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# A PRIMER ON SHAREHOLDER LITIGATION

## Securities Class Actions, Non-U.S. Jurisdiction Actions, Shareholder Derivative Actions, Mergers & Acquisitions Litigation, Appraisal Actions, and Direct Actions (Opting-Out)

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*This article is intended to provide a thorough background on various forms of shareholder litigation. However, it is not intended as a substitute for legal advice with your chosen counsel and discussions as to the merits of each particular action you may consider.*

- *All citations are omitted, but available upon request.*
- *All financial figures are in U.S. dollars unless otherwise indicated.*

# A Primer on Shareholder Litigation

## Securities Class Actions, Non-U.S. Jurisdiction Actions, Shareholder Derivative Actions, Mergers & Acquisitions Litigation, Appraisal Actions, and Direct Actions (Opting-Out)

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# I. Introduction

Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") is pleased to provide this primer on shareholder litigation to institutional investors. The goal of this primer is to briefly explain litigation options available under federal and state securities laws of the United States, as well as in a growing number of non-U.S. jurisdictions. We believe these laws should be viewed as tools that allow investors, among other things, an opportunity to recover investment losses suffered as a result of fraud or other illegal conduct and/or to implement corporate governance changes. The information contained herein provides a general overview of various substantive and procedural issues that may arise in connection with pursuing some of the options we discuss, and is intended to assist institutional investors in gaining a general understanding of the rights and remedies available under various laws, particularly the ability to serve as a plaintiff in a class action, pursuing a direct action, initiating a takeover or derivative action, as well as any benefits associated with these and other options. We hope this primer will assist the reader in becoming familiar with these areas of the law while providing an understanding as to how the institutional investor community may use these laws to safeguard the value of their investments and potentially recover losses if misconduct is involved.

# II. Overview of the United States Federal Securities Laws

Congressional regulation of securities transactions followed the historic stock market crash of 1929. According to Congressional findings (published in 1933) in the decade following World War I, of the $50 billion in securities offered in the United States, approximately $25 billion were completely worthless. Deceptive business practices and rampant fraud in the sale of securities prior to the 1929 crash led the United States Congress to enact significant legislation to regulate securities markets and transactions. The two primary pieces of federal legislation enacted during this era are: (i) the Securities Act of 1933 (the "Securities Act"); and (ii) the Securities Exchange Act of 1934 (the "Exchange Act"). As stated by the United States Supreme Court, the "fundamental purpose" of both the Securities Act and the Exchange Act is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor [or buyer beware] and thus to achieve a high standard of business ethics in the securities industry." Thus, both Acts seek to provide investors accurate material information about a security to permit investors to assess a company's risk exposure, properly value a security and factor in an appropriate rate of return for the risks of the investment. Congress recognized that inaccurate or misleading information precludes such an assessment and the Acts were designed with this policy in mind.

## A. The Securities Act

The Securities Act provides protections for investors purchasing securities in issuer transactions (initial or secondary offerings of securities). The Securities Act has two basic objectives: (i) to require issuers to provide potential investors with financial information and other material information concerning securities being offered for public sale; and (ii) to provide a statutory remedy to investors in such offerings when misrepresentations are made in the offering documents or material information is left out of such documents. The Securities Act accomplishes its objectives by mandating that, before an offering of securities occurs, an issuer must disclose all material facts about the company and the proposed security in a registration statement and a prospectus. Generally (unless specific exemption requirements are met), any securities sold in the United States must be registered. According to the Securities and Exchange Commission ("SEC"),[1] the information required under the Securities Act

[1] The SEC is an independent, nonpartisan, quasi-judicial regulatory agency created by the Exchange Act. The SEC has been granted "broad authority over all aspects of the securities industry" including the "power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations (SROs)." The SEC is also empowered to investigate and remedy violations of the federal securities laws through civil enforcement actions. Criminal prosecutions are conducted by the United States Department of Justice.

should enable "investors, not the government, to make informed judgments about whether to purchase a company's securities. While the SEC requires that the information provided be accurate, it does not guarantee it. Investors who purchase securities and suffer losses have important recovery rights if they can prove that there was incomplete or inaccurate disclosure of important information."

The inclusion of false or materially misleading statements (even ones that may be technically correct) in offering materials or omissions of material information violates the Securities Act and may allow investors in the offering to file suit to recover damages. Liability under the Securities Act can be imposed upon the issuer of a security, every person who signed the registration statement, every person who was a director of the issuer at the time the registration statement was filed, every underwriter of the security, and every accountant or other "expert" who consented to be named as having prepared or certifying any part of the registration statement. Entities engaged in the sale of registered securities (such as underwriters) are subject to liability for misleading statements in a prospectus or oral communication related to an offering. The Securities Act also imposes "control person" liability on any person who, by virtue of their position, holdings or relationship to the other persons, controls another person liable for having issued a false and misleading registration statement or prospectus.

The Securities Act provides investors with significant protections. When suing the issuer of a security (usually the corporation), the Securities Act provides for strict liability, meaning the investor is not required to establish that the issuer defendant acted intentionally or even negligently when making false and misleading disclosures in a registration statement or prospectus, or that the investor even relied on the misstatement. The investor need only establish that it bought the security in (or traceable to)[2] an offering that was conducted pursuant to a materially false and misleading registration statement or prospectus. All other potential defendants (other than the issuer) may be held liable for "mere negligence." In other words, no intent is required for their liability. With respect to non-issuer defendants, however, the Securities Act permits such defendants to assert various "affirmative defenses" to avoid liability. One such defense, the "due diligence" defense, provides that a non-issuer defendant can avoid liability under the Securities Act upon a showing that "he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." Another judicially-created defense that is protecting accountants in these causes of action, primarily in the Second Circuit, is that unless an opinion is not actually held by the accountant that the financial statements of the issuer fairly reflect its financial condition, a clean audit opinion cannot constitute a false statement. Other defendants have attempted to use this "opinion" defense in Securities Act case but have not had as much success as the accountants.

The Securities Act also sets forth the amount of damages that a plaintiff may recover. Generally, and subject to certain limitations, damages are determined by measuring the difference between the amount paid for the security (not exceeding the public offering price) and (i) the security's value when the suit was filed; (ii) the price at which the plaintiff disposed of the security before filing suit; or (iii) the price at which the plaintiff disposed of the security after filing suit but before judgment, if those damages are less than the security's value when the plaintiff filed suit. Defendants in such cases do have the ability to reduce plaintiff's claimed damages by proving some factor other than the false and misleading statement caused the loss, a concept known as a "negative causation" defense.

[2] Generally speaking, an investor who buys in the after-market of an initial public offering, can also file suit for misrepresentations contained in or omitted from offering documents, even though the investor did not actually buy in the offering, so long as the investor can "trace" its purchases to the offering itself. So long as no additional shares have entered the market place since the offering through subsequent offerings or sales by insiders, an investor can easily allege and prove that all shares available for sale are traceable to the initial offering and can bring claims under the Securities Act.

## B. The Exchange Act

While the Securities Act governs public offering of securities, the Exchange Act governs aftermarket trading including purchases and sales of securities on securities exchanges.

The principle goal of the Exchange Act is to ensure that investors have access to accurate and truthful information concerning a security being traded, including any material facts about the issuer that may affect the value of a security. In cases of securities traded in an efficient market, courts presume that most publicly available information is reflected in the security's market price. Accordingly, misrepresenting a company's performance or omitting adverse information would tend to inflate artificially the price of a security. As discussed more below, this concept of the efficient market and the accompanying "fraud on the market" presumption has come to the forefront of the securities class action bar as the Supreme Court is currently in the process of ruling on the continuing validity of the presumption.

The Exchange Act accomplishes its goal by, among other things, requiring that any statements made by or on behalf of a publicly traded company, whether they be in financial filings such as the annual report, the quarterly report or the current report, or in press releases, conference calls or otherwise — relating to a security or to an issuer of a security — not contain any material misrepresentations or omit material information. Thus, while the Securities Act covers statements made in connection with an issuance (registration statement and prospectus), the Exchange Act covers a much broader set of disclosures.[3]

The enforcement mechanism of the Exchange Act is found in Section 10(b). Section 10(b) prohibits acts or practices that constitute a "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." Pursuant to its rulemaking authority under Section 10(b), the SEC promulgated Rule 10b-5, which has become the primary antifraud provision under federal law. Rule 10b-5 states that "it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

In private lawsuits, courts require plaintiffs to plead the following six elements in order to state a claim under Section 10(b) and Rule 10b-5:

1. **a material misrepresentation (or omission)** — a statement or omission of fact is deemed to be material "if a reasonable investor would consider it important in determining whether to buy or sell stock."
2. **scienter —** plaintiffs must allege that defendants acted with a wrongful state of mind. The scienter element is not met if a plaintiff merely alleges that defendants' actions were negligent or simply poor business decisions.
3. **in connection with the purchase or sale of a security** — this element requires a plaintiff to allege that they have engaged in some type of transaction involving a security.
4. **reliance —** where securities are traded in an efficient market, reliance is presumed and plaintiffs are not required to plead that they read defendants' material misrepresentations.[4] Rather, the market's incorporation of publicly available information into the price of a security will satisfy the reliance element. If a security is not

[3] Statements made in offering documents may be subject to liability under both the Securities Act and the Exchange Act.
[4] This legal concept is known as the "fraud on the market doctrine."

traded in an efficient market, then the plaintiff will be required to plead actual reliance (i.e. they read a false statement issued by a defendant before purchasing a security).[5]

5. **economic loss —** plaintiffs must allege that they sustained a loss from their investments.
6. **loss causation** — plaintiffs are required to plead a causal connection between the material misrepresentation and the loss.

Liability under the Exchange Act can be based on any false statement (whether or not the statement is filed with the SEC) issued by a corporation, its officers or third-parties whose statements are included with a corporation's filing (such as an auditor). Court decisions have, however, limited private litigants' (but not the SEC's) ability to bring suit against third parties who aid defendants' violations of federal securities laws.[6]

### C. Private Remedies Under Federal Law

Violations of the Securities Act and/or the Exchange Act can be enforced by the federal government or by investors through private litigation. Private investor-led enforcement of the federal securities laws are a necessary component of the regulation of securities markets. To this end, the United States Supreme Court has noted the Court's long recognition "that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)."

Congress enacted the securities laws intending that investors would enforce the laws through private actions. Specifically, the Securities Act provides investors an expressed private right of action allowing any person acquiring a security based on materially false offering documents to file suit under the Act. While the Exchange Act does not contain language expressly providing investors with a private right of action, since 1946, federal courts have consistently recognized the existence of an "implied" private right of action under Rule 10b-5. Congress has itself implicitly recognized the right of investors to sue under the Exchange Act and, as recently as 1995, enacted significant legislation to regulate private lawsuits under federal law. The 1995 amendments, known as the Private Securities Litigation Reform Act of 1995 ("PSLRA"), not only implicitly acknowledged investors' ability to seek private remedies for violations of the Exchange Act, but fundamentally altered the manner in which federal securities lawsuits are litigated.

As explained in greater detail below, the PSLRA, for example, amended normal pleading rules for civil fraud suits to require heightened pleading standards for actions alleging violations under the Exchange Act. The heightened pleading standards require that a complaint filed by a private litigant specifically plead each statement alleged to have been misleading, the reasons why the statement is misleading, and, if an allegation is based upon "information and belief," the complaint must state with particularity all facts upon which the belief is based. In other words, the complaint must do much more than provide a defendant with general notice of the causes of action. Rather, courts have interpreted the pleading standard to mean that a complaint must identify the "who, what, when, and where" of the fraud.

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[5] This is the issue currently under review at the Supreme Court level with Defendants attempting to have the Court get rid of the presumption of reliance entirely, thereby requiring pleading and proving actual or "eyeball" reliance – meaning they actually must have read the statement in order to recover – or to change the test from market efficiency to one which tests price impact. Under the current state of the law, if an investor can show that the market for a particular stock generally reacts to material information, the presumption of reliance will attach and it becomes simpler to have a class certified. Defendants would like to change this test to examine whether the market reacted to a specific piece of information for the presumption of reliance to attach, which is a more costly and complicated analysis.

[6] The Exchange Act includes a provision for imposing liability on any person controlling a primary violator of the Exchange Act. The elements of control person liability are not uniform and vary from court to court.

Second, while "scienter" (or a culpable state of mind) has been a required element for imposing liability under Section 10(b), the PSLRA increased the pleading requirements by requiring plaintiffs to plead particular facts that give rise to a "strong inference" that the defendant possessed either motive and opportunity to commit fraud (such as unusual insider sales of securities before the fraud is revealed), or by setting forth facts and circumstances that constitute strong circumstantial evidence of either recklessness or conscious misbehavior. Case law requires courts to consider plausible non-culpable inferences flowing from plaintiffs' allegations when assessing whether scienter has been sufficiently pled.

The PSLRA requires plaintiffs to meet the heightened pleading requirements without the benefit of reviewing any information produced by defendants through the discovery process, such as document production, interrogatory responses or deposition testimony.[7]As a result, plaintiffs' claims often must be supported by facts developed through private investigations conducted by counsel, government investigations and other public sources.

## III. Securities Class Action Litigation

The class action mechanism is a powerful procedural tool to hold wrongdoers accountable for widespread damages caused to a large number of victims, who individually may not have sufficient damages to support the cost of prosecuting individual claims. This scenario is especially true when it comes to securities violations where individual investor damages will likely be dwarfed by class-wide damages. The class action mechanism also allows a defendant to settle all applicable claims on a class-wide basis and, in the process, limit its exposure by obtaining a class-wide release. This procedural tool serves a useful social function because it provides remedies for all persons in a class who have suffered damages stemming from the same misconduct. For these reasons, many countries recently have begun to explore implementing class or group action provisions in their own laws.

In the United States, class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. This rule permits one party or a group of parties (the "Lead Plaintiff") to file a class action complaint on behalf of a "class" of similarly situated persons and institutions when certain requirements under Rule 23 are met.

The Lead Plaintiff is responsible for prosecuting claims on behalf of the class and has the power to settle and release claims of all class members, with due process and notice being provided to the class to weigh in on any such decision to resolve a class action. When a Lead Plaintiff files a lawsuit as a representative of a class of similarly situated victims, a federal court judge must, at an early practicable time, determine whether to certify the action as a class action. This procedure is commonly known as "class certification" and is a critical hurdle in a securities case.[8] Lead Plaintiff is also charged with selecting and supervising attorneys to represent the class ("Lead Counsel").

### A. The PSLRA and Institutional Investors

As noted above, the PSLRA fundamentally changed the requirements for pleading violations under federal law. Just as important, however, is the impact of the law on the organization and leadership of federal class action lawsuits.[9]

#### 1. Reasons for Reform

Congress enacted the PSLRA to curb what it had identified as "abusive litigation" in the process of class actions, and in securities class actions in particular. It was argued that often, when a stock price dropped dramatically and

[7] The PSLRA stays all formal "discovery" until defendants' motions to dismiss are denied. Discovery is the formal process of gathering evidence to prove claims or establish defenses.
[8] Rule 23 and class certification are discussed in greater detail below. 3EE Section III.F.3.
[9] The PSLRA applies to claims pled under the Securities Act and the Exchange Act.

suddenly, plaintiffs sought to prove fraud by hindsight through extensive "fishing expedition" discovery, and trial lawyers would file a complaint using a "token plaintiff" who had no stake in the action and then "race to the courthouse" to file such complaints in a jurisdiction that was expected to be most favorable to preside over the case. Whether or not the bleak picture being painted by critics was based upon reality, Congress introduced reforms, both in procedure and substance, to securities class actions through the enactment of the PSLRA, which was made into law when Congress and the Senate overrode President Clinton's veto of the PSLRA. In his veto, President Clinton stated that the PSLRA would "have the effect of closing the courthouse door on investors who have legitimate claims."

### 2. The PSLRA: Procedure and Substance

#### (a) Procedure

The PSLRA requires a court overseeing federal securities fraud class action lawsuits to adopt a rebuttable presumption that the most adequate plaintiff to represent a class as Lead Plaintiff is the investor(s) who suffered the largest financial loss. Thus, the PSLRA removed the perceived advantage to filing the first action through this portion of the legislation.

Before appointing the Lead Plaintiff, however, the plaintiff filing the first class action lawsuit must publish notice of the filing of an action via a wire service or widely circulated publication, advising investors of the pendency of the action to inform investors that any class member may apply to the court to serve as the Lead Plaintiff. These applications must be made within sixty (60) days of the publication of the notice. The purpose of the initial notice and the 60-day period that follows, is to alert potential class members to the commencement of the litigation and to provide investors with time to measure their losses and consider whether they would like to move to be appointed Lead Plaintiff. An investor does not need to file a complaint to be appointed Lead Plaintiff; rather, any investor within the class may move the court by filing a motion for appointment as Lead Plaintiff. The motion must be accompanied by a PSLRA certification which, among other things, provides: (i) that the plaintiff did not purchase the subject security at the direction of counsel in order to participate in the action; (ii) that the plaintiff is willing to serve as a representative party on behalf of a class; (iii) that all transactions in the subject security; (iv) that all other securities class actions in the past three (3) years in which the plaintiff is serving (or sought to serve) as a representative party are identified; and (v) that the plaintiff will not accept any payment for serving as a representative party beyond his or her pro rata share of any settlement or award.[10]

After evaluating the Lead Plaintiff applications, including any arguments or briefs in support or in opposition, the judge will appoint a Lead Plaintiff or Lead Plaintiff group. The PSLRA requires courts to appoint as Lead Plaintiff the movant or movant group with the "largest financial interest" in the case (often measured as the largest loss), so long as they are also adequate to lead the class. Congress expressed its clear intention that institutional investors serve as Lead Plaintiffs because generally institutions: (i) have the largest investments, and therefore often the largest losses; and (ii) have the sophistication and experience to work most effectively and efficiently with lawyers.

#### (b) Institutional Investors as Lead Plaintiffs

One important goal of the PSLRA was to shift control of securities class actions from the lawyers to the plaintiffs. Indeed, the PSLRA "increased the likelihood that institutional investors will serve as Lead Plaintiffs" because, as Congress stated in published reports, institutional investors with large amounts at stake "will represent the interests of the plaintiff class more effectively than class members with small amounts at stake." Similarly, the Senate Report

[10] If the Lead Plaintiff movant did file a complaint, the certification must also state that the Lead Plaintiff reviewed the complaint and authorized its filing.

on the PSLRA states that "[t]he Committee believes that increasing the role of institutional investors in class actions will ultimately benefit the class and assist the courts." Senate Report No. 104-98 at 11.

Consistent with the goals of the PSLRA, since the passage of the Act, institutional investors have become much more active in prosecuting securities class actions. According to annual PricewaterhouseCoopers studies, institutional investors were lead plaintiffs in 56 securities class actions in 2002, up from 31 cases in 2001, 19 in 2000 and 18 in 1999. Participation by institutional investors in securities class actions remains high today, with institutions serving as lead plaintiffs in 77 cases in 2009, 73 in 2010, 73 in 2011, 71 in 2012, and 57 in 2013.[11] The percentage of institutional investors serving as lead plaintiff in securities class actions has averaged 48% per year since 2002.[12]

### B. What Is Being Accomplished (Important Trends in Securities Class Actions)

Securities class actions have been criticized by some who suggest that these lawsuits return little value to those harmed by the fraud. However, the past several years have seen several trends which are very favorable to investors and demonstrate that class actions are indeed a valuable vehicle not only for recovering lost monies, but also to implement meaningful corporate governance changes which produce long-term value for investors retaining positions in corporate defendants. These trends include significantly larger monetary settlements, potential corporate governance changes, lower attorney fees, payment from individual wrongdoers, creative settlements such as those involving equity as part of settlements and prepackaged bankruptcies, to name a few. It is beyond debate that the main factor influencing these trends is the involvement of institutional investors as Lead Plaintiffs.

#### 1. Increase in Monetary Value of Settlements

The increased size of settlements in securities class actions from 1995 through 2013 has been somewhat staggering. Even without the inclusion of several multi-billion dollar settlements including Bank of America, WorldCom, Enron, Cendant and Tyco, the increase in settlement dollars is still impressive. Prior to 1995 (the year the PSLRA was passed), class action settlements averaged approximately $5 million per settlement. By 2003, the average settlement had risen to approximately $25 million. That figure reached a peak of $53.9 million in 2011, and the average settlement value from 2003 to 2013 was $5 million. A closer examination of the underlying settlements which make up these averages demonstrates a further trend towards larger settlements per action. In 2003, twenty-three (23) settlements were valued at $20 million or greater, with six (6) settlements exceeding $100 million. In 2009, eleven (11) settlements reached values of $100 million or more. And from 2006 through 2013, between 8% and 13% of settled cases each year were valued at $100 million or more. Those, however, are dwarfed by the WorldCom settlement of $6.1 billion, the Enron settlement of more than $7 billion, the Cendant and Tyco settlements both totaling over $3 billion, and the $2.425 billion Bank of America settlement. The explanations for these increased settlements are not hard to find. As the size and scope of the frauds have grown astronomically, so have investor losses per case. In 1996, the median loss for settled class actions was $64 million. That figure has risen steadily over the past eighteen (18) years, reaching $321 million in 2002 and a record $687 million in 2012. Also, an increasing number of institutional investors are stepping forward to become Lead Plaintiffs. Indeed, studies have shown that, in cases where institutional investors have served as the Lead Plaintiff, the average settlement was substantially higher than those led by individual investors. Of the 100 largest settlements in securities class actions from 1996-2013, totaling over $55.7 billion in settlement proceeds, 88% of those were led by institutional investors.

[11] Final 2013 data was not available at time of publication; the full-year projection for 2013 is a run-rate based upon filings through June 30, 2013.

[12] As the full-year projection for 2013 is based upon filings through June 30, 2013, the percentage participation rate by institutions is subject to change.

Of course, this has also meant a similar increase in the total settlement dollars available. In 2001, the value of all securities class action settlements for the year was approximately $1.9 billion; by 2004, the figure had risen to approximately $5.5 billion for the year; and from 2005 through 2013, more than $56 billion in settlement proceeds were made available for distribution to investors.

### 2. Decreased Attorney Fees

As contemplated under the PSLRA, institutional investors are in a better position than individual investors to negotiate lower attorney fees, which increases the size of the recovery for the class without generally sacrificing the quality of counsel. Indeed, institutional investors are able to negotiate sophisticated fee arrangements, which may include provisions for sliding scales based on either the amount recovered for the plaintiff, the time it takes to litigate the case, or both. In addition, bonuses for certain types of recoveries (i.e., when individual defendants contribute to the settlement recovery or corporate governance measures are also enacted as part of a settlement) have become more common as motivators for counsel.

### 3. Corporate Governance Reforms

The serial nature of corporate scandals has brought corporate governance to the forefront of policy debate and action, whether government or market led. Each day seems to herald another government, industry, investor group, or firm-led voluntary corporate governance code, yet serious doubts remain as to their effectiveness given the focus on self-regulation and voluntary action. Indeed, even Sarbanes-Oxley, which was widely touted when enacted, has to date produced little in the way of deterrence and has been the victim of widespread criticism throughout the business community.[13]

Institutional investors have increasingly turned to litigation as a vehicle for implementing corporate governance reforms. Indeed, the role of litigation to secure such reforms has dramatically increased in the last few years, with some investors demanding significant governance changes alongside, and not in place of, substantial financial recoveries. Implementing corporate governance reforms through class action litigation is significant because, like all class action settlements, they must be approved by the court and are therefore judicially enforceable. The enforceability of these negotiated changes makes them all the more valuable to shareholders and an attractive way to secure the value of a long-term investment. It is important to remember, though, that it must not only be the Lead Plaintiff that is dedicated to seeking corporate governance changes. The Lead Plaintiff's chosen counsel must be seeking more than just a fee at the end of the day. Firms that focus on securing corporate governance reform have won notable changes. Corporate governance reforms that have been included in settlement agreements range anywhere from altering the audit committee's composition and control to revamping a corporation's overall structure. For example:

1. **Bank of America Corporation** in 2012 agreed to a number of corporate governance reforms and guidelines in addition to the $2.425 billion settlement with investors harmed in its acquisition of Merrill Lynch. These reforms and guidelines included that directors of the Company would offer to resign if a director did not receive the required number of votes for uncontested re-election; that executives and officers of the Company have minimum stock holding thresholds to ensure alignment of their interests with common shareholders; that all Compensation Committee members of the Company be super-independent; that the Company have its Chief Executive and Chief Financial Officers certify that they reviewed all annual and merger proxy statements; and that these and other reforms be overseen by the Court in the case and by a committee within Bank of America Corporation.

[13] Businesses from around the world have attacked the requirements of Sarbanes Oxley as onerous, and, as a result, were instrumental in the recent enactment of the Class Action Fairness Act, aimed to curtail the number of cases brought to limit businesses' exposure. By contrast, the investor community remains too fragmented to be an effective counterweight at the legislative level.

2. **Comverse Technology, Inc.** agreed to a host of corporate governance and internal control reforms in a 2010 derivative case settlement, including: the entire board of directors and senior executive corps that served at the time of the backdating scheme was replaced; the board split the positions of Chairman and CEO, with the Chairman being an independent director; the company enacted a proxy access provision for large shareholders; the board adopted a majority voting standard; and the company substantially reformed its stock option granting and administration processes as well as its internal auditing policies and procedures.
3. **Affiliated Computer Services** agreed to a settlement in an options backdating derivative case in 2009 which included numerous, substantial changes to the company's corporate governance and internal controls, including replacing the officers and directors who were most culpable in the backdating scheme, revamping the director nomination and removal process, and overhauling the stock option granting and administration policies and procedures.
4. **Southwest Airlines Company** was sued derivatively in 2008. Plaintiffs alleged that between June 2006 and March 2008, Southwest flew 46 Boeing 737 airplanes on nearly 60,000 flights without complying with a 2004 Federal Aviation Administration ("FAA") Directive that required the Company to inspect the planes for fuselage fatigue cracks. As a result, Southwest was forced to temporarily ground forty-four (44) planes and the FAA levied a record $7.5 million civil penalty on the Company. In settling the suit against the Company's officers and directors for breach of fiduciary duties in connection with its violations of FAA safety and maintenance regulations, Southwest agreed to numerous reforms targeted at ensuring Southwest's Board is adequately apprised of any issues concerning Southwest's safety and operations and at implementing significant measures to strengthen Southwest's safety and maintenance processes and procedures.
5. **Sepracor, Inc.,** in settling a derivative suit against then current and former officers and directors in 2008, agreed to cancel or reprice more than 2.7 million unexercised stock options that were alleged to have been improperly granted in violation of shareholder-approved stock option plans. Sepracor agreed to adopt internal controls and granting procedures designed to ensure that all stock options are properly dated and accounted for, to not alter the exercise prices of stock options without shareholder approval, to hire an employee responsible for ensuring that the Company complies with its stock options plans, and to appoint a director of internal auditing.
6. **Tenet Healthcare Corporation** settled a securities class action in 2006, and agreed to sweeping governance reforms including the establishment of a special independent review committee focused on compliance with ethical, legal and regulatory issues specialized to the healthcare community with the power to investigate such issues. Additionally, Tenet agreed to revise its insider trading policy such that each employee covered by the policy would be required to undergo thorough training with respect to the policy. Lastly, Tenet agreed to require that two-thirds of its directors be independent, to separate the CEO and Chairman positions, and to establish a means for shareholders to communicate with the Board, among many other significant measures.
7. **Monster Worldwide, Inc.,** in settling a stock option derivative action against it relating to the options "backdating" scandal, agreed to a settlement which required the recipients of backdated stock options to disgorge more than $32 million in unlawful gains back to the Company, and also achieved significant corporate governance changes at the Company. These measures included: (a) requiring Monster's founder Andrew McKelvey, to reduce his voting control over Monster from 31% to 7%, by exchanging super-voting stock for common stock; and (b) implementing new equity granting practices that require greater accountability and transparency in the granting of stock options moving forward. In approving the settlement, the court noted "the good results, mainly the amount of money for the shareholders and also the change in governance of the company itself, and really the hard work that had to go into that to achieve the results…"
8. **Both Juniper, Inc. and McAfee, Inc.,** in settling high-profile options backdating cases against the respective companies, agreed to comprehensive corporate governance reforms in areas such as executive compensation policies and procedures, internal auditing practices, board of directors composition and committee responsibilities, and shareholder voting policies and procedures.

9. **Siebel Systems,** the maker of business software settled a class action shareholder suit in 2003, and agreed, in part, to significant oversight reforms that included expanding the number of board members and requiring more disclosures about executive compensation.
10. **Enterasys Networks** settled a shareholder class action and, as part of the settlement, agreed to allow investors holding more than 5% of the company's stock to nominate alternative candidates to the board and to provide more information on executive compensation.
11. **Sprint Corp.** settled a shareholder suit and, as part of the settlement, agreed to substantially revise the composition of the Board, to ban insider selling during company stock buyback programs and to require independent directors to meet at least twice a year, outside the presence of management.

The governance reforms that were included in these settlements clearly advanced the interest of protecting all investors, particularly institutional investors. Again, in practice, the force behind these changes has been institutional investors and their selected counsel who understand the need for, under the correct circumstances, more than just a monetary recovery as part of a class action lawsuit.

#### 4. Creative Settlements

In addition to corporate governance reforms, institutional investors have been at the forefront of reaching more creative settlements with defendants, particularly settlements that include payment in company stock in lieu of only cash. Including stock in the settlement is particularly useful when a company's long term viability is healthy, but its short term position leaves the company with limited ability to pay a large monetary judgment. This type of settlement structure seeks to maximize the recovery by aligning the interests of the class with the future performance of the defendant company. Other creative settlements have included the use of pre-packaged bankruptcies, downside protection for plaintiffs when taking equity as part of a settlement, and others.

#### 5. The Morrison Decision

In June 2010, the United States Supreme Court issued an opinion that affirmed all investors' rights (U.S. and non-U.S.) purchasing securities in the United States to assert claims in a U.S. court. See *Morrison v. National Australia Bank*, 130 S.Ct. 2869 (2010) ("*Morrison*"). At the same time, however, the Court limited claims by investors who purchase securities on non-U.S. exchanges, regardless of where the misrepresentations were made or from where the shares were purchased. In *Morrison*, the Supreme Court held that Australian shareholders who had purchased securities in an Australian bank could not bring securities-fraud claims in a U.S. court. More specifically, the Supreme Court held that the Exchange Act does not apply extraterritorially, meaning that only securities listed on an American stock exchange that are purchased or sold are protected by the provisions of the Exchange Act. Subsequent decisions interpreting *Morrison* have likewise limited the ability of investors who purchased shares outside the U.S. exchanges to bring claims under the U.S. securities laws. As the U.S. Congress has not stepped in to rectify this dramatic reduction of shareholder rights, it will be interesting to see whether and how other countries continue to develop their own securities laws as well as mechanisms to pursue group actions. In the meantime, counsel needs to be provided to institutional investors who invest outside the U.S., regarding recovery strategies in other jurisdiction.

### C. The Benefits of Serving as the Lead Plaintiff

One of the leading misconceptions with regard to securities class actions is that there are no advantages to assuming the role of the Lead Plaintiff. While taking on the role of Lead Plaintiff requires careful consideration, it is important to note that the majority of institutional investors do not understand what is entailed. Indeed, most believe that it is much more burdensome than it truly is, and do not fully understand the benefits or the impact that Lead Plaintiff's decisions have on all investors. This section will detail the responsibilities of a Lead Plaintiff and the advantages to serving as Lead Plaintiff when the circumstances are right for your particular fund.

### 1. Serving as Lead Plaintiff and Its Advantages

In order to have a representative of the plaintiff class overseeing the litigation, the court will appoint a single plaintiff or a small group of plaintiffs as the Lead Plaintiff. As noted above, this selection is based primarily on which plaintiff or plaintiff group has suffered the largest financial loss. While nearly all courts allow small groups of plaintiffs to come together to represent the class, the size of these groups generally does not exceed five members so that they are able to work together in an efficient manner. The court will then typically approve the Lead Plaintiff's selected attorneys as Lead Counsel. This organization is usually established by the court within the first several months after the lawsuit is initiated.

