Claims Trends

A Review of Claims Activity in the Mutual Fund Industry (January 2019-March 2020)

ICIMutual

Table of Contents

Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CEA	Commodity Exchange Act of 1936
CFTC	U.S. Commodity Futures Trading Commission
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
DOL	U.S. Department of Labor
ERISA	Employee Retirement Income Security Act of 1974
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
OCIE	Office of Compliance Inspections and Examinations of the SEC
PROMESA	Puerto Rico Oversight, Management, and Economic Stability Act of 2016
PSLRA	Private Securities Litigation Reform Act of 1995
SEC	U.S. Securities and Exchange Commission
SLUSA	Securities Litigation Uniform Standards Act of 1998

In addition, U.S. Courts of Appeals are referred to by their circuit number (e.g., First Circuit, Second Circuit).

Introduction

ICI Mutual's annual *Claims Trends* reports on significant civil lawsuits, regulatory enforcement proceedings, and operational errors affecting the fund industry. This publication is designed to assist ICI Mutual's insureds in better assessing and managing the risks associated with such matters, thereby reducing the potential for associated losses and reputational damage.

ICI Mutual measures claims activity by both *frequency* and *severity*. 2019 saw a year-on-year increase in the overall number of claims submitted by ICI Mutual's insured fund groups under their directors and officers/errors and omissions (D&O/E&O) policies. Moreover, approximately 40% of ICI Mutual's insured fund groups submitted at least one claim notice over the five-year period 2015-2019. These figures suggest that in the current environment, claims frequency remains an issue for the fund industry.

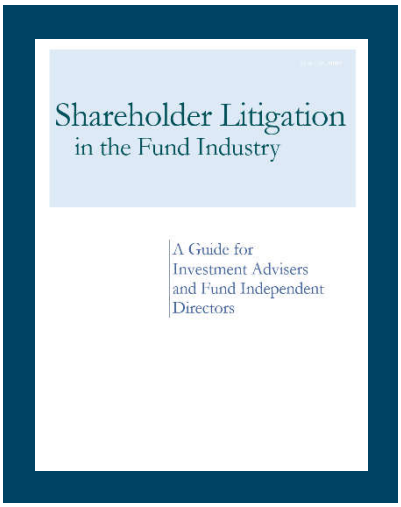
Unlike frequency, the *severity* of new claims can be more difficult to assess, particularly for civil lawsuits and regulatory proceedings, where it may take years to establish the magnitude of losses (in the form of defense costs, settlements, and judgments). Even so, severity continues to be a concern for the fund industry.

In recent years, the SEC has continued its active enforcement of the federal securities laws in the asset management area (i.e., involving registered investment companies and/or investment advisers). In its 2019 fiscal year, the SEC brought a near-record number of enforcement actions, including a significant number of actions in the asset management area.

For fund groups faced with civil litigation and/or regulatory investigations and proceedings, legal defense costs remain substantial. ICI Mutual's claims experience indicates that defense costs can quickly reach seven figures for affected fund groups and, in significant shareholder litigation, can in some cases climb into eight figures.

Shareholder Litigation in the Fund Industry

In 2019, ICI Mutual issued a new study (available at https://www.icimutual.com) that examines the general nature, number, and outcomes of the hundreds of securities-related lawsuits brought by the plaintiffs' bar against funds, fund advisers, and/or fund directors and officers over the course of this century. It serves as both a high-level introduction to "entrepreneurial litigation" risk in the modern fund industry and as a basic framework to assist advisory personnel and fund independent directors to better understand how this risk may manifest itself in the years ahead.



Fees

For much of the past decade, fees paid by funds to investment advisers and other service providers have been a key focus of litigation initiated by the plaintiffs' bar. Many of these lawsuits have alleged violations of section 36(b) of the ICA, while others have alleged violations under ERISA (as discussed below in "Other Litigation Developments – ERISA").

Section 36(b) Lawsuits

Section 36(b) imposes a fiduciary duty on investment advisers with respect to the compensation they receive for providing advisory services to registered investment companies, and it provides fund shareholders with an express private right of action to enforce this duty.[1]

In 2010, the U.S. Supreme Court, in *Jones v. Harris Associates, L.P.*, affirmed the use of the "*Gartenberg* standard" for assessing the liability of fund advisers in excessive fee cases brought under section 36(b).[2] While providing greater clarity to section 36(b) jurisprudence, the *Jones* decision did not discourage the plaintiffs' bar from initiating new section 36(b) lawsuits. Indeed, over the period 2010–2018, the plaintiffs' bar initiated 29 new section 36(b) lawsuits, involving a total of 26 fund groups.[3]

2019 and early 2020 saw continued positive developments in the fund industry's ongoing defense of these post-*Jones* section 36(b) lawsuits (see box, right), as additional lawsuits reached the later stages of the litigation process. Yet, as of the date of this *Claims Trends*, six of the 29 lawsuits still remain active in various stages of the litigation process.[4] (See chart, next page.) It is not yet certain when or how these remaining post-*Jones* lawsuits will finally be resolved.

Recent Positive Developments in Post-*Jones* Lawsuits

In 2019 and early 2020, defendants in several of the remaining post-*Jones* lawsuits obtained favorable outcomes from federal courts.

In 2019, three lawsuits were dismissed after a trial, with appeals pending in two of the three lawsuits.

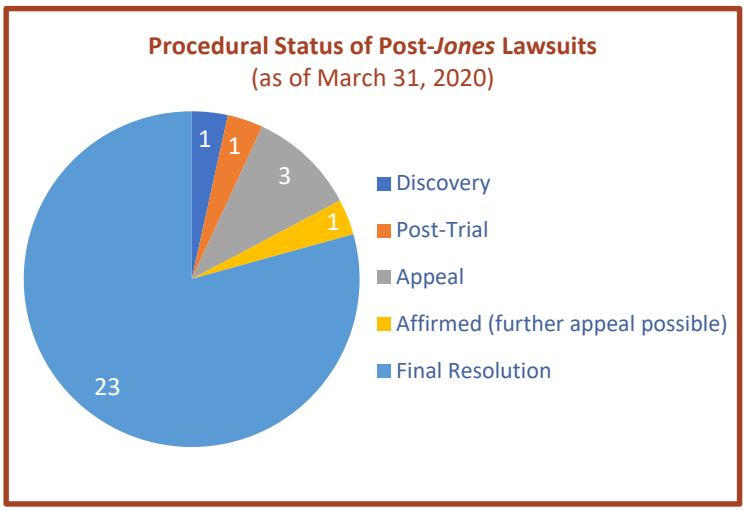
- In February 2019, after a trial held in August 2018, the district court dismissed *In re BlackRock Mutual Funds Advisory Fee Litigation* in favor of the defendants; an appeal of this decision was filed in March 2019. The appeal remains pending.[5]
- In August 2019, after a trial held in December 2018, the district court dismissed *Kennis v. Metropolitan West Asset Management, LLC.*; an appeal of this decision was filed in August 2019. The appeal remains pending.[6]
- In September 2019, after a trial held in November 2018, the court dismissed *Chill v. Calamos Advisors, LLC*; in October 2019, the parties filed a stipulation in which the plaintiffs agreed not to file an appeal of the district court's decision. The lawsuit is now concluded.[7]

In May 2019, the district court granted the defendants' motion for summary judgment in *In re Davis N.Y. Venture Fund Fee Litigation*; an appeal of this decision was filed in June 2019. The appeal remains pending.[8]

In March 2019, the dismissal of *Pirundini v. J.P. Morgan Investment Management, Inc.* was affirmed on appeal by the Second Circuit, thereby concluding the lawsuit.[9] In March 2020, the dismissal of *Goodman v. J.P. Morgan Investment Management, Inc.* was affirmed on appeal by the Sixth Circuit;[10] the time for filing a petition for a writ of certiorari with the U.S. Supreme Court has not expired.

CATEGORIES OF POST-*JONES* SECTION 36(B) LAWSUITS

As discussed in past *Claims Trends,* the post-*Jones* lawsuits can largely be divided into two basic categories, both of which have focused on disparities between fees of advisers and subadvisers. The first category, referred to here as "**manager-of-managers**" lawsuits, has focused on the alleged disparities between fees charged by advisers and fees paid to unaffiliated subadvisers. The second category, referred to here as "**subadvisory**" lawsuits, has focused on alleged disparities between fees charged by advisers for managing their *affiliated* funds and the lesser fees charged by those advisers in their roles as subadvisers to *unaffiliated* funds. A small number of lawsuits (see "Other Lawsuits" below) have relied on different theories.



"Manager-of-Managers" Lawsuits: Fourteen of the 29 post-*Jones* lawsuits have been "manager-of-managers" lawsuits. All but one of these lawsuits have concluded.

- *Lawsuit in the Post-Trial Stage:* In the one active manager-of-managers lawsuit, a district court conducted a trial in January 2020.[11] To date, no decision has been issued.

- *Lawsuits That Have Reached Final Resolutions:* Thirteen of the manager-of-managers lawsuits have reached final resolutions—six by stipulation of the parties, and seven by court order in favor of the defendants.[12] Notably, in two lawsuits closed by stipulation, the parties publicly stipulated that the resolutions were not the result of a settlement or compromise or the "payment of any consideration" by the defendants to the plaintiffs.[13]

"Subadvisory" Lawsuits: Of the 29 post-*Jones* lawsuits, ten have been subadvisory suits. One of these lawsuits is currently in the discovery stage; one was dismissed in favor of the defendant after trial; three are on appeal following district court decisions in favor of the defendants; two were affirmed on appeal; and three have reached final resolutions by stipulation of the parties.

- *Lawsuit in the Discovery Stage:* One subadvisory lawsuit remains in the discovery phase of litigation. In this lawsuit, the defendants' motion to dismiss, filed in July 2016, was denied in March 2017.[14]

- *Lawsuit Dismissed After Trial:* One subadvisory lawsuit (*Calamos*, see box on p. 2) was dismissed after trial in September 2019, and no appeal was filed. The lawsuit is now concluded.[15]

- *Lawsuits on Appeal:* District court decisions in favor of defendants in three lawsuits are on appeal. In one lawsuit (*BlackRock*, see box on p. 2), after a trial, the district court dismissed the lawsuit in favor of the defendants in February 2019; an appeal of this decision was filed with the Third Circuit in March 2019.[16] In a second lawsuit (*Davis*, see box on p. 2), a motion for summary judgment was granted in May 2019 and the plaintiffs appealed the district court's ruling to the Second Circuit in June 2019.[17] In the third lawsuit (*Met West*, see box on p. 2), the district court entered a "findings of fact and conclusions of law" following trial in August 2019; an appeal was filed later the same month with the Ninth Circuit.[18] To date, none of the circuit courts has issued a decision.

- *Lawsuits Affirmed on Appeal:* In one lawsuit (*Pirundini v. J.P. Morgan*, see box on p. 2), the district court granted the defendant's motion to dismiss in February 2018; this decision was appealed to the Second Circuit in March 2018 and was affirmed in March 2019, thereby concluding the lawsuit.[19] In another lawsuit involving the same fund group (*Goodman v. J.P. Morgan*, see box on p. 2), the defendant's motion for summary judgment was granted in March 2018; this decision was affirmed on appeal by the Sixth Circuit in March 2020.[20] The time for filing a petition for a writ of certiorari with the U.S. Supreme Court has not expired.

- *Lawsuits That Have Reached Final Resolutions by Stipulations:* Three subadvisory lawsuits have reached final resolutions by stipulation of the parties.[21] In one, the parties publicly stipulated that the resolution was not the result of a settlement or compromise or the "payment of any consideration" by the defendant to the plaintiffs.[22]

Other Lawsuits: Five of the post-*Jones* section 36(b) lawsuits cannot readily be characterized as having been either pure "manager-of-managers" or pure "subadvisory" lawsuits. All of these lawsuits have reached final resolutions.

