign exchange practices to provide more disclosure and more options for its custodial clients to achieve better transparency and rates for foreign exchange. In granting final approval of the Settlement from the bench, Judge Kaplan praised plaintiffs’ counsel for a “wonderful job,” recognizing that they were “fought tooth and nail at every step of the road.” In further recognition of the efforts of plaintiffs’ counsel, Judge Kaplan noted that “[t]his was an outrageous wrong by the Bank of New York Mellon, and plaintiffs’ counsel deserve a world of credit for taking it on, for running the risk, for financing it and doing a great job.” We anticipate that the net settlement proceeds will be distributed to class members before year end.

For more information regarding the settlement, please visit the settlement website at http://www.bnymellonforexsettlement.com/

Institutional Investor FORUMS

11TH ANNUAL

The Rights & Responsibilities of Institutional Investors

MARCH 10, 2016 | RENAISSANCE AMSTERDAM HOTEL | AMSTERDAM

Keynote Speaker

Dr. Ben S. Bernanke
Chairman
The Federal Reserve System
(2006–2014)

The 11th Annual Rights & Responsibilities of Institutional Investors will again be held in Amsterdam and co-sponsored by Institutional Investor and Kessler Topaz Meltzer & Check LLP. The pressing issues covered in this agenda will consider the ways that investment, legal and compliance officers from public pension plans, insurance funds, mutual fund companies, and sovereign wealth funds globally are paving a path forward—together—to meet larger, long term ESG and governance goals.

Proposed Topics for Discussion:

- Rethinking engagement: How do we do it efficiently?
- Navigating new regulations from a principled perspective
- Is it your fiduciary duty to save money for your plan?
- Examining the value proposition in sustainability
- Taking a look at the role of proxy advisory firms
- What are funds' top priorities when it comes to governance practices and policies?
- Examining the issue of executive pay from a global perspective
- Evaluating the different components of ESG in the investment process
- Board diversity: Different modes of action to achieve the same objective
- Case Study: The Petrobras Securities Fraud Litigation
- Case Study: The Dole Food Company Litigation

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EVENTS

WHAT'S TO COME

International Foundation of Employee Benefit Programs U.S. Annual Conference
November 08-11, 2015
Hawaii Convention Center - Honolulu, HI

State Association of County Retirement Systems Fall Conference
November 17-20, 2015
Marriott Marquis - San Diego, CA

Pennsylvania Association Public Employee Retirement Systems Fall Workshop
November 18-19, 2015
The Sheraton Station Square Hotel - Pittsburgh, PA

County Commissioners of Pennsylvania Fall Conference
November 21-24, 2015
Hotel Hershey – Hershey, PA

NCPERS Legislative Conference
January 24 – 26, 2016
Capital Hilton – Washington, D.C.

FPPTA Trustee School
January 31 – Feb 3, 2016
Hilton Lake Buena Vista – Orlando, FL

7th Annual Evolving Fiduciary Obligations of Institutional Investors
Feb 16, 2016
Omni Shoreham – Washington, D.C.

NAPPA Winter Seminar
Feb 17 – 19, 2016
Omni Shoreham – Washington, D.C.

11th Annual The Rights & Responsibilities of Institutional Investors
March 10, 2016
Renaissance Amsterdam - Amsterdam, The Netherlands

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