#### (a) Overseeing the Litigation

The Lead Plaintiff is responsible for managing the litigation primarily by overseeing and monitoring the progress of the action and the efforts of counsel. Specifically, a Lead Plaintiff will review and comment on important filings and other documents pertaining to the prosecution of the action. Lead Counsel is responsible for litigating the action and, at the same time, keeping the Lead Plaintiff well-informed so that the Lead Plaintiff can effectively monitor all progress and provide comments and suggestions. Kessler Topaz works with all of its clients to establish a reporting system that they determine to be effective, yet not overwhelming.

#### (b) Costs and Expenses

There is no financial risk in serving as a Lead Plaintiff. Kessler Topaz advances all costs and expenses incurred in the prosecution of the case and will be reimbursed only if there is a successful settlement or judgment recovery on behalf of the class. This reimbursement comes from the money recovered on behalf of the class and, thus, there is never a time when the Lead Plaintiff would have to pay anything out of its own pocket. Furthermore, unlike many other countries, in U.S. class action cases, the Lead Plaintiff is not responsible for the legal costs or expenses of the defendants in the event that a case does not resolve favorably for the class. In addition, fees earned by Kessler Topaz are contingent upon a successful recovery and are ultimately determined by the court, based on the complexity of the lawsuit, the duration of the litigation and the quality of work performed. Institutional Lead Plaintiffs often will negotiate a competitive fee agreement with counsel, to limit the maximum percentage that their selected counsel will request from the court if there is a successful resolution of the case.

#### (c) Settlement Discussions

Once discussions aimed at resolving an action commence, the Lead Plaintiff will have an opportunity to be active in all negotiations relating to the size of the financial recovery, the makeup of the consideration (i.e., cash and stock, cash and options, etc.), the proposed plan of allocation for distribution of the recovery to the class, and corporate governance demands aimed to protect shareholders from similar future frauds. Generally, the Lead Plaintiff has a strong voice when negotiating settlements and the clout of a sophisticated institutional investor cannot be overstated in these situations. Moreover, the Lead Plaintiff must approve any settlement before it is presented to a court.

#### (d) Attorneys' Fees

A common complaint directed at class actions is that plaintiffs' attorneys are awarded too large a portion of the recoveries they achieve. The reality, however, is that attorneys' fees by percentage have been dramatically reduced in the last several years as institutional investors have begun stepping forward to serve as Lead Plaintiffs.

Institutional investors are able to establish more competitive contingent fees with their counsel, well below the benchmark set by many courts. As a result, the class is benefited by a return of a larger portion of the settlement. While attorneys' fees are generally agreed to when an investor retains counsel, there are many different ways to structure agreements so that the fee properly reflects the amount and type of recovery achieved as well as the complexity and longevity of the litigation (i.e., sliding scales that encompass both the amount and timing of recoveries). It is important to note that even if counsel and the Lead Plaintiff agree on an appropriate fee, all fees must still be approved by the court as fair and reasonable.

### 2. Dispelling the Myths of Being a Lead Plaintiff

There are several myths about serving as a Lead Plaintiff. Below are several comments that we have encountered from both U.S. and non-U.S. investors, as well as the realities associated with the Lead Plaintiff role.

*There is a large time and resource commitment in being a Lead Plaintiff.*

**Incorrect.** Lead Counsel does all of the legal work and advances all of the costs and expenses associated with the litigation. The Lead Plaintiff monitors the progress of the litigation by reviewing important documents. While it is true that the Lead Plaintiff may need to produce documents and have a representative available for a deposition to answer certain questions, the time commitment generally is not significant and all expenses will be advanced by Kessler Topaz.

*Lead Plaintiffs may be held financially or otherwise liable if the case is unsuccessful.*

**Incorrect.** Unlike certain courts outside the United States, an unsuccessful plaintiff is not responsible for the defendants' fees, costs and expenses. Likewise, a plaintiff is not responsible for paying its own counsel fees, costs or expenses in a contingency matter, regardless of the outcome of the case.

*The Lead Plaintiff will receive unwanted media publicity.*

**Incorrect.** In response to questions of publicity, we typically ask investors to name the Lead Plaintiff in the Enron securities class action — arguably the most widely publicized class action ever. Most investors cannot answer this question. The truth is that most Lead Plaintiffs have as much or as little publicity as they seek. Indeed, in some instances institutional Lead Plaintiffs desire publicity to demonstrate that they are active, when necessary, to combat corporate fraud and that they are fulfilling their obligations to protect and preserve their funds' assets.

*Lead Plaintiffs will have to make frequent trips to the United States.*

**Incorrect.** The Lead Plaintiff is generally not required to attend most hearings. We do encourage our institutional clients, however, to consider attending the important hearings as the Lead Plaintiff's appearance often has a positive impact on the court. There is always the possibility that a Lead Plaintiff or other representative plaintiff will be required to sit for a deposition. These depositions typically are not burdensome and are scheduled at a convenient time and place. All costs and expenses for the litigation, including any travel related expenses, are advanced by Kessler Topaz, and are not the responsibility of the Lead Plaintiff.

*There is no reason to be a Lead Plaintiff because institutions receive the same return when, and if, the case resolves in a recovery for the plaintiffs.*

**Incorrect.** As discussed above, institutional Lead Plaintiffs frequently achieve larger recoveries than individual Lead Plaintiffs and are uniquely capable of implementing meaningful governance changes with the corporate defendant. As such, institutional Lead Plaintiffs offer material advantages for investor classes. Without question, a decline in the number of active institutional investors would lead to a decline in the quantity and quality of the recoveries and governance reforms accomplished by class actions.

*There is no need to seek to be a Lead Plaintiff because another institution will step forward anyway.*

**Incorrect.** The reality is that while there are a growing number of institutions that regularly seek to serve as Lead Plaintiffs, those same institutions are beginning to speak out against what they view as "free-riders" — institutional investors that rarely or ever serve as Lead Plaintiffs, yet always participate in class action recoveries. There is no risk in filing a Lead Plaintiff motion; indeed, one can always withdraw a motion once it is determined that another qualified institutional investor (with similar or greater financial losses) has stepped forward to protect the putative class. However, there exists a substantial risk when an institutional investor with substantial losses elects not to file a Lead Plaintiff motion and, instead, allows other smaller (perhaps individual) investors to assume the important role of Lead Plaintiff. Oftentimes, smaller investors have selected counsel with less experience and resources to prosecute these class actions which directly impact the quality and quantity of the recoveries and reforms.

*Non-U.S. based investors cannot serve as a Lead Plaintiff.*

**Incorrect.** We live in a global economy and courts in the U.S. have continually recognized that non-U.S.-based investors, many of which have very substantial holdings in U.S. securities, are adequate Lead Plaintiffs with just as much right to seek leadership positions in these cases as U.S.-based investors. While the *Morrison* opinion described on page 11 did limit the ability for investors to bring claims for investments made on non-U.S. exchanges, investors domiciled anywhere can bring claims and serve as a lead plaintiff for claims brought on behalf of investments made on U.S. exchanges.

### D. Determining Your Financial Interest in the Litigation

As discussed above, the PSLRA creates a rebuttable presumption that the plaintiff with the largest financial interest (of the movants seeking appointment) in the litigation should be appointed as Lead Plaintiff. Congress established this framework to encourage courts to appoint institutional investors as Lead Plaintiffs, reasoning that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." While the PSLRA requires a financial interest analysis to identify the movant with the most at stake in the litigation, the PSLRA does not define "financial interest" or otherwise guide courts on how to calculate an investor's "financial interest" for the purposes of selecting a Lead Plaintiff. As a result, determining how to calculate an investor's financial interest, or financial loss,[14] remains the subject of much debate among the courts. Courts confronted with this question generally employ one of two methods for calculating financial loss. The first involves calculating the out-of-pocket financial loss experienced by the lead plaintiff movant under either the FIFO (first-in, first-out) or LIFO (last-in, first-out) share matching methodology. The second involves calculating the lead plaintiff movant's losses utilizing the principles set forth by the United States Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005), which limits recovery to losses tied to the disclosure of fraud. *Dura* excludes non-fraud (or general market) related losses, whereas FIFO and LIFO tend to capture fraud and non-fraud movements in the analysis.

Under either method, it is important at the outset to note that the Class Period – the time period during which the defendants' false and misleading statements inflated the price of the security – determines which purchases and sales of the security at issue factor into a plaintiff's financial interest. Consequently, when an institutional investor elects to pursue appointment as Lead Plaintiff, counsel will first request the client's transactions in the security

[14] Courts look at several factors when assessing financial interest, including, for example, net shares purchased, net funds expended, total funds expended, and loss. Loss is considered to be the most important factor.

during the Class Period, as well as any shares of the security the client held immediately prior to the beginning of the Class Period and all post-Class Period transactions. Using this data, counsel will calculate the client's financial interest in the litigation.

### 1. Calculating Out-of-Pocket Losses (FIFO/LIFO)

Historically, many courts have equated financial interest with the out-of-pocket financial loss experienced (either as owner of the stock or on behalf of the actual owners) by the Lead Plaintiff candidate. Out-of-pocket losses are a measure of the actual financial impact of a series of transactions on an investor regardless of the reasons (fraud or market factors) for the losses. Courts utilize one of two share matching methodologies to determine financial loss – FIFO and LIFO. A court's decision on which methodology to employ can have a dramatic impact on the Lead Plaintiff candidate's financial loss. Once shares are matched, movants then value the remaining (or retained) shares using the stock's average closing price for the 90 days after the end of the Class Period.

#### (a) Matching Shares

Under FIFO, the first shares sold during the Class Period are matched or offset against the earliest purchases, even if the purchases occurred before the Class Period. For example, if an institution owns 1000 shares of Sample Company stock at the start of the Class Period, and then purchases 3000 more shares during the Class Period while also selling 2000 shares during the Class Period, 1000 of those 2000 shares sold during the Class Period are offset against the 1000 share pre-Class Period balance. Accordingly, when counsel calculates the institution's financial loss, the first 1000 shares sold during the Class Period are effectively netted out (or zeroed out) for loss calculation purposes because they relate to pre-Class Period purchases. Once counsel nets all Class Period transactions, the institution would have a net balance of 2000 shares purchased during the Class Period that were still held at the close of the Class Period (net shares purchased).

**Sample Client**
**FIFO Loss Calculation in Sample Company**
Class Period: 3/2/2015 - 7/30/2016
Retained Shares valued at: $21.00

| Transaction | Date | Shares | Price | Cost | | Transaction | Date | Shares | Price | Proceeds |
|---|---|---|---|---|---|---|---|---|---|---|
| Open Balance | | 1,000 | | | | Sale | 11/1/2015 | 500 | $144.00 | $72,000.00 |
| | | | | | | Sale | 1/18/2016 | 500 | $159.00 | $79,500.00 |
| | | | | | | *Sales offsetting opening balance:* | | 1,000 | | $151,500.00 |
| Purchase | 11/5/2015 | 1,000 | $150.00 | $150,000.00 | | Sale | 7/8/2016 | 1,000 | $171.00 | $171,000.00 |
| Purchase | 12/16/2015 | 1,000 | $156.00 | $156,000.00 | | Retained | | 2,000 | $21.00 | $42,000.00 |
| Purchase | 5/6/2016 | 500 | $162.00 | $81,000.00 | | | | | | |
| Purchase | 7/7/2016 | 500 | $168.00 | $84,000.00 | | | | | | |
| | | 3,000 | | $471,000.00 | | | | 3,000 | | $213,000.00 |
| | | | | | | | | | *FIFO loss:* | ($258,000.00) |

This methodology accounts for the reality that many institutions typically enter a Class Period with a pre-existing balance of company stock.

Conversely, under the LIFO methodology, the last shares purchased are considered the first shares sold. Under the above example, 1500 of the 2000 shares sold during the Class Period would be offset against the 3000 shares purchased during the Class Period, thereby leaving a net balance of 1500 shares purchased during the Class Period.

Because 500 shares were sold prior to any purchases (the sales on 11/1/2015), such shares could not be matched against purchases and thus are matched against the pre-class period holdings.

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Sample Client** | | | | | | | | | |
| **LIFO Loss Calculation in Sample Company** | | | | | | | | | |
| Class Period: 3/2/2015 - 7/30/2016 | | | | | | | | | |
| Retained Shares valued at: | | $21.00 | | | | | | | |
| **Transaction** | **Date** | **Shares** | **Price** | **Cost** | **Transaction** | **Date** | **Shares** | **Price** | **Proceeds** |
| Open Balance | | 1,000 | | | Sale | 11/1/2015 | 500 | $144.00 | $72,000.00 |
| | | | | | | *Sales offsetting opening balance:* | 500 | | $72,000.00 |
| Purchase | 11/5/2015 | 1,000 | $150.00 | $150,000.00 | Sale | 1/18/2016 | 500 | $159.00 | $79,500.00 |
| Purchase | 12/16/2015 | 1,000 | $156.00 | $156,000.00 | Sale | 7/8/2016 | 1,000 | $171.00 | $171,000.00 |
| Purchase | 5/6/2016 | 500 | $162.00 | $81,000.00 | Retained | | 1,500 | $21.00 | $31,500.00 |
| Purchase | 7/7/2016 | 500 | $168.00 | $84,000.00 | | | | | |
| | | 3,000 | | $471,000.00 | | | 3,000 | | $282,000.00 |
| | | | | | | | | *LIFO loss:* | ($189,000.00) |

Currently, LIFO is the majority rule in many key jurisdictions in the United States. Courts favoring LIFO do so because this methodology, unlike FIFO, takes into account gains that might have accrued to plaintiffs resulting from sales during the Class Period due to the inflation of the stock price. Because FIFO nets out (or zeros out) early Class Period sales, any inflationary gains from these early sales are not reflected in the traditional FIFO calculation. LIFO, on the other hand, is more likely to account for Class Period gains because early Class Period sales are not netted out against pre-Class Period purchases. LIFO typically takes into account more Class Period transactions than FIFO. FIFO and LIFO would be the same for investors without any pre-Class Period positions.

### (b) Valuing Retained Shares

After netting all Class Period transactions under either FIFO or LIFO, counsel determines a set-off value for the shares retained at the end of the Class Period to calculate the loss related to those shares. Under the PSLRA, the set-off value is equal to the mean trading price of the security during the 90-day period beginning immediately after the end of the Class Period ("hold price").[15] The use of the hold price is intended to reduce the impact of temporary stock price declines following the disclosure of corrective information that are erased if the stock price rebounds. After it is calculated, the hold price is multiplied by the number of shares purchased during the Class Period and still retained at the end of the Class Period – in the above example, 2000 under FIFO and 1500 under LIFO. That product is then netted with the out-of-pocket cost of the shares held at the end of the Class Period to calculate a movant's out-of-pocket loss.

## 2. Calculating Potentially Recoverable Losses Under *Dura*

Distinct from the FIFO/LIFO analysis, some courts have favored a method of calculating a prospective Lead Plaintiff's financial interest in a manner that is intended to more closely approximate the plaintiff's potentially recoverable losses rather than their out-of-pocket losses. This method is sometimes referred to as the retained shares method or the *Dura* method. The *Dura* method is designed to calculate losses only for those shares that suffered

15 If the institution sells the shares after the end of the Class Period, but before the end of the 90-day period, the actual sale price is not always utilized. Instead, counsel must use the greater of the actual sale price or the mean trading price from the end of the Class Period through the date of sale. Alternatively, if the institution sells after the 90-day period, the 90-day hold price must be used.

potential harm as the result of the revelation of fraudulent conduct. Sales of shares prior to any revelation of fraud are excluded from this calculation because any price decline they may have experienced is deemed not to be due to the fraud or its revelation. This calculation attempts to comply with the Supreme Court's decision in *Dura*, where the Court made clear that plaintiffs in securities fraud cases can recover damages only for "those economic losses that misrepresentations actually cause." 544 U.S. at 345. The *Dura* method is intended to be a proxy for damages before discovery, expert reports, or the court's ruling on potential legal theories. It is not a substitute for a fulsome damages analysis, which typically occurs later during the litigation.

Under the *Dura* method, counsel will calculate a plaintiff's financial interest by first determining, using the FIFO and/or LIFO methods described above, how many shares purchased during the Class Period were still held at the time of the corrective disclosure (which often is the end of the Class Period, except when there are multiple corrective disclosures). These shares are then multiplied by the difference between the price of the security immediately before disclosure of the fraud (in the examples below, $87.50), as opposed to the actual acquisition price,[16] and the hold price discussed above (in these examples, $21.00) to calculate the institution's financial loss. Class Period purchases sold before corrective information enters the market ("in and out transactions") are excluded from the analysis.

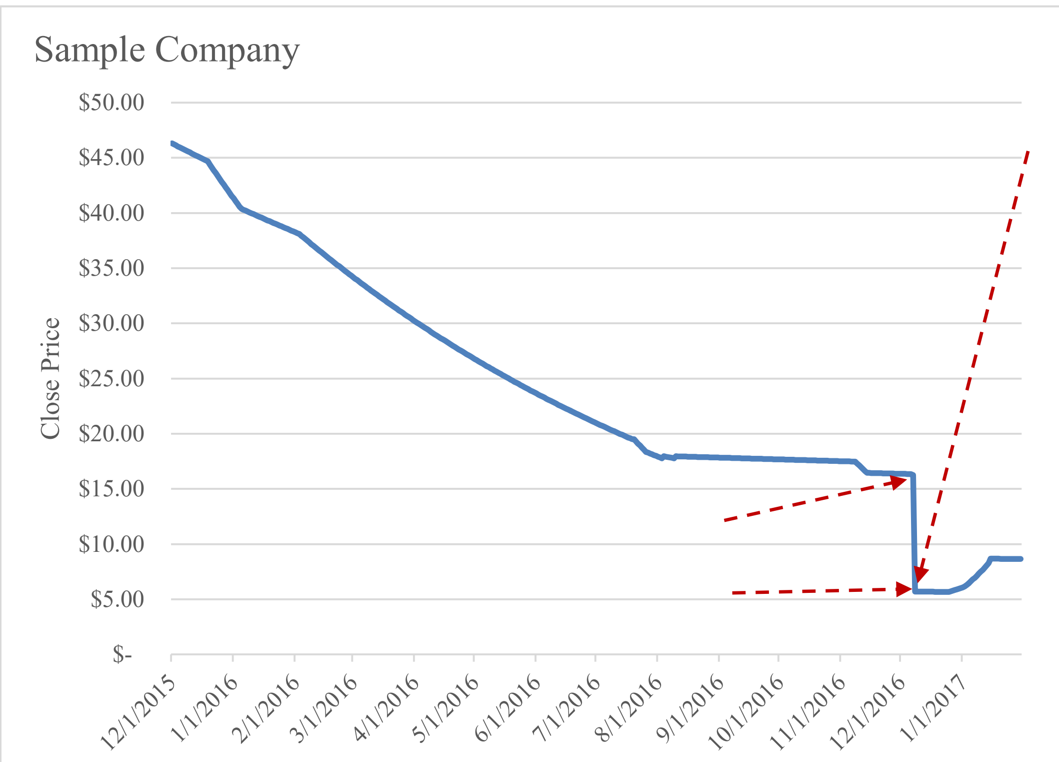
| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Sample Client** | | | | | | | | | | |
| **FIFO Retained-DURA in Sample Company** | | | | | | | | | | |
| Class Period: 3/2/2015 - 7/30/2016 | | | | | | | | | | |
| Pre-disclosure Price on 7/30/2016 | | $87.50 | | | | | | | | |
| Retained Shares valued at: | | $21.00 | | | | | | | | |
| **Transaction** | **Date** | **Shares** | **Price** | **Cost** | | **Transaction** | **Date** | **Shares** | **Price** | **Proceeds** |
| Purchase | 12/16/2015 | 1,000 | $87.50 | $87,500.00 | | Retained | | 2,000 | $21.00 | $42,000.00 |
| Purchase | 5/6/2016 | 500 | $87.50 | $43,750.00 | | | | | | |
| Purchase | 7/7/2016 | 500 | $87.50 | $43,750.00 | | | | | | |
| | | 2,000 | | $175,000.00 | | | | 2,000 | | $42,000.00 |
| | | | | | | | | | *FIFO Retained-DURA loss:* | ($133,000.00) |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Sample Client** | | | | | | | | | | |
| **LIFO Retained-DURA in Sample Company** | | | | | | | | | | |
| Class Period: 3/2/2015 - 7/30/2016 | | | | | | | | | | |
| Pre-disclosure Price on 7/30/2016 | | $87.50 | | | | | | | | |
| Retained Shares valued at: | | $21.00 | | | | | | | | |
| **Transaction** | **Date** | **Shares** | **Price** | **Cost** | | **Transaction** | **Date** | **Shares** | **Price** | **Proceeds** |
| Purchase | 11/5/2015 | 1,000 | $87.50 | $87,500.00 | | Retained | | 1,500 | $21.00 | $31,500.00 |
| Purchase | 12/16/2015 | 500 | $87.50 | $43,750.00 | | | | | | |
| | | 1,500 | | $131,250.00 | | | | 1,500 | | $31,500.00 |
| | | | | | | | | | *LIFO Retained-DURA loss:* | ($99,750.00) |

16 If the acquisition price is lower than the price of the security immediately before disclosure of the fraud, the acquisition price is typically used in the *Dura* calculation.

As can be seen from these examples, using this method can result in dramatically different financial interest calculations in those instances where the share price immediately prior to the revelation of the fraud is materially different from the actual acquisition price.

The chart below illustrates the difference between calculating out-of-pocket losses and calculating potentially recoverable losses under *Dura*. The chart shows a Sample Company whose stock price drops steadily throughout the Class Period, and then drops sharply at the end of the Class Period (on December 1, 2016), after a single corrective disclosure is made. Under the out-of-pocket losses method, the decline in the stock price throughout the Class Period will be taken into consideration in calculating a plaintiff's financial interest in the litigation, even though damages will not ultimately be recoverable for any declines in the Company's stock price that occurred before the single corrective disclosure was made. The *Dura*/retained shares method accounts for this by only considering the losses that stem from the decline in the Company's stock price occurring immediately after a corrective disclosure was made. Thus, although an initial damages calculation under the out-of-pocket losses method may indicate that a plaintiff's losses are significant, counsel should calculate the plaintiff's losses under the *Dura*/retained shares method to ensure that the plaintiff's potentially recoverable losses are substantial enough to warrant pursuing appointment as lead plaintiff in the matter.




It is important to recognize and understand that, no matter which of the above described methods is used, calculating the greatest financial interest for purposes of determining which investor is best suited (or which group is best suited) to serve as Lead Plaintiff is very different than calculating how much of the loss incurred is actually compensable under the securities laws, which is detailed further below. Even the Dura/retained shares method, which is intended to approximate the potentially recoverable losses, still provides only a rough estimate of actual damages. Ultimately, damages will only be awarded under the securities laws for the portion of the loss that was due to misconduct, as opposed to general market movements that could occur in any given stock during any given time period.

### E. Litigating Securities Class Actions

This section provides a general overview of the typical stages in prosecuting a securities class action after the Lead Plaintiff is appointment.

#### 1. The Amended Complaint and Motion to Dismiss

As noted above, the PSLRA provides specific procedures for the appointment of a Lead Plaintiff in a securities class action. Following the Lead Plaintiff appointment, the Lead Plaintiff and defendants typically agree upon a schedule to file an amended complaint and for defendants to file responsive pleadings. The amended complaint is one of the more important steps in prosecuting a securities class action because it sets forth the relevant facts and pleads causes of action that the Lead Plaintiff intends to establish at trial.

Complaints typically assert claims against issuers and officers who issued materially false statements. The complaint may also name directors who signed documents, underwriters who assisted in selling securities, and accountants who issued unqualified audit opinions as defendants.

Securities fraud complaints must be pled with particularity pursuant to Rule 9(b) of the Federal Rule of Civil Procedure and the PSLRA. The failure to comply with these stringent pleading standards may provide a basis for dismissal of the action. Accordingly, Lead Plaintiff's counsel will promptly undertake a thorough investigation of the factual circumstance that underlies the fraud, including researching all of the defendant's SEC filings, press releases, and other company statements to determine which information was falsely stated or omitted. For purposes of pleading scienter for claims brought under the Exchange Act, the state of mind of the defendant, Lead Plaintiff must plead and ultimately prove that defendants acted intentionally or recklessly in making their false statements or omitting material information. One way in which such "state of mind" evidence is plead is through circumstantial evidence of motive, which is typically pled by analyzing any insider sales by officers and directors, or acquisitions that the issuer may have made with inflated stock which may expose any motive for the fraud.

Depending on the nature of the fraudulent statements, Lead Counsel may also engage investigators to identify and contact potential witnesses, such as customers, suppliers/vendors, former employees, non-defendant companies, or retain industry experts who help better understand the industry and the fraud. Lead Counsel may also engage accounting experts to analyze the issuer's financial statements and identify violations of generally accepted accounting principles. All of these efforts go towards attempting to plead and ultimately prove that defendants knew their statements were false at the time they were made or acted recklessly in making their statements.

Once the Lead Plaintiff files the amended complaint, defendants will invariably move to dismiss the complaint on any number of grounds in order to continue the automatic stay of discovery that is mandated by the PSLRA until a decision on the motion is rendered by the Court. Motions to dismiss typically argue that the alleged false statement was immaterial to investors, that the defendants did not know the statement was false when made, that the complaint fails to satisfy the heightened pleading requirements of Rule 9(b) and the PSLRA, and that the false statements did not cause the Lead Plaintiff's losses.

Lead Plaintiff's counsel will file a brief in opposition to the motion to dismiss and the court will issue an opinion and order that either grants or denies the motion to dismiss, or parts thereof. This process can sometimes take an exceedingly long period of time based upon the complexity of the issues or the schedule of the Court deciding the motion. It is also not uncommon for a Court to give the Lead Plaintiff another chance to plead their theory, even if the first motion to dismiss is successful in causing the Court to dismiss the complaint.

### 2. Merits Discovery

Once the defendant has either answered the complaint, or the court has denied the defendant's motion to dismiss, the discovery stay, which is automatically in force under the PSLRA, is lifted and discovery begins.

Under the Federal Rules of Civil Procedure, before the discovery process begins, the parties must confer to discuss, and ideally to agree upon, a comprehensive discovery plan. The plan may address: (i) the scope and timing of discovery; (ii) the number of depositions and their length; (iii) the number of written questions (or interrogatories) each party may serve on another party; (iv) expert discovery including exchange of reports and scheduling of expert depositions; (v) issues concerning access to and retrieving documents; and (vi) obtaining document or deposition discovery from third parties. Following the meeting, the parties must provide the court with the proposed discovery plan for its approval, or if agreement is not reached, each party may submit their own proposed schedule. The court will often make modifications to the plans depending on its own schedule.

Within fourteen (14) days of the parties meeting, each party must provide the other parties to the action with their "initial disclosures." These disclosures include basic information concerning: (i) the parties' claims and defenses; (ii) identification of witnesses and contact information; (iii) identification of documents that support a party's claim or defense; and (iv) the identification of applicable insurance coverage. The Lead Plaintiff will generally be required to provide copies of its trading records, either through its own records or through its investment managers, to demonstrate its holdings in the defendant's company, as well as any other information the Lead Plaintiff possesses concerning the issuer of the securities or its decision to invest in the securities.

After the parties have provided initial disclosures, they may then serve discovery requests. These requests are made in the form of document requests and interrogatories (which are written questions), directed to parties in the action. The Lead Plaintiff will receive document requests and interrogatories relating to the claims asserted, and counsel will review the requests to ensure they are appropriate, and assist in the preparation of any responses.

The Lead Plaintiff may also be notified of the need for deposition testimony. The parties must give reasonable advance notice of any deposition and in general, the Lead Plaintiff need only sit for a few hours on a single day and counsel is generally able to schedule the deposition for a time convenient to all parties. Lead Counsel will prepare with the Lead Plaintiff prior to the deposition to assure that the Lead Plaintiff is familiar with the deposition process and is adequately prepared to respond to defendants' questions.

### 3. Class Certification

Rule 23 of the Federal Rules of Civil Procedure provides that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained." Class certification is an important procedural requirement that allows the Lead Plaintiff to maintain the action through trial on behalf of the Lead Plaintiff and all other similarly-harmed investors (the "Class"). Motions for class certification are typically filed several months after a court denies defendants' motions to dismiss.

A fundamental prerequisite to the maintenance of any class action is that there is an identifiable Class, that the Lead Plaintiff is a member of that Class, and that there are common issues of law or fact between Class members such that a Class action would be superior over any other available procedures for adjudicating the controversy.

Although class certification is a procedure distinct from the merits of the action, a court may nonetheless probe behind the pleadings before coming to rest on the certification issue. In making its class determination, the court will consider various prerequisites mandated by Rule 23, including: (i) numerosity of the parties; (ii) commonality of legal and factual issues; (iii) typicality of the claims and defenses of the class representative; and (iv) adequacy of representation. The party seeking certification bears the burden of establishing that all prerequisites are met.

Once the class is "certified," the court will direct that appropriate notice be made to the class members, generally through publication and individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; and (iv) that a class member may enter an appearance through counsel if the member so desires. Importantly, class members have the right to affirmatively opt-out of the class and to pursue a separate (but likely coordinated) action on their own behalf.

If a Class is not certified, each plaintiff is responsible for litigating its own individual claim in its own action. As such, defendants are highly motivated to defeat Lead Plaintiff's efforts to certify a Class.

#### 4. Trial

While securities class actions rarely go to trial, the possibility does exist. Since the passage of the PSLRA, less than fifteen (15) cases have gone to trial and reached a verdict. The purpose of a trial is to adjudicate contested issues of fact. In this regard, before the trial commences, judges may require Lead Counsel to draft a series of statements of fact that they believe will be established at trial. Defendants then indicate which of the proposed facts are admitted, or will not be contested, and which are disputed, specifying the nature of the disagreement, as well as drafting narrative statements of additional facts that they believe can be established. This process helps to narrow the factual issues in dispute.

Judges sometime place certain limits to avoid trials of excessive length, but without hampering counsel's ability to present their case or jeopardizing the fairness of the trial. Limits may be imposed in a variety of ways, including limiting the number of witnesses or exhibits to be offered on a particular issue or in the aggregate, controlling the length of examination and cross-examination of particular witnesses, limiting the total time allowed to each side for all direct and cross-examination, and narrowing issues by order or stipulation.

The Lead Plaintiff is not required to attend a trial if one were to occur, but may be required to appear and present limited testimony related to the investment in the defendant issuer. Kessler Topaz is one of a handful of law firms in the United States that has tried a securities fraud class lawsuit to verdict.

## IV. Litigating Securities Fraud Actions Outside of the United States

### A. Litigating in Non-U.S. Jurisdictions

In today's global world, investors are increasingly investing in securities that are traded on non-U.S. exchanges. Unfortunately, while more investing is occurring in jurisdictions outside the United States, the ability of shareholders to recover losses due to serious financial fraud related to their foreign securities has been severely limited. The U.S. Supreme Court forever changed the shareholder litigation landscape with its decision in *Morrison v. National Australia Bank* ("*Morrison*") in 2010. In the *Morrison* decision, the Supreme Court restricted the right of investors who purchased shares on a non-U.S. market to pursue a remedy in U.S. courts. The practical effect of this is that investors are now precluded from filing shareholder litigation (alleging violations of the U.S. securities laws) in U.S. courts against non-U.S. companies when the investor purchased shares on a non-U.S. exchange. The *Morrison* decision has also had a tremendous impact outside the U.S. Shareholders, no longer able to pursue legal recourse in the United States for high profile corporate scandals, are increasingly looking to pursue remedies in their home country or in the courts of the country where a corporation is domiciled or where the exchange is located.