In one of these lawsuits, the plaintiffs alleged that the adviser's fees charged to an affiliated fund were higher than those charged by the adviser to its institutional clients and a similarly managed exchange-traded fund (ETF). The lawsuit was closed by stipulation of the parties in August 2018.[23]

A second lawsuit involved the fees charged by the adviser and administrator of a business development

Section 36(b) Lawsuits Initiated Since *Jones v. Harris*

(Cases in **blue** were active as of March 31, 2020)

2010	• **Santomenno v. John Hancock Life Ins. Co.**, No. 10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013), *aff'd*, 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (2015) • **Southworth v. Hartford Inv. Fin. Serv., LLC**, No. 10-cv-878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011)
2011	• **Kasilag v. Hartford Inv. Fin. Serv., LLC**, No. 11-cv-1083 (D.N.J. filed Feb. 25, 2011), *dismissed*, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *aff'd*, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018) • **Reso v. Artisan Partners Ltd. P'ship**, No. 11-cv-3137 (N.D. Cal. filed June 24, 2011), *closed per stipulation* (Aug. 23, 2012) • **Sivolella v. AXA Equitable Life Ins. Co.**, No. 11-cv-4194 (D.N.J. filed July 21, 2011), *dismissed*, 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016), *aff'd,* 742 Fed. Appx. 604 (3d Cir. July 10, 2018)
2013	• **Laborers' Local 265 Pension Fund v. iShares Trust**, No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013), *dismissed*, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015) • **Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp.**, No. 13-cv-1601 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, No. 14-cv-44 (S.D. Iowa Feb. 8, 2016), *aff'd,* 864 F.3d 859 (8th Cir. 2017) • **In re Voya Glob. Real Estate Fund S'holder Litig.**, No. 13-cv-1521 (D. Del. filed Aug. 30, 2013), *closed per stipulation* (Oct. 19, 2017) • **In re Russell Inv. Co. S'holder Litig.**, No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013), *closed per order of closure* (Feb. 28, 2017) • **Curd v. SEI Invs. Mgmt. Corp.**, No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013), *closed per stipulation* (Nov. 21, 2016)
2014	• **Zehrer v. Harbor Capital Advisors, Inc.**, No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 40718 (N.D. Ill. Mar. 13, 2018) • **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014), *dismissed*, 2019 U.S. Dist. LEXIS 63547 (D.N.J. Feb. 8, 2019), *appeal docketed*, No. 19-1557 (3d Cir. filed Mar. 15, 2019) • **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 14-cv-414 (S.D. Ohio filed May 5, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018), *aff'd*, 2020 U.S. App. LEXIS 9868 (6th Cir. Mar. 30, 2020) • **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 14-cv-585 (D. Del. filed May 7, 2014), *closed per stipulation* (Aug. 8, 2017) • **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014), *dismissed*, 2019 U.S. Dist. LEXIS 111521 (S.D.N.Y. Jul. 2, 2019), *appeal docketed*, No. 19-1967 (2d Cir. filed Jun. 28, 2019) • **Redus-Tarchis v. N.Y. Life Inv. Mgmt.**, No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 175309 (D.N.J. Oct. 10, 2018) • **Kenny v. PIMCO**, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014), *closed per stipulation* (Aug. 9, 2018)
2015	• **Chill v. Calamos Advisors, LLC**, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015), *dismissed*, 2019 U.S. Dist. LEXIS 175641 (S.D.N.Y. Sep. 27, 2019) • **Ingenhutt v. State Farm Inv. Mgmt. Corp.**, No. 15-cv-1303 (C.D. Ill. filed July 22, 2015), closed *per stipulation* (Nov. 21, 2018) • **Wayne Cty. Emps.' Ret. System v. Fiduciary Mgmt. Inc.**, No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015), *closed per stipulation* (Jan. 4, 2016) • **Kennis v. Metropolitan West Asset Mgmt., LLC**, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015), *dismissed*, 2019 U.S. Dist. LEXIS 162598 (C.D. Cal. Aug. 5, 2019), *appeal docketed*, No. 19-55934 (9th Cir. filed Aug. 8, 2019) • **North Valley GI Med. Group v. Prudential Invs. LLC**, No. 15-cv-3268 (D. Md. filed Oct. 30, 2015), *closed per stipulation* (Feb. 2, 2017) • **Ventura v. Principal Mgmt. Corp.**, No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015), *closed per stipulation* (Oct. 17, 2017)
2016	• **Obeslo v. Great-West Capital Mgmt., LLC**, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016) • **Paskowitz v. Prospect Capital Mgmt., L.P.**, No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016), *dismissed*, 232 F. Supp. 3d 498 (S.D.N.Y. 2017), *appeal docketed*, No. 17-510 (2d Cir. filed Feb. 21, 2017), *closed per stipulation* (May 5, 2017) • **Zoidis v. T. Rowe Price Assocs., Inc.**, No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016) • **Karp v. Harris Assocs., L.P.**, No. 16-cv-8216 (N.D. Ill. filed Aug. 19, 2016), *closed per stipulation* (Nov. 28, 2016)
2017	• **Pirundini v. J.P. Morgan Inv. Mgmt. Inc.**, No. 17-cv-3070 (S.D.N.Y. filed Apr. 27, 2017), *dismissed*, 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019)
2018	• **Winston v. Western Asset Mgmt. Co.**, No. 18-cv-3523 (C.D. Cal. filed Apr. 26, 2018), *dismissed as to Western Asset defendants* (C.D. Cal. Jan. 28, 2019), *closed per stipulation* (May 7, 2019)

company, an uncommon target for plaintiffs. In January 2017, a district court granted the defendants' motion to dismiss, and the plaintiffs filed an appeal with the Second Circuit in February 2017.[24] In May 2017, the Second Circuit approved the parties' stipulation to withdraw the appeal, thus bringing the lawsuit to a close.[25]

In a third lawsuit, plaintiffs challenged the "split" between securities lending revenue paid to an ETF's adviser and its affiliate (which provided the securities lending services), a theory not shared by any other post-*Jones* section 36(b) lawsuit. This lawsuit was dismissed by the district court in August 2013; the decision was affirmed by the Sixth Circuit in September 2014; and the U.S. Supreme Court denied a petition for a writ of certiorari in March 2015.[26]

The fourth lawsuit, which involved a traditional challenge to advisory fees charged to certain mutual funds, was resolved in 2012 by stipulation of the parties.[27]

The last lawsuit in this category (filed in 2018) was closed by stipulation of the parties in May 2019.[28] While styled as a manager-of-managers lawsuit, this lawsuit was unusual in that it involved two relatively small closed-end funds and two unrelated investment advisers as defendants. The lawsuit appeared to stem from prior efforts by the plaintiff to attempt to force a conversion of the funds to open-end funds.[29]

Other Developments in Fee Litigation

Fees in the fund industry have also been challenged, directly or indirectly, under ERISA (see "Other Litigation Developments – ERISA" section below). As discussed in past *Claims Trends,* the fund industry has also, from time to time, seen fee challenges in derivative claims brought under state law for breach of fiduciary duty.

Disclosure

"Prospectus liability" lawsuits—i.e., shareholder class action lawsuits brought under the '33 Act that allege misrepresentations or omissions in fund offering documents—have long been a source of significant potential liability for funds and their directors, officers, advisers, and principal underwriters.[30] As discussed below, several new prospectus liability lawsuits have been filed in recent years against fund industry defendants.

Section 47(b) of the ICA

In August 2019, the Second Circuit held in *Oxford University Bank v. Lansuppe Feeder, Inc.*, 933 F.3d 99 (2d Cir. Aug. 5, 2019), that section 47(b) of the ICA provides an implied private right of action for rescission of contracts that violate the ICA. Prior to the Second Circuit's decision, a number of courts had declined to find an implied private right of action under section 47(b), and courts had generally found that the only private right of action under the ICA was expressly set forth in section 36(b).[31]

Some observers have expressed concern that the *Oxford* decision could lead to more shareholder litigation, but have noted the decision's narrow holding that the implied right of action for rescission is available only to the parties to the violative contract. Since shareholders are not generally themselves viewed as "parties" to any contracts, the impact of the decision may thus be limited. This said, more than one observer has suggested that the *Oxford* decision, combined with a controversial 2015 Ninth Circuit decision in *Northstar Financial Advisors, Inc. v. Schwab Investments*, 779 F.3d 1036 (9th Cir. Mar. 9, 2015) (which decision, among other things, permitted fund shareholders to sue an investment adviser directly in their capacity as third-party beneficiaries of the management contract between the adviser and the fund), might potentially lead to future shareholder litigation seeking rescission rights based on alleged breaches of fund prospectuses in violation of the ICA.[32] As of the date of publication, it does not appear that any such litigation has been filed.

From time to time, plaintiffs have also challenged fund disclosure under the '34 Act (as opposed to under the '33 Act) or under state law. As discussed below, plaintiffs have historically had limited success in bringing these types of lawsuits against fund industry defendants.

Prospectus Liability Lawsuits

The fund industry's historical claims experience evidences that prospectus liability lawsuits are often initiated in the wake of disruptions affecting certain industry sectors or the broader market, but also sometimes arise from discrete issues affecting individual fund groups. The currently active prospectus liability lawsuits are of the latter type.

2019–2020 witnessed the filing of new prospectus liability lawsuits, as well as developments in earlier lawsuits.

- *Alleged Misrepresentations of Market Volatility Risk:* In one prospectus liability lawsuit filed in July 2018 and three prospectus liability lawsuits filed in the first quarter of 2019, plaintiffs alleged that an ETF's adviser, interested trustees and officers, and distributors, among others, misrepresented, in the ETF's registration statement, the degree to which the ETF was susceptible to market volatility risk.[33] The three lawsuits filed in 2019 were consolidated in April 2019.[34] The plaintiffs filed an amended complaint in June 2019 and a second amended complaint in September 2019.[35] A motion to dismiss the second amended complaint was granted in early January 2020. Plaintiffs appealed the decision to the Second Circuit in late January and the appeal remains pending.[36] In the initial lawsuit filed in 2018 (which was not consolidated with the other three lawsuits), a district court granted defendants' motion to dismiss in March 2020.[37] To date, no appeal has been filed.

- *Alleged Investments Inconsistent with Investment Objectives:* In February 2018, amidst market volatility in which a mutual fund lost a large percentage of its value, a fund shareholder filed a prospectus liability lawsuit against the fund, its advisers, and its trustees (including independent trustees) and certain officers, alleging that the defendants caused the fund to make large investments in option spreads that were inconsistent with the fund's investment objectives of "capital appreciation and capital preservation with low correlation to the broader U.S. equity market."[38] Two additional lawsuits with substantially similar allegations were filed against the same parties later in February 2018 and March 2018.[39] The three lawsuits were consolidated in March 2018;[40] in December 2019, the defendants filed a motion to dismiss the consolidated lawsuit, which motion remains pending.[41]

- *Alleged Investments Inconsistent with Investment Objective:* In April 2017, plaintiffs filed a prospectus liability lawsuit against a newly registered fund (which had previously been an unregistered fund), its investment adviser and distributor, and its trustees (including independent trustees) and certain officers, alleging that the adviser continued to invest the fund's assets in complex derivatives that were inconsistent with the fund's investment objective of "capital preservation."[42] In June 2019, the district court granted the defendants' motion to dismiss, with prejudice. The lawsuit is now concluded.[43]

- *Alleged Misrepresentations of Trading Risks under Certain Market Conditions:* In June 2016, plaintiffs filed a class action complaint in California state court against several ETFs, their adviser and distributor, and certain officers and trustees (including independent trustees) for alleged failure to advise

investors of risks associated with stop-loss orders, particularly under certain market conditions.[44] In September 2017, the court dismissed the lawsuit, determining that the plaintiffs in the lawsuit lacked standing.[45] The plaintiffs appealed the decision to the state appellate court in December 2017.[46] The decision was affirmed on appeal in January 2020, thereby concluding the lawsuits.[47]

Other Disclosure-Based Litigation

Previous *Claims Trends* have reported on fund shareholders' challenges to disclosure in class action "securities fraud" lawsuits brought under the '34 Act. Because these lawsuits typically are subject to legal requirements that can be difficult for plaintiffs to satisfy in the mutual fund context,[48] plaintiffs have historically had limited success in pursuing these lawsuits against fund industry defendants.[49]

In December 2017 and January 2018, two class action lawsuits alleging '34 Act violations were filed against a business development company (BDC) and two of its officers, in connection with the BDC's public communications with respect to its portfolio management team. More specifically, the complaints alleged that the BDC failed to disclose, among other things, the departure of several key portfolio managers, thereby misleading investors who purchased or held shares of the BDC.[50] One of these lawsuits was voluntarily dismissed by the plaintiff in February 2018.[51] In the second lawsuit, following an August 2018 filing of a motion to dismiss, a magistrate judge in January 2019 recommended that the district court deny the motion.[52] The district court did not accept the magistrate judge's recommendation and granted the motion to dismiss without prejudice in August 2019, thereby bringing the lawsuit to a close.[53]

Securities Class Actions in State Courts

2018 U.S. Supreme Court Decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*

In March 2018, in a case arising outside the mutual fund industry, the Court addressed the question of whether SLUSA precludes plaintiffs from filing certain securities class action lawsuits under *federal* law in state courts. In *Cyan*, the Court unanimously held that SLUSA does *not* strip state courts of jurisdiction over class actions alleging '33 Act violations (i.e., state courts and federal courts have concurrent jurisdiction over such federal law class actions), and that SLUSA does *not* permit defendants to remove such federal law class actions from state court to federal court. The Court noted, however, that "covered class actions" (i.e., "sizable class actions that are founded on state law and allege dishonest practices respecting a nationally traded security's purchase or sale") are barred by SLUSA and may be removed to federal court and dismissed.[54]

Outside the fund industry, there is evidence, as some observers had predicted, that the *Cyan* decision has (1) encouraged plaintiffs to bring more '33 Act class actions in state court and/or (2) put defendants in the position of having to simultaneously defend against both a '33 Act class action in state court and a related '34 Act class action in federal court (and be unable to force the consolidation of the lawsuits).[55] For example, some newly listed public companies have been named in IPO-related lawsuits brought simultaneously in federal and state courts.[56]

While, to date, there have not been a large number of state court rulings in post-*Cyan* actions, recent rulings outside the fund industry provide some insight into how state courts are addressing procedural protections for defendants in these actions. For example, various state courts have reached differing conclusions on the applicability of the automatic discovery stay under PSLRA.[57] A recent ruling in New York state court suggests that defendants may be successful in their efforts to persuade state courts to adhere to certain federal securities law precedents and principles in such actions.[58]

2020 Delaware Supreme Court Decision in *Salzberg v. Sciabacucchi*

A March 2020 ruling outside the fund industry by the Supreme Court of Delaware may prove helpful to fund groups in managing the forum in which securities class action lawsuits are initiated. The court determined that federal forum provisions set forth in corporate charters are enforceable under Delaware law and that Delaware corporations may add provisions to their charters requiring any lawsuit brought under the federal securities laws to be filed in federal court.[59] It remains to be seen if other states adopt a similar view of federal forum provisions in corporate charters.

