

Shareholder Litigation in the Fund Industry

A Guide for Investment
Advisers and Fund
Independent Directors

The study draws from and updates information included in past ICI Mutual publications and materials, including the Company's *Claims Trends* (an annual report on fund industry litigation and regulatory enforcement developments), *Litigation Notebook* (a proprietary database providing detailed public information on lawsuits and regulatory proceedings brought against fund groups, together with access to associated court or regulatory documents), and selected *Risk Management Studies* (studies addressing specific litigation and regulatory enforcement risks with particular relevance to fund groups). Readers are directed to these publications and materials (available at www.icimutual.com) for additional information.

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Abbreviations used in this publication:

1933 Act	Securities Act of 1933
1934 Act	Securities Exchange Act of 1934
ERISA	Employee Retirement Income Security Act of 1974
FINRA	Financial Industry Regulatory Authority
1940 Act	Investment Company Act of 1940
SEC	U.S. Securities and Exchange Commission

Introduction

U.S. public companies “operate in a highly litigious business environment ... [and] confront significant enforcement in the securities law area in particular.” Public sector enforcement authorities include the SEC, FINRA, and state regulators, among others. In the private sector, enforcement is often spearheaded by attorneys who specialize in prosecuting securities-related litigation on behalf of investors, groups of investors, or issuers themselves. These attorneys—a loose and shifting confederation of law firms and individual attorneys frequently referred to as “the plaintiffs’ securities bar” or “the plaintiffs’ bar”—are generally acknowledged to be the architects and drivers behind most of the more significant securities-related lawsuits initiated in U.S. courts.

The work of the plaintiffs’ bar is praised by some and pilloried by others. Yet there is no question that the plaintiffs’ securities bar plays a leading role in what one commentator has described as this country’s “vigorous, arguably even hyperactive, system of private enforcement.” And there is no question that “entrepreneurial litigation”—in the form of securities-related litigation initiated by the plaintiffs’ bar—is, and for the foreseeable future is likely to remain, a real and ever-present risk for U.S. public companies generally.

What about for the fund industry more specifically? What has been the fund industry’s experience with the plaintiffs’ bar? And what level of risk might the plaintiffs’ bar present for fund groups in the future? This study addresses these questions by examining 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. The study thus serves both as 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.

Notes on the Plaintiffs’ Bar

Shareholder lawsuits in the fund industry are typically structured as class actions, as derivative actions, or as quasi-derivative actions. As a legal matter, in each type of action a single fund shareholder (or employee benefit plan participant) or small group thereof initiates litigation, acting either as a purported representative of a larger group (or “class”) of fund shareholders (or plan participants), or directly or indirectly as a representative of the fund (or plan) itself.

As a practical matter, however, effective control of such lawsuits typically resides not with the shareholders or plan participants who nominally initiate them, but rather with the law firms (or individual lawyers) who represent the shareholders or plan participants. As litigation counsel, these lawyers and law firms typically enjoy “broad and unconfined discretion” in their management of the lawsuits. Plaintiffs’ counsel typically operate under a contingent arrangement, under which they (and not the individual shareholders or plan participants) fund the ongoing expenses of prosecuting the litigation and stand to gain substantial benefit (in the form of attorneys’ fee awards) from the litigation’s resolution. These awards often range from 25% to 33% or more of any amounts recovered from the defendants. For these reasons, among others, the role of plaintiffs’ counsel in shareholder litigation has been compared to that of “an independent entrepreneur” or a “bounty hunter.”

Plaintiffs’ counsel are frequently skilled and well financed. Over the years, as individual lawyers and law firms have retired or otherwise left the shareholder litigation “market,” others have entered. But in today’s fund industry, as in the past, a relatively small number of plaintiffs’ counsel often spearhead each of the broader-based litigation “waves” initiated against fund groups.