The result is that more and more cases are being filed in more and more jurisdictions around the world. Sometimes multiple actions in competing forums are proposed or filed against a company for allegations stemming from the same events or facts. The result is that investors are left with a dizzying number of new countries, new laws, and new options to consider when trying recovering an investment loss.

### B. Factors to Consider When Deciding Whether to Litigate in a Non-U.S. Jurisdiction

Litigating outside of the U.S. is not without its share of challenges. The global litigation field is in constant flux as many jurisdictions are currently hearing multiparty shareholder litigation claims for the first time and debating implementation of new collective action procedural mechanisms. In those jurisdictions that have already adopted some form of group litigation procedure, the action often operates much differently than it does in the U.S. Aside from Canada, most non-U.S. jurisdictions do not allow a claimant to simply remain a passive member of the class. Instead, a claimant must opt-in or affirmatively join the litigation if they wish to recover any portion of a settlement or judgment. In addition to being aware of whether affirmative steps are required in order to recover, investors should consider the following factors when assessing a particular pending action:

- **The structure of the country/legal system:** The way a country is structured and the design of the legal system can impact how litigation will develop. Some countries, like Canada for example, are similar to the U.S. in that they are a federal system. In a federal system, the laws and application of those laws will sometimes differ depending on the province or state in which the action is being pursued. Other countries operate with a centralized government and the laws and application of the laws will be uniform throughout the country. Legal systems also vary around the world in terms of whether they are a common law system or a civil law system. In a common law system, case law has precedential value and the courts must typically base a judgment on the outcome of previous similar cases. In common law systems, lawyers are largely responsible for arguing the case before a judge or a jury and a judge's role is limited to presiding over the case and, in the case of a non-jury trial, rendering an opinion. In a civil law system, however, the judge often plays a much more active role in the litigation and previous cases do not normally have much precedential effect. Judges in civil law countries typically rely almost solely on legislation and regulations in determining the outcome of a particular case.

- **The costs and attorney fees that the investor may incur:** In many jurisdictions, attorneys are prohibited from representing clients on a contingent fee (in which the attorney only recovers a fee if the litigation is successful) basis. Claimants interested in participating in litigation may be required to pay certain costs and fees upfront or they may be required to sign a funding agreement with a third party litigation funder (where the third party will cover all the costs of litigation in exchange for a percentage of any recovery). Where a third party litigation funder is being utilized, it is important to conduct due diligence on the funder and the terms of the agreement. Make sure that the funder is sufficiently capitalized or has proper insurance. Additionally, some jurisdictions are "loser pays" systems, and if the claimants are unsuccessful in the litigation, they may be responsible for paying the attorney fees and costs incurred by the opposing party.

- **Whether the case will be a case of first impression:** Group litigation procedures and laws leading to private actions on the basis of securities law violations are relatively new in many jurisdictions outside of the U.S., and a particular case or action may be a case of first impression in that particular jurisdiction. When a case is a case of first impression, it can be more difficult to determine both the length of time for the case to reach a resolution and to evaluate the likelihood that an action will be successful.

- **The types of discovery, if any, that are allowed:** The types of evidence allowed to be presented and the procedures for gathering evidence vary greatly. Many countries do not allow for depositions, requests for production of documents, or other types of discovery. Some countries require that all documents and other evidence be produced to the court as a matter of course. Institutional investors need to be aware of the amount of time and energy they may need to expend in complying with the discovery procedures (or lack thereof) in non-U.S. jurisdictions.

- **Language differences:** When a jurisdiction operates in a different language than an institutional investor, it is often necessary to obtain translations of documents and interpreters to assist with any testimony at hearings or depositions. This can add to a legal proceeding's overall cost and it can lengthen the amount of time it takes for the action to reach a resolution.

- **Time differences:** When a jurisdiction is located in another time zone, communicating with local counsel, the court, and defendants can be difficult and time consuming. Moreover, institutional investors may be required to travel to the local jurisdiction.

## C. Overview of Litigation in Select Non-U.S. Jurisdictions

As a means of educating investors as to non-U.S. litigation, below we've provided a brief overview of the operation of group litigation in the following foreign jurisdictions: Australia, Belgium, Brazil, Canada, Denmark, France, Germany, Italy, Japan, Mexico, The Netherlands, Norway, The United Kingdom, South Africa, South Korea, Sweden and Taiwan. These are all jurisdictions where actions are currently pending or where we feel it is likely an action will be commenced in the near future.

### 1. Australia

Australia is now the number one location outside of North America where a corporation is most likely to find itself defending a class action. In 2012, Australia's securities class action settlements totaled more than one billion Australian dollars. In the first six months of 2014, a record 12 securities fraud class actions were proposed or filed. That rate of filing puts Australia on par with the United States in terms of number of securities class actions filed per year per capita.

Shareholder class action litigation in Australia is undergoing rapid change. More law firms and litigation funders are entering the market leading to increased competition. And new regulations and evolving case precedent are changing the way the cases are structured and ultimately proceed in court. Courts now appear more willing to implement Common Fund Orders (which provide that all class members are subject to paying a litigation funding fee and reimbursing funders for advanced expenses irrespective of whether they signed a funding agreement with the funder at the inception of the case). As a result, more and more actions are proceeding on an "open class" basis. That means more and more cases are affording investors an opportunity to simply register to participate in any settlement or judgment; a process similar to filing a claim in the U.S. except that the timing of the registration is different. Courts have also recently grappled with competing "open class" actions and have made determinations staying some of the competing actions or requiring one of the actions to proceed on a "closed class" basis. More details on these developments and what they mean for shareholder litigation in Australia appear below. The true shape of Australian class actions, however, is yet to be determined and there will likely be more court and legislative related documents over the coming months and years.

#### (a) Legal System Generally

Australia is a common law based Federal system. Australian trials, much like trials in the U.S., are conducted in an adversarial manner. Originally trials were heard by a judge and a jury, but in recent years, the jury trial has eroded.

### i. Discovery

Australian civil procedure allows for pretrial documentary discovery but does not allow for pretrial depositions. Most Australian courts favor a category-based approach to discovery in which the parties will exchange lists that set out the documents each party believes relevant to the legal case. The lists are filed in court and the opposing party is then allowed to inspect the other party's list. Discovery may be sought from the defendants and the representative plaintiff in a representative proceeding, but authorities disagree as to whether and when it is appropriate to order discovery against group members. Group members may be required to provide trade data and to respond to inquiries confirming the accuracy of the trade data, but they are not likely to be required to provide additional discovery or to attend hearings or review submissions. Most of those discovery obligations are limited to the representative in plaintiff – especially in an open-class proceeding.

### ii. Costs of litigation and attorney fees

Australian attorneys are prohibited from representing clients on a contingent fee basis (although there is currently an ongoing debate as to whether this restriction should be lifted), but overall the risks to investors in participating in Australian representative proceedings are relatively minimal because of the use of third party funding. Third party funding is widely available and funders will make advance payments for all expenses (including attorneys' fees) in exchange for a reimbursement of the advanced costs and a fee (a percentage of the amount of any recovery) if the case is successful for the claimants. Australia is a "loser pays" system, and the court may require the losing party to pay the prevailing party's costs and attorneys' fees. Absent class members are not responsible for paying any of the defendant's costs if the defendant prevails in a class action and instead it is the representative claimant who bears the burden. Ultimately, the award of fees and costs is discretionary and the court may determine appropriate amounts and whether costs and fees should be awarded. Adverse cost liability is also frequently covered by the third party litigation funder.

As discussed in more detail below, the lack of contingent fees and the risk of being required to pay defendant's costs if litigation is unsuccessful, has had a unique impact on collective actions in Australia. In the past, the necessity and use of third party litigation funding has influenced the way a class is defined so that only members who signed the litigation funding agreement would be considered class members. Recent Australian jurisprudence appears to be changing that and more and more cases are proceeding on an open class basis. Courts have become more inclined to issue "Common Fund Orders" which treat all would be class members the same and allow the funder to recovery reimbursement for costs and a litigation funding fee percentage (determined by the court to be reasonable) out of any recovery before proceeds are distributed to all the class members. Because of this, it is now possible for litigation funders to fund litigation on behalf of all group members, including those who do not sign a funding agreement, and receive compensation for its expenditures if the case is settled or decided in favor of the class.

## (b) Overview of the Australia's Securities Laws

Securities regulations fall under the following laws: 1) the Corporations Act 2001; 2) the Australian Securities and Investments Commission Act 2001 ("ASIC Act"); 3) the Foreign Acquisitions and Takeovers Act 1975; and 4) the regulations that accompany all the three acts. Shareholder action in Australia typically alleges violations of either or both the Corporations Act or the ASIC Act. The Corporations Act regulates the incorporation and behavior of companies, and it is the main statute responsible for financial products (e.g. securities) and the provision of financial services. Civil actions can be brought by investors alleging that a corporation committed a breach of the Corporation

Act.[17] The ASIC Act primarily governs the operations of the Australian Securities and Investment Commission, although it also contains provisions that govern the Corporations Act and some consumer protection laws (concerning financial services).[18] When a corporation provides materially misleading or deceptive statements in a disclosure document or it engages in conduct in relation to a financial product or service that is misleading or deceptive, it can be considered to have breached both the Corporations Act and the ASIC Act, and the corporation can be liable for damages. The Corporations Act also prohibits on insider trading and market manipulations. Civil actions alleging violations of the Corporations Act and/or the ASIC Act can be brought in federal court or in the courts of an Australian state or territory that has jurisdiction over the defendant.

### (c) Collective Securities Litigation in Australia

Representative proceedings, more commonly known as class actions, were introduced in Australia in 1992 through the enactment of Section IVA of the *Federal Court of Australia Act 1976*. A class action is commenced by a single representative where seven or more persons have a claim against the same person. A class action may be brought by an individual or a corporation who has sufficient interest to commence a proceeding. Australia allows class members to proceed anonymously, and neither the precise number of class members nor the identity of the members must be disclosed to the defendants or the public. To qualify as a class action, all would-be group members must have claims against all respondents. Additionally, the claims must arise out of the same, similar, or related circumstances, and they must give rise to at least one substantial common issue of law or fact.

Unlike jurisdictions such as the Netherlands, representative proceedings in Australia are not limited to pursuing injunctive or declaratory relief, and the representative plaintiff may seek damages on behalf of the class. It is irrelevant to the courts if the damages might need to be determined on an individual basis – the claims can still be brought through representative proceedings as long as the tests described above are met.

In some respects, the Australian class action system is more accommodating towards plaintiffs than the United States because:

- There is no initial certification procedure that requires the court to be satisfied that the proceedings are appropriately pursued as a class action. In fact, the burden is placed on the defendant to show that it is inappropriate for the claims to be pursued via class action. Instead, the claimant simply commences a class action by filing a complaint and specifying: 1) that they are doing so on both their own behalf and on the behalf of a defined group; and 2) the common issues of law and fact that will be decided on behalf of all group members.

- There is no requirement that common issues predominate over the individual issues.

Strictly speaking, all Australian representative proceedings are 'opt-out'. The critical question is whether the proceeding is limited to those who have executed a litigation funding agreement as of the date of commencement (a closed class) or, absent such a limiter, the proceeding is open to all that purchased during the relevant period (open class). Because Australian attorneys are prohibited from representing clients on a contingent fee basis and advancing any litigation costs, many Australian plaintiffs must rely on third party litigation funding. Until recently, when third party litigation funding was utilized, the case proceeded on a closed class basis and the class definition

[17] *See* § 10411 of Chapter 7.10 of the Corporations Act in particular which makes available private civil actions for those who suffer damages as a result of (1) false and misleading conduct; (2) improperly inducing somebody to deal; (3) dishonest conduct; or (4) misleading or deceptive conduct. Failing to abide by the continuous disclosure requirements outlined in Chapter 6CA of the Corporations Act also gives rise to civil liability.

[18] *See* § 12GF of the ASIC Act which provides private civil action for those injured by (1) unconscionable conduct; (2) misleading or deceptive conduct; or (3) false or misleading representations.

was written in a way that required those who wished to join in the litigation to register or opt-in in advance. This closed class mechanism developed as a way to guard against the "free rider problem" where absent class members who did not contribute to the costs of prosecuting the litigation or share in the risk of any adverse costs would benefit from any settlement or favorable judgment.

Recently, the courts addressed the "free rider problem" by implementing "common fund orders". This is causing a shift in the way Australian representative proceedings are structured. More cases are either being announced as open class cases from the inception or, if they begin as a closed class case, an application may be submitted or a judge may later order that the case be opened up. In October of 2016, the Full Court of the Federal Court of Australia issued a landmark decision in *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited* ("*Money Max").* In *Money Max*, the court granted an application for a common fund order which allowed a litigation funder to provide funding for a representative proceeding and obtain the contingent funders' fee from all class members if the litigation is decided in favor of the plaintiffs or resolves through a settlement. Since the *Money Max* decision, judges are increasingly opting to follow the common fund approach and an increasing number of actions are ultimately proceeding on an open class basis. There is, however, still some degree of uncertainty and accordingly many law firms and litigation funders still elect to conduct a book building process prior to filing a complaint in order to ensure that a case is economically viable and to protect their ability to proceed on either an open class or closed class basis depending on the amount of competition in the field and decisions rendered by the court.

When a case proceeds on an open class basis, eligible shareholders are bound by the results of the action unless they opt-out by a court-prescribed deadline. Unlike the U.S., there is no pre-determined point in time when a group member must be notified of their right to opt-out nor is there a predetermined amount of time in which they must opt-out. The timing of opt-out notices and the opt-out deadline is left to the judge's discretion and is often the subject of argument or negotiation between the parties.

Those who wish to remain members or a class and to share in any recovery if the action is successful, cannot merely sit back until the case resolves like they can with respect to U.S. class actions. In open class proceedings, the Australian Court typically imposes a requirement that group members "register" their claim before the case resolves. To that end, the court will usually issue a notice setting the registration deadline. This differs from the U.S. approach where class members submit their claims *after* a settlement is announced. Consequently, shareholders may end up registering for something that never leads to any recovery. It is also important to be mindful that the period of time between the court's announcement and the registration deadline could be short.

By commencing a class action, a claimant is essentially appointing itself as the representative applicant. The claim is prosecuted on that basis unless the court orders otherwise. Recently, the increased number of law firms and third party litigation funders has resulted in increased competition and multiple competing shareholder groups are are organized against the same defendant(s) regarding the same allegations. There is no clear statutory guidance on how a court should proceed when faced with multiple competing action. There are, however, a few potential outcomes, some of which have been adopted in recent cases:

- The lawyers for the competing groups may agree among themselves to joint case management agreements between themselves. In this case, all the class members who had signed funding agreements with one of the groups would be covered. It is unclear what would happen to any unfunded class members – they may be included (if the case proceeds as an open class) or they may be given an additional opportunity to become a funded class member (if the case remains closed).

- In a recent case against *Centro Properties Limited*, the court ordered the competing law firms to form a litigation committee to run the proceedings.
- The court may issue an order holding that none of the class actions can proceed on an open class basis and only allow all actions to go forward on behalf of the specific applicant and defined funded class members who joined the specific applicant. This might be similar to multiple opt out actions proceeding in the U.S.
- The court may dismiss one or more of the cases in favor of one or more of the competing cases continuing to move forward.
- The court may stay one or more of the proceedings pending the outcome of one action. This approach may be favored.
- The court may order one case to proceed on an open class basis and any of the other actions to proceed on a closed class basis on behalf of only those who directly joined the actions. In that case, the closed class actions would operate effectively like an opt-out action would in the U.S. The Australian court recently adopted this approach in *McKay Super Solutions Pty Limited (As Trustee for the McKay Super Solutions Fund) v. Bellamy's Australia Limited ("Bellamy").* In the *Bellamy* case, two competing law firm/litigation funder groups commenced open class actions against Bellamy. Both actions conducted a significant book build prior to commencing the class action and both contained a roughly equivalent size of institutional investor losses. The defendant asked the court to address the overlapping proceedings and the court decided that both cases could proceed concurrently but ordered one of the actions to proceed on a closed class basis (effectively making one of the actions an opt-out) on behalf of a defined group who had signed litigation funding agreements while allowing the other to proceed on an open class basis (although the definition of the open class group was amended in order to exclude those who were part of the opt-out group). In reaching its decision, the court reviewed the experience of the lawyers, the estimated costs of the group, the funding terms, the resources available to each group, the number of group members signed up for each group, and the ability of each funder to cover costs and any adverse cost order. The group selected to proceed on an open-class basis was selected because the court found the funder had a stronger financial position and could cover any adverse cost award mad in favor of a defendant on the basis of a large open class. The court, however, did not find the other litigation funder to be inadequate and it declined to order the other proceeding to be stayed because it felt it could not ignore the significant number of institutional investors who had elected to join that group. Instead the court also allowed that case to proceed but required it to proceed on a closed class basis on behalf of only those investors who had already signed a litigation funding agreement and retention documents to join that group.
- The court may elect to conduct a carriage motion or lead plaintiff motion and select only one of the law firms and plaintiffs to prosecute the action on behalf of all groups. In the recent case of *Perera v. GetSwift Limited* ("*GetSwift"*), the Australian Federal Court did just that. In *GetSwift,* there were three competing law firms/funder groups that initiated substantially similar proceedings on behalf of the same defined class in Australian Federal Court. The Judge overseeing the case ordered the parties to file their funding and legal cost proposals along with additional evidence in support of their application. The Judge then weighed the following:
    - the experience of the lawyers;
    - resources available to each firm;
    - state of preparation of each proceeding;
    - the litigation funders' resources available to fund applicant costs and any adverse costs;
    - the strength of the individual cases of the representative applicants;
    - the number of group members each group had retained;
    - each group's estimated costs and proposed litigation funding fee;
    - proposals from each group to reduce or control costs; and
    - the consequences of a permanent stay in each proceedings.

In making its determination, the court declined to give preference to the first to file. It also declined to award carriage on the basis of the number of group members that had signed retention documents and joined a particular action (although it should be noted that the group members were all retail investors and the court was not evaluating claims for competing support brought by institutional investors). Instead, the court gave weight to novel proposals from the law firms/funders to keep legal expenses reasonable and the factors outlined above and determined that in the interests of justice, efficiency, and not burdening class members with significant costs, two of the proceedings should be stayed while the one remaining case could proceed. In making its order, however, the court did not preclude the applicants in the two stayed proceedings from later moving to replace the applicant in the active proceedings from serving as the representative applicant if they felt that the representation was inadequate or the litigation funder's resources were lacking. This order was made independent of a common fund order and as of the time this guide was written, the court had yet to issue a common fund order that would apply to all group members.

A large amount of the uncertainty regarding how cases will proceed in Australia is due to the fact that there are large gaps in the legislative guidance and instead the judges are granted a great degree of discretion to make decisions. Under Section 33ZF of the *Federal Court of Australia Act*, judges have a significant amount of discretion to manage the cases that are before it and to make any order that the court thinks appropriate or necessary in order to promote justice. To that end, courts in recent years have issued numerous interlocutory judgments (such as *Money Max, Bellamy's,* and *GetSwift* decisions that are described briefly above) that provide some precedent for courts in navigating problems that different cases have presented in the past. Additionally, the Federal Court of Australia recently adopted a Practice Note on class actions that distilled some of the recent developments into a set of fundamental underlying principles that judges should strive for. Those underlying principles are: 1) that the interests of group members are of the utmost importance; 2) that the courts should adopt the most efficient course of action and reduce any duplication or overlap; 3) that monopolies should not be entrenched; 4) that the race to the court house should be discouraged in favor of careful case investigation and preparation; 5) that the informed choices of sophisticated group members should be respected but expensive book building processes avoided; and 6) that plaintiff lawyers and funders should be thought of as a joint commercial enterprise.

### 2. Belgium

Belgium is a federal state with a civil law legal system which draws largely on French civil procedural law. In theory, Belgian law is derived solely from legislation, however, case law and other secondary sources have become important in recent years. As a member of the European Union, Belgium must now also adhere to all EU directives.

Belgium has two official languages, Dutch and French, and the language of the court proceedings will depend upon the location of the court (e.g. if the court sits in the French speaking portion of the country, the proceedings will be in French).

Belgium is a "loser pays" system and the court will normally order the losing party to bear the costs of litigation. A winning party may also recover some compensation for their lawyer's fees, however, awarded compensation for lawyers' fees is never based on the actual amount of time the lawyer spent on the case or the actual fees that were charged. Instead the compensation is based on a defined level and factors such as the amount in controversy as well as the importance and nature of the case. Contingent fees are prohibited in Belgium and lawyers typically charge hourly rates for their services. In some rare instances lawyers will agree to flat rate fees or an hourly rate with a cap plus a success fee.

Like many other European countries, Belgium does not have a formal discovery process. Each party is responsible for proving the allegations made in their written pleadings by attaching evidence. Additionally, each party has a duty of good faith to produce evidence to the other party, even if it might be adverse to their position. If a party believes that the opposing party or a third party possesses evidence that is relevant to their case, they may solicit the production of that evidence and if the party fails to produce it they may seek the assistance of the court. There must be strong indications that the particular evidence exists and that it is in the party's possession. If the court orders the party or the third party to produce a document, there is no mechanism for the party or third party to either oppose or appeal the court's order. If either the party or the third party fails to comply with the court's order without a valid reason then the court may order them to pay damages and in cases of fraud, failure to comply with a production order can lead to the imposition of criminal sanctions.

Belgian legal doctrine generally prevents the initiation of class actions because natural or legal persons only have standing to initiate actions in which they have an existing, immediate, personal, and direct interest. Individuals lack standing to defend the interests of the general public and other similarly situated persons. The Belgian legislature, however, recently enacted legislation that now makes it possible for a class action to be commenced but only in instances where there is a dispute between consumers and a company. This class action law will enter into force in September 2014 but it will only apply to disputes that arise after its effective date.

Under the new legislation, class actions can be either opt-in or opt-out actions. In situations where physical damages are at stake, consumers must opt-in if they wish to participate in the action. Consumers who are not residents of Belgium must always opt-in, regardless of whether or not the case concerns physical damages. In all other instances, the court will decide whether a given proceeding will be opt-in or opt-out.

Courts in Brussels have exclusive jurisdiction over the new class actions. Once a claim is submitted, the court will determine whether a claim is admissible as a class action. Consumer class actions may only be utilized in disputes such as a company's breach of contract, the company's infringement of consumer protection rules, a company's manufacturing and selling of defective products, etc. To proceed as a class action, the court must determine that a class action is more appropriate than an individual action and there must be "collective damages" or damages that arise from common causes and common factual and legal questions. If the case is admissible as a class action, the parties must first undergo mandatory negotiations and if no agreement is reached then the proceedings will continue. If an agreement is reached then the court will review and approve the settlement.

A class can only be represented by either the Federal ombudsman or organizations that are dedicated to protecting the rights and interests of consumers and that are either represented in the Council for Consumption, recognized by the Minister of Economic Affairs, or accredited by the Minister. To be recognized or accredited, an organization must have existed for at least three years so no ad hoc organizations may be created for the purpose of commencing litigation.

For those disputes not involving consumers, it is not possible to initiate a class action but it is possible to litigate mass harms claims in one of four other ways: joinder of claims and claims intervention, party representation, statutory collective actions, and by piggybacking on criminal cases.

### (a) Joinder of Claims and Claims Intervention

Under the Belgian Judicial Code and Civil Code, two or more claims may be filed together in one writ of summons when they are connected. Claims are considered connected when they should be tried together in order to prevent contradictory decisions. Joinder of claims does not allow a case to proceed on a representative basis and instead each victim must institute proceedings individually. In complex actions, coordinating litigation can become quite cumbersome.

The Belgian Judicial and Civil Code also provides third parties with the ability to intervene in an already pending proceeding. In order to bring a claim in intervention, a third party may either petition to join or file a writ of summons. Third parties are allowed to intervene and can introduce their own claim against either the plaintiff or defendant as long as the intervention will not cause undue delay.

### (b) Party Representation

Party representation is the most frequently used technique for dealing with mass harms and has been utilized most frequently in high-profile minority shareholder lawsuits. Representative actions are opt-in proceedings and they have no binding effect on those who do not choose to join the action. Although a person only has standing in Belgium when they have a personal interest in the matter, a proxy or representative may represent other parties in litigation as long as she received an explicit agency agreement from each individual group member. Only those group members who provided a proxy authorization will be represented in court and considered as a party to the proceedings. Claimants must be identified in advance of the commencement of litigation, proxy agreements must be signed, and all claimants must agree to cooperate with one another.

### (c) Statutory Collective Actions

The Belgian legislature, in response to recent EU directives, has adopted several laws which allow for statutory collective actions for the benefit of a group of persons. Private or public organizations and public interest groups may now bring a case to court on behalf of their members as long as the organization satisfies specific legal criteria (such as having legal personality and having a cause of action that overlaps with the mission or goals of the organization). For example, a professional bar association may bring an action to defend the interests of the bar association as a whole. In the absence of a general statutory business that allows organizations or public interest groups the power to initiate legal action, specific legislation is required.

Unlike representative actions, a statutory collective action does not require the express consent of members of the professional organization or public interest group. This is largely because a statutory collective action is a general interest action and the individuals involved are not identified or distinguished from the group. Given that a statutory collective interest is an action for the general interest and not for individual interests, monetary damages are generally unavailable. Available remedies include injunctions, preventative actions, and publication of the court decision in local newspapers or other media (as an accessory measure).

### (d) Piggyback Technique for Crime Victims

A unique aspect of Belgian criminal law is the procedural mechanism which allows victims to participate in the criminal legal proceedings. In fact, the victim becomes a formal party to the proceedings in the same manner that the public prosecutor and defendant are formal parties. Victims are also able to bring their civil claims during the criminal proceedings and after the criminal aspects of the case are decided, the judge can then rule upon the civil claims. This allows the victim to utilize the evidence presented by the public prosecutor and the only burden of proof she has is to prove damages and causation.

In cases with multiple claimants, this procedure can be advantageous because it can serve as a *de facto* issue class action on the issue of liability. In fact, many group cases in Belgium utilize a combination of the piggyback technique and representative actions. The main disadvantage to this system is the same as in the representative action: parties must individually appoint the proxy to act on their behalf so the action remains essentially an opt-in action. An additional disadvantage is the fact that criminal proceedings can be quite lengthy and the victim/claimant does not have much control over the scheduling of the proceedings or the presentation of evidence on criminal liability.

### 3. Brazil

Historically, minority shareholders rarely have brought actions against an issuing company in Brazil in order to seek a recovery based upon allegations of fraud or abuse. Recent large scale corporate frauds, however, have led investors to explore the mechanisms Brazil has in place for pursuing redress. The advent of mandatory arbitration provision applicable to many of Brazil's largest companies has complicated the litigation environment to some extent. In addition to forum issues, investors pursuing redress in Brazil face challenges in convincing the courts and arbitral tribunals that public companies are liable for shareholder losses under Brazil's statutory provisions.

#### (a) Legal System Generally

Brazil is civil law country, however, unlike a number of other civil law systems, it is adversarial instead of inquisitorial. Parties and their lawyers must present their arguments and evidence and the judges decide cases based solely on the information and evidence presented to them. There are no jury trials in Brazil. As a civil law country, Brazilian law is based on extensive statutes and regulations. Litigation, for example, is governed by comprehensive procedures that are outlined in the Civil Procedure Code.

Brazil is a federal system with both federal and state courts. For cases in which the federal government has a relevant interest, disputes over rights of indigenous peoples, and crimes concerning federal property or services or crimes where there is an international concern, the federal courts have jurisdiction and the lower federal courts are the courts of first instance. For all other cases, including large commercial disputes, the lower state courts are the courts of first instance. There are also some states that have specialized courts that deal with commercial matters, intellectual property, bankruptcy, or lawsuits related to arbitration. Appeals of lower state court decisions are heard by state appellate courts and the state appellate court has the final say on state law cases. Appeals of lower federal court decisions are heard by the federal appellate court. On appeal (to either the state or federal appellate court) a panel of three judges reviews the case on a de novo basis. Federal appellate court decisions can be appealed one more time to one of Brazil's highest courts: either the Supreme Federal Tribunal ("STF"), which largely reviews constitutional challenges, or the Superior Tribunal de Justiça ("STJ") which is the final arbiter or all federal non-constitutional issues.

Arbitration has thrived in Brazil since the country initially adopted its Arbitration Act in 1996. Although it was initially uncertain whether the Arbitration Act was constitutional, in 2001 the Brazilian STF upheld its constitutionality and since that time arbitration has been widely used in large commercial disputes. As discussed below in section (c), arbitration law expanded to include shareholder disputes in 2001 when Brazil amended its corporation law to allow corporations to enact mandatory arbitration provisions in their bylaws and the Brazilian stock exchange (the "BM&F BOVESPA") created the Câmara de Arbitragem do Mercado ("Market Arbitration Chamber" or "MAC") to arbitrate shareholder disputes. Over the last several years, a large and ever increasing number of Brazil's largest and most prestigious companies have included mandatory arbitration provisions in their corporate charters/bylaws.

#### (b) Collective Actions in Brazil

Class actions are available for the protection of any diffuse or collective and homogenous individual rights. Class actions are primarily governed by Class Action Law and the Consumer Protection Code. The Consumer Protection Code established procedural rules for class actions on consumer law and those provisions have now been made applicable to all class actions. Class actions can be filed before either state or federal courts. Commencing the action requires that a lawsuit be filed by an entity that has standing to file class actions under the Class Action Law. Those entities include the 1) Federal Union (Brazilian federal government), states or municipalities, 2) public companies, foundations or mixed capital corporations, 3) the Public Prosecutor's Office or the Public Defender's Office, 4) Civil associations that have existed for at least a year and whose purpose includes defending the interests for which they have commenced a class action. Under the new Civil Code of Procedure, a judge can now notify one of those entities and refer a matter for a class action when multiple individual cases involving the same facts or legal issues have been filed.

Under the Brazilian model, there is a two-step process where the class can establish liability on a class-wide basis, but then damages must be established individually in a second follow-on proceeding. Once a decision is issued in favor of the class claimant, each individual who constituted a represented class member can file a damage action for the damages they suffered. If an individual commences litigation before a class action on the same issue is filed, the individual will not benefit from the resolution of the class case unless she requests that her lawsuit be stayed within thirty days of the notice of the class action being published in the record of her individual case. There is no class certification process and because only qualified entities can pursue a class action, there is no lead plaintiff and no need for a process to appoint one.

When a class action is commenced for homogenous individual rights, any decision made by the court will be binding on all members of the represented class only if the claim is successful. If the claim is unsuccessful, each individual member of the class could still commence their own litigation to establish liability and damages. Similarly, any decision dismissing the case with prejudice does not prohibit individual class members from commencing their own lawsuits.

The class action law pertaining to investor protection was enacted in 1989, but one study conducted suggested that only nine collective shareholder lawsuits had been filed as of 2007. The small number of cases pursued could be due to: 1) a lack of efficient discovery mechanisms and the fact that most investor disputes require evidence that is usually in the possession of the company or its management, 2) certain procedural obstacles, and 3) the "loser pays" regime in Brazil that requires the losing party to pay the winning party's attorney fees in an amount between 10 and 20 percent of the claimed damages plus a reimbursement of the litigation costs. The Brazilian courts have also been criticized for their slowness and the lack of expertise regarding corporate and securities laws.