Litigation under State Law

Lawsuits against fund groups have sometimes taken the form of (1) state law derivative actions—i.e., lawsuits purporting to be filed on behalf of funds themselves, that allege violations of state or common law by fund advisers and/or fund directors and officers, or (2) state law class actions—i.e., lawsuits purporting to be filed on behalf of groups (or "classes") of fund shareholders, that allege violations of state or common law by fund advisers, funds themselves, and/or fund directors and officers. This section describes recent developments in such actions.

In September 2018, a plaintiff filed a derivative and class action lawsuit alleging violations of state and common law, which named a mutual fund's investment adviser and trustees (including independent trustees) as defendants, along with the fund as a nominal defendant. The lawsuit alleges that the trustees breached their fiduciary duty and the adviser breached its contractual obligations by permitting one mutual fund to invest in and "prop up" a second mutual fund within the same trust.[60] The defendants filed a motion to dismiss in March 2019, which remains pending.[61]

In June 2019, an activist shareholder filed lawsuits in Delaware against the boards of two closed-end funds alleging that the boards (including the boards' independent trustees) breached their fiduciary duties and bylaws through "onerous" requests for information regarding prospective board nominees.[62] Later that month, the Delaware state court granted the plaintiff's request for injunctive relief, finding that the boards had improperly excluded the shareholder from presenting its slate of board nominees.[63] On appeal, in January 2020, the state appellate court overturned the lower court's grant of injunctive relief, and remanded the case to the lower court for further proceedings.[64] In February 2020, the lower court approved the parties' stipulation of dismissal of the lawsuit without prejudice.[65]

Also in June 2019, the same activist shareholder filed a lawsuit in Maryland against another closed-end fund board (in the same fund group) in an effort to declassify the board and to elect the activist's proposed slate of directors.[66] In July 2019, the court reportedly ruled that the activist shareholder failed to establish the need for an injunction requiring a vote on the proposed slate.[67] In September 2019, the defendants filed a motion to dismiss,[68] which the court granted in November 2019.[69] An appeal of this decision, filed in December 2019, was voluntarily dismissed in February 2020, thereby bringing this lawsuit to a close.[70]

Closed-End Fund Activism

Industry observers have noted a recent increase in shareholder activism in closed-end mutual funds.[71] Activist shareholder groups may seek to influence the management of closed-end funds (which funds have often been trading at a significant discount to their NAVs) in an effort to achieve a variety of goals.[72] For example, these shareholders may seek a tender offer for fund shares, liquidation or open-ending of the fund, or the election of new board members.[73] In some instances, activist shareholders may initiate litigation. As discussed above, in 2019, an activist shareholder group filed two lawsuits in different state courts against the same adviser (involving three closed-end funds managed by the adviser).

Regulatory Enforcement

The SEC pursued an active overall enforcement agenda in fiscal year 2019, with the 526 stand-alone enforcement actions (i.e., proceedings other than follow-on proceedings or deregistration proceedings) brought by the SEC representing an increase over fiscal year 2018. Of note, however, the increase was largely attributable to the agency's share class selection disclosure initiative, which encouraged investment advisers to self-report certain conflicts of interest in their sales of shares carrying 12b-1 fees.[74]

In fiscal year 2019, the SEC continued its focus on protecting retail investors and combating cyber threats, and described its approach with respect to regulating digital assets.[75] The agency also remained focused on individual accountability.

SEC Enforcement Actions

In fiscal year 2019, the Division of Enforcement continued to bring stand-alone actions against investment advisers and/or investment companies (including unregistered investment companies).[76] (As with the SEC's overall enforcement statistics, the number of stand-alone enforcement actions in this area increased as compared to the prior fiscal year, with the increase largely attributable to the SEC's share class selection disclosure initiative.) As in prior years, enforcement actions against entities outside the registered investment company space (e.g., unregistered funds and their advisers) outnumbered those within the registered fund space.

Apart from the share class selection disclosure initiative, administrative proceedings initiated and/or resolved by the SEC in 2019 and early 2020 against advisers of registered funds and/or fund officers involved various issues, including misleading disclosure regarding a fund's risk management processes,[77] valuation,[78] and improper allocation of expenses to a registered investment company.[79]

SEC Examination Priorities

The SEC communicates its examination priorities and potential enforcement risks in a variety of publications, speeches, and public statements from the chair, commissioners, and staff.

The SEC annually shares its examination priorities through the publication of OCIE's National Exam Program Examination Priorities. OCIE's 2020 examination priorities (published in January 2020) include (1) the protection of retail investors, (2) information security, and (3) financial technology (fintech) and innovation (including digital assets and electronic investment advice).[80]

This year, OCIE indicated that, with respect to registered investment advisers, it will focus on compliance programs around best execution, disclosure of conflicts of interest, and oversight of third-party service providers. In addition, OCIE indicated a "particular interest" in the accuracy and adequacy of disclosures for new types or emerging investment strategies, such as sustainable and responsible investing using environmental, social, and governance (ESG) criteria. With respect to registered investment companies, OCIE stated that it will examine the oversight practices of their boards of directors and will assess industry practices and regulatory compliance in various areas, including the use of third-party administrators as fund sponsors.[81]

Challenges to SEC "Disgorgement"

Historically, the SEC has frequently sought "disgorgement" in enforcement actions. Recent years have seen litigation challenges to the SEC's use of disgorgement as a remedy.

In 2017, the U.S. Supreme Court held that disgorgement, as "a punitive, rather than a remedial, sanction," is subject to a five-year statute of limitations.[82] In 2017, in a lawsuit against the SEC, the plaintiff cited the Supreme Court's ruling to support an allegation that the SEC had collected money from a liquidating trust as "disgorgement" without the proper statutory authority. The district court granted the SEC's motion to dismiss in August 2018; the plaintiff appealed that decision to the First Circuit. In December 2019, the First Circuit affirmed the district court's decision in favor of the SEC.[83]

In another lawsuit, a plaintiff has challenged the SEC's ability to obtain disgorgement as equitable relief in federal courts (in lieu of administrative proceedings), as no express authorization by statute permits such a remedy. In April 2017, a district court granted the SEC's motion to dismiss the lawsuit. In October 2018, the Ninth Circuit affirmed the lower court's decision. The defendants petitioned the Supreme Court for a writ of certiorari, which the Court granted in November 2019. In March 2020, the Supreme Court heard oral arguments in the case.[84] As of the time this publication went to press, a decision had not been announced.

Throughout the year, OCIE also issues risk alerts that provide information about its examination findings and priorities. In 2019, OCIE issued risk alerts on safeguarding customer records and information in network storage,[85] and on investment adviser principal and agency cross trading compliance issues.[86] Other risk alerts provided OCIE's observations from (1) investment adviser examinations (relating to compliance, supervision, and disclosure of conflicts of interest),[87] (2) investment company examinations (relating to the fund compliance rule, disclosure to investors, and the section 15(c) process), and (3) OCIE's money market fund initiative (relating to portfolio management practices, compliance programs, and disclosures) and target date initiative (relating to disclosures and compliance programs).[88]

Through speeches and other public statements, the SEC staff has further communicated that ongoing focus areas include fees and expenses, robo-advisers, and alternative sources of data.[89]

Other Regulators

The SEC is generally viewed as the primary regulator of the investment management industry, but other regulators (including FINRA, the CFTC, the DOL, state securities regulators, and foreign regulators) may also institute enforcement actions that may involve and/or impact registered funds and/or their affiliated service providers.

FINRA, which conducts examinations of broker-dealers, announced its annual priorities in early January 2020. FINRA's priorities include digital assets, liquidity management, transition from LIBOR, cybersecurity, and technology governance.[90]

The CFTC, which regulates the trading of commodities (including many futures and derivatives), often discusses its annual priorities through speeches and other public statements. The CFTC's chair and other commissioners have recently discussed, among other priorities, the breadth of applicability of the CEA to investment advisers,[91] digital assets,[92] distributed ledger (blockchain) technology,[93] cybersecurity,[94] and the CFTC's parallel enforcement program initiative.[95] In parallel enforcement actions, in January 2020, the CFTC and the SEC settled with a registered fund's investment adviser for misrepresenting how the adviser managed risks associated with certain futures and options trading.[96]

As one of the regulators responsible for administering and enforcing ERISA, the DOL may also regulate asset management industry participants with respect to their provision of services to retirement plans. Following the filing of a civil lawsuit in February 2019 alleging that a recordkeeper to retirement plans charged an undisclosed fee to third-party fund providers that distributed products through the recordkeepers' platform, the DOL and

the Secretary of the Commonwealth of Massachusetts reportedly began investigations of the recordkeeper.[97] To date, there appears to be no publicly available information regarding the status of these investigations. Meanwhile, the original lawsuit has been dismissed.[98]

Portfolio Management Errors

Over ICI Mutual's history, a significant portion of all claim amounts paid by ICI Mutual has been for "costs of correction" claims—i.e., insurance claims by advisers or other service providers for payments made by them, outside the litigation context, to remedy operational errors that have resulted in losses to funds or private accounts. Generally, "costs of correction" insurance coverage permits an insured entity to be reimbursed for costs incurred to correct an operational error, provided that the insured entity has actual legal liability for the resulting loss.[99]

In the current environment, a number of factors—including the size of fund groups, the scale of their operations, the magnitude of trades being executed on behalf of funds and other clients, the volatility of the securities markets, and operational challenges arising from the COVID-19 pandemic—may combine to create the potential for large operational errors. In ICI Mutual's experience, "costs of correction" claims involving seven-figure losses or greater have occurred in a number of areas, including trades of portfolio securities, corporate action processing, and valuation.

Examples of recent "costs of correction" claims received by ICI Mutual include claims involving errors in providing administrative services to third-party retirement plans and in tracking cash balances for certain funds.

As business operations continue to be outsourced to both affiliated and unaffiliated service providers, determining the extent to which "costs of correction" insurance coverage is available may be particularly challenging, especially in the context of certain types of events (e.g., cyberattacks).[100] In such events, the actual legal liability of an insured fund service provider (as well as any measure of "damages" incurred) may be far from clear-cut.

ICI Mutual's "costs of correction" claims history illustrates the continued importance to fund groups of close attention to policies, procedures, and the use of technology designed to prevent and detect operational mistakes and oversights.

Other Litigation Developments

In addition to the fee, disclosure, and state law-based lawsuits already discussed, 2019–2020 also saw other noteworthy litigation developments.

ERISA

As reported in past *Claims Trends*, the plaintiffs' bar has used ERISA as an avenue to attack the fund industry.[101] This trend continued over the past year, with new filings of ERISA-based lawsuits, as well as developments in existing lawsuits, involving asset managers and/or their affiliates.

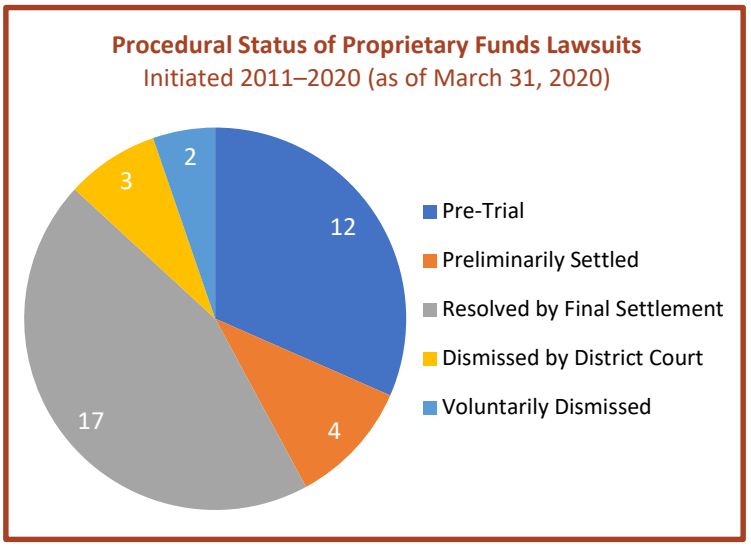
"PROPRIETARY FUNDS" LAWSUITS

Past *Claims Trends* have tracked ERISA-based lawsuits challenging the inclusion of "proprietary" mutual funds within the offerings of "in-house" 401(k) or similar employee benefit plans sponsored by asset managers and/or their affiliates.

Typically structured as class actions, these lawsuits frequently allege that the named defendants (which may include one or more entities, committees, and/or individuals) have breached their fiduciary duties under ERISA, and/or engaged in "prohibited transactions," by including in their in-house plans proprietary mutual funds that allegedly have charged excessive fees, and/or that have underperformed, relative to purportedly similar *non*-proprietary funds (i.e., funds offered by other asset managers). Such lawsuits may also include other allegations (e.g., that the defendants engaged in self-dealing, failed to include in their in-house plans the lowest-cost share classes of the proprietary funds at issue, and/or failed to adequately investigate providing non-mutual fund alternatives such as collective trusts).

