Claims Trends

A Review of Claims Activity in the Mutual Fund Industry

(January 2016-March 2017)

ICIMutual

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Abbreviations used in this *Claims Trends*:

’33 Act	Securities Act of 1933
’34 Act	Securities Exchange Act of 1934
CFTC	U.S. Commodity Futures Trading Commission
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
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
RICO	Racketeer Influenced and Corrupt Organizations Act
SEC	U.S. Securities and Exchange Commission

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*. 2016 saw a modest decrease in the overall number of claims submitted by fund groups insured by ICI Mutual under their directors and officers/errors and omissions (D&O/E&O) policies. Nonetheless, over one quarter of ICI Mutual's insured fund groups submitted at least one claim notice in 2016, and, over the five-year period 2012-2016, nearly two-thirds of insured fund groups did so. These figures suggest that even 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 remains a concern for the fund industry, as illustrated by the number of new shareholder lawsuits initiated over the past several years relating to allegations of "excessive fees."

Recent years have also witnessed significant regulatory enforcement activity by the SEC. In its 2016 fiscal year, the SEC brought a record number of enforcement actions overall, including a significant number of actions in the asset management area. Looking ahead, the impact of the new presidential administration on future SEC enforcement activity affecting the fund industry remains to be seen.

For fund groups faced with civil litigation and/or regulatory 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.

Fees

In recent years, the fund industry has faced an extraordinary wave of lawsuits that challenge, directly or indirectly, fees paid by mutual funds to investment advisers and other service providers. Many of these lawsuits, including four newly filed in 2016, have alleged violations of section 36(b) of the ICA. Others of these lawsuits have alleged violations of ERISA (as discussed in the "Other Litigation Developments – ERISA" section below).

The *Gartenberg* Standard:

"To be guilty of a violation of §36(b), … the adviser-manager must 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."

– Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982).

"The *Gartenberg* standard … may lack sharp analytical clarity, but we believe that it accurately reflects the compromise that is embodied in §36(b), and it has provided a workable standard for nearly three decades."

– Jones v. Harris Assocs. L.P., 559 U.S. 335, 353 (2010).

Section 36(b) Lawsuits

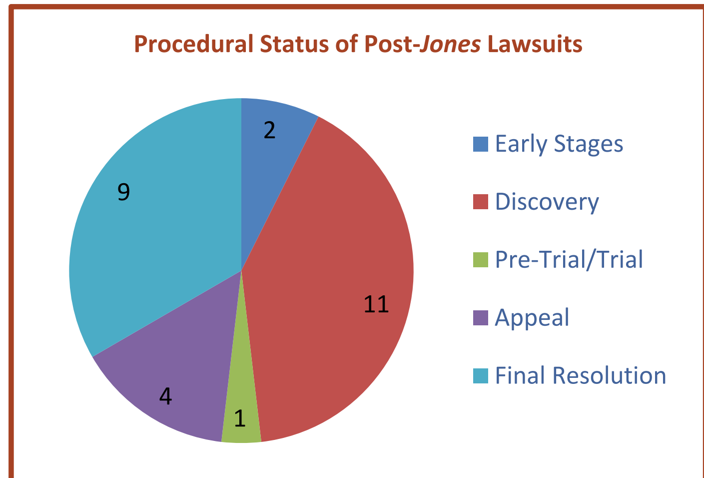
Section 36(b) of the ICA provides that the investment adviser of a registered investment company "shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services," and expressly provides shareholders with the right to bring a lawsuit to enforce this duty.[1]

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

(Cases in **blue** were active as of March 31, 2017)