### (c) Securities Arbitration in Brazil

Brazil passed the Arbitration Act in 1996 that allowed for the arbitration of certain disputes. The constitutionality of the Arbitration Act was upheld by the Supreme Federal Tribunal in 2001. Brazilian corporation law was amended in 2001 to allow corporations to enact mandatory arbitration provisions in their bylaws. Brazilian law provides that a "corporation's bylaws may establish that any disputes between the shareholders and the corporation, or between the majority shareholders and the minority shareholders may be resolved by arbitration under the terms specified by it." Subsequent to the amendment, over 160 Brazilian companies have adopted mandatory arbitration bylaws. Leading Brazilian scholars have opined that shareholders manifest their consent to such arbitration bylaws by purchasing shares of the company on a date after the bylaw was enacted. 2001 also saw the creation of the Câmara de Arbitragem do Mercado ("Market Arbitration Chamber" or "MAC") by the Brazilian stock exchange (the "BM&F BOVESPA"). The idea behind the MAC was to create another corporate governance tool and for listed companies to offer their shareholders a specialized and quick forum for the settlement of disputes, particularly those disputes that arise from the application of corporate and capital markets laws. Now, because of the perceived superiority of arbitration in resolving shareholder disputes, the BM&F BOVESPA has made submitting to arbitration a condition for an issuer's admission to premium listing classes.

According to the MAC's rules, a party that wishes to initiate an arbitration must file a Request for Arbitration with the MAC's Secretary-General. The Request for Arbitration must detail: 1) the name, address and other particulars of the parties who are to participate in the proceeding; 2) an email address for receiving correspondence relating to the proceedings; 3) a summary of the facts giving rise to the dispute; 4) the Complaint(s); 5) the amount of estimated damages; 6) the suggested venue, governing law, and language; and 7) an appointment of an arbitrator if the parties previously agreed on the composition of the panel or if no provision on this subject is contained in the arbitration agreement then a proposal regarding the number of arbitrators should be included. Along with the Request for Arbitration, the Claimant must attach the arbitration agreement and a receipt demonstrating that the initial fees were paid to the MAC.

Once the Secretary-General receives the Request for Arbitration, he will review it and if anything is missing from the application he will require the Claimant to supply the missing item within five days. Failure to provide the requested information will result in a dismissal of the action without prejudice. If the Request for Arbitration is complete, then the Secretary-General will send the Respondent party a copy of the Request for Arbitration and instruct it to submit within fifteen days an Answer that contains the following: 1) a preliminary response to the Claimant's account of the facts; 2) any objections to the commencement of arbitration proceedings; 3) an answer to the Claimant's proposal on the number of arbitrators or the Claimant's chosen arbitrator; 4) any comments on the venue, governing law, and language for the proceedings; 5) postal and email addresses; and 6) if applicable, the details of any counterclaims and the amount of estimated damages. If the Respondent fails to answer, the proceedings can still proceed normally but no default arbitral award for failure to appear shall be made.

Arbitrations can be conducted by either a sole arbitrator or a panel of three arbitrators ("Tribunal"). If the parties opt for a sole arbitrator then they must mutually agree on the arbitrator to appoint and if they fail to reach an agreement then the President of the MAC shall appoint one. If the parties select a Tribunal, then each party can name one arbitrator and the two party-selected arbitrators will appoint the third. If either party fails to appoint an arbitrator at the required time, then the President of the MAC will appoint one instead. A party may also challenge a party-selected arbitrator for certain limited grounds. If a challenge is raised, the President of the MAC will decide the challenge and either confirm the arbitrator appointment or instruct the appointing party to make a new appointment. While in theory such appointments occur relatively quickly, in practice, the process of appointing an arbitrator or Tribunal can take a year or more.

Once the sole arbitrator or Tribunal is appointed and confirmed, the Tribunal will work with the parties and draft the Terms of Reference. The Terms of Reference is a document that will govern the scope of and outline the applicable procedures for the arbitration. Each party will provide draft terms and after the drafts are circulated the parties will be summoned to a hearing where the terms will be finalized and the parties and arbitrators will then sign the complete Terms of Reference. Any failure by any of the parties to sign the Terms of Reference will not prevent the proceedings from moving forward. In practice, this provision is designed to prevent defendants who fail to appear in the arbitration proceedings from holding up the progress of the arbitration by failing to sign. It is uncertain what impact it would have on the case if a claimant disagreed with the final version of the Terms of Reference and declined to sign. Some Brazilian lawyers suggest that the proceedings would still move forward while others believe that the proceedings would be discontinued.

At the Terms of Reference hearing, the Tribunal shall seek a settlement of the dispute by agreement between the parties. If a settlement can be negotiated then the settlement agreement reached will be reduced to writing.

Once the Terms of Reference have been signed, the Tribunal and the parties will establish a provisional timetable for the exchange of briefs and evidence and for the commencement of any oral examination of witnesses. Once all evidence has been heard, the Tribunal will allow the parties time to present closing arguments. The Tribunal must then issue an award within sixty days after the closing arguments. The Chair of the Tribunal may extend the time for decision by thirty days. The decision is by majority vote and any dissenter is entitled to record a separate opinion. If no majority agreement is reached, the vote of the Chair shall be decisive.

There are many advantages of arbitration compared to litigating in Brazilian court. For example, as discussed above, the Brazilian Code of Civil Procedure contains a "loser-pays" provision, requiring the losing party to potentially pay between 10% and 20% of the amount of claimed damages to the opposing party's attorneys. That provision applies in court proceedings, but not necessarily in MAC arbitrations, leaving the parties to the arbitration free to agree that there will be no fee-shifting at all. That decision would be made at the outset, when negotiating the "terms of reference" for the arbitration.

Other advantages of arbitration are the lower costs of starting the arbitration and the fact that arbitration proceedings are typically confidential, so that investors do not need to worry about publicity. Arbitration in Brazil also offers specialized arbitrators and speedy proceedings; the average duration is only 15 months, although in a complex arbitration it can last 24 to 36 months. Further, unlike court cases, in a MAC arbitration the plaintiffs will have a direct influence on the composition of the panel by selecting one arbitrator of their choice, who will then jointly with the defendants' choice select the third arbitrator on the panel. The Brazilian Arbitration Act does not require arbitrators to be Brazilian nationals or lawyers, although they should be fluent in Portuguese because the proceedings will probably be conducted in Portuguese (with real-time translation into English most likely available). The arbitral award will be enforceable without the need for court recognition in Brazil, or in any country that is a signatory to the New York Convention.

According to the MAC, as of September 2018 the chamber has conducted a total of 116 proceedings. Of those, 65 have reached their conclusion and 51 are still in progress.

### (d) Other elements of litigation and arbitration in Brazil

#### i. Discovery

##### (1) Litigation

Brazil does not have a discovery system like that available in the United States. Generally speaking, in Brazilian litigation, each party must rely on their own evidence. The Civil Procedure Code places the burden of proof on the claimant to prove all its allegations and the facts that give rise to its claims and the respondent has the burden to prove facts in support of its defense. In consumer actions that arise under the Consumer Protection Code, burden of proof is shifted to the defendant. The Civil Procedure Code contains provisions that allow either party to request the disclosure of documents from the other party or from a third party. The request must detail as completely as possible the document or evidence that is requested, demonstrate the purpose of the evidence and set out the facts that relate to it, and indicate the grounds for belief that the evidence is in the control or possession of the other party. Once a request is made, the other party is granted five days to respond and their response must detail the reasons why the evidence cannot be disclosed. A judge will not allow a party to refuse to disclose evidence when 1) the party has a legal duty to disclose it, 2) the party mentioned the evidence in the proceedings, or 3) the evidence is common to both parties. Otherwise the judge has discretion to either order the production of the evidence or to deny the request. If a party fails to produce evidence or remains silent, then the facts stated by the party making the disclosure request are presumed to be true and correct or the judge can issue a search and seizure order. The Civil Procedure Code also contains provisions that allow judges discretionary power to control and manage litigation and among those powers is an ability to allocate the burden of proof for a given issue to either party and to order either party to produce evidence.

#### (2) Arbitration

Like litigation in Brazil, a downside of Brazilian arbitration is that it allows for only very limited formal document discovery. However, the arbitral tribunal appointed to oversee the case can take on an active role in compelling the production of evidence it deems necessary, either at a party's request or on its own motion. Thus, a panel may take parties' statements, hear witnesses, and determine the production of expert investigations and other evidence deemed necessary. It may also grant interim measures to compel witnesses to attend the hearing, or to compel a party to produce documents. And as a final resort, if a party fails to produce requested evidence, the tribunal can apply an adverse inference to that party. Fees required to be paid to the arbitrators are calculated on an hourly basis.

### ii. Costs of Litigation or arbitration and attorney fees

#### (1) Litigation

Parties to litigation must pay legal fees for their attorney(s) but those fees can be charged as a contingency fee basis, hourly, or some combination or hourly or flat fee plus a success fee. Litigation in Brazil can proceed quite slowly, but despite the slow pace there is a significant amount of work required on the bureaucratic process and legal fees charged on an hourly basis alone can become quite significant. Other costs that foreign claimants can expect to pay include the court fees, translations (all documents must be translated in Portuguese by an official translator and certified by the local Brazilian Consulate). The most significant cost that claimant(s) can potentially expect to incur are adverse party costs. Adverse costs are fees amounting to 10-20% of the value of the dispute that are paid by the losing party directly to the opposing party's lawyers. The claimant in a class action is exempt from paying for court fees, experts, and adverse awards on legal fees unless the case was commenced in bad faith.

If a claimant resides abroad and does not own real property in Brazil, the defendant can petition the court for a security deposit for costs and require the claimant to provide collateral to cover all court expenses and adverse costs fees in the event the case is not decided in their favor. If there is an applicable treaty between Brazil and the country where the claimant resides, the security for costs requirement could be waived.

#### (2) Arbitration

Fees for the Market Arbitration Chamber are set out in a schedule and based on the monetary value of the claims before it. Each party is required to pay the MAC a monthly fee for the duration of the proceedings. If the proceedings do not specify a monetary amount for the claim, the administrative fees will be charged at a minimum rate, but may need to be supplemented later once the value of the claims is determined. If any party fails to pay costs, the MAC may order the proceedings to halt until either party pays the outstanding fees. Fees and expenses for the MAC are to be borne in equal shares by the parties.

The parties can agree in the Terms of Reference to waive any adverse costs. Absent an explicit agreement to waive adverse costs, it is possible that adverse costs could be awarded to the prevailing party's attorneys according to the rules set out in the Brazilian Code of Civil Procedure. However, there is an open question in Brazil as to whether adverse costs are appropriate in arbitration. Many Brazilian attorneys, arbitrators, and legal scholars do not believe that the adverse costs outlined in the Civil Code of Procedure are applicable to arbitration. The Brazilian Arbitration Act does not contain express language concerning adverse costs like that found in the Brazilian Civil Code of Procedure. Instead, the Brazilian Arbitration Act provides only that "[t]he arbitral award shall decide on the parties' duties regarding costs and expenses for the arbitration, as well as on any amount resulting from bad faith conduct, if applicable, complying with the provisions of the arbitration agreement, if any." (Article 27 of Brazilian Arbitration Act).

#### (3) Third party funding

There are no restrictions or prohibitions on third party funding in Brazil. However, such funding mechanisms are relatively new and there is not a lot of competition in the market. There is virtually no existing market to obtain after-the-event insurance that could cover any adverse cost risk.

### (e) Laws Applicable to Shareholder Claims in Brazil

### A. The Brazilian Securities Law and Corporation Law

Brazil's securities market is regulated primarily by the Brazilian Securities Law and the Brazilian Corporation Law. The laws require full disclosure and transparency of information and issuers are required to periodically provide information to the Brazilian Securities and Exchange Commission ("CVM") for the purpose of informing both the CVM and the market as a whole of the business and financial status of the issuer. The CVM has the authority to investigate and punish any violations of the Securities and Corporation Law as well as any fraudulent practices that have caused damage to any person. Any breach of the Securities Law of the Corporation Law can result in administrative penalties and criminal charges (that must then be adjudicated in the courts). But there is an open question as to whether civil liabilities can be pursued by a party that is damaged due to another party's breaches of the securities laws.

#### (1) Liability of corporate officers

Under the Corporation Law, corporate officers are subject to duties of diligence and of loyalty to the corporation and they are prohibited from misusing the powers of their office. Officers are also subject to a conflict-of-interest law prohibiting participation in any corporate transaction in which they have an interest that conflicts with the corporation's interest. In addition, officers of an issuing corporation are responsible for the accuracy of information submitted to the CVM. Officers are personally liable to the corporation for losses caused by actions they take beyond the scope of their authority with wrongful or knowing intent or that contravene the law or the corporation's bylaws. Moreover, an officer who is aware of misconduct by other officers with respect to their duties under the bylaws, but fails to make this known to the general meeting of shareholders, is jointly and severally liable with those other officers for that misconduct. A shareholder asserting claims against the directors or officers for misstatements must plead: (i) damages, (ii) that the defendants negligently failed to disclose all material information, and (iii) causation.

Managers, however, are exempt from liability in instances where shareholders have approved the management's accounts and financial statements unless there was fraud, error, or wrongful intent.

The company is entitled to sue its managers and seek compensation for illegal acts conducted by the manager. Under certain circumstances, shareholders can initiate derivative litigation on behalf of the company. Derivative litigation can be pursued when the shareholders authorize action at the annual general meeting but management fails to act pursuant to the authorization. Derivative litigation can also be pursued when the shareholders collectively do not approve litigation at the annual general meeting, but shareholders representing at least 5% of the stock can file. However, this type of litigation is rare in large part because of the adverse cost risk that a shareholder would be incurring in pursuing a derivative suit.

Shareholders can also file litigation directly against the management of a company for damages they sustained. The shareholders cannot file direct litigation if they only sustained damages indirectly. For example, a shareholder could have their own claim for damages due to misstatements or omissions made by management in certain required disclosure documents. The shareholder could pursue those damages in court. However, if the management or others cause damage to the company (and thereby indirectly harm the shareholder) then the shareholders cannot pursue action for those damages.

### (2) Liability of the corporation

As mentioned above, publicly listed corporations in Brazil must register with the CVM. The CVM is tasked with regulating capital markets in accordance with the Corporation Law and the Securities Law. To make a public offering of shares, a corporation must file with the CVM a prospectus including any relevant fact concerning the issuer. Publicly held corporations must also file and make available annual and quarterly information reports, which must report any relevant events subsequent to the prior report. Moreover, the officers of a publicly held corporation have a duty to immediately make public any new material fact. The CVM defines “material fact” to include any act or event related to the corporation’s business that may have a substantial bearing on, inter alia, an investor’s decision to trade in the securities.

### (3) Liability of controlling shareholder

The Brazilian Corporations Law contains provisions that outline the liability of a corporation’s controlling shareholder when they violate the duties required of it by the law. More specifically, the controlling shareholder owes fiduciary duties to its minority shareholders and can potentially be held liable for abusing its controlling power.

Minority shareholders are entitled to file a lawsuit on behalf of the controlling shareholder to recover damages without first obtaining a vote at the annual general meeting. Any shareholder may pursue this action as long as they pay the court costs, attorney fees, and any resultant adverse costs. When the minority shareholder obtains a favorable ruling for the company, the law provides that the controlling shareholder must not only pay the award to the company but also reimburse the shareholder for litigation expenses. Furthermore, the controlling shareholder must pay the minority shareholder who brought the action 5% of the total amount of rewarded compensation.

### (4) Liability under the Brazilian Civil Code

It is a subject of debate in Brazil as to whether a company can be held liable for shareholder losses. Some Brazilian law experts suggest that they cannot, because of the existence of Brazil’s Securities and Corporate laws, which specifically regulate securities markets and lack anti-fraud provisions equivalent to those in the Civil Code. Those experts argue that, in a civil law jurisdiction such as Brazil, when the law includes both a general and a specific provision, the specific provision, such as the Securities and Corporation Law provisions will usually control.

On the other hand, other Brazilian lawyers argue that a Civil Code claim is not preempted by the Securities and Corporation Laws. They believe a shareholder could assert a Civil Code claim against a corporation by demonstrating (i) that the corporation violated its rights, (ii) injury, and (iii) causation. These lawyers believe that the predicate violation of the shareholder’s rights could take the form of a violation of a specific obligation set forth in the Brazilian Corporation or Securities Laws, or conduct not expressly addressed in those laws, such as general fraud. They also point out that the provisions of the Brazilian Corporation Law do not preclude application of general liability rules set out in the Brazilian Civil Code.

The Brazilian Civil Code provides a general cause of action for damages to persons injured by the intentional or negligent acts of another. Specifically, Article 186 states (in translation), that a person "commits an illicit act" when he "by voluntary act or omissions, negligence or imprudence, violates rights and causes damages to another." Article 927 provides for the recovery of damages caused by a violation of Article 186.

#### (5) Applicable Statue of Limitations

Lawsuits against management or the controlling shareholders for acts with wrongful intent or breach of the law or company's bylaws must be brought within three years from the date of publication of the minutes of the shareholders general meeting that approved the balance sheet in which the violation occurred. Lawsuits filed by shareholders against the Company must be filed within three years, but it is unclear when that statute of limitations begins to run. Most commentators argue, however, that the statute of limitations begin to run on the date upon which the shareholder became aware of the damages suffered.

### 4. Canada

Outside of the United States and Australia, Canada is the most frequently used forum for class actions. To date, only a handful of class actions have actually proceeded to trial because virtually all cases that have succeeded past the class certification stage have been settled by defendants. Canadian class actions frequently follow after a similar class action has been filed in the United States and the outcome of a case in the United States will sometimes influence the outcome of the subsequent class action in Canada.

Canada's legal system consists of both provincial and federal courts. With the exception of Quebec, which is a civil law jurisdiction, all Canadian provinces and territories are common law jurisdictions. Each province and territory within Canada has its own set of rules governing civil procedure and there are variations as to the timing and procedure of an action. Trials in Canada may be heard by a judge alone or by a judge and a jury, although jury trials are becoming rare in civil cases and have been completely abolished in Quebec.

Canada is a "loser pays" jurisdiction, although the court has discretion. The rules governing the recovery of fees and costs vary by province. Attorneys are generally permitted to represent clients on the basis of contingency fees, however, the fee must be reasonable, the agreement in writing, and the agreement must be approved by the court.

All provinces in Canada, except Prince Edward Island and the territories, allow for representative actions. Additionally, the Federal Court of Canada allows for representative actions permitting an individual to commence a proceeding on behalf of a group of persons with similar claims. There are differences within each province. For example, in Ontario, Quebec, Manitoba, Nova Scotia, Saskatchewan, and the Federal Court, potential class members are required to opt out regardless of their place of residence. However, in Alberta, British Columbia, New Brunswick, and Newfoundland, there is a distinction between resident and nonresident class members. Resident members may opt out of the class proceedings but non-residents are not automatically included and instead must opt-in to the action.

Canadian class action statutes were originally based on Rule 23 of the United States Federal Rules of Civil Procedure but there are some stark differences. Canadian class actions require neither "typicality" nor "predominance" of common issues over individual issues. There is also no requirement of "numerosity" and in provinces like British Colombia; for example, a class action may consist of merely "two or more" class members. Based on these differences, there is a consensus that the standard for class certification is much lower in Canada than in the United States.

The procedure for appointing a class representative varies by province. In general Canadian courts have identified the following qualities as being ideal for representative plaintiffs:

- Someone who has sufficient knowledge of the litigation and is sophisticated enough to instruct counsel and make informed decisions.
- Someone who has a real interest in the action.
- Someone who does not have idiosyncrasies that would impact his ability to represent the interests of the class.

Discovery procedures generally differ among the provinces. Aside from Quebec, all provinces require parties to disclose the existence of all relevant documents that are in their possession, power, or control and assert whether they claim the particular document is privileged. Upon request by opposing counsel, a party must produce all relevant non-privileged documents. In class actions, most discovery occurs after the class certification stage. Prior to class certification discovery is limited to production of only those documents that are relevant to certification. In class proceedings only the class representatives are required to produce documents and sit for depositions. In Quebec, there is no general duty to disclose and parties only disclose documents upon which they intend to base their arguments. A party seeking documents from the other party must specifically identify and request a particular document. There is no obligation in Quebec for a party to disclose the existence of a document, even if it is relevant, unless it has been specifically requested.

Securities class actions generally proceed under common law theories of either negligent/fraudulent misrepresentation or of negligence/conspiracy in respect of the issuance or sale of the securities to the public. There is potential for shareholders to pursue actions for securities purchased on both the primary and secondary market. To proceed under a common law theory of negligent misrepresentation, each plaintiff has to establish individual reliance. But recent amendments to the securities laws in some provinces have created statutory causes of action related to securities purchased on the primary market where each class member is deemed to have relied on the misrepresentation and accordingly those causes of action have effectively removed the individual reliance requirement. Shareholders can now pursue actions based on alleged misrepresentations made in publicly disclosed documents or oral statements and the failure by a corporation to make timely corrective disclosures. For cases concerning negligent misrepresentation in relation to shares purchased on the secondary market, there is conflicting case law as to whether claimants must prove actual individual reliance or whether a class can proceed under an "efficient market" theory in order to establish that, by purchasing securities, the plaintiffs had relied upon the alleged misrepresentations. Unfortunately, until the appellate court is given an opportunity to weigh in, there will likely continue to be conflicting opinions as to what is required.

Under the Ontario Securities Act, plaintiffs must seek leave to proceed as a class action. In order to obtain leave, the plaintiffs must show: 1) that the action is brought in good faith (which is satisfied by showing that the plaintiffs brought the action with an honest belief that they have an arguable claim); and 2) that there is a reasonable possibility (something more than a de minimus possibility or chance) that the action will be resolved in plaintiffs' favor at trial.

Secondary market claims proceeding under a statutory cause of action are subject to strict damage caps and specific formula for calculating damages. Those limitations, however, have not yet been reviewed by Canadian courts.

In Quebec, general principles of civil law allow plaintiffs to pursue securities claims alleging misrepresentation. The plaintiff must show that he relied on the misrepresentation and that the reliance resulted in damages. As in Ontario, the law for secondary market liability is unsettled in regards to whether reliance must be demonstrated on an individual basis and whether that requirement is a bar to proceeding as a class action. The law may never need to be settled, however, because in 2007 Quebec adopted the Quebec Securities Act. Investors may pursue a claim under the Quebec Securities Act without establishing that they relied on the misrepresentation and damages are presumed to flow from the misrepresentation. The Quebec Securities Act has not yet been applied by the courts in a class action context.

In Canada, just as in the United States, institutional investors are considered uniquely qualified to act as the representative plaintiff in securities fraud class actions. In *Smith v. Sino-Forest Corporation*, a carriage motion to determine which of four rival law firms and four proposed Ontario class, actions arising against Sino-Forest, would proceed. The court rejected the arguments made by Mr. Smith (an individual investor who was seeking to serve as the class representative after losing approximately half of his investment value) to disqualify the institutional investors from serving as class representatives. The court ultimately decided that the case *Labourers v. Sino-Forest* would proceed and that institutional investors would serve as the class representative because:

- The expertise of the institutional investor could lead to a greater likelihood of success for the entire class.
- The expertise of the institutional investor makes it better able to manage class counsel.
- One goal of the *Class Proceedings Act of 1992* is judicial economy and institutional investors better promote that goal. The court explained that in its view, institutional investors typically have sufficient resources to pursue litigation on their own. This means that the institutional investor is more likely than an individual to opt out of a class action if it is not serving in a representative capacity. However, if an institutional investor serves as a representative party then it is unable to pursue an opt-out action solely on its own behalf and judicial economy is better preserved.
- Institutional investors are already essentially serving in a representative capacity on behalf of their individual members that number in the thousands.

### 5. Denmark

Class actions are still relatively rare in Denmark even though a class action mechanism has existed since 2008. While only a small number of cases have been pursued as class actions so far, most of those cases have concerned securities. A number of the securities class cases are still pending, including, a 2011 action, filed by 87 international institutional investors against Vestas Wind Systems A/S alleging it overstated its 2009 profits and issued unrealistic guidance for 2010 revenues and profits.

Three more recent cases, filed against OW Bunker A/S in 2017, will have a significant impact on future prospectus liability litigation because they will test the potential liability of investment banks involved with a public offering and potentially help flesh out the legal requirements related to the prospectus and the pre-public offering process. The three pending actions against OW Bunker are prospectus liability actions alleging that the company's prospectus provided incorrect, incomplete, and misleading information and that it omitted other material information from the prospectus. OW Bunker is now bankrupt, but the cases have been filed against the bankruptcy estate, the board of directors, the former management, the ultimate owner and private equity fund, and two of the four banks involved in organizing the Initial Public Offering ("IPO"). OW Bunker had an IPO in March 2014, and at the time of the IPO its market capitalization was approximately 5.3 billion Danish Kroner (approximately $981.7 based on the average exchange rate in March 2014), but by November of 2014, the company filed for bankruptcy after it sustained losses of approximately $150 million in risk management losses and $125 million in credit losses due to serious fraud conducted by its Singapore-based subsidiary, as well as problems with its internal risk management.

### (a) Legal System Generally

Denmark is a civil law country. Courts rely most heavily on the Constitutional Act, statutes, and regulations when deciding cases. Case precedent and customary law also may have some bearing on court decisions. The courts in Denmark include: a Supreme Court, two High Courts, 24 district/county courts, specialized courts, including the Copenhagen Maritime and Commercial Court and the Land Registration Court, the courts of the Faroe Islands and Greenland, the Appeals Permission Board (which considers petitions for leave to appeal civil and criminal cases to both the High Courts and the Supreme Court), the Danish Judicial Appointments Council, and the Danish Court Administration (which ensures the proper administration of all the courts). There is no right to a jury in a civil case, but lay people participate as a jury of sorts and decide criminal cases with the judge(s).

Civil cases at the district court level (which serve as the courts with original jurisdiction to hear most civil, criminal, probate, bankruptcy and enforcement disputes) are typically tried by one judge. In more complex cases, however, a panel of three judges may hear the case. The High Courts function as the first-level appellate courts for district court decisions. The High Courts also have original jurisdiction over regional disputes. Any district court decision can be appealed to the High Courts as long as the value of the dispute exceeds DKK 20,000. If a case has a value of less than DKK 20,000, a decision can only be appealed with permission of the Appeals Permission Board. The High Courts typically sit in panels of three judges, but there are times that more judges may sit on a panel. The Supreme Court is the final level of appeal, but a decision may only be appealed to the Supreme Court if the Appeals Permission Board grants leave. As a general rule, a case can only be appealed once. Cases that begin in a district court are rarely granted leave for a third level appeal to the Supreme Court unless the case is a test case and will have implications for other matters or is of special interest to the public.

#### i. Discovery

Denmark does not have a formal discovery process like the United States. There is no duty on a party to produce documents or other evidence and there are no pretrial depositions. Parties must provide the evidence on which they intend to rely. Similarly, there are no depositions and parties present witnesses that can testify in support of their case. There is also a limited possibility for one party to submit a motion to request the other party or a third party to submit particular documents as long as the request is relevant to the proceedings. If a party does not comply with the court's order to provide documents, then the court may interpret the noncompliance in the light most favorable to the requesting party.

#### ii. Costs of litigation and attorney fees

When pursuing litigation in Denmark, plaintiffs can expect to pay court fees, expenses for witnesses, experts, and translations, and attorney fees. Additionally, Denmark is a "loser pays" system and the costs that are awarded to the prevailing party are usually a standard value based on the value of the claim that was made. When a result is not clear cut, courts will typically not award the prevailing party all their costs and fees. If a plaintiff is not a citizen of a member state of the European Union, the defendant can require the plaintiff to provide security for the potential legal costs the plaintiff may have to pay. If security is required, the amount of security will be the maximum costs and risk that the plaintiff would be expected to incur in the event a judgment was not in their favor. Attorneys in Denmark are prohibited from representing clients on a contingent basis, in which they agree to only take a percentage of the proceeds if they are successful. Attorneys are, however, allowed to enter an agreement in which they will not invoice a client for any fees unless a particular result is achieved. In that case, the fees must be based on the actual work performed as opposed to a percentage of any recovery. It is rare for attorneys to actually enter into such agreements. There are no restrictions on third party financing of litigation costs.

### (b) Collective Securities Litigation in Denmark

The rules creating and governing class actions in Denmark entered into force on January 1, 2008. Class actions are not limited to a particular area of law and claims made by multiple individuals can generally be tried as a class action. In order to proceed as a class action: 1) the matter must concern “uniform claims from several persons,” which does not require the claims to be identical, but does require the claims to have the same factual and legal basis; 2) Denmark needs to have proper jurisdiction over the claims; 3) the Danish court must possess the necessary expertise to handle the claims; 4) the court must deem the class action to be the best way of examining the claims (this requires the court to agree that a class action is more appropriate than a traditional joinder of claims); 5) the class members must be capable of being identified and notified about the proceedings in an appropriate manner; and 6) there must be the possibility that a suitable class representative can be appointed.

Both opt-in and opt-out class actions are available, but the opt-in procedure, which requires potential class members to affirmatively join the action, is utilized most frequently. Opt-out claims are only used in circumstances where the claims of each individual are so small that the claims could not realistically be pursued via individual actions.

In opt-in proceedings, a class representative is appointed by the court and may be either a member of the class, an association, a private institution or organization, or a public authority authorized by law to act. The class representative must represent the best interests of the class during the course of the proceedings. The court may consider the financial interests of the would-be representative in assessing the would-be representative’s adequacy. The class representative cannot change any of the claims, the class definition, or other elements of the action without the court’s consent. The class representative also cannot settle the claims of class members without court approval. In opt-in proceedings, the court will set a specific deadline for potential class members to join the action. The court also determines the method of providing notice to potential class members. Those wishing to join the action must petition to join by written submission.

To lodge a class action, any would-be class representative (who meets the requirements of the law) can lodge a writ of summons. The writ of summons must contain a description of the class, information on how class members will be identified and informed about the action, and a proposal for the class representative. The court is not bound to agree to the would-be class representative’s proposal. The class representative represents all class members and the class members do not become parties in the proceedings, however, class members retain rights and obligations that are similar to those of an individual who is a direct party to a case. Class members are subject to the same rules on evidence including document production and the submission of written statements. Absent class members are not, however, entitled to give in-person evidence during the oral proceedings. Class members must also be notified of any motions to withdraw or dismiss (and the court will not take any action in this regard until all absent class members have been notified) or other developments that the court deems important. The class representative cannot change the class definition, scope of the claims or other parameters that impact all class members without the court’s consent. Any decision is binding on class members even though they are not direct participants in the action.

After the writ of summons is filed, the defendant files a statement of defense on or before a date determined by the court. Thereafter, the court schedules a pretrial teleconference where the parties will agree on the timeline for the remaining case proceedings and, to the extent possible, determine a date for the commencement of trial. In complex cases, there is usually a need for the parties to exchange additional pleadings and expert reports before any trial begins. The parties may negotiate a settlement at any point during the litigation process, and indeed the court may encourage the parties to settle, but any settlement of a class action requires court approval.

### (c) Overview of Denmark's Securities Laws

Prior to January 2018, the Danish Securities Trading Act ("STA") was the law that regulated the securities markets in Denmark. However, as of January 3, 2018, the Capital Markets Act ("CMA") replaced the STA. The CMA outlines the overall framework for securities trading in Denmark and provides rules that govern prospectuses, public offerings and admissions to trading, disclosure obligations, takeover bids, etc. The CMA is supplemented by executive orders and regulatory guidelines and often works in tandem with the Danish Companies Act and the Financial Business Act. In addition, the Nasdaq Copenhagen A/S also has Issuer Rules, as well as the Member Rules and Warrant Rulebook that companies must abide by. For the purposes of establishing civil liability of companies to shareholders, the CMA does not depart significantly from the STA. The primary changes to the law involved implementing European directives and increasing the prospectus exemption threshold for public offerings and admissions of new shares.

Private securities actions can be pursued for investors seeking damages due to misleading or omitted information in prospectuses or other company publications. Actions can also be brought for unjustified delays in disclosing inside information. Most claims are brought against the issuer or the management or board of directors.