Since 2011, the plaintiffs' bar has initiated at least 38 such lawsuits (with three of these lawsuits having been initiated since January 2019).[102] Twenty-two of the 38 lawsuits have been fully resolved, with 17 resolved through final monetary settlements, three dismissed by the courts (with one of these dismissals affirmed on appeal), and two voluntarily dismissed by the parties.

Of the 16 active lawsuits, 12 lawsuits are in the pre-trial stage of the litigation process, and preliminary settlements have been reached in four. With respect to the four lawsuits with preliminary settlements, a notice of settlement has been filed in one lawsuit, motions for preliminary approvals of settlements have been filed in two other lawsuits, and



preliminary approval of a settlement has been granted in another lawsuit.

The preliminary and final monetary settlements in these "proprietary funds" lawsuits collectively total over $260 million.[103]

- *Lawsuits in the Pre-Trial Stage:* Twelve of the 16 active lawsuits remain in the pre-trial stage of the litigation process. Three of these 12 lawsuits are currently in their early phases, with a motion to dismiss yet to be filed in two and a motion to dismiss pending in the third.[104] In seven of the 12 lawsuits, motions to dismiss have been denied, in whole or in part.[105] In an eleventh lawsuit, a motion for summary judgment remains pending.[106] In the twelfth lawsuit, the court issued a "case stated" decision (i.e., a decision based on undisputed facts in the pre-trial record), in which the court ruled for the defendants on certain counts and against them on other counts. The trial date in this twelfth lawsuit has yet to be scheduled.[107]

- *Lawsuits with Preliminary Settlements:* Preliminary settlements have been reached in four of the 16 active lawsuits. In March 2020, the court granted a motion for preliminary approval of a monetary settlement in one;[108] in December 2019 and March

2020, motions for preliminary approvals of monetary settlements were filed in two others;[109] and in the fourth, in March 2020, the parties announced their intention to settle the matter. This fourth lawsuit is notable for a 2018 First Circuit decision that shifted to plan sponsors (rather than employees) the burden of proving, once a loss has been shown, that a breach of fiduciary duty under ERISA caused such loss.[110]

- *Lawsuits Resolved by Final Settlements:* Seventeen of the lawsuits have reached final monetary settlements.[111] Eight of these final monetary settlements were approved by district courts in 2019 and early 2020.[112]

- *Lawsuits Dismissed by Court:* Three of the lawsuits have been dismissed by the courts. In one, following a bench trial, the district court issued a judgment in favor of the defendants in January 2019.[113] No appeal was filed, and the lawsuit is now closed. A second lawsuit was concluded following a ruling granting defendants' motion to dismiss.[114] In the third lawsuit, in August 2018, the Eighth Circuit affirmed the district court's dismissal, thereby concluding the lawsuit.[115]

- *Lawsuits Voluntarily Dismissed by the Parties:* Two lawsuits closed in 2018 pursuant to voluntary dismissals.[116]

In addition to the lawsuits described above challenging the inclusion of proprietary *registered* funds as investment options in in-house retirement plans, at least one lawsuit (filed in March 2020) has challenged an asset manager's inclusion of proprietary *non-registered* funds (specifically, proprietary target-date collective investment trusts) as investment options in in-house retirement plans.[117] This lawsuit remains pending in an early stage of the litigation process.

FEE-BASED LAWSUITS

The previous section described lawsuits challenging the inclusion of proprietary mutual funds as investment options in "in-house" plans sponsored by asset managers and/or their affiliates. As reported in previous *Claims Trends*, there have also been lawsuits challenging fees and compensation received directly or indirectly by asset managers and/or their affiliates as service providers to "third-party" plans. 2019 and early 2020 saw developments in some of these lawsuits, as well as the filing of four new lawsuits (subsequently consolidated into a single lawsuit).

In a fee-based ERISA lawsuit filed in 2016, the plaintiff alleged that the plan sponsors/administrators and certain affiliated parties breached their fiduciary duties to third-party retirement plans through their negotiation of revenue sharing fees, which, the plaintiff argued, had the effect of increasing the overall management fees of the mutual funds in which the plans invested.[118] A motion for summary judgment, filed in December 2016, was denied in September 2017.[119] The parties stipulated to a dismissal in January 2019.[120]

Insurance Considerations for ERISA Litigation Involving In-House Plans

Broadly stated, "fiduciary liability" insurance insures against liabilities arising out of third-party claims brought against company-sponsored employee benefit plans, the sponsoring companies themselves, and/or certain other persons or entities associated with such plans, by reason of their breach of fiduciary duties under ERISA (and/or common and other statutory law) in providing services to "in-house" retirement plans. Historically, fiduciary liability coverage has been viewed by insurance markets as separate and distinct from other types of liability coverages, including both "directors and officers" (D&O) coverage and "errors and omissions" (E&O) coverage. Indeed, fiduciary liability coverage is generally offered as a separate, stand-alone insurance product.

In a lawsuit filed in September 2017, plaintiffs alleged that a third-party provider of recordkeeping and other services to third-party 401(k) plans breached its fiduciary duties by charging "unreasonable" fees for its services.[121] Defendants filed a motion to dismiss in February 2018, which the district court granted in part and denied in part in February 2020.[122]

In four lawsuits filed in early and mid-2019, plaintiffs participating in third-party plans alleged that plan service provider that operated a mutual fund platform (or "supermarket") charged an undisclosed "infrastructure" fee to funds distributed through the platform.[123] The lawsuits were consolidated in August 2019.[124] In February 2020, the district court granted the defendants' motion to dismiss the consolidated lawsuit, on the grounds that the defendants did not owe a fiduciary duty under ERISA with respect to the fees at stake.[125] Defendants filed an appeal with the First Circuit in March 2020.[126]

MISMANAGEMENT LAWSUITS

The federal securities laws do not, in general, permit direct lawsuits against advisers for alleged mismanagement of assets. ERISA, however, provides an express right of action against plan "fiduciaries" for mismanagement of plan assets under their control—i.e., for failure to adhere to their duty of "prudent management."

In a "proprietary funds"-like class action lawsuit filed in April 2018, plaintiffs participating in their employers' retirement plans alleged that certain plan fiduciaries mismanaged participants' assets (and breached their fiduciary duties) through the selection and retention of affiliated mutual funds as underlying investments for plan assets.[127] Participants' assets were placed in collective investment trusts, which, in turn, invested in index mutual funds managed by the defendants. These affiliated mutual funds, according to the plaintiffs, had higher fees and lower performance than the fees and performance of similar funds. The defendants' motion to dismiss was granted in part and denied in part in January 2019. A motion for reconsideration of the court's decision remains pending. Trial is scheduled for February 2021.[128]

Bankruptcy Claims Involving Portfolio Securities

Mutual funds have occasionally been ensnared in proceedings arising from bankruptcies, typically for no reason other than the funds' status as passive holders or former holders of securities of the bankrupt issuers. In these "clawback" proceedings, bankrupt issuers and/or their creditors often seek a return of pre-bankruptcy payments made to security holders or other creditors, including funds. While these bankruptcy proceedings—including those involving the Tribune Company and General Motors (now concluded)—have typically involved corporate issuers, a recent bankruptcy-like proceeding involves the Commonwealth of Puerto Rico, an American territory.[129]

***Tribune* Bankruptcy:** The *Tribune* proceeding involves "constructive fraudulent conveyance" and/or "intentional fraudulent conveyance" claims under state and/or federal law. In September 2013, a federal district court dismissed the *state* law *constructive* fraudulent conveyance claims (on standing grounds).[130] In March 2016, the Second Circuit affirmed the district court's decision (on the grounds of preemption by federal law). A petition for a writ of certiorari was filed in October 2016 with the U.S. Supreme Court, which denied the petition in May 2019.[131] The Second Circuit subsequently (1) recalled

its earlier decision (in May 2018) in light of a February 2018 decision by the U.S. Supreme Court (the *Merit* decision, which involved the application of a "safe harbor" provision of the federal bankruptcy laws to financial institutions serving as conduits) and (2) issued, in December 2019, an amended decision, which held that the payments to the funds and other defendants were entitled to the protection of the "safe harbor."[132]

In April 2019, the district court denied a request in *Tribune* to amend the complaint to add a *federal* constructive fraudulent transfer claim.[133] In June 2019, the federal district court in *Tribune* issued a judgment that dismissed the *federal* law *intentional* fraudulent conveyance claim.[134] The district court's decisions were appealed to the Second Circuit in July 2019, where they remain pending.[135]

***General Motors* Bankruptcy:** In the *General Motors* bankruptcy proceeding, various entities (including a number of mutual funds) held interests in a term loan secured by collateral subject to a security interest. Due to an apparent clerical error, the security interest in certain collateral for the term loan was inadvertently released by the administrator for the term loan.[136] Concluding that the release of the security interest was unauthorized, the bankruptcy court granted summary judgment in favor of the defendant lenders in March 2013.[137] On a direct appeal from the bankruptcy court, the Second Circuit reversed the bankruptcy court's decision in January 2015, and remanded the proceeding to the bankruptcy court.[138]

An amended complaint was filed in May 2015.[139] Various dispositive motions were denied by the bankruptcy court in June 2016.[140] In the interim, a trial to resolve certain disputed issues of fact regarding the identification and valuation of the remaining secured collateral took place in April 2017. In September 2017, the bankruptcy court issued an opinion regarding collateral valuation.[141]

In January 2019, the bankruptcy court issued two opinions, one related to whether certain assets were "secured" and another related to an "earmarking" defense raised by defendants.[142] Shortly thereafter, in February 2019, the parties reached an agreement in principle to fully resolve the action.[143] In April 2019, the parties reached a settlement agreement, which was approved by the bankruptcy court in June 2019. The action was dismissed with prejudice in July 2019.[144]

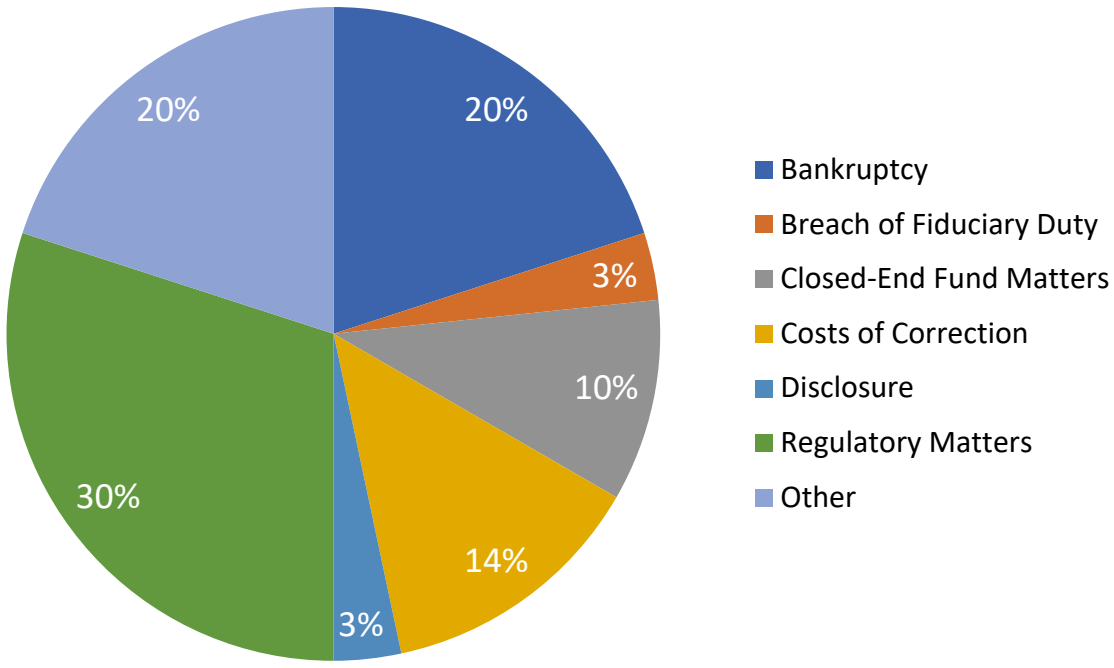
***Puerto Rico* Adversary Proceedings:** The *Puerto Rico* proceedings arise from Puerto Rico's difficulties in meeting its bond debt and unfunded pension obligations. Following the enactment of PROMESA in 2016, which allowed Puerto Rico to avail itself of federal bankruptcy-like proceedings, Puerto Rico filed to restructure its debt in 2017.[145]

Various entities (including mutual funds) held municipal debt issued by Puerto Rico, and a number of funds and/or fund advisers appear to have been named in related adversary proceedings.[146] In December 2019, the district court stayed these adversary proceedings until March 2020.[147] In a February 2020 court filing, Puerto Rico's federal oversight board advised that it had reached a deal with a subset of bondholders on a bankruptcy plan that, if approved, would assist Puerto Rico in emerging from bankruptcy.[148] Hearings on the confirmation of the plan are currently scheduled to occur in October and November 2020. In March 2020, the district court extended the stay of the related adversary proceedings until the court has the opportunity to decide whether the plan can be confirmed.[149]

D&O/E&O Claims Data

D&O/E&O Notices by Subject (2019)