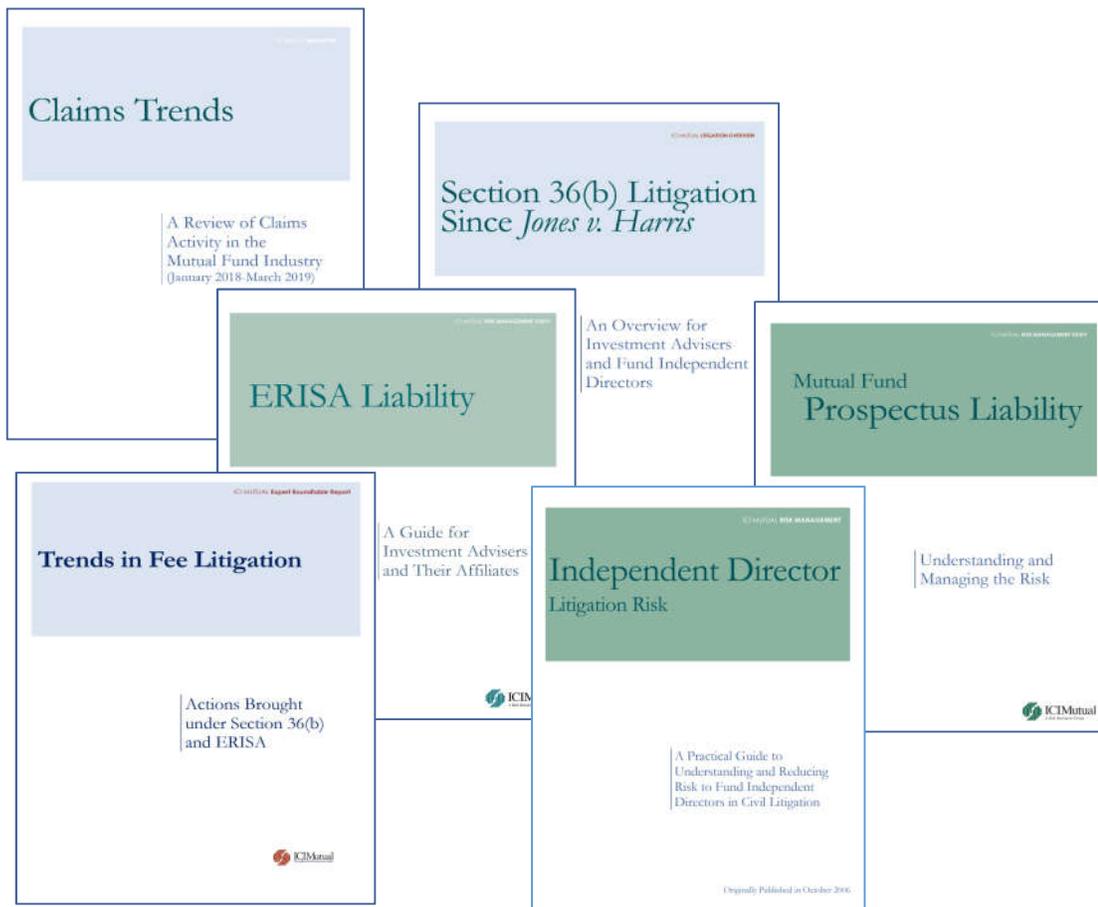
Fund groups are, of course, subject to other types of litigation risk beyond securities-related lawsuits, including litigation arising from employment practices, supplier disputes, or other routine business matters. This study focuses solely on high-stakes securities-related litigation—i.e., on lawsuits initiated by the plaintiffs’ bar that seek to obtain substantial monetary recoveries, either (1) on behalf of subsets (“classes”) of fund investors (including, for purposes of this study, both classes of fund shareholders and classes of employee benefit plan participants investing in funds through their plans) or (2) on behalf of funds (or plans) themselves.

Shareholder Litigation:

High-stakes securities-related lawsuits initiated by the plaintiffs’ bar to obtain substantial monetary recoveries, either on behalf of classes of fund investors (or employee benefit plan participants) or on behalf of funds (or plans) themselves.

As detailed in the pages that follow, thus far this century such high-stakes lawsuits have been premised on various legal theories, have taken various structural forms, and have spanned a number of underlying subject matters. For convenience, this study uses the term **shareholder litigation** or **shareholder lawsuits** to refer to all such lawsuits.

Additional information on shareholder litigation in the fund industry can be found in various ICI Mutual publications, available at www.icimutual.com.



Legal Overview

The plaintiffs' bar has initiated hundreds of shareholder lawsuits this century challenging a wide array of fund group practices, protocols, and products. These lawsuits can be broadly categorized by their underlying legal theories and structural forms. Regardless of the particular theory or structural form, most of the key procedural stages in shareholder litigation remain the same. Summarized below are these underlying legal theories, structural forms, and key procedural stages.

Underlying Legal Theories

Relevant Law	Description	Typical Defendants
1933 Act	<p>"Prospectus liability" lawsuits allege inadequate or inaccurate disclosure in mutual fund prospectuses, statements of additional information, or certain other documents filed with the SEC. Liability reaches only materially inaccurate or incomplete <i>disclosure</i>, but the plaintiffs' bar nevertheless often seeks to use this avenue to attack fund performance and/or various industry practices.</p> <p>Typically structured as class actions</p>	<p>Funds Fund Directors & Officers Distributors Advisers/Other Affiliates (as "control persons")</p>
1934 Act	<p>"Rule 10b-5" or "securities fraud" lawsuits may allege inadequate or inaccurate disclosure in mutual fund prospectuses, statements of additional information, annual and semi-annual reports, or certain other publicly available documents. For various reasons, including a requirement that the "class" of shareholders must have relied on the allegedly misleading disclosure and potential difficulties faced by plaintiffs in demonstrating "scienter" (i.e., an intent to deceive), it is relatively uncommon for the plaintiffs' bar to pursue disclosure-based litigation against fund groups under the 1934 Act.</p> <p>Typically structured as class actions</p>	<p>Funds Fund Directors & Officers Advisers/Other Affiliates (as "control persons" or otherwise)</p>
1940 Act	<p>"Section 36(b)" or "excessive fee" lawsuits allege breach of a fiduciary duty imposed on fund advisers by section 36(b) of the 1940 Act. Violation requires that an adviser "charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."</p> <p>Structured as quasi-derivative actions</p>	<p>Advisers Other Affiliates</p> <p>(Fund Directors are not typically named as defendants, but are often key non-party witnesses.)</p>
State Law	<p>"State law" lawsuits allege breach of fiduciary duty or other violations of state law. Procedural requirements applicable to derivative actions, and developments in the jurisprudence applicable to state law-based class actions, can present challenges for the plaintiffs' bar in pursuing litigation under this legal avenue.</p> <p>Typically structured as derivative actions (or sometimes as class actions)</p>	<p>Fund Directors & Officers Advisers Other Affiliates</p> <p>(Funds are often named as "nominal defendants" in derivative actions, and may be named as defendants in state law-based class actions.)</p>
ERISA	<p>ERISA-based lawsuits allege failure to meet various of the obligations and duties that ERISA imposes on "plan fiduciaries" and other "parties in interest." One significant category of ERISA-based lawsuits—i.e., "proprietary funds" lawsuits—alleges liability on the part of advisers or their affiliates, as sponsors of "in-house" retirement plans, for including "proprietary" mutual funds in the menus of their in-house plans.</p> <p>Often structured as class actions</p>	<p>Advisers Other Affiliates</p>