#### i. Prospectus Liability

Section 12(1) of the CMA specifies that a prospectus must include information necessary to enable investors to make an informed assessment of the issuer and the rights attached to the securities. An investor can seek damages from an issuer and anyone who is responsible (that is anyone who took part in the drafting of the prospectus or in the share offering process) for the contents of the prospectus for misleading or untrue statements in prospectuses on the basis of non-contractual general tort liability. The Danish Supreme Court judgment in a case brought against BankTrelleborg established the presumption that a share subscription would not have occurred if the information in the prospectus was adequate and correct. The burden is therefore on the defendants to demonstrate otherwise.

#### ii. Liability for Other Disclosure Violations

The CMA and the EU Market Abuse Regulation ("MAR") provides causes of action for investors who suffered losses as a result of reliance on other published information or for instances where a company omitted information from publications or engaged in unjustified delays in publishing certain information. Under Article 17(1) of MAR, an issuer of securities must inform the public as soon as possible regarding any inside information that directly concerns the issuer. Inside information is defined in Article 7 of MAR as: a) information of a precise nature; b) that has not been made public; c) that directly or indirectly concerns the issuer; and d) that if it were made public would likely have a significant effect on the prices of the financial instruments. Prior to the enactment of MAR, inside information only had to be disclosed once the relevant event or circumstance was a reality. For example, it would not be necessary to disclose information about negotiations or ongoing investigations or circumstances. However, under MAR 17(4), an issuer can only delay disclosure of information if: a) immediate disclosure is likely to prejudice the legitimate interests of the issuer; b) delay of disclosure is not likely to mislead the public; and c) the issuer is able to ensure the confidentiality of that information. This law essentially requires that an issuer be able to document that it met the requirements during the entire period that a disclosure was delayed.

#### iii. Damages

Danish law does not allow for punitive damages nor does it provide for compensation without a demonstrable loss. Under Danish law, the injured party is entitled to full compensation for his or her loss but should not receive any enrichment from the loss.  Rescission damages are available because the general law of damages specifies that an investor is entitled to be restored to the position that they would have been in had they not purchased the relevant securities.

### 6. France

France is a civil law country and the primary sources of laws are statutes and written rules. Case law is not binding precedent, but it can be persuasive to judges because judges must justify their decisions. There are no juries in French civil courts. Although the country is based on civil law, the process is adversarial and judges will decide claims based on the information presented by the parties. Judges do have the power to order additional investigative measures if they deem it appropriate. There is no right to a jury trial and most civil liability cases are tried by either one or a panel of three judges, depending on the amount at stake and the complexity of the matter.

France is a "loser pays" system. Unavoidable legal costs (such as court costs, cost of translation of documents, and factual witnesses) are typically paid by the losing party. The judge has discretion to apportion costs differently based on the financial circumstances of the parties and the merits of the case and as a matter of practice full the losing party rarely has to pay the full amount of costs to the other party.

Contingent attorney fees, where an attorney will agree to complete all work and only receive payment in the event their client prevails, are illegal in France. A French attorney may be disbarred for agreeing to represent a client on a pure contingent fee. French law does, however, allow for the inclusion of a complementary fee depending on the result obtained or the quality of service rendered. In a fee agreement containing a complementary fee, a written fee agreement with a client will include a provision for remuneration of the services performed and the addition of other fees, a sort of bonus, based on the result obtained. Although attorneys are prohibited from representing clients on a contingent basis, third party funding is theoretically possible. The third party, however, may not remit payments directly to the attorney because attorneys may only be paid by a client or the agent of a client.

The American concept of discovery does not exist in France. Parties are required to disclose all documents relied upon in support of their case and to exchange written witness statements and expert reports. Before a proceeding begins, a party may file a request and obtain a provisional decision, without notice to the other party, in order to preserve evidence. In order to obtain a decision, there must be a legitimate reason to preserve evidence or to establish the factual circumstances upon which the resolution of the dispute depends in order for the judge to order legally permissible investigative measures to occur. This mechanism requires parties to specifically identify the documents known to exist or evidence they are requesting. Once a proceeding has begun, a party may file a request for an order requiring the other party to produce certain documents that are known to exist. As in the pre-proceeding measure, a court typically requires the request to include specifically identified documents. Traditionally there is no ability for a party to find facts or request documents that it does not know to exist but in recent years the French courts have applied a lower threshold of specificity. Parties may oppose discovery requests by arguing that a request is a "legitimate impossibility." "Legitimate impossibility" includes all documents that protect an individual's private life or the confidentiality of professional activity. Courts, however, rarely accept this excuse from corporate defendants.

There is no system for class actions in France because a principle of French law is that each person must bring their own claim. Even when actions are grouped together for purposes of convenience, an individual generally must still present their own arguments and evidence and the judge will issue a separate judgment in respect to their individual claim. French law does, however, provide a few different mechanisms for initiating group actions that still adhere to these principles. These mechanisms are joinder, consolidation, action taken in a collective interest, and joint representative actions.

### (a) Joinder

When there is a common question of law or fact or multiple claims arise from the same event, multiple plaintiffs may join together in one action. When a case is brought by several joint plaintiffs, the plaintiffs are typically represented by one attorney and the proceedings will be the same as in the case of only one plaintiff. Unlike a class action, the court will assess each individual plaintiff's loss and decide upon remedies separately. This type of action is most frequently used in mass tort or consumer protection cases.

### (b) Consolidation

Consolidation is not truly a mechanism for effectively bringing a group action because the parties' litigation expenses are not shared and the parties do not proceed with any joint litigation strategy. In fact, in consolidation actions, plaintiffs have typically all filed individual lawsuits. A court may then, either upon its own motion or upon motion by a party, consolidate several claims that have been brought by different plaintiffs. Courts will only consolidate claims where it is in the interest of justice to rule on them jointly. In consolidation claims, each plaintiff continues to act separately and through their own attorney but the actions of one plaintiff (e.g. in moving to postpone or scheduling a hearing date) will affect all other plaintiffs.

### (c) Action taken in a collective interest

Actions may be brought by associations in the "collective interest" of its members. For an association to qualify to bring a collective action, it must be an organization that is authorized by a ministerial decree as a nationwide representative of its constituents. In order to pursue a collective interest action, the association must prove there is an interest that is both different from the individual interests of represented persons and the interest of the public. Associations cannot recover compensation for individual damages that have been suffered and generally the proceedings are utilized for injunctive relief (e.g. banning the use of a particular provision in a contract).

### (d) Joint representative actions

An association may also act on behalf of identified individuals when damages arising from the same facts have been suffered by the individuals (investors or consumers). In order to pursue a joint representative action, an approved and nationally recognized association must be instructed by at least two individuals (investors or consumers) to initiate a lawsuit. Joint representative actions may be brought in consumer cases, investor claims, and environmental claims. Unlike an action taken in the collective interest, a joint representative action may seek compensation for the damages suffered by each individual. Essentially, a joint representative action consolidates all claims that could have been brought individually in French courts.

While a joint representative action might appear to be the French version of a class action, the procedure is limited in the following ways: 1) only approved associations can bring an action; 2) an association cannot initiate a claim on its own and must instead be instructed in writing by at least two individuals; and 3) associations have limited means of soliciting others to join in a claim. Advertising is strictly prohibited. An association may not use TV or radio or distribute flyers or personal letters. Violating the prohibition on advertising could potentially have serious consequences in that a claim may be held inadmissible if there is evidence the association solicited claims improperly. The only exceptions to the strict regulations on advertising arise in relation to claims brought by investor associations. In investor claims a judge may authorize the association to use other means of advertisement.

### 7. Germany

Germany is generally not as litigious as the United States, however, recently there have been an increasing number of lawsuits brought by investors against banks and securities issuers that allege that a prospectus was misleading or contained false information. The wave of securities litigation in Germany initially began when Deutsche Telekom AG went public. In its 1999 prospectus, Deutsche Telekom valued its real property but by 2001, it became apparent that the value of the real property had been grossly overstated. Deutsche Telekom wrote down the values of its real property by 2 billion Euros and the share price of its stocks dropped by 92%. Between 2001 and 2003, over 13,000 individual claims were filed against Deutsche Telekom and the debacle ushered in changes to German civil procedure that were designed to make securities litigation more streamlined and efficient. As a result, more securities litigation is now occurring in Germany. More recently, the 2015 revelation that Volkswagen AG had been manipulating its emissions results in various TDI "clean diesel" vehicles in order to circumvent U.S. Environmental Protection Agency and California Clean Air Act regulations, thrust Germany and its shareholder litigation mechanisms into the spotlight.

#### (a) Legal System Generally

Germany is a civil law country; however, it operates with more of an adversarial system than the inquisitorial system that is found in many other civil law jurisdictions. There are no juries in civil litigation and instead, career judges, selected by an independent commission on the basis of academic qualifications, will preside over and decide a case. Commercial disputes are often heard by the commercial division of a regional court, and a panel of one professional judge and two lay judges will decide the case. Lay judges are appointed based upon the recommendation of the Chamber of Industry and Commerce. To be a lay judge, an individual must be a German citizen, at least 30 years old, and a tradesman (which means a member of the management board, a managing director, or proxy of a company is eligible to serve as a lay judge).

To commence an action, a plaintiff must submit a conclusive written pleading that states all the facts and presents the evidence upon which claims are based. Accordingly, this means that a party must have thoroughly investigated a claim prior to commencing an action and that there is little need for much discovery.

##### i. Discovery

Discovery is limited, but the court may order a party or a third party to produce documents if the requesting party makes a motion and provides specific information as to what it intends to prove with the specific document(s) in question. The German Civil Procedure Code states that U.S. style discovery is not permitted and will be inadmissible in German courts.

##### ii. Costs of litigation and attorney fees

Germany is a "loser pays" system, and the losing party must reimburse the prevailing party for all attorneys' fees and courts costs. While attorneys are free to agree on fees with their client, the minimum fee that an attorney must charge for a particular case and the amount of attorney fees that may be reimbursed by the losing party is set by regulation and depends on the monetary value of the dispute. Contingency fees are not allowed and attorneys who are not relying on the statutorily prescribed fees will often charge an hourly rate. There is no prohibition on third party litigation funding in Germany

### (b) Overview of Germany's Securities Laws

Securities actions in Germany typically arise under Section 37(b) and (c) of the German Securities Trading Act (*Wertpapierhandelsgesetz* or "WpHG") and under general tort principles found in Sections 823 and 826 of the German Civil Code (*Bürgerliches Gesetzbuch* or "BGB"). Claims for prospectus liability arise under the Securities Prospectus Act (Wertpapierprospektgesetz) and the Capital Investment Act (Investmentgesetz).

The WpHG focuses on the regulation of securities, securities trading, financial instruments, futures, derivatives, and other similar products. It contains provisions requiring for the disclosure of important information relating to listed companies, prohibitions against insider trading and share price manipulation. The WpHG is similar to Section 10(b) of the U.S. Securities and Exchange Act of 1934 in that it creates a private cause of action for damages that an investor incurs as a result of false, misleading, or omitted public statements made on the capital markets. In making a claim under the WpHG, a plaintiff need not prove transaction causation (otherwise known as reliance) if the investor is seeking inflation damages, but if the investor is seeking rescission damages, then reliance is required (more detail about the German standard of reliance is below). A plaintiff alleging WpHG claims must also prove that the defendant's actions caused the plaintiff's loss.

As an alternative (or as an additional claim), shareholders can bring claims for investment losses against a company and its executives under the BGB. Section 823 provides a cause of action for the intentional violation of statutory regulations (including the WpHG, but can also be used in conjunction with other statutes). Section 826 is the general tort provision that provides for liability when one person intentionally causes injury or damage to another by failing to act with good morals. Tort claims can be more difficult to prove than WpHG claims because they require a showing that the defendant acted with intent or conditional intent. Tort claims also require a showing of transaction causation or reliance. Germany does not yet recognize the fraud-on-the-market theory that is used to prove reliance in the U.S. However, proving reliance in Germany typically only requires that an investor state that it would not have purchased the relevant shares at the price it purchased the shares, if it had known about the misstatement, omission, etc. While tort claims are more difficult to prove, the applicable statute of limitations can be longer than for claims under the WpHG. The statute of limitations for tort claims expires, at the earliest, three years after the cause of action arose (counted from the end of the year in which the claim arose). In contrast, claims on the basis of § 37b WpHG expire no later than three (3) years after the false or misleading statements were made, but, within that three (3) year limit, claims will expire one (1) year after actual knowledge of the omission of relevant information. The statute of limitations begins to run after the omission, but if the plaintiff obtains actual knowledge of the omission, then a one-year statute of limitations begins to run at the point of plaintiff's knowledge. Thus, there is a strict limit of three (3) years after the omission of information that should have been disclosed, or the publishing of misleading information, regardless of actual knowledge of the plaintiff.

Under German law, the Landgericht (District Court) where the defendant is domiciled has the exclusive jurisdiction over any claims made under the WpHG. Plaintiffs must file their complaint and any applications for model case proceedings (discussed below) before the Landgericht with jurisdiction.

### (c) Collective Securities Litigation in Germany

In Germany, there is no real procedure for a class action to proceed, like in the United States. Under the German Constitution, there is a fundamental right to be heard in court. This means that a judge cannot take action with regards to parties who are not actively participating in an action and who were not provided an opportunity to participate. As a result of this constitutional provision, it is highly unlikely that Germany will ever adopt a class action procedure similar to that in the United States. Germany utilizes an "opt-in" system for securities litigation: only claimants who file suit in their own name (or take active steps to join an existing suit) will be able to recover. However, in the wake of all the securities litigation arising out of Deutsche Telekom cases, the legislature enacted the Capital Market Model Proceedings Act ("KapMuG"), which gives the court system a means of efficiently dealing with securities litigation involving multiple claimants. Even though claimants must file their own individual complaints (or a joint complaint with numerous investors), the KapMuG provides a mechanism for the court to decide all common legal and factual issues. The common legal and factual issues are decided on the basis of a model case and then the outcome binds all the parties.

Under the KapMuG, any investor claiming damages due to violations of the WpHG (i.e. false or misleading information concerning a public market or a prospectus) may file a complaint and submit an application to institute a model case proceeding before the appropriate Landgericht. Incidentally, a defendant is also free to submit an application to institute a model case proceeding once one or more cases is filed against it alleging violations of the WpHG. If, within a 4 month period, a minimum of 10 complaints are filed concerning the same subject matter,[19] then the Landgericht may initiate the KapMug or model case proceedings. In initiating the KapMuG, the Landgericht stays all pending cases on the subject matter (even including cases that are filed after the model case proceeding has commenced) and it will refer the matter to the Oberlandesgericht ("OLG") which is the higher regional court. The OLG then determines the issues that are to be decided and selects a model plaintiff from among the stayed cases. In deciding which case to designate as the model case, and which plaintiff to designate as the model claimant, the court will consider numerous factors, including the number of claimants in the case, the amount in controversy, the experience of the law firm(s) representing the claimants, the claimants' suitability to represent all those similarly situated, and whether the proposed model case covers all aspects of the claims asserted by others. Another relevant factor will be the extent to which other claimants consent (or object) to a particular claimant's designation as model claimant.

The model claimant is responsible for overseeing and directing the litigation of the common issues. In a sense, the model claimant serves a role like the lead plaintiff in a U.S. class action, however, instead of representing absent class members, the model plaintiff is representing only those who filed complaints. Those claimants who filed a complaint, but who are not selected as the model claimant, are automatically included in the model case proceedings, and their individual cases are stayed pending the outcome of the model case proceeding. Similarly, additional claimants may continue to file complaints or register their claims (bearing in mind any potential statute of limitations) at any point after the KapMuG is initiated and up until a decision is rendered. If a claimant files a complaint, their case will also be stayed. If a claimant chooses to register their claim and not file a complaint, the registration will toll any applicable statute of limitations. However, the claimant must then convert their registration to an active complaint before the KapMuG reaches a conclusion if it wants to be bound by the outcome. The advantage in registering a claim versus filing an active complaint is that registration carries with it lower court costs and no adverse cost risk. While all claimants who filed a complaint are responsible for paying a pro-rata share of the costs (including adverse party costs) the model claimant incurs in prosecuting the model case proceedings, claimants who register claims do not have to share in the pro-rata costs and adverse costs risk, but they will face additional costs if they convert to an active complaint (and would be responsible for sharing the model case proceedings cost at that time). As noted above, registering a complaint also carries the risk that an investor will not be included in any settlement or bound by any judgment if they do not convert their case to active before a judgment is reached.

In a sense, the claimants who are not serving as the "model plaintiff" are similar to passive members of a class in the U.S. class action system in that they are not required to actively participate in the action. Unlike the U.S.,

[19] If less than 10 actions are filed then the KapMuG will not be initiated and each individual case proceeds on its own.

however, those claimants are afforded the opportunity, if they so choose, to participate in the model case proceedings on a limited basis by filing briefs and attending hearings. Otherwise they have very limited influence on the case strategy and they do not control or oversee the litigation.

Once the model case reaches judgment (and assuming the decision is in favor of the model plaintiff), all individual cases resume in order to litigate unique factual and legal issues, such as "reliance" and the amount of each claimant's damages. Conversely, if the model claimant reaches a settlement with the defendant, it can apply to have the settlement approved by the court. At that time, each (stayed) plaintiff is given the opportunity to opt-out of the settlement and if fewer than 30% of all pending but stayed actions/claimants opt out in a 30-day period, then the settlement will be binding on all remaining claimants who did not opt out. Any settlement proceeds are available only to those who previously filed an individual lawsuit that was included in the model case proceedings.

### 8. Italy

Italy is a civil law jurisdiction based on codified rules that judges must apply to cases presented to them. While case law may be persuasive to a judge, it is not binding. There is no concept of a trial by jury in Italy and all disputes are decided by judges. Mediation is compulsory in all civil actions in Italy, except for Consumer Class Actions. Mediation provides parties with the opportunity to potentially settle a case at an earlier stage.

Italy is a "loser pays" system and the losing party may be requested to reimburse any of the costs and expenses initially borne by the winning party. The court, however, has some discretion and can exclude from the award any costs that it deems exorbitant or not justifiable. In the class action context, the leading plaintiff bears all costs related to the action. The leading plaintiff may ask for "joining fees" from parties that file a deed of participation. Attorneys are permitted to represent clients on a contingent fee basis, however, in practice many attorneys are unwilling to enter such an arrangement.

There is no discovery procedure for claimants in civil actions. There are also no depositions and no attendance at court or testimony is required. The onus is on the parties to the litigation to allege and prove the allegations and the courts will decide disputes on the basis of the information presented.

In Italy, there are three mechanisms for pursuing multiparty litigation: opt-in consumer class actions, representative actions, and cumulative actions. None of these mechanisms are similar to the U.S. style opt-out class actions.

#### (a) Consumer Class Actions

Under Article 140-bis of the Consumer Code, if multiple parties are damaged as a result of the same wrongdoing, then the parties may bring a class action. A class action can be brought to seek protection of: 1) contractual rights of a group of consumers who vis-à-vis the same company were in a homogenous situation; 2) homogeneous rights of the end consumers of a certain product; and 3) homogenous rights that deserved compensation for the damage caused to consumers as a result of unfair business practices. A class action may be utilized to seek compensation for damages or restitution. At this point, it remains unclear as to whether an action for securities fraud can be pursued as a class action.

#### (b) Representative Actions

A representative action may be pursued by consumer associations on behalf of all consumers for injunctive relief. There is no ability for consumers to either opt-in or opt-out of these actions. These actions may not be used to claim any form of compensation.

#### (c) Cumulative Actions

This is the procedure most likely to be used for an action for securities fraud since it remains unclear whether the Class Action mechanism can be utilized in that context. In a cumulative action, multiple plaintiffs may all grant a single attorney the ability to act on their behalf against a single defendant. In this type of case every plaintiff must sign an individual Power of Attorney. Each plaintiff still maintains individual rights in the action and the case is not decided on the basis of a lead plaintiff.

As noted above, mediation is mandatory in all civil cases in Italy but it is not mandatory in class actions. Mediation is, however, required in cumulative actions and an action for securities fraud that proceeded as a cumulative action would undergo mediation before proceeding to a trial.

### 9. Japan

Japan used to be a country that emphasized pre-dispute regulation, but in recent years it has begun to shift to a system of deregulation and free competition. Accordingly, the country is attempting to make changes to the way litigation operates and the number of lawsuits filed is on the rise. After the adoption of the Financial Instruments and Exchange Act (the "FIEA") in 2004, securities litigation began to gain momentum among Japanese investors, but it wasn't until the high profile accounting scandal at Olympus Corporation in 2011, when investors from around the globe began looking to Japan to pursue legal recourse. Numerous institutional investors filed suit in Japan against Olympus as a result of the accounting scandal and the action on behalf of one group of investors announced a settlement in 2014 for 11 billion yen (approximately $92 million). Another action on behalf of another group of investors also recently settled (2016) for an undisclosed sum. As a result of the successful resolutions of the Olympus cases and two recent high-profile corporate scandals (accounting discrepancies announced at Toshiba in 2015 and emissions manipulations disclosed by Mitsubishi in 2016), Japan is once again in the spotlight for shareholder litigation.

#### (a) Legal System Generally

Japan is a civil law country, but unlike many civil law countries which utilize the inquisitorial system, it operates in an adversarial manner. Judges are present at all stages of a proceeding, including when the plaintiff appears in court to state the complaint and when the defendant responds. There are no jury trials in civil cases in Japan, and compared to other countries, overall rates of civil litigation are low because of a cultural aversion to litigation and a proclivity for resolving disputes through settlement. More than half of all cases filed are resolved through settlement proceedings and judges often use their authority to advise parties to settle.

##### i. Discovery

Japan does not have a system of pretrial discovery like in the U.S., however, there are means for collecting evidence that are designed to be used after a trial commences. Authority and control over collecting evidence is under the purview of a judge's responsibilities. Japanese attorneys do not have the power to compel production of documents or testimony of witnesses or parties and must rely on either voluntary cooperation or the intervention of the court. Although most evidence gathering is done after trial commences, there are some methods of procuring evidence informally through attorneys.

##### ii. Costs of litigation and attorney fees

Japan is a loser pays system and the court fees and other litigation costs of the prevailing party are paid by the losing party. There is no cap on the amount of court fees that a losing party must pay but the judge is free to use discretion. The attorneys' fees are not considered costs, however, and each party is responsible for paying their own attorneys' fees. Japanese attorneys are permitted to charge purely contingency fees, however, in practice that type of fee arrangement is not as typical.

Third party funding is also permissible and in recent years it has been successfully used in a number of shareholder class actions in Japan.

Court costs and stamp duties are set by statute and depend upon the amount in controversy. In joint proceedings, the court costs and other costs and fees are generally shared among the group.

### (b) Overview of Japan's Securities Laws

Shareholders can typically bring actions in Japan for allegations of violations of the Financial Instruments & Exchange Act ("FIEA") and for violations of the Japanese Civil Code ("JCC"). The FIEA is particularly designed to cover accounting fraud cases, but also covers prospectus liability and other material misrepresentations, omissions, or false statements made by a company. Litigation under the FIEA allows investors to bring a claim in Japanese civil courts for damages that result from false material statements or material omissions made in quarterly or annual reports.

Unlike claims in the U.S. or many other countries, investors do not need to prove either scienter (that the company made deliberate misstatements or omissions) or reliance on the misstatements. That makes claims under the FIEA very attractive and strong. Article 21 of the FIEA provides that when an annual or quarterly report "contains any false statement on important matters or lacks a statement on important matters that should be stated or on a material fact that is necessary for avoiding misunderstanding [the company] shall be held liable to compensate damage sustained by persons who have acquired the Securities issued by [the company] without knowing of the existence of the fake statement or lack of such statement." Essentially, under Art. 21, investors may successfully assert a claim by furnishing proof of (1) falsity, (2) materiality, and (3) loss causation.

The JCC provides for general tort liability. Article 709 is a general tort provision, stating that "[a] person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence." A plaintiff suing under Article 709 must demonstrate (a) the defendant's intentional or negligent wrongdoing (the "illegal act"), and (b) that the wrongdoing caused damage to the plaintiff ("loss causation"). The Japanese Supreme Court has held that investors who have incurred losses due to false statements or misrepresentations made by issuers may rely upon Article 709 to recover those losses.

### (c) Collective Securities Litigation of Japan

Japan does not currently have a class action system, but it does have two procedural mechanisms that allow for group litigation: joinder and representative actions. Joinder and representative actions do not allow for actions of the magnitude of the typical U.S. class action, but they do allow for a wider array of group actions. Japan also allows for consumer group actions, but those actions may only be brought by qualified consumer groups and the actions may only seek injunctive relief.

#### i. Joinder of Claims

Joinder of claims proceedings are the predominant method used to bring multiparty actions in Japan. Joinder is a procedure that allows for the consolidation of claims between several parties into one single combined action. The Japanese Code of Civil Procedure provides that when the rights or liabilities for an action are common to more than one person or when actions are based on the same facts or laws, then the individuals may join together as co-litigants to either pursue or defend against a claim. Each party must give its authorization to be part of the proceeding. Typically, this type of group action only involves a small number of parties, but it is not unheard of to have several hundred people join together in an action. An action in joinder can only be commenced when it can be demonstrated that each individual lawsuit is economically viable.

In joinder, a limited number of lawyers will typically act jointly for the parties. In practice, the co-litigants will form one group and hire common lawyer(s). Documents appointing a lawyer have to be executed by each party. Because the lawyers are representatives of all parties, each individual party is not required to appear in court. This multiparty action is maintained at the discretion of the court and the court can decide at any point to separate the claims if it decides that there are significant dissimilarities in the proceeding. Even if the court does not elect to separate the claims, there is no guarantee that the judgment will be the same for each party joined as a co-litigant. Even after joining in a multiparty claim, each party retains a right to settle their individual claim, withdraw, or appeal a judgment independently of the other co-litigants. Throughout the litigation procedure, each co-litigant's actions are seen as independent of and do not affect the other co-litigants.

Litigation costs per person decrease with joinder because the court fees are based the amount in controversy. As an example: an individual claimant with alleged damages of 1 million yen would pay court fees in the amount of 8,600 yen and the stamp duty of 6,000 yen. In comparison, if 100 people joined as co-litigants and each alleged 1 million yen in damages, for a total of 100,000,000 yen, the court fee would only be a total of 410,760 yen or 4,107.6 yen per person. Parties are able to share all other litigation-related costs including expert and witness fees, postage, and attorneys' fees.

#### ii. Representative Actions

The Japanese Code of Civil Procedure provides that a number of individuals appoint one or more representatives to commence a proceeding on behalf of everyone. The group of people sharing the representative must share common interests. According to precedent, common interests include: 1) where the purposes, obligations, or liabilities of an action are common to more than one person; and 2) where the claim or defense is based on the same facts or laws. The representative party must be chosen from amongst the parties with a shared claim or defense. Once parties have chosen a representative, the parties will be withdrawn from the proceedings, but the judgment will still pertain to them. Representatives have to be explicitly authorized by each represented party. Parties do not, however, actually have to initiate an individual complaint in court. Identifying and acquiring authorizations from potential parties limits the number of parties that can participate. Once the representative has been selected, the representative has the right to select a lawyer.

A new party can join the representative action if he can demonstrate that he shares a common interest in the claim. There are no restrictions or limitations on a party's ability to either withdraw from the group action or change the representative.

A representative is free to withdraw from litigation or enter into a settlement agreement at their discretion. The decision or settlement agreement will, however, be shared by all represented parties.

### 10. Mexico

Mexico's legal system is based on Roman or civil law. The country has both federal and local laws for each of its 31 states and for the Federal District of Mexico. The basis of the law in Mexico (in order of hierarchy) is the constitution, treaties, legislation, and then regulations. Trials in Mexico are typically heard and decided by a judge and not a jury.

There is no U.S.-style discovery in Mexico. Instead, parties must disclose all documents that support their case either at the time of filing or the time of answering. No evidence will be admitted after the initial filings unless the documents or other evidence falls within an exception such as the party being unable to obtain the documents (because they were out of the party's control) or the party did not know of the existence of the documents. When parties are unable to file documents in support of their claim, they must declare under oath the reason why there were unable to file the evidence.

There is no limitation or prohibition on the negotiation of fees between lawyers and their clients. Accordingly, Mexican lawyers may represent parties on a contingency fee basis. The only important limitation on attorney fees is found in the class action law, which provides a cap on plaintiffs' lawyers' fees based on a calculation linked to the minimum wages in Mexico City so as to reduce the portion of a judgment that ultimately goes to the attorneys. Similarly, there is no prohibition or regulation of third party funding nor is there a requirement that any party provide security for costs. Mexico is not a "loser pays" system and an unsuccessful plaintiff will not be required to pay any portion of the defendant's legal fees.

Mexico amended its Federal Code of Civil Proceedings and adopted a law on collective actions, which entered into force in early 2012. Collective actions are now allowed in matters related to the consumption of goods or services and for matters related to the environment. Only actual damages, specific performance, or injunctive relief is available via a class action. There are no provisions allowing for punitive or exemplary damages. Under Mexican law, a class with at least 30 people may proceed with actions in each of three categories: 1) actions seeking to protect society in general; 2) actions seeking to protect rights held by an easily determinable group of individuals who share a legal claim based on common facts and law; 3) actions seeking to protect the individual rights of a group of people that have the same contractual relationship with the defendant.

Under Mexican law, there is a class certification procedure similar to that in the U.S. in which the court will determine whether the class has standing as a class to sue the defendant. Contrary to the procedure in the U.S., however, the defendant only has five days after receiving the complaint (and a possible five day extension) to gather information and challenge class certification.

Mexico's collective action system is an opt-in system and members of a class must affirmatively take action in order to recover. Unlike other opt-in systems, however, Mexico requires that members of a class affirmatively opt-in within 18 months after a settlement or judgment is reached as opposed to at the beginning of proceedings. At this point it is unclear whether an individual who fails to opt-in will be precluded from pursuing another lawsuit.

### 11. The Netherlands

In the immediate aftermath of the *Morrison* decision, many attorneys and commentators predicted that the Netherlands would become a sort of haven for global securities class actions because of the Dutch procedural mechanism known as the Dutch Act on the Collective Settlement of Mass Claims (*Wet Collectieve Afwikkeling Massaschade*, or "WCAM"). The WCAM allows parties to a dispute to negotiate a settlement and then apply to the Amsterdam Court of Appeals to have the settlement declared legally binding on all similarly situated members (the "class") who did not opt-out. The WCAM (discussed in more detail below) looked to be an effective mechanism for investors to seek monetary relief on a class-wide basis. The reality, however, is shaping up to be much different. While the Netherlands remains a viable option for shareholders, it is not necessarily an appropriate forum for all cases. Nevertheless, there are circumstances where pursuing redress via the Netherlands can be the best option for a group of investors.

#### (a) Legal System Generally

The Netherlands is a civil law country, which means actions at law typically arise under the Dutch Civil Code (*e.g.* an action arises when a person commits an act prohibited by the Dutch Civil Code), other statutes and regulations, or under a dispute stemming from a contractual agreement between the parties. Unlike other civil law countries, the

Dutch legal process is adversarial in nature and not inquisitorial. Judges play a more passive role and the parties (if self-representing) or their attorneys are responsible for presenting the evidence and arguing in support of their position. There is no trial by jury and all civil cases are typically decided before a panel of three appointed judges.

The Netherlands is divided into eleven districts and civil proceedings are typically brought before three-judge panels in the district where there is jurisdiction. Generally, jurisdiction is conferred depending on the circumstances and may be based on things like, inter alia, the place of residence of the defendant, an agreement between the parties, or the type of contract. There are certain courts that have exclusive jurisdiction over particular types of actions. For example, consumer group actions are the exclusive jurisdiction of The Court of Appeals in The Hague and requests stemming from the WCAM are the exclusive jurisdiction of the Court of Appeals of Amsterdam.

Decisions of the district courts may be appealed to one of four courts of appeals. The court of appeals will review both the factual and legal findings of the district court. On appeal, a five judge panel will review the case. After the judgment of the court of appeals is issued, a party may appeal to the Supreme Court. The Supreme Court is a court of cassation and it will only review the legal interpretation of the court of appeals and not any of the facts in dispute.