Year	Cases
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 (May 23, 2011) & 2013 U.S. Dist. LEXIS 103404 (July 24, 2013), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (U.S. Apr. 20, 2015) (No. 14-1054) • **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), *appeal docketed*, No. 16-1580 (8th Cir. filed Mar. 8, 2016) • **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), *appeal docketed*, No. 16-4241 (3rd Cir. filed Dec. 6, 2016)
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*, No. 13-6486 (6th Cir. Sept. 30, 2014), *cert. denied* (U.S. Mar. 2, 2015) (No. 14-771) • **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. 13-cv-1601 (S.D. Iowa Feb. 8, 2016) (final judgment), *appeal docketed*, No. 16-1580 (8th Cir. filed Mar. 8, 2016) • **In re Voya Global Real Estate Fund S'holder Litig.**, No. 13-cv-1521 (D. Del. filed Aug. 30, 2013) • **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) • **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014) • **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 14-cv-414 (S.D. Ohio filed May 5, 2014) • **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 14-cv-585 (D. Del. filed May 7, 2014) • **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014) • **Redus-Tarchis v. N.Y. Life Inv. Mgmt.**, No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014) • **Kenny v. PIMCO**, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014)
2015	• **Chill v. Calamos Advisors, LLC**, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015) • **Ingenhutt v. State Farm Inv. Mgmt. Corp.**, No. 15-cv-1303 (C.D. Ill. filed July 22, 2015) • **Wayne County Employees' 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) • **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)
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*, No. 16-cv-2990 (S.D.N.Y. Jan. 24, 2017), *appeal docketed*, No. 17-510 (2d Cir. filed Feb. 21, 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)

In its landmark 2010 decision in *Jones v. Harris Associates, L.P.*, the U.S. Supreme Court affirmed the use of the longtime "*Gartenberg* standard" for assessing the liability of fund advisers in excessive fee cases brought under section 36(b).[2]



Contrary to what some observers may then have anticipated, the Supreme Court's decision in *Jones* did not discourage the plaintiffs' bar from initiating new section 36(b) lawsuits. To the contrary, the plaintiffs' bar has initiated twenty-seven new section 36(b) lawsuits, involving twenty-four fund groups, since *Jones*, with twenty-two of these lawsuits initiated since January 2013.[3] As of the date of this *Claims Trends*, and as shown in the chart above right, eighteen of the twenty-seven lawsuits remain in various stages of the litigation process.[4] It remains too early to predict with certainty when or how these pending section 36(b) lawsuits will be resolved, or when the post-*Jones* wave of section 36(b) filings by the plaintiffs' bar may ultimately conclude. Yet several positive developments in the courts in 2016 and early 2017 have provided grounds for cautious optimism in this regard. Most notably, in August 2016 and February 2017, respectively, federal district courts issued judgments on the merits in favor of the defendant advisers in the only two post-*Jones* lawsuits to have thus far proceeded through trial.[7] (See box, left.)

Recent Judgments Following Trials in Post-*Jones* Lawsuits

In a positive development for the fund industry, federal district courts have recently issued judgments on the merits in favor of the defendant advisers following trials in two post-*Jones* section 36(b) lawsuits—Sivolella v. AXA Equitable Life Insurance Company and Kasilag v. Hartford Investment Financial Services, LLC. The two are the first of the post-*Jones* section 36(b) lawsuits to have proceeded through trial (and are also the only section 36(b) lawsuits, thus far, to have proceeded to trial since 2009).

The judgment in *Sivolella* followed a 25-day "bench" trial held in January and February 2016. In August 2016, the *Sivolella* court issued a 146-page opinion, in which it concluded that "[p]laintiffs have failed to meet their burden to demonstrate that Defendants breached their fiduciary duty in violation of section 36(b) of the ICA or [to] have shown any actual damages." In December 2016, the plaintiffs appealed the district court's decision to the Third Circuit. The appeal remains pending.[5]

Prior to a 4-day bench trial held in *Kasilag* in November 2016, the court had granted the defendants a pre-trial "summary" judgment on a key *Gartenberg* factor—i.e., the independence, expertise, care, and conscientiousness of the fund board. In February 2017, the *Kasilag* court issued a 70-page opinion, in which the court concluded that the plaintiffs had "elected to present minimal evidence" on certain of the *Gartenberg* factors, and had not carried their burden of proof with respect to those factors that remained under consideration by the court. In March 2017, the plaintiffs filed a notice of appeal of this decision.[6]

For a general discussion and overview of post-*Jones* developments in section 36(b) litigation, see ICI Mutual's 2016 study, entitled *Section 36(b) Litigation Since* Jones v. Harris*: An Overview for Investment Advisers and Fund Independent Directors*, available at www.icimutual.com.