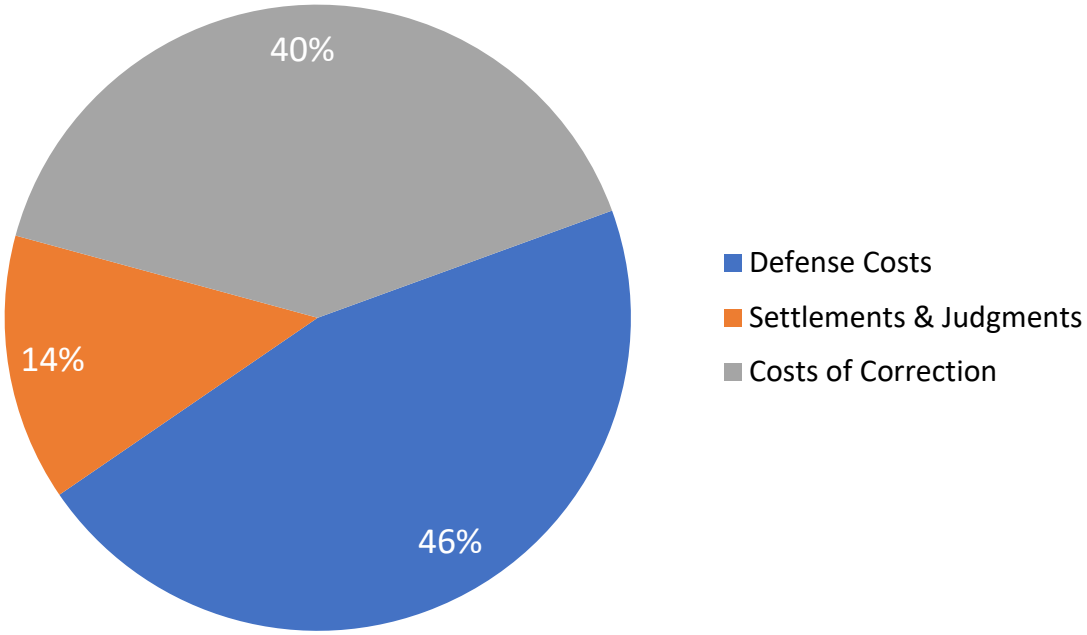
Regulatory matters and bankruptcy matters constituted the most common subjects of claims notices submitted under ICI Mutual D&O/E&O policies in 2019. As shown in the chart below, a substantial percentage of notices received (the "Other" category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2010–2019)

The chart below shows the breakdown of payments (i.e., defense costs, settlements and judgments, and costs of correction) made by ICI Mutual on claims submitted under ICI Mutual D&O/E&O policies over the ten-year period January 1, 2010 through December 31, 2019.



Endnotes

1 15 U.S.C. § 80a-35(b) (2007).

2 Jones v. Harris Assocs. L.P., 559 U.S. 335 (2010). This standard was first articulated by a federal appellate court in *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923 (2d Cir. 1982). The court set forth six factors—the "*Gartenberg* factors"—which are generally viewed to include: (1) the nature and quality of services provided to the fund and its shareholders; (2) the profitability of the fund to the adviser-manager; (3) "fall-out benefits" accruing to the adviser-manager or its affiliates; (4) "economies of scale" realized by the adviser-manager (and the extent to which they are shared); (5) comparative fee structure; and (6) the independence, expertise, care, and conscientiousness of the fund's board in evaluating adviser compensation. *Id.* at 928-32.

3 The count of post-*Jones* lawsuits herein does not include cases that were consolidated into other cases.

4 Twenty-three of the post-*Jones* lawsuits have concluded. *See* Laborers' Local 265 Pension Fund v. iShares Tr., 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015); Santomenno v. John Hancock Life Ins. Co., 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (dismissed as to section 36(b)) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013) (dismissed as to ERISA), *aff'd*, 677 F.3d 178 (3d Cir. 2012) (as to section 36(b)) & 768 F.3d 284 (3d Cir. 2014) (as to ERISA), *reh'g denied*, No. 13-3467 (3d Cir. Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (2015); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. Feb. 28, 2017) (closed by order of closure without prejudice); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (closed by stipulation); Karp v. Harris Assocs., L.P., No. 16-cv-8216 (N.D. Ill. Nov. 28, 2016) (closed by stipulation); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219 (E.D. Pa. Nov. 21, 2016) (closed by stipulation); Wayne Cty. Emps.' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (closed by stipulation); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. Nov. 7, 2011) (voluntarily dismissed); Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. Aug. 23, 2012) (order dismissing with prejudice pursuant to a stipulation of the parties); In re Voya Glob. Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. Oct. 19, 2017) (closed by stipulation); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, (S.D. Iowa Feb. 8, 2016), *aff'd*, 864 F.3d 859 (8th Cir. 2017); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (closed by stipulation); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 9, 2017) (closed by stipulation); Paskowitz v. Prospect Capital Mgmt., L.P., No. 17-510 (2d Cir. May 15, 2017) (closed by stipulation); Kasilag v. Hartford Inv. Fin. Servs., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *aff'd*, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018); Sivolella v. AXA Equitable Life Ins. Co., 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016), *aff'd*, 742 Fed. Appx. 604 (3d Cir. July 10, 2018); Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Aug 9, 2018) (closed by stipulation); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. Nov. 21, 2018) (closed by stipulation); Zehrer v. Harbor Capital Advisors, Inc., 2018 U.S. Dist. LEXIS 40718 (N.D. Ill Mar. 13, 2018) (order granting summary judgment); Redus-Tarchis v. N.Y. Life Inv. Mgmt., 2018 U.S. Dist. LEXIS 175309 (D.N.J. Oct. 10, 2018) (order granting summary judgment); Pirundini v. J.P. Morgan Inv. Mgmt. Inc., No. 17-cv-3070 (S.D.N.Y. filed Apr. 27, 2017), *aff'd*, No. 18-733 (2d Cir. Mar. 18, 2019); Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. May 7, 2019) (stipulation of dismissal with prejudice); Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. Sept. 27, 2019) (order of dismissal) (stipulation of non-appeal filed on October 25, 2019).

5 In re BlackRock Mut. Funds Advisory Fee Litig., 2019 U.S. Dist. LEXIS 63547 (D.N.J. Feb. 8, 2019) (order dismissing lawsuit after trial), *appeal docketed*, No. 19-1557 (3d Cir. Mar. 15, 2019).

6 Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162, 2019 U.S. Dist. LEXIS 162598 (C.D. Cal. Aug. 5, 2019) (district court adopts findings of fact and conclusions of law in favor of defendants following trial), *appeal docketed*, No. 19-55934 (9th Cir. Aug. 8, 2019).

7 Chill v. Calamos Advisors, LLC, 417 F. Supp. 3d 208 (S.D.N.Y. Sept. 27, 2019) (order of dismissal) (stipulation of non-appeal filed on October 25, 2019).

[8] In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318, 2019 U.S. Dist. LEXIS 111521 (S.D.N.Y. May 30, 2019) (order granting summary judgment), *appeal docketed*, No. 19-1967 (2d Cir. June 28, 2019).

[9] Pirundini v. J.P. Morgan Inv. Mgmt. Inc., 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018) (order granting motion to dismiss), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019).

[10] Goodman v. J.P. Morgan Inv. Mgmt., Inc., 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018) (order granting motion for summary judgment), *aff'd*, 2020 U.S. App. LEXIS 9868 (6th Cir. Mar. 30, 2020).

[11] Obeslo v. Great-West Capital Mgmt., No. 16-cv-230 (D. Colo. filed Jan. 29, 2016) (trial held on January 13–28, 2020).

[12] The following seven lawsuits were closed by stipulation of the parties: Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. May 7, 2019) (stipulation of dismissal with prejudice); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. Nov. 21, 2018) (closed by stipulation); In re Voya Glob. Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. Oct. 19, 2017) (stipulation of dismissal with prejudice); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (stipulation of dismissal with prejudice); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (stipulation of dismissal with prejudice); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219 (E.D. Pa. Nov. 21, 2016) (stipulation of dismissal with prejudice); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. Nov. 7, 2011) (closed by stipulation).

The following nine lawsuits were closed by court order (with district court decisions affirmed on appeal in five of these lawsuits): Pirundini v. J.P. Morgan Inv. Mgmt. Inc., No. 17-cv-3070, 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018) (order granting motion to dismiss), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019); Chill v. Calamos Advisors, LLC, 417 F. Supp. 3d 208 (S.D.N.Y. Sept. 27, 2019) (order of dismissal); Redus-Tarchis v. N.Y. Life Inv. Mgmt., 2018 U.S. Dist. LEXIS 175309 (D.N.J. Oct. 10, 2018) (order granting summary judgment); Sivolella v. AXA Equitable Life Ins. Co., 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016), *aff'd*, 742 Fed. Appx. 604 (3d Cir. July 10, 2018); Zehrer v. Harbor Capital Advisors, Inc., 2018 U.S. Dist. LEXIS 40718 (N.D. Ill Mar. 13, 2018); Kasilag v. Hartford Inv. Fin. Serv., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *aff'd*, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44, 2016 U.S. Dist. LEXIS 188713 (S.D. Iowa Feb. 3, 2016), *aff'd*, 864 F.3d 859 (8th Cir. 2017); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. Feb. 28, 2017) (order for closure); Santomenno v. John Hancock Life Ins. Co., No. 10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (as to section 36(b)), *aff'd*, 677 F.3d 178 (3d Cir. 2012) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013) (as to ERISA), *aff'd*, 768 F.3d 284 (3d Cir. 2014).

A case similar to *Santomenno* was filed in 2011 by the same plaintiffs' lawyers against another insurance company and certain affiliated investment advisers. Santomenno v. Transam. Life Ins. Co., No. 11-cv-736 (D.N.J. filed Feb. 8, 2011). That lawsuit also challenged fees under ERISA and sought to recover advisory fees, but, rather than alleging a violation of section 36(b), the lawsuit sought to recover certain fees based on the allegation that one defendant acted as an unregistered investment adviser in violation of IAA section 203. The lawsuit was transferred to a federal district court in California, which, in February 2013, granted a motion to dismiss with respect to the IAA claim, but denied the motion with respect to the ERISA claims. Santomenno v. Transam. Life Ins. Co., 2013 U.S. Dist. LEXIS 22354 (C.D. Cal. Feb. 19, 2013). On an interlocutory appeal of the partial denial of the motion to dismiss, the Ninth Circuit, in February 2018, reversed the district court's denial of defendants' motion to dismiss and remanded to the district court with orders to grant defendants' motion to dismiss. Santomenno v. Transam. Life Ins. Co., 883 F.3d 833 (9th Cir. Feb. 23, 2018) (order reversing and remanding the district court's decision). The district court dismissed the lawsuit with prejudice in April 2018, thereby bringing the lawsuit to a close. Santomenno v. Transam. Life Ins. Co., No. 12-cv-2782 (C.D. Cal. Apr. 24, 2018) (order dismissing lawsuit with prejudice).

[13] Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (stipulation of dismissal with prejudice); North Valley GI Med. Grp. v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (stipulation of dismissal with prejudice).

[14] Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2289 (N.D. Cal. Apr. 27, 2016) (filing of motion to dismiss) & 2017 U.S. Dist. LEXIS 48661 (N.D. Cal. Mar. 31, 2017) (order denying motion to dismiss).

[15] Chill v. Calamos Advisors, LLC, 417 F. Supp. 3d 208 (S.D.N.Y. Sept. 27, 2019) (order of dismissal) (stipulation of non-appeal filed on October 25, 2019).

[16] In re BlackRock Mut. Funds Advisory Fee Litig., 2019 U.S. Dist. LEXIS 63547 (D.N.J. Feb. 8, 2019) (order dismissing lawsuit after trial), *appeal docketed*, No. 19-1557 (3d Cir. Mar. 15, 2019).

[17] In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318, 2019 U.S. Dist. LEXIS 111521 (S.D.N.Y. May 30, 2019) (order granting summary judgment), *appeal docketed*, No. 19-1967 (2d Cir. June 28, 2019).

[18] Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162, 2019 U.S. Dist. LEXIS 162598 (C.D. Cal. Aug. 5, 2019) (district court adopts findings of fact and conclusions of law in favor of defendants following trial), *appeal docketed*, No. 19-55934 (9th Cir. Aug. 8, 2019).

[19] Pirundini v. J.P. Morgan Inv. Mgmt. Inc., 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018) (order granting motion to dismiss), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019).

[20] Goodman v. J.P. Morgan Inv. Mgmt., Inc., 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018) (order granting motion for summary judgment), *aff'd*, 2020 U.S. App. LEXIS 9868 (6th Cir. Mar. 30, 2020).

[21] Karp v. Harris Assocs., L.P., No. 16-cv-8216 (N.D. Ill. Nov. 28, 2016) (closed by stipulation); Wayne Cty. Emps.' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (closed by stipulation); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 9, 2017) (closed by stipulation).

[22] Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 9, 2017) (closed by stipulation).

[23] Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Aug. 9, 2018) (closed by stipulation).

[24] Paskowitz v. Prospect Capital Mgmt., L.P., 232 F. Supp. 3d 498 (S.D.N.Y. 2017) (order granting motion to dismiss), *appeal docketed*, No. 17-510 (2d Cir. Feb. 21, 2017).

[25] Paskowitz v. Prospect Capital Mgmt., L.P., No. 17-510 (2d Cir. May 15, 2017) (mandate issued).

[26] Laborers' Local 265 Pension Fund v. iShares Tr., 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015).