### i. Discovery

There is no real procedure for pre-trial discovery as there is in the United States. Parties may voluntarily produce documentation in support of their position or the court may order the parties to provide certain documents. If a party refuses to comply the only consequence is that the court may either “draw any conclusions it deems appropriate” or it may shift the burden of proof to the non-complying party. “Fishing expeditions” are not allowed and generally requests to the court to compel the production of documents are limited to specific documents that are already known to exist.

Depositions are not allowed and witnesses may only be heard by the judge. A witness may be heard by the judge either before (via a provisional hearing) or after the commencement of legal proceedings. Both parties may ask questions of the witness, however, there is no real cross-examination.

Detailed information concerning facts and circumstances of a potential case may also be learned via Inquiry Proceedings (*enquêteproceduire)*. Inquiry Proceedings are a legal procedure used to investigate the affairs and course of action of a company for potential mismanagement. Labor unions, the public prosecutor, and shareholders (who independently or collectively as a group own either 10% of the shares of a company, or shares with a nominal value of 225,000 Euros, or own shares of a lower threshold amount stipulated in the company’s articles of association) have the right to initiate an inquiry procedure through the Enterprise Chamber, an independent division within The Amsterdam Court of Appeals. To initiate an inquiry procedure, an application must be submitted. The application to be submitted is a formal document that must contain specific information including the name and address of the company, a description of what information is sought and the foundation for the inquiry. The applicant is free to attach any documents in support of the request to the application. Upon receiving the application, if there are well-founded reasons to doubt that a company’s policies or conduct are in conformity with the law, the Enterprise Chamber may first order an inquiry and appoint an inspector. Inspectors are typically scholars, lawyers or auditors and they investigate and create a report on the policies and conduct of the company and, if applicable, the responsible individual(s). That report provides a foundation for either the company or its shareholders to address the problems independently or for the Enterprise Chamber to order specific measures including, but not limited to, the annulment of resolutions, suspension or dismissal of board members, and the temporary appointment of new board members. The Enterprise Chamber has no authority to determine liability and award damages because determining liability and awarding damages is left to courts of first instance. However, the reported findings from the proceeding may be used as evidence in subsequent litigation to establish liability and damages. The report's findings are not binding on the court of first instance, but courts typically consider it persuasive evidence.

### ii. Costs of litigation and attorney fees

Lawyers' and experts' fees are the primary costs in civil litigation. The Netherlands has a loser pays system in which the successful party is entitled to recover both attorney fees and legal expenses that were reasonably incurred. Generally the attorney fees awarded by the court represent only a small portion of the actual costs because the court utilizes fixed figures based upon factors such as the amount in dispute and the number of court-related activities that occurred. Dutch attorneys are prohibited by the rules of ethics from taking cases on a contingency fee basis. Court fees are capped.

Litigation is typically funded through legal, legal insurance, or litigation funding. In collective actions, associations and foundations fund litigation through membership fees, donations, and litigation funding. In the WCAM context, attorney fees and other court costs are frequently negotiated with defendants as part of the settlement terms or foundation members agree in advance with a litigation funder to pay a portion of any recovery in exchange for the litigation funder covering all costs and expenses incurred as part of the litigation.

## (b) Overview of the Netherlands' Securities Laws

There are four primary laws that regulate the Dutch securities market: 1) Financial Supervision Act (*Wet op het financieel tozicht*, or "Wft"), 2) the Act on the Supervision of Financial reporting (*Wet toezicht financiële verslaggeving*), 3) the Dutch Securities Depositary Act, (*Wet giraal effectenverkeer*),[20] and 4) the Act on Prevention of Money Laundering and Financing of Terrorism (*Wet ter voorkoming van Witwassen en Financieren van Terrorisme*). The Wft contains many provisions that are similar to provisions in U.S. securities laws. For example, listed companies in the Netherlands have a continuous disclosure obligation to disclose price-sensitive information or any information that is likely to have a material impact on the price (including facts and information that is not public knowledge), liability for the contents of a prospectus,[21] and there are restrictions on insider trading. Breaches of the Dutch securities laws, and more specifically the Wft, can lead to a company being criminally and administratively sanctioned.

Generally a company's liability is based on general tort law but error, defaults, or unlawful acts that are breaches of the Wft and any of its related regulations also give rise to causes of action. Under Dutch tort law, issuers can be liable for misstatements made in a prospectus, periodic reports, and any ad hoc information the company published. Section 6:194 of the Dutch Civil Code provides that anyone who issues a statement about products or services is acting wrongfully towards another party if the statement is misleading in any way. In pursuing a claim for a false or misleading statement, there is no requirement that investors prove scienter. That is, the investors do not need to demonstrate that the company acted with any intent or knowledge of the wrongdoing. Dutch law presumes that if misstatements were made in any of the company's filings, the directors, executive management, and board members are responsible for them and the burden is on the defendants to prove that the statements are not attributable to him.

In order to pursue a viable claim, Dutch Law requires proof of causation. Causation in this context requires both that there is "cause in fact" (that is that the damages occurred as a result of the defendant's action – in the securities context that means that the share price was what it was at the time of purchase or sale as a result of defendant's actions)) and legal cause (in the securities context, that inquiry typically centers around reliance: did the investor

[20] This particular law relates to the book-entry and delivery of securities. As such, it primarily relates to post-trade clearing houses or clearing brokers like Euroclear.
[21] Including the Prospectus requirements that were outlined in the EU Prospectus Directive (2003/71/EC).

rely upon the defendant's misstatement or omission in making its investment decision?). Similar to the U.S., Dutch law does not require an investor show specific reliance. Instead the Netherlands has adopted a theory that is similar to the U.S. fraud-on-the-market doctrine. In the Dutch Supreme Court's notable decision in the World Online case, the court acknowledged that savy investors are guided by a multitude of sources of information and that proving reliance or causation from a misstatement or omission to a specific investment decision could be impracticable. In recognizing this, the court established a presumption of causation between the misleading statement and the investment decision. As a result, there is no direct proof of reliance required under Dutch law. Instead, it may be sufficient for an investor to claim that he would have bought the shares at a lower price.

### (c) Collective Securities Litigation in the Netherlands

Under the Dutch Law, there are two different procedures that allow for the resolution of group claims: the Collective Action proceeding and the WCAM. Neither is akin to the U.S.-style class action. The Collective Action Proceeding may only be used to establish the liability of a defendant (or seek other declaratory relief) and not to pursue claims for damages and the WCAM procedure requires the voluntary settlement between the parties before the proceedings may commence. What follows is an explanation of the two different mechanisms.

#### i. The Collective Action

Article 3-305a of the Dutch Civil Code provides that a "Representative Organization" may pursue collective action to establish the liability of a defendant or to obtain other declaratory relief as long as the claim is to protect "similar interests" of its members or other persons. A Representative Organization need not have its own direct *financial* interest in the claim – its interests in pursuing the claim can be merely to further objectives in its governing documents (for example seeking to defend the rights of its members). A Representative Organization includes either a Foundation (*stichting)* or an Association (*vereniging).* A Foundation is a legal entity that has no existing or set members and that may be set up solely for the purpose of pursuing a collective action or settlement (examples: Foundations were established in both the *Fortis* and *Shell* securities cases in order to pursue collective remedies). An Association, on the other hand, is a legal entity which has members and aims to achieve a specific purpose (example: the Dutch Association of Shareholders also known as the Vereniging van Effectenbezzitters or VEB). Both Foundations and Associations must be not-for-profit legal entities and they must be legally independent and not owned by any one person – even the person who established the entity cannot exercise ownership rights. Both Foundations and Associations are able to accept third party funding.

To pursue a collective action, the Representative Organization files a complaint to establish the liability of a defendant or seek other declaratory relief. The complaint cannot seek any damages. As mentioned above in the Discovery section, if Inquiry Proceedings were pursued, the Representative Organization may use evidence and the report of findings from the Inquiry Proceedings as evidence of a defendant's wrongdoing. While the collective action is proceeding, any applicable limitations periods are tolled for all covered members. Once a collective action reaches a judgment, individual members can bring individual damage claims by either filing an independent complaint, joining with multiple other individuals to file a joint complaint, or by selling claims to a third party who then bundles the claims and commences proceedings in her own name as owner of the claims. Upon conclusion of the collective action (when the Representative Organization prevailed), it is also possible that the Representative Organization and the defendant are able to negotiate a settlement and then use the WCAM procedure to have the settlement declared binding and deemed globally applicable.

### ii. The WCAM

The WCAM is an act that is designed solely for the purpose of making settlement agreements binding and enforceable against parties (and absent class members). In order to fall under the purview of the act, the settlement must deal with either damages caused by a singular incident or a series of similar incidents. This act does not contain any mechanism by which a court can determine liability. If one party wishes to incentivize another party to negotiate a settlement, they must use either the collective action procedure, publicity, litigation in another country, or some other means. Once parties have entered into a settlement agreement, this act allows them to apply to the Amsterdam Court of Appeals to have the settlement agreement declared binding and enforceable.

A Representative Organization is the only entity that can commence a WCAM procedure, however, it should be noted that because a Foundation can be established solely for the purpose of pursuing a legal action, it can be established after a settlement has been negotiated. The settlement need not be negotiated by the Representative Organization, it can be negotiated by individual plaintiffs or others. Once a settlement has been reached, the Representative Organization submits the settlement to the Amsterdam Court of Appeals in Amsterdam and seeks to have the agreement declared binding and enforceable upon all interested persons (that is those that would be part of a "class"). The Class must have all suffered a loss as a result of the same facts or circumstances. Once the Amsterdam Court of Appeals receives the settlement agreement and application to declare it binding, it sets a deadline for class members to object to the terms of the settlement. The Court of Appeals then reviews the application and any decisions and renders a decision. If the court approves the settlement, then the settlement is binding and enforceable against all class members (unless a class member took steps to "opt-out"). Any class member who does not choose to opt out is able to share in any proceeds from the settlement but they are prohibited from bringing or continuing any legal action against the defendant that concerns the same facts or circumstances.

To date there have been six settlements that have been declared binding by the Amsterdam Court of Appeals and one additional settlement is currently pending. Of those 7 cases, 4 cases concerned securities. Those cases are:

- *Royal Dutch Shell* – A securities case with a defined class of 500,000 worldwide (except for U.S. based investors) investors. The settlement of $352.6 million was approved in 2009.
- *Vedior* – A securities action on behalf of 2,000 members who sold their stock on the day rumors started to spread about merger talks between Vedior and Randstad. The Dutch Association of Shareholders, the VEB, alleged that Vedior failed to timely inform the market of the merger talks and as a result there were investors who were denied the benefit of the higher share price that was available after the news was disclosed. The €4.25 million settlement was approved in 2009.
- *Converium* – A securities action with a defined class of about 12,000 members resident in the Netherlands, the U.K., and Switzerland. This action was brought by two Associations in the Netherlands over alleged misrepresentations made by two Swiss Companies (Scor Holding AG and Zurich Financial Services, Ltd.) in relation to their financial situations. The settlement of $58.4 million was approved in 2012.
- *Ageas (formerly known as Fortis Bank)* – A settlement of €1.2 billion was announced in this action in March 2016. The settlement is currently pending before the Amsterdam Court of Appeals and a hearing is scheduled for March 24, 2017. Once approved, the settlement will be the largest class settlement ever agreed to in Europe.

### (d) Potential Developments: Introduction of U.S.-Style Class Action in the Netherlands

In November of 2016, the Dutch Minister of Security and Justice submitted to the Dutch House of Representatives a legislative proposal to introduce U.S.-style class actions in the Netherlands. The proposal seeks to modify the current law (which, as described above, only allows collective actions for the purposes of seeking a declaratory judgment) and allow a Representative Organization to bring a claim for damages in the District Court of Amsterdam on behalf of a defined class. There is no limitation in the proposal on the type of claims (e.g. consumer, shareholder, environmental) that could potentially be pursued under this new mechanism. Additionally, the current legislative proposal includes the following interesting provisions:

- Where there are multiple competing proceedings initiated by different Representative Organizations, the court would appoint the one it deems most suitable as the lead representative organization for all of the defined class members. The lead representative organization would need to be able to demonstrate expertise, have a sufficient number of claimants supporting them, and be sufficiently capitalized.

- Although the actions would be "opt-out", because of the need for the lead representative to demonstrate that a large number of claimants support their candidacy to be a representative, for all practical purposes, claimants would still likely need to opt-in with a particular group.

- Defined class members can choose to "opt-out" at the beginning of the certified class action, but their individual proceedings could be stayed for up to a year at the request of the defendant. Although the class action would toll the statute of limitations for all those who are defined class members, parties who chose to opt-out would need to take action within 6 months after opting out.

- The law leaves in place the requirements that a stitching or association be a non-profit entity and continues to allow Foundations to be formed on an ad-hoc basis, however, it would implement stringent governance requirements for the organization's board and supervisory board including: requiring D&O insurance, requiring that the board members have a non-profit background, requiring the preparation of financial statements, and requiring that the organization have a website and communication structure.

- There must be a "sufficiently close connection" with the jurisdiction of the Netherlands in order for the case to be allowed to proceed. To meet that jurisdictional requirement, one of the following conditions must be met: 1) the majority of the defined class members represented by the Representative Organization must reside in the Netherlands, 2) the defendant has a residence in the Netherlands, or 3) the event (or events) on which the claim is based took place in the Netherlands.

- Currently under Dutch law, adverse costs are fixed by the court. Under this new proposal, the lead representative organization could recover the real costs of the litigation if the parties reach a settlement. Conversely, the lead representative organization would be liable for any adverse costs if it loses the action.

- Any settlement would need to be approved by the Amsterdam District Court. It is unclear whether the approval of the settlement would utilize the existing WCAM proceedings or whether this proposal seeks to limit the jurisdiction and extra-territorial application of the WCAM.

At present the adoption of a U.S.-style class action is merely a proposal and there has been a lot of criticism (primarily from the business community) regarding the proposal. As a result, although the proposal is slated for legislative discussion in 2017, it might not be enacted in its present or any other form.

### 12. Norway

Norway is a constitutional monarchy and it is governed by its parliament. Like many European countries, Norway's legal system is based primarily in civil law. But unlike many European countries, Norway is not a pure civil law country and instead, its legal system utilizes aspects of customary law, civil law, and common law traditions. Most laws, however, are derived from acts of parliament.

The Norwegian court system is divided into three levels with the city/district courts at the lowest level, the courts of appeal at the middle level, and a Supreme Court as the highest court in the land. District courts hear cases of first-impression and each district court normally has one professional judge and two lay judges, although depending on the complexity of the legal case more judges and different combinations of judges may be utilized.

Discovery operates differently in Norway than in the United States. There are no depositions and requests for production are only possible once a proceeding has commenced. Parties are under a general obligation to testify about facts related to the dispute and to produce documents that may be evidence in the proceedings, regardless of whether those facts or documents are favorable to their position.

Norway is a "loser pays" system, however, the court has discretion to set the amount of costs and if the result was not clear-cut then the losing party may only be ordered to pay a small percentage of the prevailing party's costs. Attorneys are not allowed to represent clients on a purely contingent fee basis. Lawyers can, however, agree to fee arrangements in which they receive a bonus if their client prevails. Most lawyers charge hourly fees, although some may be willing to agree to flat rate representation depending on the matter. All attorney fees are subject to a 25% value added tax (VAT). Third party funding of litigation is possible, however, it is not commonly used.

Class actions have been possible in Norway since January 1, 2008. Class actions are available when four preconditions are met: 1) the matter must concern a uniform claim by several persons; 2) the court is able to hear all claims with the same panel of judges and the same procedural rules will apply to all the claims; 3) the court determines that a class action is the most appropriate method for deciding the claims; and 4) an appropriate class representative is capable of being appointed.

Class actions can be either opt-in or opt-out, and the court determines which procedure is desirable for a particular action. The opt-in procedure is the default method and the court will set a deadline for interested class members to join by filing a written submission. The opt-out procedure is only considered appropriate in circumstances in which the value of each individual claim is so small that it would be unlikely for claimants to bring individual claims.

The court will appoint a class representative that is responsible for safeguarding the interests of the class members. The class representative must keep all class members informed about the status of the litigation. In the event the class representative wishes to settle the dispute, he must notify all class members and give them an opportunity to voice their opinions on the proposed settlement and an opportunity to specify whether they accept the settlement and want to be bound by the terms of it. Although class members may decide whether to be bound by a settlement, all class members are automatically bound by the terms of any judgment rendered by the court provided they were registered class members at the time the judgment was issued. The class representative is normally responsible for paying for the litigation, including the opposing side's fees and costs in the event the litigation is unsuccessful. The class representative can avoid this liability by making a specific request that the court issue an order specifying that only those individuals who accept liability for a specific amount of the costs may register as members of the class.

### 13. The United Kingdom

There is no single unified judicial system for the whole of the United Kingdom (England, Scotland, Wales, and Northern Ireland). Instead, there is one system for England and Wales, one for Scotland, and one for Northern Ireland. The United Kingdom is primarily a common law system, although Scotland utilizes some elements of civil law. Legislation is enacted by parliament but the judiciary is responsible for interpreting the legislation and following judicial precedent.

The United Kingdom is a "loser pays" system and a prevailing party may potentially recover both the court costs and legal fees incurred as a result of the action. All fees and costs are fully within the discretion of the court. Attorneys are prohibited from representing clients on a contingency basis, but third party funding is allowed and attorneys may charge a conditional fee (where the lawyer bills the client at an hourly rate and charges a success bonus that is equal to a percentage of the base fee). Conditional fee agreements are strictly regulated.

In England and Wales, there is no procedure that is akin to the opt-out class actions that exist in the United States. Instead, there are three mechanisms for pursuing multi-party litigation: Group Litigation Orders, Statutory Collective Actions, and Representative Actions.

#### (a) Group Litigation Order

The Group Litigation Order ("GLO") is a case management procedure that allows judges to combine cases that give rise to common or related issues of fact or law. It may be brought by any person or legal entity that has a claim. It is an opt-in action and only those individuals who have claims that meet one or more of the common legal and factual issues. The GLO grants courts broad discretion and contains very few specific mandates. There is no minimum number of claims that must exist in order for a court to order a GLO. A GLO must, however, specify the group register, the issues the GLO will determine, and the court responsible for managing the claims. Judges may also decide the criteria for a claim to be entered on the group register, may outline the manner in which the GLO may be advertised, and may specify a deadline for joining the actions. Judges may also determine that one or more cases will proceed as the lead or test cases and will appoint lead solicitors. Ultimately, in a GLO, each individual claim remains separate and the outcome of any one case, including the lead or test case, does not automatically determine the result in the remaining claims. Lead or test cases are used as a means of establishing findings of law and fact that may then be applied in other cases and certain findings of law are made binding on all parties that have joined the group register at the time of the judgment. The GLO also may provide for a more expedient resolution to a case as it may encourage defendants to settle.

#### (b) Statutory Collective Actions

There are five consumer protection statutes in the U.K., that were implemented as a result of EU directives, that allow for collective actions for misleading advertisements, unfair terms in consumer contracts, unfair trading, and violations of other consumer protection laws. The Office of Fair Trading is entrusted with the primary enforcement responsibility; however, consumer organizations may bring actions for injunctive relief on behalf of consumers. All consumer organizations wishing to bring an action must be approved by the government. "Which?" is the only consumer association that is currently authorized to act in collective consumer litigation. "Which?" has yet to bring any actions for injunctive relief and has so far only brought matters to the attention of the Office of Fair Trading.

### (c) Representative Actions

If there are multiple individuals who have suffered losses as a result of a violation of UK competition law, then a "specified body" may bring a representative action. Three conditions must be met in order for the "specified body" to proceed with a representative action:

1. Each individual with a claim must expressly grant the specified body permission to act on his/her behalf.
2. The Office of Fair Trading or the European Commission must have established that there was a violation of competition law.
3. The complaints must all relate to goods or services received by consumers.

Just as in Statutory Collective Actions, an organization must be approved to be a specified body and in order to be approved they must meet criteria such as demonstrating they represent or protect the interests of consumers, demonstrating a lack of bias and an ability to act independently, impartially, and with integrity. So far only "Which?" has been approved.

Unlike in a Statutory Collective Action, the remedy in a Representative Action is an award paid to the individual consumers and not injunctive relief. While the remedy is typically paid to each individual consumer who was represented in the action, if all the consumers and the "specified body" agree, the award may be made to the "specified body."

## 14. South Africa

### (a) Legal System Generally

South Africa has a mixed legal system that incorporates elements of both civil and common law. The courts in South Africa include: various specialized courts (such as tax courts, divorce courts, etc.); Magistrates' Courts (which are the court of first instance for civil cases with a value of less than R100,000 and less serious criminal offenses); the High Courts (which are the court of first instance for serious criminal offenses and all civil cases with a value of more than R100,000 and the court of first appeal for anything that was decided by the Magistrates' Courts); the Supreme Court of Appeal (which exclusively handles appeals sent to it by the High Courts and is the final decider in most instances unless a case raises a constitutional issue); and the Constitutional Court (the highest court that exclusively decides the constitutionality of laws and decisions rendered by the lower courts).

High Court cases of original jurisdiction are usually heard by one judge, but any case that is being heard on appeal must be heard by a panel of at least two judges. At the Supreme Court of Appeal, panels of three to five judges decide all cases by a simple majority. The Constitutional Court is comprised of eleven judges who hear and decide all cases brought before the court.

High Court proceedings are public. The court has discretion to make certain proceedings confidential, but in practice this is rarely done. All pleadings and documents filed during the course of the proceedings are deemed public.

Proceedings are generally adversarial with all parties represented by counsel. Judges may pose questions to witnesses and counsel, but counsel bears the primary responsibility for presenting arguments and evidence to the court.

#### i. Discovery

South Africa's system of document production and evidentiary discovery is different than that in the United States or other jurisdictions that allow for some form of fact finding. Parties to litigation may make requests for documents and all parties are required to specify by oath all the documentation and evidence in its possession (or that were previously in the party's possession) that relate to the action. Once the items have been outlined in an affidavit, the other party is invited to inspect and photocopy any of the items. As a general rule, and absent special circumstances and court permission, an item of evidence cannot be introduced at trial if it was not included in the discovery affidavit. Failure by a party to participate in the discovery process or produce certain evidence can result in a default judgment against that party. Certain categories of documents that are deemed privileged (e.g. attorney/client privilege, marital privilege, privilege against self-incrimination, etc.) need not be produced, but they must still be listed in the affidavit along with the grounds for claiming privilege. Depositions are not part of the South African discovery process.

#### ii. Costs of litigation and attorney fees

Lawyer's fees are negotiated between the lawyer and the client, but are most frequently based on an hourly rate. Contingency fees are allowable subject to certain guidelines outlined in the Law Society and the Contingency Fees Act No. 66 of 1997. When a party commences litigation, they must pay court fees that are set out in a schedule and based on the amount in dispute. Third party funding is allowed as is adverse cost insurance. South Africa is a "loser pays" system and as a general rule the prevailing party is entitled to reimbursement of his costs. The amount of attorneys' fees and other costs is set by the court and so the amount of any award may not be the full costs incurred by the prevailing party. Additionally, the courts have discretion to award costs or adjust the amount of any award based on factors like the merits of the case, the percentage of arguments won or lost, the and the conduct of the parties during the proceedings.

### (b) Class Actions in South Africa

Section 38(c) of South Africa's Constitution expressly allows for the use of class actions. The Constitution, however, does not set out any guidelines or procedures for how a class action is to proceed. The procedures and requirements governing class actions have, therefore, been established by case precedent.

Class actions have most frequently been used in South Africa in order to enforce constitutional rights. Class actions concerning other statutory or contractual rights are very much in their infancy. The rules of civil procedure in the Magistrates' courts, the High Courts, and the Supreme Court of Appeal do not include any guidelines or instructions for class actions. As a result of the lack of clear procedures and limited case precedent, it is uncertain whether class actions in South Africa will follow an opt-out or opt-in procedure.

In the limited decisions available, South African courts have taken a broad view of defining the class and determining who has standing to assert the claims on behalf of the class. Some judges have determined that a class action can only be commenced when (1) the class is so large that utilizing joinder for all would-be class members would be impractical, (2) there are common questions of law and fact to be decided on behalf of all class members, (3) the claims of the applicant(s) are typical of the claims of other class members, (4) the applicant(s) and their legal counsel will adequately represent the class. In contrast, the rules of civil procedure of the Magistrates' Courts, the High Courts, and the Supreme Court of Appeal provide that joinder is the only allowable mechanism for an interested party to become part of an existing case. There is no existing procedural step that allows the court to formally recognize members of a class and allow a representative to litigate on behalf of all those who have not formally joined the action. Unless a judge decides independently to recognize a class, all would-be class members effectively need to opt-in and be formally joined to the action.

If a judge does decide to recognize a class, notice must be served on all would-be class members in order to notify them that they will be bound by the outcome of the case. At that point, the absent class members have an opportunity to opt-out of the class action. As with all other elements of South African class actions, there are no established rules or guidelines regarding the form, timing, or scope of any required notice.

#### (c) Securities Laws in South Africa

South Africa's securities are primarily regulated by the New Companies Act and the SS Act. The SS Act contains provisions regarding insider trading and manipulative, false or deceptive trade practices and civil actions may be brought against persons who contravene it. The New Companies Act contains provisions concerning continuous disclosure obligations and the form and content of prospectuses. The New Companies Act also provide for extensive civil liability for false statements or failure to disclose material information or any information that may impact the price or create a false market in the security.

Investors can also potentially pursue actions for misrepresentations made by companies as a common law tort claim without reference to a specific statutory provision. In order to prove a tort claim for misrepresentation, an investor must prove that the company (or individual), committed an act (e.g. a misrepresentation or omission) due to either negligence or intent, that was wrongful, and that was the factual and legal cause of loss or damages that were suffered by the investor(s). In practice proving all of these elements can be difficult. It appears that investors could be required to prove reliance on particular statements (or lack of statements) caused them to make certain investment decisions that resulted in a loss. It does not appear that South African law currently recognizes a "fraud on the market" presumption of reliance like the U.S. does. It also can be complicated to demonstrate or calculate the loss that results from any misrepresentations or omissions.

### 15. South Korea

South Korea is somewhat of an anomaly in that it is a civil law jurisdiction that has an opt-out system for securities class actions. In 2005, in response to a number of large accounting-related frauds at South Korean companies in the early 2000s, South Korea adopted a class action mechanism solely for the purpose or prosecuting securities-related frauds. In the first four years after the passage of the law, no class actions were filed. Beginning in 2009, shareholders began to avail themselves of the system and South Korea has seen approximately one new securities class action filed every year since.

#### (a) Legal System Generally

South Korea is a civil law country that is similar to many European systems (and Germany in particular). The Korean Constitution, adopted in 1948, was influenced by the U.S. Constitution and recent legislation (such as the Korean Securities-Related Class Action Act) is often modeled on the U.S. system. The courts in South Korea include: municipal courts (which exercise jurisdiction over small claims and misdemeanors), 13 District Courts that serve as the courts of first instance for most civil and criminal matters, courts with specialized jurisdiction including the Family Court and the Administrative Court, six High Courts (the appellate level courts), the Supreme Court of South Korea (the highest level of appellate review for most civil and criminal cases), and the Constitutional Court of South Korea (whose jurisdiction is limited to questions related to assessing the constitutionality of various laws). There are no juries in civil cases in South Korea; all civil cases are decided by either a single judge or a panel of three judges. Limited advisory juries were introduced in 2008, for criminal and environmental cases, but the judges still determine all questions of fact and law. Judges are nominated by the Chief Justice of the Republic of Korea and confirmed by a council of the Justices of the Supreme Court. Judges serve terms of 10 years and may be re-appointed. Justices to the Supreme Court or the Constitutional Court are each appointed in a separate nomination process and have different terms of service compared to the lower courts.

Civil litigation begins when a plaintiff files a complaint with the court setting out the alleged facts and violations of the law, as well as the remedy sought. Once the complaint is filed with the court, the court will serve the defendant with the complaint. The defendant is then required to file a written answer to the complaint within 30 days after the complaint is served. The parties then exchange briefs and supporting documents under the supervision of the court during the pre-trial period. Once the pre-trial period concludes, the judge sets a date for the trial. Trials are public and conducted orally in front of the judge(s). After the conclusion of the trial the judge(s) will render a judgment. After the judgment is rendered, the losing party has 14 days in which to appeal before the judgment becomes final.

#### i. Discovery

There is no discovery mechanism similar to that in the U.S. No disclosure of documents can be sought prior to commencing litigation. Once litigation has commenced, a party can seek the production of certain documents by applying to the Court for an order. To do so, the party needs to specifically identify the documents sought. However, even if the court orders a party to produce certain documents or evidence, there is no effective sanction or mechanism that will force a party to comply with the court's order. As an example, in an accounting fraud related securities class action commenced in October 2013 against GS Engineering & Construction, the court ordered the defendant to produce financial records, construction project agreements, bidding packages and cost reports but the defendant never complied with the court's order and there was no mechanism available for either the court or the plaintiff to enforce the disclosure order.

#### ii. Costs of litigation and attorney fees

Legal costs can be significant in South Korea. The plaintiff is required to pay a filing fee at the inception of a case. The filing fee is calculated by reference to the damages alleged by the plaintiff.

Unlike in many other jurisdictions, there are no prohibitions or restrictions on attorneys charging contingency fees. Class members in securities class actions will not typically be required to pay any out-of-pocket expenses because the law firm representing the lead plaintiff will cover the costs in exchange for a contingency fee. Some law firms may charge the lead plaintiff a low upfront fee. In the securities class action context, the lead plaintiff and the counsel it hires must agree to any fee. After the resolution of the case, the court must also approve the fee that the plaintiff's attorney will receive and the court has the authority to reduce the amount the attorney is ultimately paid from any award or settlement after considering factors like the complexity of the case, the amount of time spent on the case (including the time spent on various briefs and the quality of those briefs), and the total amount awarded and distributed to class members.

South Korea is a "loser pays" jurisdiction and the losing party will often be required to pay for the prevailing party's costs. The amount of costs is set by a statutory scale and such costs often are only a fraction of the actual attorneys' fees in a case. The amount of any adverse costs awarded is up to the discretion of the Court. Where the outcome of a particular case is divided, the court will apportion the costs between the parties. Law firms that are representing a lead plaintiff in a class action will frequently cover this adverse cost risk, but even where a particular potential action is meritorious, the law firms have to be willing to assume the risk that the case will be unsuccessful. This additional risk limits the number of securities class actions that are pursued in South Korea. And, as noted above, without procedures for obtaining discovery, it is difficult for plaintiffs to obtain evidence to prove their case. There is no third party litigation funding in South Korea because the Attorney-at-Law Act provides that fees and other profits earned through the provision of legal services cannot be shared with a non-attorney.

### (b) Overview of South Korea's Securities Laws

#### i. Substantive Provisions

Securities are governed by the Financial Investment Services and Capital Markets Act (the "Capital Markets Act"). The Capital Markets Act contains specific provisions prohibiting insider trading and market manipulation, as well as provisions regarding required timing and content of all disclosures. As an example, the Capital Markets Act stipulates that if a person who has acquired or disposed of securities issued by a reporting corporation suffers a loss due to a false, misleading or omitted statement of material information then ANY person involved in the publication of the report (and the directors of the reporting corporation at the time of publication) are liable to the shareholder for the loss suffered. The reporting corporation or any person who is facing potential liability can avoid culpability if they can prove that they were unaware of the false, misleading, or omitted statement despite exercising due diligence. Similarly, if the claimant had knowledge of the false, misleading or omitted material information at the time it acquired or disposed of the securities, then the defendant will not be liable.

Actions for securities fraud violations must be brought by the earlier date of either: a) one year from the date the claimant became aware of the unlawful act or, b) three years from the date of the defendant's alleged unlawful act (e.g. the date of the false or misleading disclosure).