NEWER POST-*JONES* SECTION 36(B) LAWSUITS (FILED IN 2013-2016)

As noted above, twenty-two of the twenty-seven post-*Jones* section 36(b) lawsuits were first filed during the period 2013 to 2016. Of these newer lawsuits, fourteen remain pending in federal district courts; two are on appeal to federal circuit courts; and six have been resolved.

The post-*Jones* lawsuits (including the newer lawsuits) can largely be divided into two basic categories, both

of which focus on disparities in fees paid to advisers and subadvisers. The first category, sometimes referred to as "**manager-of-managers**" lawsuits, focuses on the alleged disparities between the fees paid to advisers and the fees paid to unaffiliated subadvisers. The second category, sometimes referred to as "**subadvisory**" lawsuits, focuses on alleged disparities between the 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*. In a third category are a smaller number of the post-*Jones* cases that rely on different theories in seeking to establish that the fees at issue are excessive; these are discussed in "Other Lawsuits" below.

"Manager-of-Managers" Lawsuits: Of the twenty-two post-*Jones* section 36(b) lawsuits first filed from 2013 to 2016, ten are "manager-of-managers" lawsuits.[8] As described below, seven of these lawsuits remain in various stages of the litigation process, and three have been resolved.

- Two lawsuits have pending motions to dismiss (i.e., motions in the early stage of litigation in which defendants challenge the adequacy of plaintiffs' allegations on purely legal grounds).[9]
- Three lawsuits are now in the discovery (fact-finding) stage of the litigation process. In one of these three lawsuits, the district court denied the defendant's motion to dismiss.[10] In two of these three lawsuits, the defendants opted not to file motions to dismiss.[11]
- In a sixth lawsuit, the defendant's motion for summary judgment, filed in September 2016, remains pending.[12]
- In a seventh lawsuit, a federal district court granted the defendant's motion to dismiss in February 2016. The district court's decision is on appeal to the Eighth Circuit.[13]
- Three of these lawsuits have been resolved, either by stipulation of the parties or by court order.[14]

"Subadvisory" Lawsuits: Nine of the twenty-two post-*Jones* lawsuits first filed from 2013 to 2016 are "subadvisory" suits.[15] As described below, seven of these lawsuits remain in the litigation process, and two have been resolved.

- In seven of these lawsuits, motions to dismiss have been denied in whole or in part, thereby allowing the lawsuits to proceed to the discovery phase of the litigation.[16]
- The two remaining subadvisory lawsuits have been closed by stipulation of the parties.[17]

Fund Independent Directors and Attorney-Client Privilege in Section 36(b) Litigation

In November 2016, in the course of the discovery (fact-finding) stage of a pending section 36(b) lawsuit, a federal district court ordered a mutual fund's independent trustees to produce documents that they had withheld or redacted under the doctrine of attorney-client privilege. The court accepted the plaintiff's argument that a "fiduciary exception" to the attorney-client privilege should apply, that certain communications between the attorney and the trustees (who are not parties to the lawsuit) should be viewed as relating to the trustees' role as fiduciaries to the funds, and that the documents should therefore be made available to the plaintiff in the discovery process.[18]

A similar motion to compel production of a specific document, filed by plaintiffs in another section 36(b) lawsuit, was denied in March 2017 on the grounds that court deemed the document to be "irrelevant."[19] In a third section 36(b) lawsuit, a motion to compel production of documents viewed as privileged by fund independent directors was filed in March 2017 and remains pending.[20]

It remains to be seen whether such motions by plaintiffs' lawyers to compel documents viewed as privileged by fund independent directors become more common in section 36(b) litigation. Some commentators have expressed concern about the potential chilling effect that these motions might have on communications between mutual fund boards and their counsel.[21]

Other Lawsuits: Three of the twenty-two post-*Jones* section 36(b) lawsuits first filed during the period 2013 to 2016 cannot readily be characterized exclusively as either "manager-of-managers" or "subadvisory" lawsuits.[22] As described below, two of these lawsuits remain in the litigation process, and one has been resolved.