[27] Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. Aug. 23, 2012) (closed by stipulation).

[28] Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. filed Apr. 26, 2018).

[29] Winston v. Western Asset Mgmt. Co., No. 18-cv-3523, 2018 U.S. Dist. LEXIS 224971 (C.D. Cal. Oct. 9, 2018) (order denying motion to dismiss). The district court subsequently granted a stipulation to dismiss the Western Asset defendants from the lawsuit. Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. Jan. 28, 2019).

[30] *See generally* ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY: UNDERSTANDING AND MANAGING THE RISK, https://www.icimutual.com.

[31] Oxford Univ. Bk. v. Lansuppe Feeder, Inc., 933 F.3d 99 (2d Cir. Aug. 5, 2019). *See generally* Stephen Bier, *Second Circuit Finds that Section 47(b) Provides for Private Right of Action, Raising New Implications and Considerations for Mutual Fund Advisers and Trustees*, DECHERT ONPOINT LEGAL UPDATE (Sept. 10, 2019), https://www.jdsupra.com/legalnews/second-circuit-finds-that-section-47-b-24051/.

[32] *See, e.g.*, *id.*; Gary O. Cohen, *Second Circuit Opens Door to Lawsuits Based on Contract Violating 1940 Act*, CARLTON FIELDS INSIGHTS (Feb. 6, 2020), https://www.carltonfields.com/insights/expect-focus/2019/second-circuit-opens-door-to-lawsuits-based-on; *Second Circuit Creates Split Regarding Private Right of Action for Rescission under Section 47(b) of the 1940 Act*, VEDDERPRICE (Aug. 2019), https://www.vedderprice.com/second-circuit-creates-split-regarding-private-right-of-action-for-rescission-under-section-47-b-of-1940-act-regulatory-update-8-19.

[33] Drapeau v. ProShare Tr., No. 18-cv-107 (D. Vt. filed July 3, 2018); Ford v. ProShares Tr. II, No. 19-cv-886 (S.D.N.Y. filed Jan. 29, 2019); Bittner v. ProShares Tr. II, No. 19-cv-1840 (S.D.N.Y. filed Feb. 27, 2019); Mareno v. ProShares Tr. II, No. 19-cv-1955 (S.D.N.Y. filed Mar. 1, 2019).

[34] Ford v. ProShares Trust II, No. 19-cv-886 (S.D.N.Y. Apr. 29, 2019) (order of consolidation).

[35] In re Proshares Trust II Secs. Litig., No. 19-cv-886 (S.D.N.Y. June 21, 2019) (filing of consolidated amended complaint); In re Proshares Trust II Secs. Litig., No. 19-cv-886 (S.D.N.Y. Sept. 6, 2019) (filing of second consolidated amended complaint).

[36] In re Proshares Trust II Secs. Litig., No. 19-cv-886 (S.D.N.Y. Sept. 27, 2019) (filing of motion to dismiss second amended complaint); In re Proshares Trust II Secs. Litig., No. 19-cv-886 (S.D.N.Y. Jan. 3, 2020) (order granting motion to dismiss), *appeal docketed*, No. 20-419 (2d Cir. Jan. 31, 2020).

[37] Drapeau v. ProShare Tr., No. 18-cv-107 (D. Vt. Mar. 5, 2020) (order granting motion to dismiss).

[38] Sokolow v. LJM Funds Mgmt., Ltd., No. 18-cv-1039 (N.D. Ill. filed Feb. 9, 2018).

[39] Bennett v. LJM Funds Mgmt., Ltd., No. 18-cv-1312 (N.D. Ill. filed Feb. 21, 2018); Nosewicz v. LJM Funds Mgmt., Ltd., No. 18-cv-1589 (N.D. Ill. filed Mar. 2, 2018).

[40] Sokolow v. LJM Funds Mgmt., Ltd., No. 18-cv-1039 (N.D. Ill. Mar. 28, 2018) (order consolidating *Bennett* and *Nosewicz* into *Sokolow*).

[41] Sokolow v. LJM Funds Mgmt., Ltd., No. 18-cv-1039 (N.D. Ill. Dec. 19, 2019) (filing of motion to dismiss).

[42] Emerson v. Mut. Fund Series Tr., No. 17-cv-2565 (E.D.N.Y. filed Apr. 28, 2017).

[43] Emerson v. Mut. Fund Series Tr., 393 F. Supp. 3d 220 (E.D.N.Y. June 25, 2019) (memorandum of decision and order).

[44] Jensen v. iShares Tr., No. 16-552567 (Super. Ct. Cal. filed June 16, 2016).

[45] Jensen v. iShares Tr., 2017 Cal. Super. LEXIS 547 (Super. Ct. Cal. Sept. 18, 2017) (statement of decision).

[46] Jensen v. iShares Tr., No. A153511 (Cal. Ct. App. Dec. 1, 2017) (notice of appeal).

[47] Jensen v. iShares Tr., 44 Cal. App. 5th 618 (Ca. Ct. App. Jan. 23, 2020) (decision).

[48] Under section 10(b) of the '34 Act and rule 10b-5 thereunder, one such requirement is that a plaintiff demonstrate that defendants engaged in intentional or reckless misconduct (i.e., "scienter"). *See generally* ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY: UNDERSTANDING AND MANAGING THE RISK, https://www.icimutual.com (at pp. 6-7, discussing legal requirements applicable to "securities fraud" class action lawsuits brought under section 10(b) of the '34 Act and rule 10b-5 thereunder).

[49] As reported in prior *Claims Trends*, a noteworthy development in the rule 10b-5 area came in 2011 with the Supreme Court's decision in *Janus Capital Group v. First Derivative Traders*, 131 S. Ct. 2296 (2011). In considering whether an investment adviser to mutual funds (and the adviser's parent company) could be held liable for allegedly deceptive statements included in mutual fund prospectuses, the Court in *Janus* held that the adviser did not itself "make" any of the alleged prospectus misstatements at issue, and therefore could not be liable as a "primary" violator in shareholder litigation brought under rule 10b-5.

In March 2019, in a lawsuit outside the fund area, *Lorenzo v. SEC*, 2019 U.S. LEXIS 2295 (Mar. 27, 2019), the Supreme Court appears to have expanded the scope of "primary" liability under rule 10b-5, holding that an individual who did not "make" false and misleading statements within the meaning of the *Janus* decision could nonetheless be held liable under rule 10b-5 for *disseminating* false and misleading statements with intent to defraud. The effect of *Lorenzo* on mutual fund litigation under the '34 Act remains to be seen.

[50] Sandifer v. Capitala Fin. Corp., No. 18-cv-52 (C.D. Cal. filed Jan. 3, 2018) (subsequently transferred to another district court; *see* Sandifer v. Capitala Fin. Corp., No. 18-cv-63 (W.D.N.C. filed Feb. 5, 2018)); Paskowitz v. Capitala Fin. Corp., No. 17-cv-9251 (C.D. Cal. filed Dec. 28, 2017).

[51] Sandifer v. Capitala Fin. Corp., No. 18-cv-63 (W.D.N.C. filed Feb. 5, 2018) (voluntarily dismissed on February 28, 2018).

[52] Paskowitz v. Capitala Fin. Corp. No. 18-cv-96, 2019 U.S. Dist. LEXIS 104619 (W.D.N.C. Jan. 7, 2019) (magistrate judge's recommendation to district court to deny defendants' motion to dismiss).

[53] Paskowitz v. Capitala Fin. Corp. No. 18-cv-96, 2019 U.S. Dist. LEXIS 138203 (W.D.N.C. Aug. 15, 2019) (order granting motion to dismiss). The judgment was entered on October 25, 2019, Paskowitz v. Capitala Fin. Corp. No. 18-cv-96 (W.D.N.C. Oct. 25, 2019) (judgment in case).

[54] Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061 (U.S. Mar. 20, 2018).

[55] *See, e.g.*, Doug Greene et al., *The Coming Securities Class Action Storm: Multijurisdictional Litigation After* Cyan, PLUS JOURNAL (3d Qtr. 2018), *available at* https://www.wileyrein.com/media/publication/486_Q32018.pdf; Kevin LaCroix, *Guest Post: Baker Hostetler, The State of Securities Litigation After* Cyan, THE D&O DIARY (Apr. 23, 2018), https://www.dandodiary.com/2018/04/articles/securities-litigation/guest-post-state-securities-litigation-cyan/; Fried Frank, *Securities Litigation Update* (Summer 2018), https://www.friedfrank.com/siteFiles/Publications/FriedFrankSecuritiesLitigationUpdateSummer2018.pdf.

[56] *See* Kevin LaCroix, *Multiplied and Parallel Litigation: The Mess that* Cyan *has Wrought*, D&O Diary (Nov. 18, 2019), https://www.dandodiary.com/2019/11/articles/securities-litigation/multiplied-and-parallel-litigation-the-mess-that-cyan-has-wrought/#.

[57] *See* Vincent Sama, *Post-*Cyan *Ruling on Discovery Stay,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 29, 2019), https://corpgov.law.harvard.edu/2019/06/29/post-cyan-ruling-on-discovery-stay/; Rachel Graf, *NY Judges Split On Post-*Cyan *Discovery Stays*, LAW360 (Aug. 7, 2019); Rachel Graf, *Year-Old* Cyan *Ruling Still A Touchy Subject For Attorneys*, LAW360 (Mar. 22, 2019).

[58] *See* Tom McParland, *Post-'*Cyan*' Appellate Guidance a Top Area of Interest Heading Into 2020*, Law.com (Dec, 27, 2019), https://www.law.com/newyorklawjournal/2019/12/27/post-cyan-appellate-guidance-a-top-area-of-interest-heading-into-2020/.

[59] Salzberg v. Sciabacucchi, No. 346, 2019, 2020 Del. LEXIS 100 (Del. Mar. 18, 2020).

[60] Lanotte v. Highland Capital Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. filed Sept. 5, 2018).

[61] Lanotte v. Highland Capital Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. Mar. 25, 2019) (filing of motion to dismiss).

[62] Saba Capital Master Fund v. BlackRock Credit Allocation Income Trust, C.A. No. 2019-0416 (Del. Ch. No. filed June 4, 2019) (filing of complaint).

[63] Saba Capital Master Fund v. BlackRock Credit Allocation Income Trust, C.A. No. 2019-0416, 2019 Del. Ch. LEXIS 243 (Del. Ch. No. June 27, 2019) (issuance of memorandum opinion).

[64] BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd., 220 Del. LEXIS 14 (Del. Super. Ct. Jan. 13, 2020).

[65] Saba Capital Master Fund v. BlackRock Credit Allocation Income Trust, C.A. No. 2019-0416 (Del. Ch. No. filed Feb. 25, 2020) (approval of stipulation of dismissal).

[66] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc. Case No. 24-C-19-003168 (Md. Cir. Ct.).

[67] *See U.S. Listed Closed-End Funds and BDC Activist and Key Corporate Actions*, AST (July 2019), https://www.astfinancial.com/media/444040/c-users-dcampagnone-documents-ast-cef-monthly-july-2019.pdf; Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc., Case No. 24-C-19-003168 (Md. Cir. Ct.).

[68] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc. Case No. 24-C-19-003168 (Md. Cir. Ct. Sept. 13, 2019) (filing of motion to dismiss).

[69] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc. Case No. 24-C-19-003168 (Md. Cir. Ct. Nov. 15, 2019) (order granting motion to dismiss).

[70] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc. Case No. 2068-2019 (Md. Ct. Spec. Apps. Feb. 27, 2020) (notice of voluntary dismissal).

[71] *See, e.g.*, Tim LeeMaster, *The Funds and Firms Pursuing Closed-End Fund Activism*, FUND DIRECTIONS (Feb. 13, 2020), https://funddirections.com/news/76965/the-funds-and-firms-pursuing-closed-end-fund-activism-2/; Thomas A. DeCapo & Kenneth E. Burdon, *Activists Take Another $290 Million Bite Out of Vulnerable Closed-End Fund Asset Class*, SKADDEN (June 19, 2019), https://www.skadden.com/insights/publications/2019/06/activists-take-another-$290-million-bite.

[72] *See* Tim LeeMaster, *Western Asset Closed-End Funds Attract New Activist Fund*, FUND DIRECTIONS (Feb. 10, 2020), https://funddirections.com/news/76953/western-asset-closed-end-funds-attract-new-activist-fund/.

[73] *See* Skadden, Arps, Slate, Meagher & Flom LLP, Investment Management Update (Jan. 2020), https://www.skadden.com/insights/publications/2020/01/investment-management-update; Rachael Levy, *Boas Weinstein Fund Spars with BlackRock and Neuberger Berman*, WALL ST. J. (Aug. 29, 2019), https://www.wsj.com/articles/boaz-weinstein-hedge-fund-spars-with-blackrock-and-neuberger-11567033568; Tim LeeMaster, *Eaton Vance CEF Latest to Fall Under Activist Attack*, FUND DIRECTIONS (Jan. 23, 2020), https://funddirections.com/news/76891/eaton-vance-cef-latest-to-fall-under-activist-attack/.