Structural Forms

Class Actions

A class action lawsuit is a “lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group.” The individual plaintiff (or small group of plaintiffs) is thus proceeding **directly** in seeking recovery for the larger group (or “class”) for which he or she is a representative.

Derivative Actions

A derivative lawsuit “permits an individual shareholder to bring ‘suit to enforce a corporate cause of action against officers, directors, and third parties,” and thereby “to protect the interests of the corporation from the misfeasance and malfeasance of ‘faithless directors and managers’ [including, in the fund industry context, fund advisers].” The individual is thus proceeding **derivatively** in seeking recovery for the company (e.g., fund) of which he or she is a shareholder.

Quasi-Derivative Actions

Section 36(b) lawsuits are sometimes described as “quasi-derivative” in nature, in that the individual serving as the plaintiff is proceeding **directly** in his or her capacity as a fund shareholder in bringing suit against the fund’s adviser, but is acting **derivatively** in that any recovery in the lawsuit accrues to the fund itself (rather than to a class of shareholders of which the named fund shareholder is the representative). Under relevant federal court rules, such lawsuits are neither class actions nor traditional derivative lawsuits.

Key Procedural Stages



Settlement

Settlement: At any stage of the process, a plaintiff may withdraw his or her lawsuit, or the lawsuit may be resolved through a settlement (or otherwise through mutual agreement of the parties).

Other Key Stages in Certain Litigation

Class certification: At this stage in class action litigation, the lower court determines (typically following an opportunity for related factual investigation by the parties) whether a lawsuit can properly be brought as a class action under applicable rules of court procedure. If it can, then the class action is said to be “certified.” In certain circumstances, the court order granting or denying class action certification may be appealed prior to the conclusion of the underlying lawsuit.

Shareholder derivative demands: For derivative lawsuits to proceed, applicable state law typically requires that shareholder derivative demands be made. In response, funds themselves—through appropriate fund representatives (e.g., an appropriate committee of directors)—usually conduct shareholder derivative demand investigations (SDDIs) to determine whether pursuing litigation would be in the best interests of the funds. Determinations not to pursue litigation that are “made in good faith by independent decision makers after reasonable inquiry” generally result in termination of the litigation by the courts.

Frequency

Since 2000, nearly **400** shareholder lawsuits have been initiated against fund groups.

Frequency of shareholder litigation can be measured either by (1) **absolute numbers** (i.e., total numbers of shareholder lawsuits filed, or absolute numbers of fund groups involved) or (2) **litigation rate** (i.e., the relative risk that an individual fund group will be subject to a shareholder lawsuit over a given period of time).

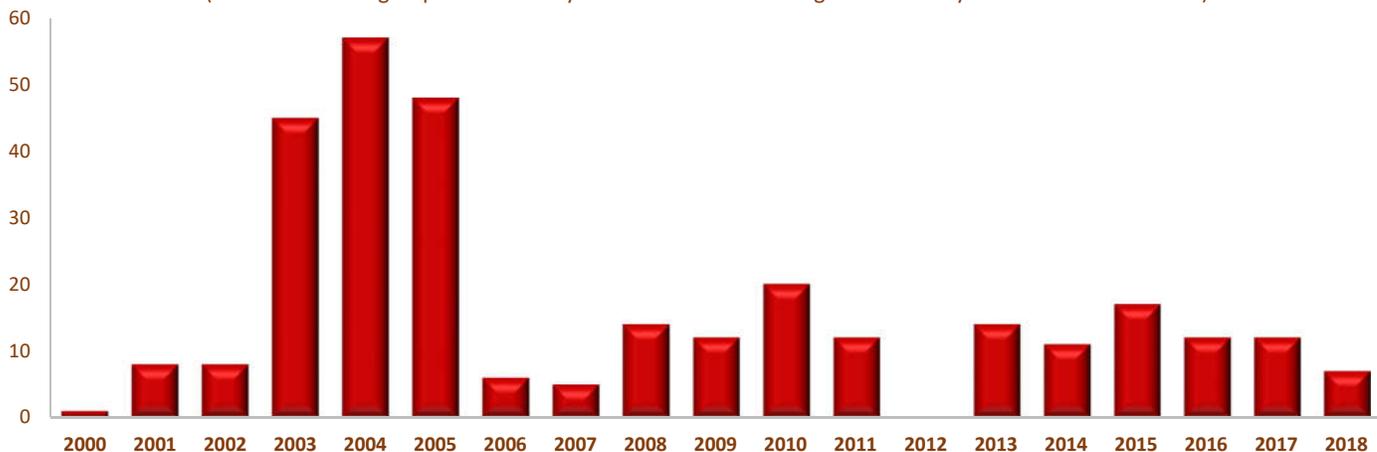
Absolute Numbers

Since 2000, the plaintiffs' bar has initiated nearly 400 shareholder lawsuits against fund groups. Over 80% of these lawsuits have targeted the 100 largest fund groups (as measured by the fund groups' fund assets under management in the year the lawsuits were first filed).