#### ii. Damages

The Capital Markets Act includes specific sections regarding damages available for specific securities fraud violations. For example, for violations of the disclosure obligations and accounting fraud claims, damages are presumed to be the difference between the purchase price paid by the claimant in acquiring the security and either the market price as of the close of the proceedings or, if the claimant disposed of the security prior to the close of the court proceedings, the sale price. The defendant can attempt to mitigate damages by proving that all or a portion of the damages are due to market factors and not related to the disclosure violations or discovery of accounting fraud. There are no punitive damages available, but a claimant is entitled to interest on damages. Interest accrues at a rate of 5% per annum from the date on which the alleged wrongful act occurred and 15% per annum from the date on which the complaint is served on the defendant. The Court has discretion to adjust the applicable interest rates where it deems it appropriate.

### (c) Securities Class Actions in South Korea

With the passage of the Securities-Related Class Action Act on January 1, 2005 (the "Securities Act"), South Korea adopted a U.S.-style class action regime solely for the prosecution of securities fraud related claims. Although the mechanism is an opt-out mechanism and includes many of the procedural elements of U.S. securities class actions (such as class certification and lead plaintiff appointment), there are also some differences to how each of those stages operates.

If a class action is commenced, all potential victims who fall under the definition of the class become members of the action unless they opt-out of the case. Class actions, however, are limited to specific claims for losses that arise from, or in connection with, trading in securities that are listed on the Korea Exchange (KRX) or the Korea Securities Dealers Automated Quotation (KOSDAQ). There are four main types of securities frauds that can give rise to an action: (1) false statements, omissions, or failure to include information in the company's registration statement or issued prospectuses; (2) false statements, omissions, or failure to include information in the company's quarterly, semi-annual, or annual reports; (3) insider trading or market manipulation; and (4) accounting fraud.

In order for a securities class action to proceed, the Court must certify the class based on the following requirements: (1) the class definition must apply to at least fifty shareholders; (2) the class must hold at least 0.01 percent of all outstanding shares issued by the company; (3) the Court must determine that the class action mechanism is the most adequate and efficient means to protect the rights and interests of all class members; and (4) there must be factual and legal issues that are common to all class members. The Court will question the applicant and would-be defendant and review the case dockets before determining whether to certify the class. In a recent Korean Supreme Court case, the Court held that the Court's inquiry at the certification stage should be limited to determining whether the standards for certification are met and that the courts should not evaluate whether the defendant is liable for the damage alleged.

After the Court issues its certification decision, either party can appeal. Technically a defendant can appeal the decision twice (once to the appellate level court and then to the Supreme Court) at the class certification stage and this can add substantial delay to the overall length of the proceedings. Generally it takes a number of months for the Court to certify a class, but the class certification stage has taken more than three years in some past cases where there were appeals of the lower court's decision. If the Court declines to certify a class (and the lead plaintiff does not successfully appeal), individual claimants are not precluded from filing separate lawsuits over the same subject against the defendant.

Any person (including individuals who are not domiciled or residing in South Korea) who suffered damages in relation to securities traded on a Korean Exchange due to a defendant's alleged misconduct can be a claimant and, through legal counsel, can file a petition in Court. Claims cannot be assigned to third parties for the purpose of a lawsuit and only the injured party may file a claim. Once a class action is filed by one or more class members and is certified by the Court, the court issues a public notice of filing and any person wishing to be a lead plaintiff must submit an application to the Court within 30 days of the public notice. The Court will then determine that a lead plaintiff is appointed who can fairly and adequately represent the interests of all class members. The Court will determine the adequacy of a would-be lead plaintiff and its counsel and ensure that neither the lead plaintiff nor the lead attorney has participated as a lead of three or more securities class actions in the prior three years. The Court will also disqualify any attorney from acting in the proceedings if it determines that the attorney owned a security subject to the class action or if the attorney has any other monetary interest directly in the securities.

Following class certification and appointment of a lead plaintiff/lead counsel, cases follow the general civil procedure that is used in all litigation in South Korea. Securities class actions (after the Court certifies the action and moves to the merits of the dispute) can take two or more years to reach a resolution. Any decision to stop the case before a decision on the merits (by withdrawing the complaint/petition), any settlement, or any other major action that could impact the rights of all absent class members requires the Court's approval and the Court will give absent class members an opportunity to be heard before rendering a decision.

If a class action reaches a settlement that is Court approved or judgment, it will be binding on all class members unless a class member filed a declaration of exclusion with the court. Any individual who falls within the class definition and who did not file a declaration of exclusion is eligible to receive proceeds from any settlement or judgement. The lead plaintiff is responsible for enforcing the court judgment against the defendant but may ask the court to appoint a distributor to distribute any proceeds among all class members.

## 16. Sweden

Sweden is a civil law country and most lawmaking power is vested in the legislature. Accordingly, the courts resolve legal disputes by reference to (in order of relative weight given): statutes, preparatory works, case law, and legal doctrine. There is no discovery in Sweden like there is in the United States because parties must provide the evidence on which they intend to rely. A party may, however, request documents in possession of the other party or a third party and may seek the assistance of the court if they encounter resistance.

Sweden, like many other European countries, is a "loser pays" system and the losing party is responsible for paying the prevailing party's reasonable legal costs. Reasonable legal costs can include attorney's fees, the party's own work and loss of time, fees for witnesses and experts, and court costs. Attorneys are not allowed to represent clients on a contingency fee basis except in some limited circumstances. Although, as discussed in more detail below, attorneys can assume some of the financial risk in a class action context by covering the representative plaintiff's legal costs until completion of the litigation.

Sweden enacted the Swedish Group Proceedings Act (the "Act") and it went into effect in January, 2003. The Act makes it possible for a plaintiff to bring an action as the representative of a group of several persons or entitles. Virtually every type of claim, except those concerning freedom of speech or freedom of the press or those cases which must be appealed before a special court such as the Labor Court or Market Court, may be pursued as a group action under the Act. Groups may bring actions to seek any type of relief including, but not limited to, declaratory judgments, payment of damages, and judgments ordering specific performance.

Under the Act, there are three types of group action that may be commenced: private group actions, organization group actions, or public group actions. Private group actions are those actions brought by an individual who has a legal claim. Organization group actions are those brought by a nonprofit association which, according to its charter, protects consumer interests in disputes with businesses. A public group action can only be initiated by public authorities that are specifically designated by the government.

To commence a group proceeding, a plaintiff either submits an application for summons to the competent court or a plaintiff in ongoing proceedings submits a written application requesting the case be converted to group proceedings. In the application, the plaintiff must provide details about the group to which the action relates, the facts or circumstances common to the group members, circumstances known to the plaintiff that might vary among group members, and the important facts or circumstances which weigh heavily in favor of handling the particular action as a group action as opposed to an individual action. The plaintiff must also define the group with sufficient detail to allow the court to decide whether a group action is sufficient and so the court may properly notify all group members. In general all the names and addresses of group members are provided, however, it is possible to proceed without this information if the names and addresses are deemed unnecessary for resolving the dispute. These requirements exist because the court is tasked with determining whether to allow the particular action to proceed as a group action. Under the Act, a group action may only be allowed if: 1) the action is based on facts and circumstances that are common or similar among the group members; 2) there are not claims of some members of the group that rest on facts or circumstances that are substantially different than other group members; 3) the case is best pursued as a group action because the individual claims are too small or could otherwise not be equally well pursued; 4) the group is appropriately defined; and 5) the plaintiff is likely to be a strong representative of the group (considering the legal claims, the financial circumstances of the plaintiff, etc.).

Sweden is an opt-in system, which means that a group member must affirmatively act by a deadline prescribed by the court and indicate to the court that he wishes to be included in the proceedings. The court carries the burden of informing all potential group members of an action either individually by mail or via publication in newspapers.

The court may also order either the plaintiff or defendants to furnish the information to group members if that is likely to be the most efficient means. The party who is ordered by the court to notify potential group members is entitled to reimbursement of expenses from public funds.

The representative plaintiff plays an important role in the litigation and should provide all group members information and the opportunity to provide feedback on matters affecting the litigation. The representative plaintiff has the authority to enter into a settlement with the defendants but that settlement must be confirmed by a judgment of the court. The representative plaintiff, not the group members, is the party responsible for the defendant's reasonable legal costs if the litigation is unsuccessful. To alleviate the financial burden of covering both its own legal costs and potentially covering defendant's legal costs, Swedish law provides for risk agreements that allow the representative plaintiff's legal counsel (who must be a member of the Swedish Bar) to cover some of the plaintiff's legal costs. The legal counsel may not, however, assume the risk of paying the defendant's legal costs. This type of arrangement is different than a contingency fee arrangement in that the counsel's right to fees may not be based solely on the value of the dispute. Instead the agreement provides for both the counsel's normal fee and an additional fee if the litigation is successful.

Generally, group members are not responsible for any of the legal costs or financial risks of the litigation. It is only if the outcome of the litigation is in the group's favor and the defendant is unable to reimburse the representative plaintiff's legal costs that the group members will be responsible for reimbursing the representative plaintiff's legal costs up to the amount of the judgment.

### 17. Taiwan

#### (a) Legal System Generally

Taiwan is a civil law country.  There are no juries.  Proceedings are overseen and adjudicated by judges and the judges primarily look to the Constitution, codes, statutes, and ordinances, as opposed to case precedent when rendering a decision.  Judges in Taiwan do, however, consult case precedent as a reference.

There are three levels of courts in Taiwan.  District Courts are the courts of first instance and all fact-finding and evidence gathering must occur at the District Court level.  After the District Court renders a decision, the losing party may appeal to the High Court and finally to the Supreme Court for the final judgment.

##### i. Discovery

The plaintiffs usually have the burden of proof in a case and there is no U.S.-style discovery mechanism or duty of the defendant to disclose or provide information. Instead, as in many civil law jurisdictions, parties who seek evidence must make a motion to the court to request any documentation or witness examinations from the opposing party (or any third party).  Judges may also request evidence from either party (or any relevant third party) or launch an investigation on their own accord and without a motion being made by either party.  Once a motion has been made by a party, the judge has discretion whether to grant the motion for discovery.  If the judge issues an order for a party to produce documents or testimony and the opposing party fails to comply with the orders, then the judge may make a negative inference against the party from whom the evidence was sought.

There are no statutory restrictions on the types of evidence that is considered admissible. A party may submit (if in their possession) or request (if not in their possession) any relevant evidence.  That evidence must be presented to the court of first instance if it is to be considered and it is up to the judges to determine the probative value of what is submitted.  Either party or the judge may also seek expert testimony on any given matter.  Witnesses and experts will deliver evidence through in-court testimony.

### ii. Costs of litigation and attorney fees

When commencing litigation or filing an appeal, the plaintiff or appellant must pay court costs that are proportional to the monetary value of the claim. The court costs for filing a complaint are typically about 0.6 to 1 percent of the monetary claim value. Court costs for filing an appeal are usually about 1.5 times the amount of the initial court costs. Courts will dismiss actions for failure to pay court costs. In addition to court costs, the defendant may petition the court to require a bond be paid on behalf of any foreign plaintiffs (that is any plaintiff that does not at least have an office or legal presence in Taiwan). The bond amount may be equivalent to approximately 3% of the total amount claimed.

Attorneys in Taiwan charge fees based on a negotiated agreement with the client. The negotiated fees may be a flat rate, hourly charges, or, in civil matters, an attorney can represent a client on a contingency fee basis. Contingency fees are only prohibited for criminal, family law, and juvenile matters.

Taiwan is a "loser pays" jurisdiction and the prevailing party may recover court fees, costs, and expenses incurred in prosecuting the case. However, the prevailing party cannot recover their attorney fees if they prevail in the court of first instance or the first level appeal. Attorney fees are only recoverable if a party prevails in an appeal before the Supreme Court. There is also a maximum allowable attorney fee that may be included in the litigation expenses to be paid by the losing party.

In group litigation, costs are shared among the members of the group or class by agreement made by all the involved parties. There is no provision for the court to manage the costs incurred or allocate the costs among all group members.

Third party litigation funding is permitted. Additionally, as discussed below, in actions initiated by government-sanctioned organizations, participating claimants are not responsible for any out-of-pocket payments because the costs and fees typically are covered by the organization in exchange for a contingency fee if the action is successful.

## (b) Collective Litigation in Taiwan

Although some procedural mechanisms for group or class actions have existed since 1994 (when the Consumers Protection Act was enacted and empowered consumer protection groups to bring litigation on behalf of groups of at least 20 consumers), class actions remain relatively rare in Taiwan. Most class actions that have been initiated have been in the area of securities or shareholder litigation, environmental protection, or consumer protection. This appears to be a legacy of the fact that the initial class action mechanisms were category specific and limited to consumer protection (beginning in 1994) and investor protection (beginning in 2002). It was not until the 2003 amendment to the Code of Civil Procedure that a broad-based mechanism was adopted to make class or group actions available to all disputes, and not just consumer and investor disputes.

Taiwan offers two types of procedural mechanisms that are akin to a class action. The first is an opt-in group action where multiple claimants, whose claims all arise from the same "public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind," file a suit and then by motion or consent of the claimants and with the court's approval, the court appoints an attorney as a representative of the group and issues a public notice for other impacted claimants to join the action. Under the second procedural mechanism, which is somewhat unique to Taiwan, actions are initiated by government-sanctioned organizations ("GSOs") instead of private parties. The GSO-led actions were originally established within the confines of specific areas of law, including the Consumer

Protection Act and the Securities Investor and Futures Trader Protection Act, but now any GSO that is legally established may bring these group claims as long as they are in the public interest.

### i. Opt-In Group Actions

Taiwan's Civil Code allows multiple plaintiffs to file one joint lawsuit. This mechanism is similar to joinder. Claimants are not automatically included and instead need to take certain steps or opt-in in order to be included in the case. In order to file a group action, the plaintiffs' claims must all be against the same defendant(s) and must be based on common facts and law. There is no criteria that restricts who can initiate the group proceedings. The class members generally decide together who will serve as the representative of the action in court.

If, after a number of plaintiffs join together to bring an action and the action is certified by the court as a class, and if the class representative or other interested claimants petition the court, the court will publicize the action through the government gazette and media in order to notify potential claimants that they have an opportunity to participate. The court may also seek to publicize the action without an application being made by the representative or other interested claimants, but in that case the court must obtain the consent of the representative before publicizing the case. The notification to would-be claimants typically contains a 20-day notice period in which the would-be claimants must act to join the case.

Once a group case is up and running, the case operates like any other civil litigation in Taiwan. The representative submits evidence in support of the common allegations of fact and law and the defendant submits evidence in rebuttal. On average it takes about four to eight months to get to a trial. After the trial, if the judge issues a decision in favor of the plaintiffs, the judge can assess damages for the class of plaintiffs in one of two ways: (1) independently assess the damages owed to each and every plaintiff, or (2) the members of the class can agree on an amount to be allocated to each member and then the class representative can petition the court for a lump sum judgment so that the court need not engage in the exercise of assessing damages on an individual basis.

### ii. GSO Initiated Securities Actions

The Securities Investors and Futures Traders Protection Act (the "Act") was adopted on July 17, 2002, and became effective on January 1, 2003. The Act established the Securities and Futures Investors Protection Center (the "SFIPC" or the "Center") as a GSO to provide mediation and litigation services on behalf of investors that have disputes with listed companies. In addition, the Center manages a protection fund to compensate investors if a securities or commodities firm is unable to do so due to financial difficulties. This protection fund is funded by required monthly contributions from a variety of organizations, including the Taiwan Stock Exchange, the Taiwan Futures Exchange, the GreTai Securities Market, and various securities and futures firms.

The SFIPC was established as a GSO to become the legal source to protect investors and pursue litigation on their behalf when there are allegations that a company has committed securities fraud. The SFIPC is authorized to file class action lawsuits or commence arbitration under its name as an authorized representative of investors who suffered a loss. According to the Act, "the protection institution may bring an action or submit a matter to arbitration in its own name with respect to a single securities or futures matter injurious to a majority of securities investors or futures traders, after having been so empowered by not less than 20 securities investors or futures traders." Having the SIFPC serve as the representative ensures that companies are held accountable for fraudulent behavior and that investors receive compensation. Taiwan's securities markets are dominated by individual investors who do not typically have the resources to file lawsuits for their losses. However, both institutional and individual investors are able to participate in SFIPC-filed actions on a cost-free basis. Having a GSO responsible for the shareholder actions allows for procedural and cost efficiency. Additionally, in many instances, such as where there are allegations of insider trading or other criminal behavior, the SFIPC's case is brought in conjunction with any criminal proceedings. If the criminal prosecution does not result in a guilty verdict, then the SFIPC case will also likely fail.

In order for the SFIPC to initiate an action, there must be at least 20 investors who have suffered damages and who register and assign their claim to the Center. When the SFIPC believes there is a case meriting action, it will issue a public notice on its website and invite investors to register to participate in the recovery effort. If there are at least 20 investors who are impacted and who register to participate, the Center will commence a lawsuit or arbitration in its own name. Investors who register are not bound to continue with the case until its conclusion. The Act recognizes the right of claimants to withdraw their claims at any time. And if an investor chooses to withdraw, the withdrawal will not preclude the Center from continuing to litigate on behalf of the other investors, even if the registered number drops below 20.

Determining whether an investor suffered a loss in a case proposed by the SFIPC in Taiwan can sometimes be quite difficult, and it is often a much different exercise than calculating losses in U.S. class actions. Many cases in Taiwan center on allegations of insider trading and damages in those cases are limited to those who traded opposite the insider (for example buying shares on the date an insider sold shares) on specific days. The class periods for insider trading cases are also quite different and instead of running for a concurrent stretch of time, there will be a series of listed dates on which the insider traded. Estimating damages for insider trading cases is not typically possible because the damages will depend on the amount that the court determines the defendant(s)' trading influenced the market price on each given day. For this reason, it may be worthwhile for investors who have trades opposite an insider to participate in the action – especially if the opposite trading volume is significant.

The Center is forbidden by law from asking for any form of out-of-pocket payment towards the litigation costs. The SFIPC operates on a contingency basis and if there is compensation recovered from the litigation or arbitration, the Center is allowed to first deduct costs and expenses from the award before distributing compensation to each of the registered investors. If the case is unsuccessful, the participating investors are responsible for neither the upfront costs the SFIPC incurred nor the costs incurred by the defendants that would normally be payable to defendants under Taiwan's "loser pays" system. The adverse cost risk is covered by the SFIPC. Although registering investors are not responsible for the costs, the SFIPC benefits from some cost reductions that were granted to it by law. For example, the court fees charged on any SFIPC-filed action are capped and any claimed damages that are greater than NT$30 million are assessed court fees based on a set claim value of NT$30 million.

The SFIPC is the most robust and successful GSO in Taiwan. It has initiated the greatest number of cases[22] and enjoyed many successes on behalf of shareholders. One of the Center's most well-known cases was against the company Procomp Informatics ("Procomp"). In 2004, it was discovered that the chairperson and managers of Procomp had made misleading statements about the company's financial condition in order to bolster its 1999 listing application. Even after the company was successfully listed in Taiwan, Procomp continued to manipulate its accounting records and make fraudulent representations in its financial statements. After the public learned of the scandal, over ten thousand investors authorized the SFIPC to file a lawsuit. The SFIPC commenced litigation and the court issued a judgment against the chairperson, managers, board of directors and supervisors of Procomp and in favor of investors who had suffered losses due to trading Procomp's stocks between 1999 and 2004.

### (c) Securities Laws in Taiwan

Many shareholder actions in Taiwan arise under Securities Exchange Law ("SEL"). The SEL regulates the offer, issue, and trade of securities. Under the SEL, a company or its officers can be held liable for damages by

[22] As of March 2018 the Center had registered investors and recovered at least partial compensation funds for 59 cases.

shareholders for misrepresentations, or fraudulent or misleading acts that are made during the offer, issue, private placement or trading of securities, or for any fraudulent or misleading statements that are made within any financial reports, prospectuses, or other required continuous disclosure documents provided by the issuers or underwriters of the securities. The statute of limitations for bringing damage claims under the SEL is two years from the date on which the shareholder became aware of the misrepresentation or fraud or five years from the date of the offer, issue, or trading of the securities.

# V. Shareholder Derivative Actions

Unlike a class action, which is brought on behalf of investors, a shareholder derivative action is a lawsuit brought by a shareholder of a public company on behalf of and for the benefit of the company against the directors and/or officers of that company. A company's board of directors is traditionally responsible for making decisions about whether or not the corporation will pursue litigation; however, in a derivative action, shareholders are permitted to "step into the shoes" of the directors and bring litigation that the board would be unwilling to pursue. Such unwillingness typically relates to the fact that the board members themselves are alleged to have participated in the misconduct and thus would be unlikely to "sue themselves." Shareholder derivative litigation can recover damages for financial harm caused by the conduct of its insiders, and also can be used to improve the governance of public companies in order to guard against such harms in the future. This section is intended to familiarize the reader with the nuances of shareholder derivative litigation, including the procedural requirements, underlying principles, and objectives of these actions, as well as to provide examples of successful derivative actions litigated by Kessler Topaz.

## A. Plaintiffs in Shareholder Derivative Actions

Any shareholder of a company can serve as a plaintiff in a shareholder derivative action provided that the shareholder has held stock in the company continuously throughout the time period in which the wrongful conduct occurred and through the litigation. Strategically, it is beneficial for larger and more sophisticated shareholders to serve as derivative plaintiffs. First, allegations raised by such shareholders are traditionally treated more seriously by companies, defendants, and the courts, as compared to allegations raised by smaller shareholders. Thus, actions filed by larger and more sophisticated shareholders have an increased likelihood of effecting positive results for the company, be it monetary recovery or therapeutic corporate governance improvements. This is typically true whether or not the investor has a large position in the stock. Second, as in many shareholder actions, multiple plaintiffs often file substantially similar derivative actions on behalf of the same company. These situations often produce leadership disputes in order to determine which plaintiff will be the lead plaintiff in the litigation, and will thus be able to control the course of the litigation. Unlike federal class action lawsuits, derivative actions are not subject to the PSLRA and do not have a structured lead plaintiff appointment process. Although the PSLRA is not applicable, courts frequently give deference to shareholders with larger holdings in the subject company when selecting a Lead Plaintiff. In addition to the size of a shareholder's holdings and the shareholder's level of sophistication, courts will consider factors such as which plaintiff was the first to file a complaint, the quality of the plaintiff's pleadings, and the experience of plaintiff's counsel.

## B. State Law Fiduciary Duties

Because shareholder derivative actions generally arise out of violations of state corporation laws, they are traditionally brought in state courts. However, shareholder derivative actions can be and are brought in federal court when certain claims arise and requirements are met. Under Delaware state law,[23] directors and officers of public companies owe a "triad" of fiduciary duties to the companies that they serve: (i) loyalty, which requires directors and officers to not use their positions of trust and confidence to further their private interests; (ii) care, which requires that directors use that amount of care which ordinarily careful and prudent people would use in similar circumstances; and (iii) good faith, which requires corporate fiduciaries to act with a genuine attempt to advance corporate welfare — to not act in a manner unrelated to a pursuit of the corporation's best interests. Breaches of the three (3) duties form the foundation of the claims underlying shareholder derivative actions.

## C. Requirements to Bringing Shareholder Derivative Actions

In order to bring a shareholder derivative action, two general requirements must be met. First, the claims asserted by the shareholder must be derivative — i.e., the harm alleged by the plaintiff must be to the company itself, and not to the shareholder directly. Second, because company directors are traditionally charged with preserving the interests of the company, the shareholder must be able to demonstrate that a demand on the board to pursue the action was wrongfully refused, or that making a demand on the board to pursue the action would have been futile.

### 1. Direct or Derivative Harm

One of the prerequisites to bringing a shareholder derivative action is that the harm alleged by the plaintiff was suffered by the company (i.e., the claims are "derivative"), not the shareholder (i.e., the claims are "direct"). Delaware law provides a two-pronged test to determine whether claims are derivative or direct. The first question to be asked is: who suffered the alleged harm? If the company suffered the harm, then the claims are derivative; if the shareholder directly suffered the harm, then the claims are direct. The second question to be asked is: to whom would the benefit of litigation accrue? If the company would benefit from the litigation, the claims are derivative; if the plaintiff would benefit individually from the litigation, the claims are direct. If the shareholder suffered the alleged harm, or the benefit of the intended litigation would accrue to the shareholder, then the claims are direct and cannot be pursued derivatively by the shareholder on behalf of the company.

### 2. Demand and the Special Litigation Committee (SLC)

Because claims underlying derivative actions belong to the company, and because the company's board of directors is traditionally responsible for pursuing claims on behalf of the company they serve, shareholders are traditionally required to "demand" that the board pursue these claims. After a shareholder makes a demand on the board of directors, the board may either: (i) refuse the demand; or (ii) investigate the claims underlying the demand, after which the board may elect to refuse the demand or, alternatively, prosecute plaintiff's claims based upon the results of that investigation. An investigation into a shareholder's claims may be conducted by the entire board, by certain directors thereof, or by a specially designated Special Litigation Committee ("SLC") that has been constituted specifically to investigate and evaluate the merits of plaintiff's allegations. If the board refused plaintiff's demand with no investigation or following an investigation not conducted by a SLC, the shareholder may still pursue his or her claims, but must demonstrate that the board's refusal of the demand was not protected by the business judgment rule. However, where a properly formed SLC refuses a shareholder's demand, that shareholder may only continue to pursue the claims if it is shown that the SLC lacked independence or good faith, or failed to conduct a reasonable investigation into plaintiff's allegations.

[23] A significant number of companies in the United States are incorporated in the State of Delaware, and those companies' directors' conduct is governed by Delaware law. Regardless of the jurisdiction in which shareholder derivative actions are filed, where the company in question is incorporated in Delaware, the court hearing the case will apply Delaware law to the claims asserted. In addition, because Delaware law governs such a large number of American companies, and because the corporate laws of Delaware are so thoroughly developed, many courts throughout the country use precedents established in Delaware to guide their own decisions on corporate matters. For these reasons, we use principles of Delaware law in this primer to illustrate the legal principles germane to the matters discussed herein.

Making a demand, however, is not always a necessary prerequisite to bringing a shareholder derivative litigation. Where making a demand on the board to commence litigation would be "futile," a shareholder may commence a derivative action without making such a demand. "Demand futility" exists where the board members are conflicted and cannot be expected to properly investigate or pursue the claims. In order to demonstrate demand futility, the plaintiff must plead particularized facts in his complaint to create a reasonable doubt that either: (i) the directors are disinterested and independent; or (ii) the directors otherwise exercised business judgment in the conduct underlying plaintiff's allegations. The issue of demand futility is a fact-specific inquiry that must be decided on a case-by-case basis. Common factors that establish demand futility are a director's direct involvement in the unlawful conduct underlying plaintiff's claims, and close familial, social, or business relationships among directors that preclude those directors from acting independently of one another.

### D. Objectives of Derivative Litigation

The objectives of these actions are primarily twofold: (i) to recover from wrongdoers monetary damages for the company; and (ii) to require the company to adopt corporate governance improvements designed to prevent the complained of harmful conduct from occurring again in the future. In the event that either one (or both) of these forms of relief is obtained, the company and its shareholders both benefit: the company because of the recovered financial contribution and/or improved corporate governance; the shareholders because of the company's improved corporate governance, which often results in an increase in stock price.

### E. Examples of Derivative Cases Litigated by Kessler Topaz

#### 1. Options Backdating

The "backdating" of stock options is a practice by which company directors, often with the assistance of company officers, manipulate the grant date of company stock options in order to give themselves more favorable, i.e., lower, option exercise prices. The practice of backdating stock options constitutes a breach of the fiduciary duties of good faith and loyalty by the directors and officers who engage in such backdating, as the granting of backdated options unduly benefits the recipients thereof to the detriment of the company and its shareholders. The backdating and subsequent exercise of manipulated stock options depletes substantial funds from public companies because the recipients of backdated stock options pay the company less money when they exercise those options than they otherwise would if the options were properly granted. Backdating stock options also violates company stock plans, federal tax laws, and federal securities laws. Furthermore, many companies have suffered harm as a result of stock option backdating by being forced to incur expenses associated with investigations of the underlying conduct and the massive financial restatements associated with the proper recognition of option grant dates and exercise prices.

The objective of litigating options backdating cases is to seek the repayment of money by those who were granted or received backdated options, as well as corporate governance reforms aimed at improving the manner in which directors determine and award compensation to corporate executives. From 2006 to 2008, Kessler Topaz filed more than 125 complaints on behalf of companies the directors and executives of which manipulated the exercise dates and prices of their stock options in order to enrich themselves and others at the company's expense. The majority of these cases have settled, and Kessler Topaz has recovered hundreds of millions of dollars in ill-gotten gains from backdated stock options and instituted groundbreaking corporate governance reforms not only with regard to options-granting, but also with regard to executive compensation generally, as well as accounting and record-keeping internal controls, and broader reforms regarding the composition, structure, and functioning of the board of directors and its committees. For example, in *In re Monster Worldwide, Inc. Derivative Litigation*, Index No. 06 108700 (N.Y. Sup. Ct.), Kessler Topaz attorneys negotiated a settlement that required the recipients of backdated stock options to disgorge more than $32 million in unlawful gains to the Company, plus significant corporate governance measures. These measures included (a) requiring Monster's founder Andrew McKelvey to reduce his voting control over Monster from 31% to 7%, by exchanging super-voting stock for common stock; and (b) implementing new equity granting practices that require greater accountability and transparency in the granting of stock options moving forward. In approving the settlement, the court noted "the good results, mainly the amount of money for the shareholders and also the change in governance of the company itself, and really the hard work that had to go into that to achieve the results…." Similarly, in *In re Comverse Technology, Inc. Derivative Litigation,* Index No. 601272/06 (N.Y. Sup. Ct.), Kessler Topaz attorneys negotiated a settlement that required the Company's founder, Chairman and CEO Kobi Alexander and other executives to disgorge more than $62 million to the Company and overhauled the Company's corporate governance and internal controls, including replacing a number of members on the board of directors and corporate executives, splitting the Chairman and CEO positions, and instituting majority voting for directors.

### 2. Corporate Waste and Executive Compensation

Derivative cases based upon corporate waste and executive compensation share similarities with options backdating cases. Corporate waste and executive compensation cases are filed because corporate executives breach their fiduciary duties of good faith and loyalty when they receive excessive compensation packages, and are intended to recover these sums from the unjustly enriched executives in order to those sums to the company. Examples of derivative cases based upon corporate waste and executive compensation that Kessler Topaz has successfully resolved include *In re Viacom Inc. Shareholder Derivative Litigation*, Index No. 602527/05 (N.Y. Sup. Ct.), in which Kessler Topaz attorneys negotiated a settlement that reduced Viacom Chairman and CEO Sumner Redstone's compensation by more than $30 million and significantly enhanced the alignment of his compensation with shareholder returns, and *Mercier v. Whittle*, Case No. 2008-CP-23-8395 (S.C. Comm. Pl.), in which Kessler Topaz attorneys negotiated a settlement that included significant corporate governance reforms and monetary payments, including requiring the CEO to leave the Company's board of directors and forgo $250,000 of his severance package; requiring the positions of Chairman and CEO be held by two separate people; mandating that the Company hold twice annual conference calls with their large shareholders so that investors will be able to speak directly with management; and requiring that the Board confer with its largest shareholders when considering new appointments to the Board.