[74] Pursuant to this initiative, 95 investment advisory firms self-reported. The Division of Enforcement agreed to recommend standardized settlement terms. The terms did not impose a penalty on self-reporting advisers, but did require disgorgement of certain fees paid to the advisers. *See* SEC, Div. of Enforcement, *Annual Report 2019*, at 11 (Nov. 6, 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf. While the bulk of these actions were brought in March and then September 2019, the SEC appeared to have continued to bring enforcement actions based on information obtained through its inspection of firms' sales of certain share classes. *See* Jill Gregorie, *J.P. Morgan Securities Slapped With $1.5M Share Class Fine*, IGNITES (Jan. 10, 2020), https://www.ignites.com/c/2619593/316053/morgan_securities_slapped_with_share_class_fine.

[75] *See* SEC, Div. of Enforcement, Annual Report 2019, at 6-10 (Nov. 6, 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

[76] *See id.* at 28 (indicating that 191, or approximately 36%, of its stand-alone actions in fiscal year 2019 were against investment companies/investment advisers, up from 108 (approximately 18%) in fiscal year 2018).

[77] *See* In re Catalyst Capital Advisors, LLC, File No. 3-19674, IAA No. 5436 (SEC Jan. 27, 2020), https://www.sec.gov/litigation/admin/2020/ia-5436.pdf (finding a registered investment adviser made material misstatements concerning its risk management procedures for a mutual fund under its management).

[78] *See* In re Fifth St. Mgmt., LLC, ICA Rel. No. 33312, File No. 3-18909 (SEC Dec. 3, 2018), https://www.sec.gov/litigation/admin/2018/33-10581.pdf (finding that an adviser improperly valued certain investments held by a business development company).

[79] *See id.* (finding that an adviser improperly allocated expenses to two business development companies).

[80] SEC, OCIE, 2020 Nat'l Exam Program Examination Priorities at 9-14 (Jan. 7, 2020), https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf

[81] *Id.* at 15-16.

[82] Kokesh v. SEC, 137 S. Ct. 1635 (2017). The Court had previously applied a five-year statute of limitations, running from the time of the misconduct at issue, to SEC enforcement actions seeking civil penalties, such as fines, penalties, and forfeiture. Gabelli v. SEC, 568 U.S. 442 (2013).

In March 2018, the Tenth Circuit remanded the lawsuit to the district court, ruling that actions that took place within the limitations period remained subject to disgorgement. SEC v. Kokesh, 884 F.3d 979 (10th Cir. Mar. 5, 2018). On remand, the district court ordered prejudgment interest on the disgorgement amount sought by the SEC. SEC v. Kokesh, 2018 U.S. Dist. LEXIS 186412 (D.N.M. Oct. 31, 2018).

[83] Jalbert v. SEC, 327 F. Supp. 3d 287 (D. Mass. Aug. 22, 2018) (order granting motion to dismiss), *aff'd*, 945 F.3d 587 (1st Cir. 2019)

[84] SEC v. Liu, 262 F. Supp. 3d 957, 976 (C.D. Cal. 2017), *aff'd*, Liu v. SEC, 754 Fed. Appx. 505 (9th Cir. 2018), *cert. granted*, No. 18-1501, 140 S. Ct. 451 (S. Ct. 2019).

[85] SEC, OCIE Nat'l Exam Program Risk Alert, Safeguarding Customer Records and Information in Network Storage—Use of Third Party Security Features; (May 23, 2019), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Network%20Storage.pdf.

[86] SEC, OCIE Nat'l Exam Program Risk Alert, Investment Adviser Principal and Agency Cross Trading Compliance Issues. (Sept. 4, 2019), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Principal%20and%20Agency%20Cross%20Trading.pdf.

[87] SEC, OCIE Nat'l Exam Program Risk Alert, Observations from Examinations of Investment Advisers: Compliance, Supervision, and Disclosure of Conflicts of Interest (July 23, 2019), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Supervision%20Initiative.pdf.

[88] SEC, OCIE Nat'l Exam Program Risk Alert, Top Compliance Topics Observed in Examinations of Investment Companies and Observations from Money Market Fund and Target Date Fund Initiatives (Nov. 7, 2019), https://www.sec.gov/files/Risk%20Alert%20-%20Money%20Market%20Fund%20and%20Target%20Date%20Fund%20Initiatives.pdf.

[89] *See, e.g.*, Jill Gregorie, *Fees, Expenses to be 'Mainstay' of 2020 Exams: SEC Official*, IGNITES (Mar. 10, 2020), https://www.ignites.com/c/2681273/325753.

[90] FINRA, 2020 Risk Monitoring and Examination Priorities Letter, at 9-11 (Jan. 9, 2020), https://www.finra.org/sites/default/files/2020-01/2020-risk-monitoring-and-examination-priorities-letter.pdf.

[91] *See, e.g.*, Remarks of CFTC Division of Swap Dealer and Intermediary Oversight Director Joshua B. Sterling Before the District of Columbia Bar Association (Sept. 25, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opasterling1 (noting that commodity pool operators and commodity trading advisors include "a large swath of money management and advisory shops that have been substantially regulated for decades by the SEC and other agencies worldwide" and discussing potential reforms that would permit the CFTC to implement Dodd-Frank's purposes).

[92] *See, e.g.*, Statement of Heath Tarbert, Chairman, CFTC; Kenneth A. Blanco, Director, Financial Crimes Enforcement Network (FinCEN); and Jay Clayton, Chairman, SEC, Leaders of CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets (Oct. 11, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/cftcfincensecjointstatement101119.

[93] *See, e.g.*, CFTC, Opening Statement of Commissioner Brian Quintenz Before the CFTC Technology Advisory Committee (Oct. 3, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement100319.

[94] *See, e.g.*, *id.*

[95] *See, e.g.*, Keynote Address of Director of Enforcement James M. McDonald at the Practicing Law Institute's White Collar Crime 2019 Program (Sept. 25, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald5 ("The CFTC and SEC also recently filed parallel charges against a portfolio manager for mismarking swaps that spanned across the respective agencies' jurisdictions.")

[96] In re Catalyst Capital Advisors, LLC and Jerry Szilagyi, CFTC Docket No. 20-13 (CFTC Jan. 27, 2020), https://www.cftc.gov/media/3351/enfcatalystcapitaladvisorsllcorder012720/download; In re Catalyst Capital Advisors, LLC, File No. 3-19674, IAA No. 5436 (SEC Jan. 27, 2020), https://www.sec.gov/litigation/admin/2020/ia-5436.pdf (findings by the CFTC and the SEC that a registered investment adviser made material misstatements concerning its risk management procedures for a mutual fund under its management).

[97] *See* Gretchen Morgenson, *Government Probes Fidelity Over Obscure Mutual-Fund Fees*, WALL ST. J. (Feb. 27, 2019), https://www.wsj.com/articles/fidelitys-fees-on-low-cost-funds-eyed-in-government-probe-11551263401. The lawsuit that reportedly called attention to the "infrastructure" fee is *Wong v. FMR LLC*, No. 19-cv-10335 (D. Mass. filed Feb. 21, 2019). *Wong* and *Summers v. FMR LLC*, No. 19-cv-10501 (D. Mass. filed Mar. 18, 2019), filed a month later, are discussed in "Other Litigation Developments – ERISA – Fee-Based Lawsuits." *See infra* notes 123–126 and accompanying text; Nicole Piper, *Fidelity Faces State Investigation over Fund Fees*, CITYWIRE (Mar. 5, 2019), https://citywireusa.com/professional-buyer/news/fidelity-faces-state-investigation-over-fund-fees/a1206756.

[98] Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. filed Feb. 14, 2020) (order granting motion to dismiss).

[99] The coverage also typically requires the insured to obtain the insurer's advance consent before incurring any costs for which the insured may seek reimbursement. *See generally* ICI Mutual's 2009 Risk Management Study, MUTUAL FUND D&O/E&O INSURANCE: A GUIDE FOR INSUREDS, at 35-36, https://www.icimutual.com (discussing insurance for the costs of correcting operations-based errors).

[100] *See, e.g.*, ICI MUTUAL, *D&O/E&O Insurance Coverage For Network Security Events: Frequently Asked Questions*, Question 8 (Jan. 2017), https://www.icimutual.com.

[101] *See generally* ICI Mutual's 2010 Risk Management Study, ERISA LIABILITY: A GUIDE FOR INVESTMENT ADVISERS AND THEIR AFFILIATES, https://www.icimutual.com & ICI Mutual's 2014 Expert Roundtable Report, TRENDS IN FEE LITIGATION: ACTIONS BROUGHT UNDER SECTION 36(B) AND ERISA, https://www.icimutual.com.

[102] The count of "proprietary funds" lawsuits set forth herein does not include cases that were consolidated into other cases.

[103] The preliminary settlements are as follows: In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., No. 11-cv-784 (N.D. Ga. filed Mar. 24, 2020) (filing of motion for preliminary approval of $29 million proposed settlement); Cervantes v. Invesco Holding Co. (U.S.), Inc., No. 18-cv-2551 (N.D. Ga. Mar. 9, 2020) (filing of motion for preliminary approval of $3.47 million preliminary settlement); In re M&T Bank Corp. ERISA Litig., No. 16-cv-375 (W.D.N.Y. Dec. 26, 2019) (filing of motion for preliminary approval of $20.85 million preliminary settlement). In addition, a notice of settlement was filed in another lawsuit. Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. Mar. 25, 2020) (filing of notice of settlement).

The final settlements are as follows: Stevens v. SEI Invs. Co., No. 18-cv-4205 (E.D. Pa. Feb. 28, 2020) ($6.8 million); Velazquez v. Mass. Fin. Servs. Co., No. 17-cv-1124 (D. Mass. Dec. 5, 2019) ($6.875 million); Price v. Eaton Vance Corp., No. 18-cv-12098 (D. Mass. Sept. 24, 2019) ($3.45 million); Bowers v. BB&T Corp., No. 15-cv-732 (M.D.N.C. May 10, 2019) ($24 million); Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich. Apr. 23, 2019) ($4.5 million); Schapker v. Waddell & Reed Financial, Inc., No. 17-cv-2365 (D. Kan. Apr. 8, 2019) ($4.875 million); Cryer v. Franklin Resources, Inc., No. 16-cv-4265 (N.D. Cal. Dec. 6, 2018) ($26.75 million); Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. Oct. 9, 2018) ($21.9 million); Urakhchin v. Allianz Asset Mgmt. of Am., L.P., 2018 U.S. Dist. LEXIS 54681 (C.D. Cal. July. 30, 2018) ($12 million); Main v. Am. Airlines Inc., No. 16-cv-473 (N.D. Tex. Feb. 21, 2018) ($22 million); Richards-Donald v. TIAA-CREF, No. 15-cv-8040 (S.D.N.Y. Oct. 20, 2017) ($5 million); Andrus v. New York Life Ins. Co., No. 16-cv-5698 (S.D.N.Y. June 15, 2017) ($3 million); Gordan v. Mass Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) ($30.9 million); Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa Oct. 28, 2016) ($3.8 million); Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa Nov. 13, 2015) ($3 million); Krueger v. Ameriprise Fin., Inc., 2015 U.S. Dist. LEXIS 91385 (D. Minn. July 13, 2015) ($27.5 million); Bilewicz v FMR LLC, 2014 U.S. Dist. LEXIS 183213 (D. Mass. Oct. 15, 2014) ($12 million).

[104] Baker v. John Hancock Life Ins. Co., No. 20-cv-10397 (D. Mass. filed Feb. 27, 2020) (no motion to dismiss filed to date); Falberg v. The Goldman Sachs Group, Inc., No. 19-cv-9910 (S.D.N.Y. filed Oct. 25, 2019) (no motion to dismiss filed to date); Cho v. Prudential Ins. Co. of Am., No. 19-cv-19886 (D.N.J. filed Jan. 24, 2020) (filing of motion to dismiss).

[105] Karg v. Transamerica Corp., No. 18-cv-134, 2019 U.S. Dist. LEXIS 140567 (N.D. Iowa Aug. 20, 2019) (order denying motion to dismiss); Karpik v. Huntington Bancshares Inc., No. 17-cv-1153, 2019 U.S. Dist. LEXIS 224264 (S.D. Ohio Sept. 26, 2019) (order granting in part and denying in part motion to dismiss); Baird v. BlackRock Inst'l Trust Co., N.A., 403 F. Supp. 3d 765 (N.D. Cal. Sept. 3, 2019) (order granting in part and denying in part motion to dismiss); In re G.E. ERISA Litig., No. 17-cv-12123, 2018 U.S. Dist. LEXIS 211106 (D. Mass. Dec. 14, 2018) (order granting in part and denying in part motion to dismiss); Feinberg v. T. Rowe Price Grp., Inc., No. 17-cv-427, 2018 U.S. Dist. LEXIS 140709 (D. Md. Aug. 20, 2018) (order denying motion to dismiss); Beach v. JPMorgan Chase Bank, N.A., No. 17-cv-563 (S.D.N.Y. Mar. 29, 2018) (order granting in part and denying in part motion to dismiss); Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Jan. 18, 2018) (order denying motion to compel arbitration, dismiss, and stay claims).

In *Severson*, the decision denying the motion to compel arbitration, dismiss, and stay claims is the subject of a pending interlocutory appeal by the defendants to the Ninth Circuit. Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Feb. 20, 2018) (notice of appeal) & (N.D. Cal. July 13, 2018) (amended notice of appeal). The plaintiffs subsequently filed a second amended complaint. Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Jan. 31, 2019), which the district court granted in part and denied in part in February 2019. Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Feb. 8, 2019).