Approximately 100 lawsuits related to the 2003-2004 mutual fund trading scandal ("market timing") period, during which the plaintiffs' bar launched litigation attacks on fund groups with a frequency unprecedented in the fund industry's long history. If these lawsuits are excluded from the overall count (on the theory that they should perhaps be viewed as atypical of the fund industry's overall litigation risk), total numbers for the 2000-2018 period amount to nearly 300 shareholder lawsuits filed against fund groups.

Litigation frequency for the first decade of this century has exceeded that experienced to date for the second decade. Of note, excluding market timing era lawsuits from the count reduces the frequency disparity between the decades. Frequency of shareholder litigation in more recent years has itself been significant, however, as reflected in the fact that at least 130 shareholder lawsuits were initiated against fund groups over the 2010-2018 period.

Absolute Numbers of Lawsuits Filed Against 100 Largest Fund Groups
(with size of fund groups measured by fund assets under management in the year the lawsuit was filed)

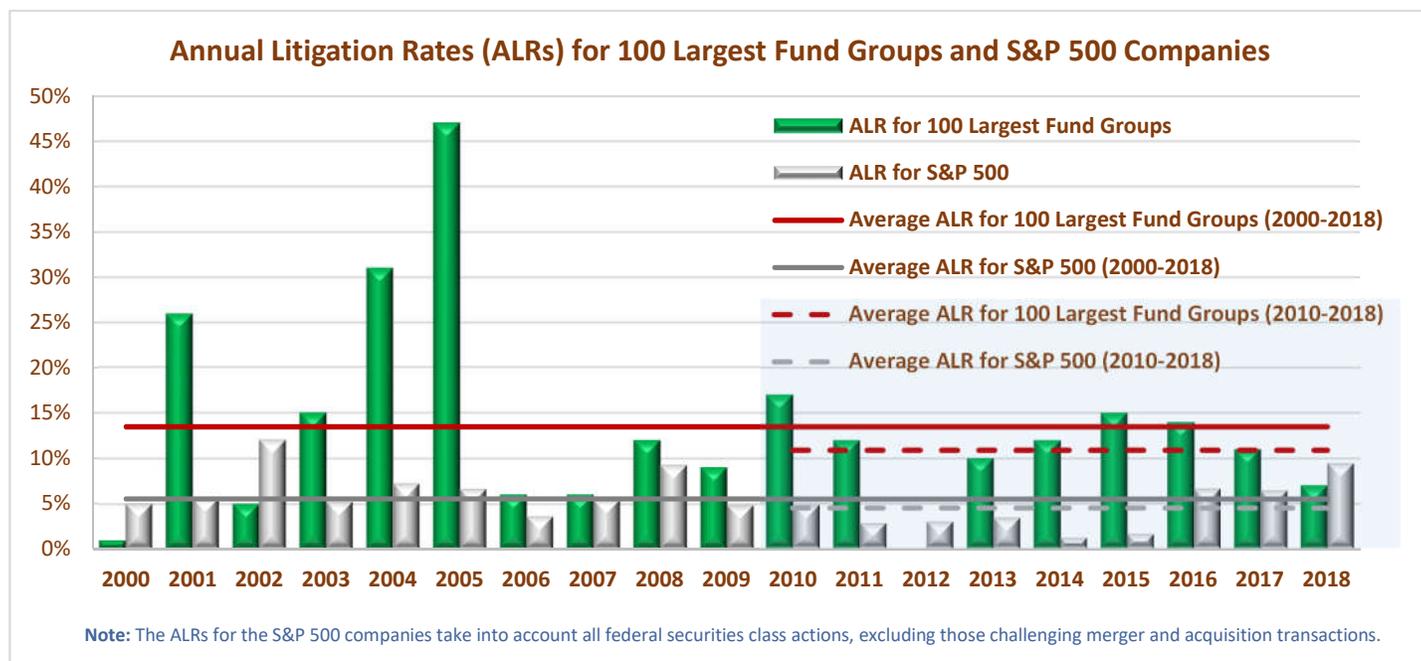


Note: Plaintiffs' lawyers often file multiple, competing shareholder lawsuits against a single fund group. These lawsuits are frequently thereafter "consolidated" into a single or small number of lawsuits. This study counts lawsuits that were, or are expected to be, consolidated as a single lawsuit. In the case of market timing era lawsuits (many of which were ultimately transferred to a single "multi-district litigation" (MDL) proceeding, with many tracks, sub-tracks, and sub-sub-tracks), this study counts the sub-sub-tracks separately.

Litigation Rate

In assessing shareholder litigation frequency for the 100 largest fund groups, it is instructive to examine the “litigation rate” for—i.e., the percentage of—the 100 largest fund groups targeted each year in shareholder litigation. The accompanying chart shows the annual litigation rates (ALRs) for the 100 largest fund groups for the overall 2000-2018 period and for the 2010-2018 period.