- One of these lawsuits alleges that the adviser's fees charged to an affiliated fund are higher than those charged by the adviser to its institutional clients, but adds an allegation that the adviser's fees were higher than those it charged to its similarly managed exchange-traded fund (ETF). The discovery process in this lawsuit has been extended, and the court has set a trial date in June 2018.[23]

- A second of these lawsuits involved the fees charged by the adviser and administrator of a business development company, a unique 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] The appeal remains pending.

- In the remaining lawsuit, which was concluded in March 2015, 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 section 36(b) lawsuit.[25]

OLDER POST-*JONES* SECTION 36(B) LAWSUITS (FILED IN 2010-2011)

Five of the twenty-seven post-*Jones* lawsuits were first filed in 2010-2011. As described below, two of these lawsuits—both "manager-of-managers" lawsuits—remain in the litigation process, and three have been resolved.

- In one of these lawsuits (referenced in the box on page 3), the parties proceeded to a "bench" trial (i.e., a trial held before a judge, and not a jury) in early January 2016, marking the first section 36(b) lawsuit to proceed to trial since 2009. Closing arguments were held in June 2016. (Earlier, in August 2015, the district court had denied the parties' motions for summary judgment.[26]) In August 2016, the district court decided in favor of the defendants, dismissing the action with prejudice.[27] In December 2016, the district court denied the plaintiff's motion to alter judgment and to amend/correct the opinion and order of the court.[28] The plaintiff promptly appealed the district court's dismissal to the Third Circuit, and the appeal remains pending.[29]

- In a second of these lawsuits (also referenced in the box on page 3), a bench trial was held in November 2016 and closing arguments were held in February 2017. (Earlier, in March 2016, the district court had granted in part and denied in part the plaintiffs' motion for partial summary judgment and the defendants' motion for summary judgment.[30]) In February 2017, the district court decided in favor of the defendants, dismissing the action. In March 2017, the plaintiffs filed a notice of appeal in this lawsuit.[31]

- The other three post-*Jones* section 36(b) lawsuits filed in 2010-2011 have been resolved. As reported in prior *Claims Trends*, two of these were closed by stipulation of the parties,[32] and a third lawsuit—in

Judicial Vacancies in the Federal Courts

As of March 2017, there are more than 100 judicial vacancies in the federal courts (representing approximately one-eighth of the entire federal judiciary). These include one vacancy on the U.S. Supreme Court, approximately 20 on the federal circuit courts of appeals, and nearly 100 on the U.S. district courts.[33] These vacancies provide the new presidential administration with an opportunity to reshape the federal judiciary. Some legal observers have suggested, however, that notwithstanding the overall number of vacancies, the new administration's ability to alter the ideological balance of many of the federal circuit courts of appeals is likely to be limited.[34]

which the plaintiffs had initially combined section 36(b) claims and another ICA claim with ERISA claims—came to a close in April 2015.[35]

Other Developments in Fee Litigation

In recent years, fees in the fund industry have also been challenged, directly or indirectly, under ERISA, as described in more detail in the "ERISA" section below. As discussed in past *Claims Trends,* the fund industry has also 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—have periodically been a major source of potential liability for funds and their directors, officers, advisers, and principal underwriters. In some instances, these lawsuits have coincided with disruptions affecting certain industry sectors or the broader market. A number of such lawsuits were filed, for example, in the wake of the "dot com" collapse in 2000 and then again (as discussed below) during the 2007-2009 subprime/credit crisis period.[36]

During the period from 2010 to 2014, no noteworthy new prospectus liability lawsuits were filed under the '33 Act against fund industry defendants. Several new prospectus liability lawsuits were filed in 2015 and 2016, however. These more recent lawsuits arose from discrete issues at a small number of fund complexes.