### 3. Accounting Fraud and Financial Restatements

Derivative cases based on accounting fraud and financial restatements are filed because directors and executives of companies breach their fiduciary duties of good faith and care when they falsify corporate transactions or otherwise improperly recognize revenue. Often times this conduct requires the company to restate its historical financial results once the wrongdoers' conduct becomes public. The harm to the company in this category of cases includes the loss of revenue and/or net income upon the restatement, in addition to the costs incurred by the company in investigating the cause of and ultimately conducting the restatement. Examples of accounting fraud and financial restatement cases that Kessler Topaz has successfully resolved include *Graham v. Hutcheson, et al.*, Case No. 08cv-0246 MMA (NLS) (S.D. Cal.), in which Kessler Topaz attorneys negotiated a settlement that, among other things, required Leap Wireless International, Inc. to adopt a new billing system, enhanced compliance and accounting procedures, and greater oversight of accounting and internal controls by management, the Audit Committee, and the Company's independent auditors.

### 4. Self-Dealing Transactions

Not unlike corporate waste and excessive compensation cases, self-dealing cases involve directors and/ or officers who breach their fiduciary duties of good faith and loyalty by usurping business transactions or opportunities that rightfully belong to the company, or otherwise act to benefit themselves to the detriment of the company. The harm to the company in these cases is usually the loss of potential revenue or the loss of other assets that rightfully belong to the company. These cases are filed with the purpose of recovering for the company the lost assets and/or opportunities that the wrongdoers usurped from the company. An example of a self-dealing transactions case that Kessler Topaz has litigated is *In re The Fairchild Corporation Shareholder Derivative Litigation*, Case No. 871-N (Del. Ch.) In *Fairchild*, it was alleged that Chief Executive Officer Jeffrey Steiner caused the company to make improper payments to him and his family, and to provide below-market loans to company officers and directors. As a result of this litigation, Steiner repaid approximately $3.76 million to the company, and the company reduced Steiner's compensation by 50%. In addition, the company added independent directors to the board, and substantially reformed the company's executive compensation practices.

### 5. Corporate Governance

Corporate governance cases are based upon allegations that directors have breached their fiduciary duty of care by failing to properly oversee the operations of the company. These "failure of oversight" actions often involve claims, harm to the company, and litigation objectives that are similar to those involved in corporate waste, self-dealing transactions, and accounting fraud derivative actions. Kessler Topaz has litigated numerous shareholder derivative actions focused on corporate governance and failure of oversight claims. One such action, *Klotz v. Parfet, et al.*, Case No. 03-06483-CK (Cir. Ct. Mich.) involved allegations that the directors of CMS Energy Corporation failed to properly monitor the business practices of CMS, thereby permitting CMS to engage in "round-trip" energy trades that had the effect of inflating the company's revenues and trading volume. As a result of the derivative action filed on behalf of CMS, a $12 million payment was paid to the Company by its insurance carriers, and numerous corporate governance improvements were enacted at the Company, including adding five new independent directors to the board and creating a position of Chief Compliance Officer.

### 6. Insider Trading

Insider-trading cases involve allegations that executives and/or directors violated their fiduciary duties of good faith and loyalty by engaging in stock purchases or sales based upon non-public information that they learned through their positions with the company. Derivative cases alleging insider trading are brought in order to recover the amount of profits that were unjustly received as a result of insider trading transactions. An example of insider trading cases that Kessler Topaz has litigated is *In re Oracle Corp. Derivative Litigation*, Consol. C.A. No. 18751 (Del. Ch.). *Oracle* alleged that Chief Executive Officer and Chairman of the Board Larry Ellison sold nearly $900 million of Oracle stock in the days immediately preceding the company's announcement that it missed its earnings estimates for the first time in five years. As a result of this litigation, Ellison disgorged $100 million worth of profit he received from his allegedly unlawful stock sales.

### 7. Conclusion on Derivative Actions

Shareholder derivative litigation is an important tool for shareholders concerned with the conduct of corporate directors and officers, and to rectify the harm caused by wayward corporate fiduciaries. It is of the utmost importance that concerned shareholders remain cognizant of the importance of strong corporate governance and faithful fiduciary conduct, and proactively seek to effect positive corporate changes. Companies with strong leaders and effective corporate governance measures are more profitable for their shareholders, and in the right circumstances a derivative action can ensure that the companies are as productive and profitable as possible.

# VI. Mergers & Acquisitions Litigation

Mergers and acquisitions ("M&A") litigation generally involves transactions where the ownership structure of a company will be materially altered, either through the receipt of stock in a new combined entity or — as is more typical — through the receipt of cash consideration in exchange for the stock held by the company's shareholders. Although Delaware law is extremely deferential to the business judgment of directors and officers in routine corporate decisions, Delaware courts closely scrutinize M&A transactions in which the public shareholders will lose ownership of their shares and the company. Courts will examine two elements of any M&A transaction: (i) the fairness of the price shareholders will be paid in exchange for their shares; and (ii) the fairness of the process resulting in the M&A transaction and the requisite shareholder approval for consummating the transaction.

## A. Fair Price

M&A transactions typically offer shareholders premium consideration in return for their stock and control of the company. The short-term gains offered in M&A transactions, however, often cloud the significant risk of long-term losses created by ceding control in an otherwise healthy and growing company. The prospect that shareholders are not receiving the full value of their shares is particularly acute in going-private transactions where directors and officers will maintain their ownership in the company. In such transactions, management is essentially telling shareholders that they should sell their shares at the offered price even though they themselves are not willing to sell their own shares at that price. To protect shareholders in M&A transactions, Delaware law requires directors and officers to undertake a sales process that would be reasonably expected to maximize shareholder returns in any sale of the company. This generally entails some sort of auction, or at least a canvassing of the market, prior to agreeing to enter into such a transaction.

A prime example of a situation where shareholders were not receiving fair value for their shares was the case against Genentech, Inc. This shareholder litigation surrounded the July, 2008 attempt by Roche Holdings, Inc. to acquire Genentech for $89 per share. A shareholder action ensued to enforce provisions of an affiliation agreement between Roche and Genentech and to ensure that Roche fulfilled its fiduciary obligations to Genentech's shareholders through any buyout effort by Roche. The litigation resulted in the companies entering into an amended affiliation agreement, which allowed a negotiated transaction between Roche and Genentech to close, and enabled Roche to acquire Genentech for $95 per share, approximately $3.9 billion more than Roche offered in its hostile tender offer.

## B. Fair Process

Related to the requirement that directors and officers maximize the price shareholders will receive in M&A transactions is the requirement that the sale process be fair to all bidders and potential bidders. Delaware law disfavors restrictions placed by buyers on a company's ability to provide other interested parties with the information necessary to make an offer that may lead to shareholders receiving higher consideration. The sales process of a company will be considered fair only if all the potential buyers were treated fairly and equally.

Delaware law also requires that M&A transactions be approved by a majority of the company's shareholders. To secure the requisite shareholder approval, directors and officers are required to provide shareholders with all material information that a shareholder would reasonably require to make an informed decision whether to approve the proposed transaction. Such information includes, for example, the reasons the board is recommending shareholders approve the transaction, the background and history of how the transaction came about, the company's financial projections and how they were used in assessing the financial fairness of the transaction, the personal financial benefits received by the company's directors and officers, and the payments received by the investment bankers who advised the company to enter into the transaction. Where directors and officers fail to fully and fairly disclose all material information, Delaware law empowers shareholders to enjoin the shareholder vote from proceeding until all the relevant information is made available.

# VII. Appraisal Actions

Stockholders of a company that is slated to be merged out of existence, who believe that the merger price does not reflect the company's true value, may have the option to ask a court to appraise the "fair value" of the company's shares and award that value to the stockholder. In such an "appraisal action," the stockholder generally does not receive the merger consideration. Instead, the appraisal-seeking stockholder receives whatever the court determines after a trial to be the fair value of the appraised shares, plus interest from the date of the merger. Appraisal rights are often referred to as "dissenter's rights" or "dissenting stockholder rights."

Stockholders in appraisal actions, unlike in fiduciary merger litigation, do not have to prove that any corporate fiduciary breached his or her duties to the stockholders. Instead, appraisal actions generally concern only (1) whether the stockholder has satisfied the statutory procedures for asserting appraisal rights; and (2) evidence and expert testimony by corporate valuation experts concerning the company's fair value, presented at a trial. Appraisal cases usually take several years to litigate to conclusion.

Also unlike fiduciary merger litigation, the appraisal-seeking stockholder is not entitled to an award of their attorneys' fees and litigation and expert expenses. Attorney's fees and litigation expenses are generally assessed and pro-rated among all of the appraisal-seeking stockholders, since all will receive the fruits of the appraisal proceeding. However, appraisal proceedings can yield a per-share "fair value" that is less than the merger price, meaning that stockholders would have done better by accepting the merger consideration. There is, therefore, the risk in all appraisal litigation that a stockholder both receives less than the merger consideration for their shares, and also has to pay a share of attorneys' fees and the other costs of the litigation.

Accordingly, the first question that stockholders often ask in considering appraisal is whether the number of shares for which appraisal is sought by all dissenting stockholders is large enough to make an appraisal action economically feasible. If the number of shares is small, it is usually economically unwise to pursue an appraisal action, since the costs of litigation could exceed any recovery.

A stockholder's right to appraisal is established by statute, and the rights and procedures vary from state-to-state. Discussing appraisal rights as they exist under Delaware law, however, gives stockholders a general framework for understanding this important post-merger remedy. Delaware's legal framework for appraisal is, such as its corporate law generally, far more developed and more frequently invoked than that of other jurisdictions.

### Appraisal Rights and Proceedings under Delaware Law

In Delaware, appraisal rights are established under Section 262 of the Delaware General Corporation Law. This statute has particularized requirements that stockholders must follow in order to pursue an appraisal remedy.

Section 262 begins from the premise that stockholders have appraisal rights. However, in a broad exception, the statute then eliminates appraisal rights for stockholders of companies either (i) having more than 2,000 stockholders "of record" (i.e., stockholders who do not hold their shares in "street name" through a broker); or (ii) that are listed on a national stock exchange. While that broad exception would appear to eliminate appraisal rights for stockholders of all publicly traded companies, Section 262 then reinstates appraisal rights for stockholders who would be required to receive at least some cash as merger consideration under the terms of the merger agreement.

Thus, in mergers where the target company's stockholders are slated to receive only the acquiring company's stock in exchange for their stock, Section 262 does not allow for appraisal rights. Similarly, in mergers where stockholders can receive cash for their shares if they choose to do so by "electing" to receive cash instead of stock, those stockholders are not entitled to seek appraisal because the merger agreement does not "require" that they receive cash as merger consideration. The upshot is that appraisal rights are available to stockholders of Delaware-incorporated public companies where a merger agreement has a mandatory cash component of the merger price.

When a stockholder is entitled to seek appraisal, Section 262 prescribes a procedure for asserting and exercising appraisal rights.

*First,* a stockholder seeking appraisal must deliver a timely demand for appraisal of its shares. Where a stockholder vote on the merger is required – as is typical in public-company mergers – the demand for appraisal must be delivered to and received by the company before the merger vote occurs. Where there is a merger that does not require a stockholder vote, such as a so-called "short-form" merger that often occurs after a tender offer, the demand must be postmarked within 20 days after the mailing of a required Notice of Merger by the surviving corporation. The stockholder will have to prove timely delivery or mailing, as the case may be. The requirements of what the demand must contain are not onerous, and it is sufficient to state in a letter that the holder demands appraisal of their shares.

*Second*, the demand must be made by or on behalf of the record holder. This is because Section 262 reflects the Delaware legislature's view that a company is entitled to rely on its list of stockholders – identifying the "record holders" – in determining with whom it may deal as stockholders. Accordingly, if a beneficial owner of company stock holds that stock in "street name" through a brokerage account and the brokerage is the formal "record holder," the brokerage must make the appraisal demand on behalf of the beneficial owner. The record holder's identity must be clear in the demand, as must the chain of custody leading to the beneficial owner.

*Third*, the shares subject to the appraisal demand must not be voted in favor of the merger. Yet, an appraisal-seeking stockholder need not make an all-or-nothing decision with respect to appraisal, and can choose to seek appraisal for some of their shares while accepting the merger consideration for the remainder. Regardless, however, none of the stockholder's shares may be voted in favor of the merger. Doing so effectively invalidates the appraisal demand, even if the stockholder wants to seek appraisal for only some shares and receive merger consideration for the rest.

*Fourth*, the shares subject to an appraisal demand must not be surrendered for the merger consideration. This is critical: even if an appraisal-seeking stockholder's shares are negligently exchanged by a broker for the merger consideration, the stockholder's appraisal rights are vitiated unless a formal appraisal petition has already been filed with the court, as described immediately below.

*Fifth*, assuming that the stockholder has fulfilled the preceding steps, the right to appraisal terminates 120 days after the merger's effective date unless the stockholder files a "petition for appraisal" in the Delaware Court of Chancery. Once that is done, a stockholder may not withdraw an appraisal demand without both the surviving company's and the Court's approval.

Once all five steps are satisfied and an appraisal petition is on file with the Court, the case is consolidated with other appraisal petitions concerning the same merger, and the case proceeds with all appraisal-seeking stockholders on one side and the surviving post-merger company on the other.

There is no motion to dismiss or similar procedural device to determine whether a valid appraisal claim exists. Instead, once the five steps are satisfied, the litigation is essentially a valuation exercise, with both the surviving post-merger company and the appraisal petitioners presenting competing testimony from financial experts and other evidence pertaining to valuation. It is then up to the Chancery Court judge assigned to the case to determine the "fair value" to award to the appraisal seeking stockholder. Appraisal awards also include an award of interest at a rate prescribed by statute, from the date of the merger to the date of payment.

There is no single valuation method used in appraisal actions. The only requirement is that a valuation model must be generally considered acceptable in the financial community and otherwise admissible in court. Valuation methods almost always take into account the company's future prospects, but excluded from the definition of "fair value" are events or increased value that arise solely from the expectation or closing of the merger. For example, a company's pre-merger projected future cash flows and earnings growth can be (and usually are) considered in determining fair value, but the value of cost savings that would not be realized absent the merger are excluded from the fair value calculation.

The Chancery Court often employs and weighs several valuation methods in appraising stock. Among the valuation methods most respected today by the Delaware Chancery Court is the "discounted cash flow" model, which, in essence, values a company's positive cash flows in future years and discounts that value to achieve a present value. That method is nearly always used by investment bankers in valuing public companies and is generally considered among the most analytically rigorous of valuation models. Other corporate valuation methods commonly considered in appraisal proceedings, and used by investment bankers, are comparisons between the per-share merger consideration and (i) the implied per-share value of comparable companies based on their stock prices relative to earnings, using available current public market data; or (ii) the relative value paid to stockholders in other merger transactions involving comparable companies, using available historical data. Another method is to add together the values of a company's individual assets, and then divide the overall enterprise value by the number of outstanding shares to reach a per-share value. The Chancery Court will also consider the value of intellectual property, tax-loss carryforwards, and corporate legal claims, as well as the company's market value at the time of the merger, in appraising "fair value."

### Appraisal Rights and Proceedings in Other Jurisdictions

Appraisal proceedings and prerequisites for stockholders of companies incorporated outside Delaware are, for the most part, substantially similar to those in Delaware. Appraisal-seeking stockholders must, generally, strictly follow prescribed statutory procedures for demanding appraisal and then subsequently participate in an appraisal proceeding. Experts present valuation opinions to the court, and the judge ultimately assesses and assigns a value to the company's shares.

There are, however, important state-specific differences from Delaware law. Some states, such as New York, do not provide appraisal rights for stockholders of publicly traded companies, regardless of the form of merger consideration. Other states, such as Maryland, use "fair market value" instead of "fair value" as the valuation goalpost. In Michigan and other states, the surviving corporation, rather than the stockholder, must initiate the appraisal proceedings. Several jurisdictions, such as Pennsylvania, make statutory appraisal actions a stockholder's sole remedy for an unfairly priced merger, absent a showing of fraud or intentional misconduct that could justify a separate cause of action.

In all jurisdictions, stockholders considering seeking appraisal would be well advised to seek the guidance of counsel to determine the steps that need to be taken in order to validly demand and pursue an appraisal remedy.

## Decisions in Selected Delaware Appraisal Actions

*In re Appraisal of The Orchard Enterprises, Inc.* (July 2012)
The Orchard Enterprises, Inc. ("Orchard Enterprises") was acquired by its largest stockholder, Dimensional Associates, in July 2010, cashing out the remaining stockholders at $2.05 per share. The appraisal petitioners presented expert testimony that Orchard Enterprises' fair value was $5.42 per share. Dimensional Associates' expert stated that the merger price was generous, and that fair value actually was only $1.53 per share. The price disparity, for the most part, concerned the value of Orchard Enterprises' preferred stock owned by Dimensional Associates before the merger, and whether that value should be included, or not, in calculating fair value. Generally siding with the appraisal petitioners on the proper way to value the company, and including the value of the preferred stock, the Chancery Court concluded that Orchard Enterprises had a fair value of $4.67 per share, more than twice the merger price.

*In re Emerging Communications Inc. Shareholder Litigation* (May 2004)
This case presents an example of fiduciary merger litigation proceeding in tandem with a statutory appraisal action. Emerging Communications was taken private in October 1998 by its majority stockholder in a two-step transaction involving a tender offer for the company's stock and a subsequent cash-out merger. Both the tender offer and the merger were priced at $10.25 per share. Stockholders commenced two sets of litigation, one seeking appraisal and the other seeking a remedy for fiduciary duty violations by the controlling stockholder. The stockholders contended, through expert opinion, that the fair value for the stock was $41 per share, while the company's expert maintained that fair value equaled only $10.38 per share. The difference between the two experts' opinions was based on different inputs used for the discounted cash flow valuation model. After concluding that the controlling stockholder had violated its fiduciary duties to the stockholders in the tender offer-merger transaction, the Court then held that the remedy in the fiduciary litigation was the same as in the appraisal action: an award of fair value to the stockholders. The Court then determined the proper inputs for the discounted cash flow method, resolving disputes between the experts, and determined that fair value was $38.05 per share, nearly $28 per share more than the merger price.

*Gesoff v. IIC Industries Inc.* (May 2006)
The company here was the publicly traded U.S. subsidiary of a non-U.S. holding company. The foreign holding company orchestrated a going-private transaction to cash out the public stockholders of the U.S. subsidiary, and a price of $10.50 per share was purportedly negotiated by a special committee of the company's board. Stockholders brought both fiduciary duty actions and an appraisal action seeking fair value. After a trial of both actions, the Court rejected as unreliable the stockholders' valuation expert, principally because that expert had relied on asset valuations done by others that were themselves unreliable. The Court, then, sided with the company's valuation expert on methodology, but made adjustments to correct certain mistakes the expert made in his analysis. Despite the Court's embrace of the defense expert's methodology, the Court decided that the merger underpriced the company's fair value by $3.80 per share, or about 35%, awarding $14.30 per share (plus interest) to the appraisal petitioners.

*Laidler v. Hesco Bastion Environmental, Inc.* (May 2014)
In this case, the dissenting stockholder of a closely held company sought appraisal after refusing to accept approximately $307 per share for their 10,000 shares of the company, which merged with another company after the remaining 90% of the company's shares approved the deal. The company had one product, a mobile and rapidly deployable barrier, used primarily by the military and as flood protection following natural disasters. The company

did not project cash flows in the ordinary course of its business, and the company was about to lose license and patent protection on its one product. The unprojected and unreliable cash flows made it impossible for the Court to apply the preferred discounted cash flow methodology. Guided by expert testimony, the Court instead used a "direct capitalization of cash flow analysis" to determine fair value. As a result of that analysis, the Court determined that the stockholder's shares were each worth about $364 per share, more than 18% above the merger price.

# VIII. Direct Actions (Opting-Out)

As an alternative to participating in a class action, investors who seek to recover damages from violations of securities laws may instead file an individual, direct action (also known as an "opt-out" action) and recover losses on their own behalf. By bringing an individual action, the investor is generally not bound to the outcome of the class litigation and has a right to prosecute its own case independent of the class action.

There are several advantages to bringing an individual direct action, including the ability to chart one's own litigation course and to determine the settlement terms. However, there are certain important risks in opting-out of class litigation, including a bar on participating in any class recovery and the inability to insist on corporate governance reforms. As such, every investor should have access to relevant information about their legal options to bring an individual claim and should seek competent legal advice before making the decision to opt-out of a class action.

In 2017, the U.S. Supreme Court issued a ruling that limits the availability of an opt-out action once the statute of repose has run on a particular claim. Unlike limitations periods, statutes of repose give explicit protection to defendants and enforce certainty. In *California Public Employees Retirement System v. ANZ Securities, Inc.,* (U.S. June 26, 2017), plaintiffs opted out of a class action and brought their own Securities Act claims more than three years after the challenged offering. The Supreme Court held that the three-year statute of repose for claims arising under the 1933 Securities Act prevented them from filing a lawsuit. As a result, plaintiffs with 1933 Act claims who choose to opt out of a class action must do so and file their own actions within the three-year repose period. This holding has also been extended to Section 10(b) claims under the 1934 Exchange Act which are subject to a five-year statute of repose. As a result of the *ANZ Securities* ruling, it is now more important than ever to consult with appropriate legal counsel as soon as possible to determine an adequate opt-out strategy.

## A. Larger Recoveries

The size of the out of pocket loss attributed to the alleged misconduct is often the most significant determinant of whether to file an individual direct action. Individual actions are usually not an option for investors with a nominal loss because of the time and expense involved in any litigation. Direct actions are usually reserved for investors with sizable losses who have the financial ability and structure to pursue their own claims.

For example, many public pension funds and large institutional investors opted-out of the WorldCom class action litigation and pursued individual actions on their own behalf, including five New York City funds that eventually reached a $78.9 million settlement, an amount reportedly three times larger than what the funds would have recovered under the class settlement. Likewise, a group of Alabama public funds opted out of the WorldCom class case and ultimately achieved a $111 million settlement, several times what it purportedly would have received had it remained in the class. According to a spokesperson for the Alabama funds, the settlement amounted to roughly ninety percent of their losses.

Similarly, many public pension funds and institutional investors that opted-out of the $2.65 billion dollar securities class action settlement with AOL Time Warner achieved recoveries that far exceeded what they would have recovered had they remained in the class case. For example, the State of Alaska reported that its settlement represented 50 times what it would have recovered in the class settlement and the California State Retirement System said its settlement represented 6.5 times what it would have recovered. State of Ohio public pension funds recovered $144 million in individual actions against AOL Time Warner, $135 million more than the $9 million they would have recovered under the class settlement, according to Ohio state officials. Thus, presuming the reports are accurate, in the right type of factual situation, a direct action could be advantageous.

### B. Factors to Consider

The decision to file an individual action or remain a passive class member normally involves the consideration of many factors. These factors include: the size of your loss and the ability of defendant(s) to pay damages; the benefits of setting your own litigation strategy by pursuing an individual lawsuit; the advantage of being able to settle an individual claim without court approval and class notice; and the benefit of being able to select the forum in which to file the individual action subject to certain parameters regarding venue.

### C. Size of Loss

By definition, the maximum recovery in an individual action is limited to the amount of damages suffered by the individual plaintiff. There is no minimum threshold loss required to bring an individual action, but an individual action to recover a relatively nominal loss may not be a practical option given the time and expense usually associated with prosecuting a securities action against one or more defendants. It is for this reason that opt out actions are typically filed in situations where the maximum recoverable damages in the parallel class action are substantial.

### D. Aggregating Claims

Although it may be economically impractical to bring an individual claim that involves a relatively small loss, it is sometimes possible to join or consolidate multiple individual actions, commonly referred to as a “mass action.” By sharing the benefit of a coordinated investigation and prosecution, pooling claims of more than one investor may make economic sense with smaller individual claims, which, standing alone, would otherwise be impractical.

### E. Availability of State Court Forum

A notable strategic advantage of litigating individual actions is that they are not subject to the Securities Litigation Uniform Standards Act (“SLUSA”) that Congress passed in 1998. SLUSA gives exclusive jurisdiction of securities class actions to the federal courts. Because SLUSA applies to class actions, and not individual actions, state court forums may be available where there is no other basis for federal jurisdiction (such as arising under the federal bankruptcy code or diversity jurisdiction).

Whether there is an advantage to prosecuting the case in a state court forum varies from state to state, but state laws are generally more favorable to plaintiffs, and state courts normally provide a home court advantage to state and local pension funds, and other investors, located within the state.

Furthermore, class actions brought in federal court must satisfy heightened pleading requirements and are subject to automatic discovery stay of the PSLRA. On the other hand, individual actions brought in state court that allege violation of state securities and common law are normally not subject to such heightened pleading requirements, and in some cases, may not be subject to the automatic discovery stay of the PSLRA. Many states also provide for broader liability to “secondary actors” who either aid or abet the primary violation, thereby increasing the pool of possible defendants.

### F. Settlement

Individual plaintiffs control the settlement negotiations and are able to settle their claim without having to obtain court approval or provide notice of the settlement terms to passive class members. Because the court does not have to approve the settlement and the parties do not have to give notice to the class, the process to settle an individual action is more streamlined and can result in a quicker recovery.

### G. Avoidance of Class Certification Issues

As noted above, certification of a Class is a necessary component for litigating claims as a class action. Opt-out actions avoid this process and are able to litigate the merits of their claims without crossing this intermediate procedural hurdle.

### H. Timing

The Federal Rules of Civil Procedure permit a court to refuse to approve a class settlement without extending the opportunity for class members to opt-out of the settlement. While the decision to file an individual action usually occurs at an earlier stage, it may be possible to wait and see the amount of the class settlement before electing to opt-out in order to pursue an individual action, and sometimes, this is the most prudent course of action. However, waiting may create discovery obstacles and other inefficiencies. For example, a court may not allow an opt-out plaintiff to re-depose witnesses deposed in the class case.

### I. Risks / Discovery / Unique Defenses

The decision to forego possible recovery as a passive class member in favor of pursuing an individual claim may yield a larger recovery but certainly involves risk. First and foremost, opting out of the class action serves as a bar to participation in any future class settlement or judgment, and it is generally an irreversible decision. Thus, it is always possible remaining in a Class would yield a better result.

In addition, direct actions require active participation in the litigation, including responding to discovery requests and the appearance at depositions. Defendants will invariably seek to find some infirmity that will prevent the individual action from moving forward, which may involve trying to discredit the individual claim.

The decision to file an individual action should also involve consideration of unique defenses that may exist in a direct action that do not exist in the context of class action litigation. For example, individual actions may be time barred while claims of passive class members are "tolled" under judicial doctrine; individual actions may involve unique issues of reliance that do not avail themselves to the "fraud on the market doctrine;" and, among other things, the individual plaintiffs may have had access to unique information about the investment opportunity that defeats any claim of reliance on public statements by the company.

While there can be many advantages to pursuing a direct action or opting out of a class action, Kessler Topaz believes that actual opportunities to opt-out or file a direct action are not very common and are often limited to larger institutional investors. Careful consideration must be given to the added value one can hope to achieve in a direct action or opt-out before going forward with such an action.

### J. Recent Decisions Involving Opt Out Claims

***Opt Out Plaintiffs Withstand Defendants' Attacks on Standing To Bring Securities Fraud Claims***. In In re Petrobras Sec. Litig., 152 F. Supp. 3d 186 (S.D.N.Y. 2016), dozens of opt out plaintiffs brought securities fraud actions against oil giant Petrobras and numerous corporate officers arising from the company's involvement in multi-year, multi-billion dollar bribery and kickback scheme. Defendants argued that many of these plaintiffs lacked standing to bring claims because they were suing on behalf of an injured fund, series, or member, and themselves did not suffer an injury. This is a common challenge in opt out cases given the complex structure of many participating plaintiffs, which typically include large foreign pension funds, mutual funds and trusts. In a victory for opt outs, the district court rejected each of defendants' attacks, holding plaintiffs satisfied the requirements to invoke the "prudential exception" to standing under W.R. Huff Management Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100, 109–10 (2d Cir. 2008). Huff requires plaintiffs sufficiently plead a close relationship with the injured party and a barrier to that party's ability to bring its own claims. By pleading that the injured funds or series on whose behalf they sued lacked a separate legal personality, had no employees and/or could not act except through the plaintiff, among other things, the opt out plaintiffs passed that test.

***Trial Court Rejects Defendants' Plea To Stay Opt Out Actions Pending 23(f) Review.*** In In re Petrobras Sec., 193 F. Supp. 3d 313 (S.D.N.Y. 2016), Judge Rakoff addressed and denied defendants' motion to stay all proceedings until the Second Circuit resolved their interlocutory appeal of his class certification order. At the time, those proceedings included "no fewer than 27 substantial entities, such as pension funds, institutional investors, and others" who had "opted out of the class action and brought their own, individual actions." In denying defendants' motion, Judge Rakoff underscored the significant work done and contributions made by the opt out plaintiffs, reasoning that the resolution of class-specific issues by the Second Circuit should not "stall[] an entire litigation that has evolved into one that is primarily a non-class action" and was on verge of trial. Subsequently, in an unpublished order shortly thereafter, the Second Circuit granted defendants' renewed motion for stay, but did not provide any explanation for its decision.

***District Court Sustains Opt Out Plaintiffs' "Holder" Claims Under English Law.*** In In re BP p.l.c. Sec. Litig., 2017 WL 7037706 (S.D. Tex. June 30, 2017), individual investors in twelve opt out actions asserted "holder" claims under English common law against BP for misconduct related to the Deepwater Horizon explosion. In a holder claim, the plaintiff alleges that the defendants' misrepresentations induced the plaintiff not to purchase stock, but to continue holding (i.e., refrain from selling) stock. The decision is noteworthy for two reasons. First, because the Supreme Court has barred plaintiffs from bringing holder claims under federal securities laws in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), few cases have addressed the requisite standard to plead actual reliance for holder claims. In sustaining the opt outs' claims, Judge Ellison held that to plead actual reliance in this context, plaintiffs must allege "that they reviewed specific statements; that they evaluated whether to hold or sell their shares; and, most important, they must allege facts . . . showing that the statements motivated them to hold their shares rather than sell them." Second, because the U.S. federal securities laws do not provide relief for injuries sustained on transactions through foreign exchanges, plaintiffs' novel holder claims provide the opt out plaintiffs with a unique avenue of recovery not available in the class context.

***To Plead Section 18 Claims, Investors Need Not Link Every Purchase To A Specific Misstatement.*** In Discovery Glob. Citizens Master Fund, Ltd. v. Valeant Pharm. Int'l, Inc., 2018 WL 406046 (D.N.J. Jan. 12, 2018) and T. Rowe Price Growth Stock Fund, Inc. v. Valeant Pharm. Int'l, Inc., 2018 WL 395730 (D.N.J. Jan. 12, 2018), several opt out plaintiffs sued Valeant and its CEO and CFO for violating the Exchange Act of 1934, including Section 18. Section 18 requires a plaintiff to plead actual reliance on an alleged false or misleading statement – rendering such claims unsuitable for class treatment but available to opt outs. Valeant argued plaintiffs had failed to plead actual reliance because they did not "link" each of their at-issue transactions to a particular misstatement. In other words, they did not specifically identify the statement they relied on when making each purchase. The district court disagreed and declined to adopt defendants' "linkage requirement," holding instead that in the Third

Circuit, plaintiffs need only identify the alleged misstatements in specific SEC filings, and plead actual 'eyeball' reliance on these documents in deciding to purchase damages securities.

## IX. Conclusion

Kessler Topaz hopes this primer has helped to show that shareholder litigation can be a tool to recover losses and implement reforms. We also hope this information will assist institutional investors when assessing whether to come forward and serve as plaintiffs in the right circumstances. Considering what is at stake, it is crucial that a sophisticated investor, who understands the value that can be achieved through this type of litigation, be the one overseeing counsel in these actions. Kessler Topaz is committed to serving the investment community and providing the best possible results for our clients and the classes they represent.

If you would like any further information with regard to class actions in general, opt-out litigation, non-U.S. shareholder litigation, serving as a plaintiff, or any of the services which Kessler Topaz can provide to you, please do not hesitate to contact Darren J. Check, Esquire at (610) 822-2235 or via e-mail at dcheck@ktmc.com.

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