Since 2010, a top 100 fund group has had a roughly a **1-in-9** chance of being targeted in a shareholder lawsuit in a given year.



To put the ALRs for the 100 largest fund groups in perspective, it is useful to compare the litigation experience of S&P 500 companies in the broader corporate sector. As the chart illustrates, the ALRs for the 100 largest fund groups have for many years generally exceeded those for S&P 500 companies. This finding may surprise those who have tended to view the fund industry environment as less litigious than for S&P 500 companies, and fund groups as less susceptible than S&P 500 companies to the threat of shareholder litigation.

Shareholder Litigation Against S&P 500 Companies

Comparing ALRs for S&P 500 companies to those of the fund industry’s 100 largest fund groups is not precisely apples-to-apples, given that (1) S&P 500 company litigation rates are heavily influenced by the frequency of rule 10b-5 class action lawsuits, for which fund groups are at limited risk; and (2) fund group litigation rates include certain types of shareholder litigation (e.g., section 36(b) lawsuits, “proprietary funds” ERISA-based lawsuits) to which S&P 500 companies are not susceptible. Even so, the comparison is instructive, suggesting that at least for larger fund groups, the threat of shareholder litigation has generally exceeded that for S&P 500 companies.

Legal Theory	Fund Groups	S&P 500
1933 Act	✓	✓
1934 Act	✓	✓
1940 Act	✓	✗
State Law	✓	✓
ERISA (“proprietary funds” lawsuits)	✓	✗

Waves and One-Offs

Shareholder litigation against fund groups this century has been characterized by “waves and one-offs.” This shorthand phrase reflects the fact that the plaintiffs’ bar has pursued both “waves” of substantially similar shareholder lawsuits targeting multiple fund groups and “one-off” shareholder lawsuits targeting individual fund groups.

Waves

Many of this century’s shareholder lawsuits against fund groups have come in the form of “waves” of substantially similar lawsuits initiated against multiple fund groups, involving substantially similar underlying allegations. By ICI Mutual’s count, there have been at least eight distinct waves of shareholder lawsuits initiated over the 2000-2018 period. The box opposite describes each of these waves and sets forth the approximate time period during which the shareholder lawsuits associated with each wave remained in progress.

The wave phenomenon has offered opportunities for the plaintiffs’ bar to pursue shareholder litigation initiatives against the fund industry on near-industrial scale. Plaintiffs’ attorneys have cast a wide net by filing substantially similar lawsuits against multiple fund groups in multiple jurisdictions, and by utilizing what might be characterized as “economies of scale” in prosecuting these lawsuits (e.g., in crafting templates for use in preparing complaints and other court filings, in developing efficiencies in conducting fact-finding discovery, in employing experts).

One-Offs

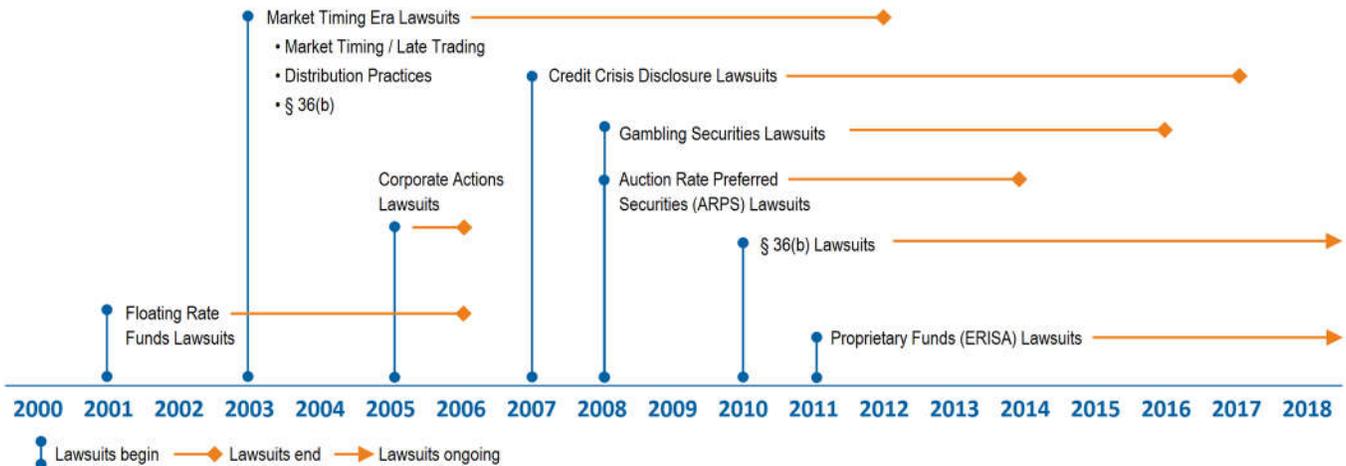
Separate and apart from waves, the fund industry has been subject, on a year-in-year-out basis, to “one-off” shareholder litigation—i.e., to shareholder lawsuits that have targeted individual fund groups and that have arisen from practices, protocols, or events specific to the individual fund groups themselves.

As illustrated by recent lawsuits (see box, right), one-off shareholder lawsuits can create substantial financial and reputational risks for the fund groups involved. This said, because one-off shareholder lawsuits, unlike waves, involve only individual fund groups, they do not present the same kind of systemic risk for the fund industry.