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

2015-2016 PROSPECTUS LIABILITY LAWSUITS

A small number of new prospectus liability lawsuits involving the fund industry were filed in 2015 and 2016. In one of these lawsuits, filed in May 2015 in federal district court, plaintiffs alleged '33 Act violations (as well as '34 Act violations) by a fund, its directors (including independent directors) and officers, and its investment adviser, subadviser, and distributor, in connection with the adviser's use of improper performance data in the public filings and marketing materials for a registered investment company. In July 2016, the federal district court granted in part and denied in part a motion to dismiss.[37] This lawsuit remains pending.

In 2016, following the suspension of redemptions by a high-yield bond fund in December 2015, prospectus liability lawsuits were filed that generally name as defendants the fund, its directors (including independent directors) and officers, and its investment adviser and distributor. These lawsuits, filed in federal district courts, generally allege '33 Act violations with respect to misrepresentations and omissions in offering documents.[38] Following consolidation of the actions in May 2016,[39] the litigation was stayed in February 2017,[40] and the parties filed a motion for preliminary approval of settlement in March 2017.[41] Similar underlying facts were alleged in two lawsuits brought in state court against the same defendants.[42] These state court lawsuits were consolidated in September 2016, and the consolidated state lawsuit remains pending.[43]

SUBPRIME/CREDIT CRISIS-RELATED LAWSUITS

As discussed in prior *Claims Trends,* in 2007-2009, a number of fund groups were involved in lawsuits that challenged the adequacy of disclosure provided by certain fixed-income funds that had significantly underperformed their peers during the subprime/credit crisis period. Nearly all of these subprime/credit crisis-related prospectus liability lawsuits have now effectively been concluded, with a number having involved multi-million dollar settlements. In one of the longest-running of these lawsuits, the district court granted final approval of a $125 million settlement in August 2016.[44] Settlement amounts approved by the courts in these prospectus liability lawsuits from the subprime/credit crisis period have collectively totaled over $650 million.[45]

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 may be subject to various legal requirements that can be difficult for shareholders to satisfy in the mutual fund context,[46] plaintiffs have historically had limited success in pursuing these lawsuits against fund industry defendants.

As noted above, '34 Act violations (in addition to '33 Act violations) were alleged in a class action lawsuit filed in May 2015 in connection with an adviser's use of improper performance data in the public filings and marketing materials for a registered investment company.[47] This lawsuit remains pending.[48]

Plaintiffs have also utilized the '34 Act in challenging disclosure provided in proxy statements and other public communications. In late 2015, a business development company (BDC) was targeted in two lawsuits filed in the same federal district court. These lawsuits alleged '34 Act and common law claims in connection with a proxy contest over the BDC's investment adviser's attempt to sell the investment advisory contract. In one lawsuit, an adviser competing for the contract alleged that misrepresentations in the BDC's proxy statement and other public communications regarding the proposed sale constituted violations of the '34 Act and common law.[49] In the second lawsuit, the plaintiffs filed a class action lawsuit on behalf of the BDC's shareholders, alleged '34 Act and common law violations similar to those alleged in the competing adviser's lawsuit.[50] Both lawsuits were voluntarily dismissed without prejudice in February 2016.[51] To date, neither lawsuit has been re-filed.

Litigation under State Law

Lawsuits against fund groups sometimes take 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 developments in state law actions in 2016 and early 2017.

"Demand" Requirement in State Law Derivative Actions

As a general rule, before initiating state law derivative actions, a fund shareholder must first make a "demand" on his or her fund board asking the board to authorize and pursue litigation on behalf of the fund. A shareholder failing to make such a demand often finds his or her lawsuit dismissed by the court as a matter of law.

Nonetheless, courts may excuse fund shareholders from the "demand" requirement under certain circumstances. One such circumstance, sometimes referred to as "demand futility," was at issue in two recent lawsuits involving fund industry defendants. In a lawsuit brought in New York state court, the court dismissed the lawsuit, finding that the plaintiffs had failed to satisfy the "very limited exception" of demand futility—i.e., that the independent directors of a fund were not sufficiently independent and disinterested to impartially consider the shareholder demand.[52] In another lawsuit, a Kansas state court declined to dismiss a shareholder derivative lawsuit notwithstanding the absence of a demand being made on the fund's board.[53]