[106] Bekker v. Neuberger Berman Group, LLC, No. 16-cv-6123 (S.D.N.Y. Sept 13, 2019) (filing of motion for summary judgment).

[107] Moitoso v. Fidelity, No. 18-cv-12122, 2020 U.S. Dist. LEXIS 53656 (D. Mass. Mar. 27, 2020) (order finding defendants violated ERISA; proceeding to trial on questions of causation and damages).

[108] In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., No. 11-cv-784 (N.D. Ga. filed Mar. 11, 2020) (order granting preliminary approval of $29 million settlement).

[109] In re M&T Bank Corp. ERISA Litig., No. 16-cv-375 (W.D.N.Y. Dec. 26, 2019) (filing of motion for preliminary approval of $20.85 million settlement); Cervantes v. Invesco Holding Co. (U.S.), Inc., No. 18-cv-2551 (N.D. Ga. Mar. 9, 2020) (filing of motion for preliminary approval of $3.47 million settlement).

[110] Brotherston v. Putnam Investments, LLC, No. 15-cv-13825 (D. Mass. Mar. 25, 2020) (filing of joint notice of settlement).

In this lawsuit, following a bench trial, the district court issued an order in favor of defendants in June 2017. Brotherston v. Putnam Invs., LLC, 2017 U.S. Dist. LEXIS 93654 (D. Mass. June 19, 2017). In July 2017, the plaintiffs filed an appeal of this decision to the First Circuit, which, in October 2018, affirmed in part and vacated in part the district court's decision, and remanded the lawsuit to district court. Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. Oct. 15, 2018). Broadly speaking, the First Circuit's ruling highlighted the issue of which party—the plan sponsor or the employee—has the burden of proving, once a loss has been shown, that a breach of fiduciary duty under ERISA caused such loss. The First Circuit then stayed the lawsuit to give the defendants/appellees leave to file a petition for a writ of certiorari with the U.S. Supreme Court. Brotherston v. Putnam Invs., LLC, No. 17-1711 (1st Cir. Oct. 29, 2018) (order granting 90-day stay of the First Circuit's mandate to allow defendants/appellees to file a petition for writ of certiorari with the U.S. Supreme Court). Filed in January 2019, the defendants/appellees' petition was denied in January 2020 and the case was remanded to district court. Brotherston v. Putnam Investments, LLC, *cert. filed* (Jan. 11, 2019) (No. 18-926), *cert. denied* (U.S. Jan. 13, 2020) (18-926).

[111] The previous final settlements are as follows: Urakhchin v. Allianz Asset Mgmt. of Am., L.P., 2018 U.S. Dist. LEXIS 54681 (C.D. Cal. July. 30, 2018) ($12 million); Main v. Am. Airlines Inc., No. 16-cv-473 (N.D. Tex. Feb. 21, 2018) ($22 million); Richards-Donald v. TIAA-CREF, No. 15-cv-8040 (S.D.N.Y. Oct. 20, 2017) ($5 million); Andrus v. New York Life Ins. Co., No. 16-cv-5698 (S.D.N.Y. June 15, 2017) ($3 million); Gordan v. Mass Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) ($30.9 million); Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa Oct. 28, 2016) ($3.8 million); Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa Nov. 13, 2015) ($3 million); Krueger v. Ameriprise Fin., Inc., 2015 U.S. Dist. LEXIS 91385 (D. Minn. July 13, 2015) ($27.5 million); Bilewicz v FMR LLC, 2014 U.S. Dist. LEXIS 183213 (D. Mass. Oct. 15, 2014) ($12 million)

[112] The 2019 and early 2020 final settlements are as follows: Stevens v. SEI Invs. Co., No. 18-cv-4205 (E.D. Pa. Feb. 28, 2020) ($6.8 million); Velazquez v. Mass. Fin. Servs. Co., No. 17-cv-1124 (D. Mass. Dec. 5, 2019) ($6.875); Cryer v. Franklin Resources, Inc., No. 16-cv-4265 (N.D. Cal. Oct. 4, 2019) ($26.75 million); Price v. Eaton Vance Corp., No. 18-cv-12098 (D. Mass. Sept. 24, 2019) ($3.45 million); Bowers v. BB&T Corp., No. 15-cv-732 (M.D.N.C. May 10, 2019) ($24 million); Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich. Apr. 23, 2019) ($4.5 million); Schapker v. Waddell & Reed Financial, Inc., No. 17-cv-2365 (D. Kan. Apr. 8, 2019) ($4.875 million); Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. March 1, 2019) ($21.9 million).

[113] Wildman v. Am. Century Servs., LLC, No. 16-cv-737 (W.D. Mo. Nov. 8, 2017) (filing of motion for summary judgment) & 237 F. Supp. 3d 902 & 237 F. Supp. 3d 918 (W.D. Mo. Feb. 27, 2017) (orders denying motion to

dismiss and granting in part and denying in part the defendants' motion for summary judgment); Wildman v. Am. Century Servs., LLC, 2019 U.S. Dist. LEXIS 10672 (W.D. Mo. Jan. 23, 2019) (order dismissing lawsuit).

[114] Patterson v. Morgan Stanley, No. 16-cv-6568, 2019 U.S. Dist. LEXIS 174832 (S.D.N.Y. Oct. 7, 2019) (order granting motion to dismiss).

[115] Meiners v. Wells Fargo & Co., 2017 U.S. Dist. LEXIS 80606 (D. Minn. May 26, 2017) (order granting motion to dismiss), *aff'd*, 898 F.3d 820 (8th Cir. Aug. 3, 2018).

[116] Wayman v. Wells Fargo & Co., No. 17-cv-5153 (D. Minn. Feb. 13, 2018) (notice of voluntary dismissal).

[117] Becker v. Wells Fargo & Co, No. 20-cv-01803 (N.D. Cal. filed Mar. 13, 2020).

[118] Krikorian v. Great-West Life & Annuity Ins. Co., No. 16-cv-94 (D. Colo. filed Jan. 14, 2016).

[119] Krikorian v. Great-West Life & Annuity Ins. Co., 2017 U.S. Dist. LEXIS 219693 (D. Colo. Sept. 25, 2017) (order denying motion for summary judgment).

[120] Krikorian v. Great-West Life & Annuity Ins. Co., No. 16-cv-94 (D. Colo. Jan. 14, 2019) (order granting parties' stipulation of dismissal).

[121] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. filed Sept. 8, 2017) (filing of complaint).

[122] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. Feb. 4, 2020) (order granting in part and denying in part motion to dismiss).

[123] Bailis v. FMR LLC, No. 19-cv-10654 (D. Mass. filed Apr. 5, 2019) (complaint); Sills v. FMR LLC, No. 19-cv-11595 (D. Mass. filed July 23, 2019) (complaint), Summers v. FMR LLC, No. 19-cv-10501 (D. Mass. filed Mar. 18, 2019); Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. filed Feb. 21, 2019).

[124] All four have been consolidated under Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. Aug. 5, 2019) (stipulation to consolidate lawsuits).

[125] Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. Feb. 14, 2020) (order granting motion to dismiss).

[126] Wong v. FMR LLC, No. 20-1286 (1st Cir. filed Mar. 6, 2020) (filing of an appeal).

[127] Nelsen v. Principal Glob. Investors Tr. Co., No. 18-cv-115 (S.D. Iowa filed Apr. 16, 2018).

[128] Nelsen v. Principal Glob. Investors Tr. Co., 362 F. Supp. 3d 627 (S.D. Iowa Jan. 24, 2019) (order granting in part and denying in part motion to dismiss), No. 18-cv-115 (S.D. Iowa Feb. 7, 2019) (defendants' motion for partial reconsideration of district court's ruling on motion to dismiss), No. 18-cv-115 (S.D. Iowa Feb. 27, 2019) (order scheduling trial for February 1, 2021).

[129] *See, e.g.*, Official Comm. of Unsecured Creditors of Tribune Co. v. JPMorgan Chase Bank, N.A., No. 10-ap-55841 (Bankr. D. Del. Mar. 26, 2013) (dismissed) & Kirschner v. FitzSimons, No. 10-ap-54010 (Bankr. D. Del. filed Nov. 1, 2010) (both adversarial proceedings in In re Tribune Co., No. 08-bk-13141 (Bankr. S.D.N.Y. filed Dec. 8. 2008)); In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. filed Dec. 20, 2011); Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y filed July 31, 2009); PR Adversary Proceedings, *infra* note 146.

In addition, a number of recent bankruptcy cases (e.g., involving Nine West) have named funds as defendants for status as passive holders or former holders of securities of the bankrupt issuers. *See* Wilmington Sav. Fund Society, FSB v. Dickson, No. 20-cv-1484 (C.D. Cal. filed Feb. 13, 2020); Kirschner v. Cade, No. 20-cv-60343 (S.D. Fla. filed Feb. 14, 2020); Kirschner v. Georgiadis (N.D. Ill. filed Feb. 14, 2020); Kirschner v. Los Angeles Capital Mgmt. & Equity Research, Inc., No. 20-cv-1922 (C.D. Cal. filed Feb. 27, 2020); Kirschner v. Card, No. 20-cv-10396 (D. Mass. filed Feb. 27, 2020), Wilmington Sav. Fund Soc'y, No. 20-cv-10398 (D. Mass. filed Feb. 27, 2020).

[130] In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310 (S.D.N.Y. Sept. 23, 2013).

[131] Deutsche Bank Tr. Co. Americas v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 818 F.3d 98 (2d Cir. 2016) (affirming district court's decision, on grounds that the

appellants' claims are preempted by section 546(e) of the Bankruptcy Code), *reh'g denied* (July 22, 2016), *cert. denied* (May 17, 2019) (No. 16-317).

[132] Niese v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 946 F.3d 66 (2d Cir. 2019) (order amending earlier decision in light of Supreme Court's decision in *Merit Mgmt. Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018)).

[133] In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296, 2019 U.S. Dist. LEXIS 69081 (S.D.N.Y. Apr. 23, 2019). The district court had earlier denied the request to add a federal constructive fraudulent transfer claims in August 2017, but had suggested at that time that such an amendment might be appropriate based on the outcome of a then-pending Supreme Court case (*Merit*). In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. Aug. 24, 2017) (order denying trustee's request to amend complaint).

[134] In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. June 13, 2019). The issuance of the judgment had the effect of making final and appealable an earlier decision, In re Tribune Co. Fraudulent Conveyance Litig., 2017 U.S. Dist. LEXIS 3039 (S.D.N.Y. Jan. 6, 2017).

[135] Kirschner v. Large Shareholders, No. 19-3049 (2d Cir. filed July 15, 2019).

[136] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y filed July 31, 2009).

[137] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., 486 B.R. 596 (Bankr. S.D.N.Y. Mar. 1, 2013) (motion granting summary judgment).

[138] Official Comm. of Unsecured Creditors v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 777 F.3d 100 (2d Cir. Jan. 21, 2015) (order reversing bankruptcy court decision).

[139] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-bk-50026 (Bankr. S.D.N.Y. May 20, 2015) (filing of first amended complaint).

[140] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., 553 B.R. 253 (Bankr. S.D.N.Y. June 30, 2016) (order denying dispositive motions).

[141] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. Sept. 26, 2017) (filing of memorandum and opinion regarding fixture classification and valuation).

[142] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. Jan. 29, 2019) (order granting in part and denying in part motion for summary judgment regarding certain assets); *id.* (order granting motion for partial summary judgment dismissing defendants' earmarking defense).

[143] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. Feb. 1, 2019) (letter regarding agreement in principle).

[144] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. July 2, 2019) (stipulation and order of dismissal).

[145] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. filed May 3, 2017).

[146] *See, e.g.*, Special Claims Comm. of the Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Jefferies LLC, No. 19-ap-281 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Barclays Cap/Fixed, No. 19-ap-282 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Interactive Brokers Retail Equity Clearing, No. 19-ap-283 (D.P.R. filed May 2, 2019); Official Comm. of Unsecured Creditors v. Defendant 1E, No. 19-ap-284 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1A, No. 19-ap-285 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1B, No. 19-ap-286 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1C, No. 19-ap-287 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1D, No. 19-ap-288 (D.P.R. filed May 2, 2019) (collectively, "PR Adversary Proceedings").

[147] PR Adversary Proceedings (D.P.R. Dec. 27, 2019) (orders extending stays to March 11, 2020).

[148] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Feb. 10, 2020) (filing of the amended report and recommendation of the mediation team).

[149] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Mar. 10, 2020) (extending the stay period pending the court's decision regarding confirmation).

ICI Mutual is the predominant provider of D&O/E&O liability insurance and fidelity bonding for the U.S. mutual fund industry. Its insureds represent more than 60% of the industry's managed assets. As the mutual fund industry's dedicated insurance company, ICI Mutual is owned and operated by and for its insureds. ICI Mutual's services assist insureds with identifying and managing risk and defending regulatory enforcement proceedings and civil litigation.

ICI Mutual also serves as a primary source of industry information regarding mutual fund insurance coverage, claims, risk management issues, and litigation developments. Publications include an extensive library of risk management studies, the online *Litigation Notebook*, and the annual *Claims Trends* newsletter. Additional services include peer group profiles, coverage analyses, and assistance to insureds and their counsel in litigation defense.

1401 H Street NW, Suite 1000
Washington, DC 20005

800.643.4246
info@icimutual.com
www.icimutual.com