Recent Examples of One-Off Lawsuits

- **2016 State Law-Based Derivative Lawsuit**
In this lawsuit alleging breach of fiduciary duty by an investment adviser in connection with a managed fund’s investment in a start-up company, a settlement totaling nearly \$20 million was reached in 2018.
- **2016 Prospectus Liability Lawsuit (and Related Derivative Lawsuit)**
In these two lawsuits alleging false and misleading disclosure by a collapsed junk bond fund, settlements collectively totaling nearly \$40 million were reached in 2017.

Post-2000 Shareholder Litigation Waves



1. **Floating Rate Funds Lawsuits:** A small number of fund groups were targeted in prospectus liability lawsuits that challenged fund disclosure relating to the valuation of loans held by “floating rate” funds.
2. **Market Timing Era Lawsuits:** This wave comprised three distinct categories of shareholder lawsuits:
 - **Market Timing/Late Trading Lawsuits:** At least twenty-one fund groups were targeted in shareholder lawsuits initiated in the wake of press reports and regulatory enforcement actions over “market timing” and “late trading” of fund shares. (Most of these lawsuits were subsequently consolidated and transferred to a single federal multi-district litigation (MDL) proceeding.) Meanwhile, a single plaintiffs’ law firm launched separate state law-based litigation challenging the “fair valuation” practices of nearly a dozen fund groups.
 - **Distribution Practices Lawsuits:** At least two dozen fund groups were targeted in class action lawsuits challenging fund distribution practices. Some of these lawsuits were later subsumed into the MDL proceeding referenced above, and certain others evolved into section 36(b) lawsuits separate from those referenced below.
 - **Section 36(b) Lawsuits:** More than a dozen fund groups were targeted in section 36(b) lawsuits alleging that fees charged by fund advisers to their retail mutual funds were excessive relative to fees being charged by the advisers to their institutional and other non-mutual fund clients.
3. **Corporate Actions Lawsuits:** Nearly forty fund groups were targeted in class action lawsuits alleging that the fund groups had failed to participate (i.e., file proofs of claim) on behalf of managed funds in settlements of securities class actions brought against issuers of securities held by the funds. As indicated in the chart, these lawsuits were dismissed in relatively short order (either by court order or voluntarily by the plaintiffs).
4. **Credit Crisis Disclosure Lawsuits:** At least eleven fund groups were targeted in prospectus liability class action lawsuits challenging disclosure relating to valuation of fixed-income funds.
5. **Gambling Securities Lawsuits:** Four fund groups were targeted in class action and/or derivative lawsuits challenging investments by funds in securities issued by off-shore gambling companies.
6. **Auction Rate Preferred Securities (ARPS) Lawsuits:** At least a dozen fund groups were targeted in class action and/or derivative lawsuits challenging decisions relating to ARPS issued by closed-end funds. Earlier lawsuits in this wave alleged that defendants had disadvantaged ARPS shareholders by *refusing* to redeem the funds’ ARPS, whereas later lawsuits alleged that defendants had disadvantaged *common* shareholders by *redeeming* the funds’ ARPS.
7. **Section 36(b) Lawsuits:** Since the U.S. Supreme Court’s 2010 decision in *Jones v. Harris*, more than two dozen fund groups have been targeted in section 36(b) lawsuits, most of which have focused on disparities between fees charged by advisers and fees paid to subadvisers.
8. **Proprietary Funds (ERISA) Lawsuits:** At least thirty-five fund groups have been targeted to date in ERISA-based class action lawsuits challenging the inclusion of “proprietary” mutual funds in the menus of the in-house retirement plans established by fund advisers (or their affiliates) for their employees. (While there had been a small number of “proprietary funds” lawsuits filed in earlier years, the current wave can be viewed as starting in 2011.)

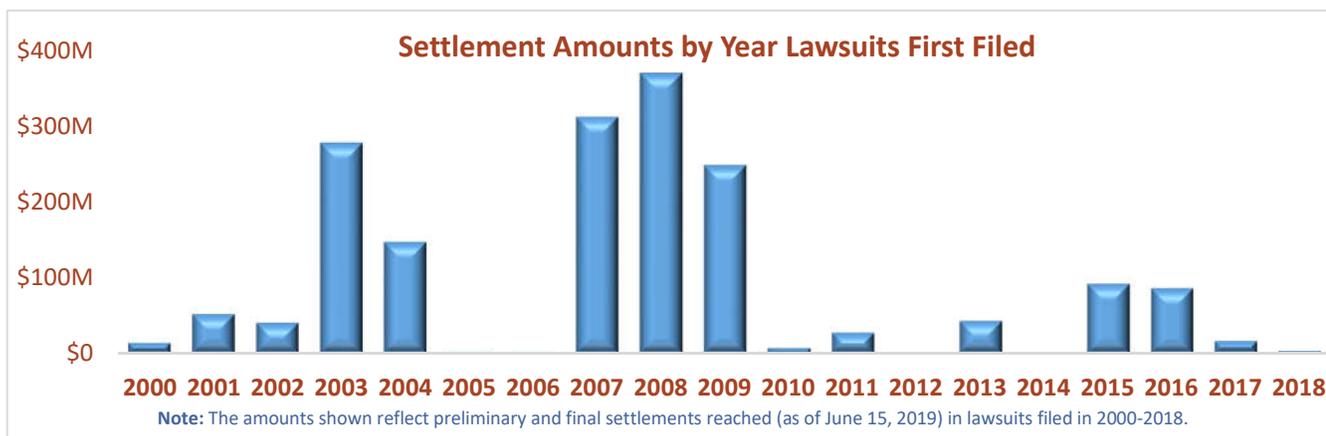
Severity

Severity of shareholder litigation can be measured by dollar amounts paid by individual or entity defendants (or their insurers) in (1) **settlements** agreed to by such defendants in individual lawsuits, (2) **judgments** awarded to plaintiffs in individual lawsuits, and (3) litigation **defense costs** incurred by such defendants.