2016-2017 State Law Actions

As reported in last year's *Claims Trends*, a derivative lawsuit filed in New York state court in January 2016 alleged that, by permitting a mutual fund to exceed its stated concentration limits in certain securities, the fund's directors (including independent directors) and investment adviser breached their fiduciary duties, and the investment adviser breached its contractual obligations to the fund.[54] A motion to dismiss the action, filed in June 2016, was granted in February 2017.[55] An appeal of this decision, filed in March 2017, remains pending.[56]

Another previously reported derivative lawsuit, originally filed in New York state court in February 2016, followed the suspension of redemptions by a high-yield bond fund in December 2015. (This event also gave rise to recent disclosure-based litigation, discussed under "Disclosure," above.[57]) This derivative lawsuit alleges that a fund's investment adviser and certain officers (one of whom is also an interested director) committed breaches of fiduciary duty and of contract by failing to ensure that the fund had sufficient liquidity in its portfolio to meet redemption requests from fund shareholders. In February 2017, the lawsuit was removed to federal court, and the district court has stayed the lawsuit.[58]

In a third derivative lawsuit, initially filed in federal district court in February 2016, shareholders alleged that the investment advisers to two mutual funds, as well as fund officers and trustees (including independent trustees), committed breaches of fiduciary duty and contract with respect to the funds' alleged investments in a start-up company.[59] This federal court lawsuit was voluntarily dismissed in February 2016 and was then re-filed in Kansas state court in April 2016.[60] The defendants' motions to dismiss were denied at a hearing in November 2016.[61] In January 2017, the Kansas Supreme Court denied the defendants' petition for a writ of mandamus.[62] Motions to dismiss, filed in January 2017, remain pending.[63]

Update on Pending Ninth Circuit Appeals in Securities Lawsuits

Last year's *Claims Trends* reported on a controversial Ninth Circuit decision that, in the view of some industry observers, had the potential to introduce new legal avenues (i.e., new state law-based avenues) for use by the plaintiffs' bar in pursuing fund industry defendants.[64] The appellate decision reversed the district court's decision and remanded the case to the district court. Shortly after the Ninth Circuit issued its decision, plaintiffs' attorneys amended their complaint in a separate lawsuit involving a different fund group, to assert state law-based legal theories of recovery.[65] The district courts in both of these lawsuits thereafter issued decisions in favor of the respective defendants, after which the respective plaintiffs filed appeals to the Ninth Circuit. These appeals remain pending.[66]

To date, concerns that the Ninth Circuit decision would lead to a wave of state law-based claims against the fund industry have not been realized. Except as discussed above, it appears that no additional lawsuits seeking to capitalize on the Ninth Circuit's highly publicized decision have been filed.

Fund Investments in Gambling Industry Securities

Prior *Claims Trends* have reported on federal lawsuits brought against several fund groups, which originally alleged that fund investments in online gambling companies constituted racketeering under RICO. As reported in the past, most of these federal lawsuits were dismissed,[67] but certain plaintiffs refiled their lawsuits in state courts or other federal courts, alleging that the investments violated state or common law.

The last remaining lawsuit of this type appears to have finally come to a close. The lawsuit, concluded in state court in January 2012,[68] was subsequently filed in federal court in June 2013, where it was dismissed by the federal district court in January 2015.[69] In May 2016, the Third Circuit affirmed the district court's dismissal.[70]

Regulatory Enforcement

In 2016, as in recent prior years, the SEC continued to pursue an aggressive enforcement agenda. The SEC brought a record total of 868 enforcement actions during its 2016 fiscal year, including a significant number of actions in the asset management area.[71]

It is too soon to predict how the SEC's enforcement agenda may be affected by November's election results and the new presidential administration. Recent months have witnessed the departures of a number of individuals holding key positions at the SEC (as noted in the box, right). More broadly, it is possible that there could be future changes in SEC enforcement priorities, in federal securities regulations, or conceivably even in certain provisions of the federal securities laws themselves, that could have significant implications for SEC enforcement activity both in general and in the asset management area.