Settlements

Settlements of class action lawsuits or derivative lawsuits typically require judicial approval. The amounts and other terms of such settlements are thus typically publicly disclosed in court filings. Settlements of class action and derivative shareholder lawsuits this century have involved publicly reported payments by fund industry defendants of amounts ranging from the low millions of dollars to the low hundreds of millions of dollars. Settlements to date in lawsuits initiated during the 2000-2018 period collectively total approximately \$1.75 billion.

By contrast, settlements of “quasi-derivative” section 36(b) lawsuits typically do *not* require judicial approval and the amounts of any associated monetary payments are typically *not* publicly disclosed. More than a dozen of the section 36(b) lawsuits initiated since 2010 have been resolved by agreement of the parties; in a relatively small number of these, the parties have specified that no monetary payments were made by defendant advisers. However, there is no publicly available information as to whether any of the remaining resolutions have included monetary payments by defendant advisers or, if so, in what dollar amounts.

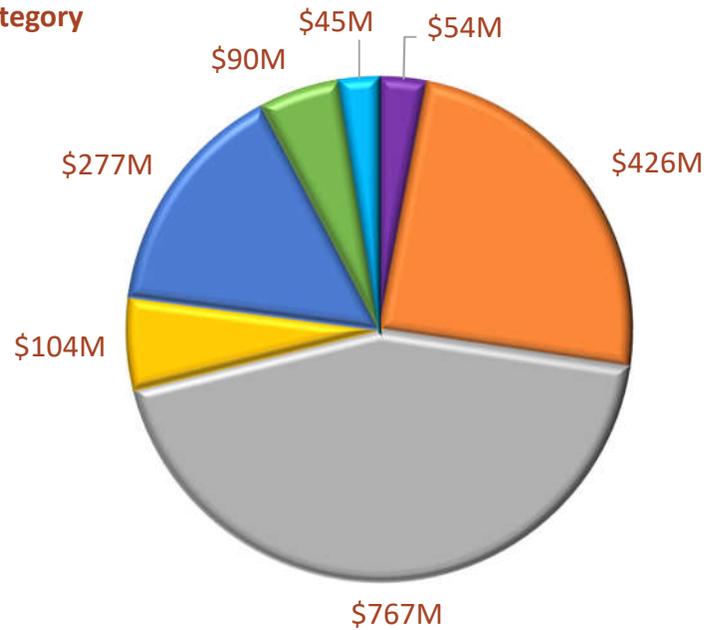


Judgments

ICI Mutual is unaware of any significant monetary *judgments* that have been awarded by courts against fund industry defendants this century. Why? For two reasons. First, shareholder lawsuits not otherwise resolved by the courts in favor of fund industry defendants in pre-trial stages of the litigation process are typically resolved through negotiated settlements. Thus, as a practical matter, few shareholder lawsuits proceed to trial so as to result in judgments. Second, in the relatively rare instances where shareholder lawsuits have proceeded through trial, fund industry defendants have been awarded judgments in their favor.

Total Settlement Amounts (2000-2018) by Category
(not including costs of defense)

- Closed-End Funds
- Market Timing Era
- Credit Crisis
- Other Prospectus Liability
- Proprietary Funds
- Other ERISA
- Miscellaneous



Note: The amounts shown reflect preliminary and final settlements reached (as of June 15, 2019) in lawsuits filed in 2000-2018.

Defense Costs

As noted above, a number of shareholder lawsuits this century have been resolved through settlements. In many others, fund industry defendants have been successful in securing dismissals or judgments in their favor. But regardless of how lawsuits have been ultimately resolved, fund groups have invariably incurred legal fees and associated costs in defending themselves through the litigation process. Fund groups have also incurred considerable expense in other areas as well, including fees and costs associated with use of expert witnesses, with securing legal representation for fund independent directors as non-party witnesses (e.g., in section 36(b) litigation), and with conducting shareholder derivative demand investigations and/or internal corporate investigations.

Defending shareholder litigation is frequently an extraordinarily expensive, multimillion-dollar proposition for fund groups (and their insurers). This is particularly—although not exclusively—the case in the section 36(b) litigation area, where defense costs alone have often run into the tens of millions of dollars in individual lawsuits. Because defense costs incurred by fund groups in defending against shareholder litigation are not publicly reported, it is impossible to precisely quantify the total dollar amounts that have been paid this century by fund groups (and their insurers) in defending against shareholder litigation. ICI Mutual estimates that the fund industry’s total costs in defending against shareholder litigation for the 2000-2018 period have likely approached, if not exceeded, \$1 billion.

What Lies Ahead?

Some may argue that fund groups should find themselves at lesser risk for shareholder litigation going forward. Others may argue the opposite. The fund industry’s experience with shareholder litigation this century provides evidence to support both positions.

Better days ahead?	Or not?
It is true that despite repeated efforts, the plaintiffs’ bar has yet to secure a favorable final judgment in a section 36(b) lawsuit.	Yet it is also true that a number of this century’s section 36(b) lawsuits have been resolved through settlements, and history demonstrates that the plaintiffs’ bar has long had a way of reemerging periodically to launch broad-scale litigation attacks on advisory fees based on new and evolving theories of section 36(b)-based liability.
It is true that relatively few prospectus liability class action lawsuits have been filed against fund groups since the credit crisis.	Yet it is also true that the fund industry has enjoyed the insulating effect of a decade-long bull market, and the fund industry’s not-so-distant experience with credit crisis-related prospectus liability litigation provides a stark and cautionary reminder of the extraordinary costs—in terms of both settlements and defense costs—that such litigation can exact from fund groups in the aftermath of substantial investment losses.
It is true that the dozens of ERISA-based proprietary funds lawsuits initiated in recent years have not involved funds or fund directors and have not been directed at the core asset management activities of fund advisers.	Yet it is also true that many of these lawsuits have been resolved through monetary settlements, and the frequency and severity of these lawsuits have underscored the continued susceptibility of the fund industry to the litigation “wave” phenomenon discussed earlier in this study.

Shareholder litigation risk for fund groups may also be affected by future economic, political, and legal developments. Here, questions are more easily formulated than answers:

- Will a future market downturn spur the plaintiffs’ bar to again utilize prospectus liability class actions—formally couched as challenges to fund disclosure—to wage thinly veiled attacks on fund performance?
- Will the plaintiffs’ bar, faced with an increasingly conservative federal judiciary, seek to capitalize on a recent U.S. Supreme Court decision by initiating more 1933 Act-based shareholder lawsuits in *state* courts, where judges may be more “plaintiff-friendly” and where pleading standards and proof burdens on plaintiffs may be reduced?
- Will the plaintiffs’ bar reemerge at a future date, with a new and untested theory of section 36(b) liability, to mount another broad-scale litigation attack on advisory fees?
- Might a future administration or Congress pursue amendments to the 1940 Act or other federal securities laws that would facilitate efforts by the plaintiffs’ bar to pursue alleged violations of these laws through shareholder litigation?

Based on the evidence at hand, it is rational to expect that the plaintiffs’ bar will—or at least should—prove to be more selective in its future attacks on the fund industry than it has been in the past. At the same time, it must be acknowledged that the plaintiffs’ bar is entrepreneurial, that it has invested substantial time and resources this century in developing an understanding of the fund industry’s operations and regulatory regime, and that the fund industry remains a large and inviting target. On balance, it seems likely that shareholder litigation will, for the indefinite future, remain a periodic and potent threat for fund groups.

Notes

- p. 2 “operate in a highly litigious business environment” Amanda M. Rose and Larry J. LeBlanc, *Policing Public Companies: An Empirical Examination of the Enforcement Landscape and the Role Played by State Securities Regulators*, 65 FLA. L. REV. 395, 398 (2014).
- p. 2 “vigorous, arguably even hyperactive, system of private enforcement” John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 245 (2007).
- p. 2 “entrepreneurial litigation” JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* (Harvard University Press) (2015).
- p. 2 “broad and unconfined discretion” John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better than “Voice,”* 30 CARDOZO L. REV. 407, 411 (2008).
- p. 2 “an independent entrepreneur” John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882-83 (1987) (“[I]t is more accurate to describe the plaintiff’s attorney as an independent entrepreneur than as an agent of the client”).
- p. 2 “bounty hunter” See, e.g., Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1243 (2003).
- p. 5 “lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group” BLACK’S LAW DICTIONARY 284 (9th ed. 2009).
- p. 5 “... suit to enforce a corporate cause of action ...” *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991) (internal quotations, emphasis, and citations omitted).
- p. 5 “made in good faith by independent decision makers after reasonable inquiry” *Halebian v. Berv*, 931 N.E.2d 986, 993 n. 11 (2010).
- p. 7 Information on ALRs for S&P 500 companies *Securities Class Action Filings—2018 Year in Review*, CORNERSTONE RESEARCH (2019), <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review>; *Securities Class Action Filings—2010 Year in Review*, CORNERSTONE RESEARCH (2010), <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings%E2%80%942010-Year-in-Review.pdf>.
- p. 7 Note to “ALR” chart Consistent with Cornerstone’s report, the ALRs for S&P 500 companies in the chart include only “core filings” and thus do not reflect lawsuits relating to merger and acquisition (M&A) transactions. Given that the broader set of exchange-listed public companies experienced a significant increase in M&A lawsuits in 2017 and 2018, it is reasonable to assume that the subset of S&P 500 companies also may have experienced at least some increase in M&A lawsuits in those years.
- p. 7 ALRs for S&P 500 companies The chart reflects ALRs for all S&P 500 companies for the 2000-2018 and the 2010-2018 periods. Cornerstone also breaks out ALRs for S&P 500 companies in various sectors; in the “Financials” sector (and, since 2017, the “Financials/Real Estate” sectors), the average ALR was under 8% for the 2000-2018 period and was under 4% for the 2010-2018 period.
- p. 12 a recent Supreme Court decision *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (U.S. Mar. 20, 2018).

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.



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