A Time of Transition at the SEC

With the change of the presidential administration in January 2017, former SEC chair Mary Jo White resigned from the agency. President Trump has nominated Walter J. Clayton, a partner in a prominent New York law firm, to be the SEC's next chair. Pending confirmation of a new chair by the U.S. Senate, SEC commissioner Michael S. Piwowar is serving as acting chair.[72]

At this time, the SEC has only two commissioners, with three seats vacant. As a result, quorum requirements and other procedural issues may serve as constraints on SEC enforcement and regulatory activity for the near term.[73]

In addition to the commissioner vacancies, recent staff departures have left openings for new directors in the Divisions of Corporate Finance, Enforcement, and Economic and Risk Analysis, as well as in OCIE. The director of the Division of Investment Management has indicated his intention to remain at the SEC.[74]

SEC Enforcement Actions

In the asset management area, the overall number of SEC proceedings involving investment advisers or investment companies reached a new high of 160 in fiscal year 2016.[75]As in prior years, enforcement actions in this area focused primarily on actors outside the registered investment company space (e.g., unregistered funds and their advisers). But as in the past, registered funds and their associated service providers and personnel did not escape SEC scrutiny.

Administrative proceedings initiated or resolved by the SEC in 2016 and early 2017 against advisers of registered funds, advisory personnel, and/or fund

officers involved a number of different issues, including illegal cross trades,[76] valuation,[77] misleading disclosures about fund investments,[78] inadequate disclosure in connection with an exemptive application,[79] and the failure to prevent the misuse of material nonpublic information by consultants.[80]

SEC administrative proceedings were also initiated or resolved against fund advisers and/or advisory personnel with respect to their *non*-registered fund activities. Issues involved in these proceedings included "cherry picking" (or the practice of allocating profitable trades to more favored clients over others),[81] and the failure of an adviser to supervise an employee who misappropriated client funds.[82]

SEC Examination Priorities

SEC publications and other communications from the SEC and its staff can provide the investment management industry with some level of insight into areas of potential enforcement risk in the future. The SEC annually communicates its examination priorities through the publication of OCIE's National Exam Program Examination Priorities.[83] In its Examination Priorities for 2017, OCIE identified three overarching themes: protecting retail investors, assessing market-wide risks, and focusing on senior investors and retirement investments.[84] Of particular interest to the fund industry, OCIE indicated a going-forward focus on ETFs, never-before examined investment advisers, share class selection, money market funds, and cybersecurity.[85]

In addition to its annual list of examination priorities, OCIE issues periodic risk alerts that provide further insights into its examination findings and priorities. During 2016, OCIE issued risk alerts on various topics, including a share class initiative,[86] supervisory practices at registered investment advisers,[87] compliance with whistleblower rules,[88] and the "top five" investment adviser compliance topics.[89]

The SEC's Whistleblower Program

The SEC's whistleblower program, implemented pursuant to Dodd-Frank, provides significant financial incentives for corporate insiders and others to report tips to the agency.[90] Such whistleblowers are protected by anti-retaliation provisions.[91] To assess compliance with these provisions, OCIE announced, in October 2016, a sweep examination of investment advisers and broker-dealers (among others).[92]

The SEC has also taken other steps to protect would-be whistleblowers. For example, the SEC recently settled an administrative proceeding against an investment adviser with respect to separation agreements that required departing employees to "waive any right to recovery of incentives for reporting misconduct" as a prerequisite for the employees to receive monetary separation payments from the firm.[93]

Other Regulators

The SEC is not the only regulator that may institute enforcement actions involving registered funds or their affiliated service providers. Others include FINRA, the CFTC, state securities regulators, and foreign regulators.

FINRA, which conducts examinations of broker-dealers, has announced that its annual priorities for 2017 include investigating excessive and short-term trading, liquidity risks, management of conflicts of interest, anti-money laundering, and technology (e.g., technology management and cybersecurity).[94]

The CFTC, which regulates the trading of commodities (including many futures and derivatives), has disclosed its 2017 priorities through public statements. Among the CFTC's 2017 focus areas are derivatives, stress testing and market interaction in the event of Brexit, and

cybersecurity.[95] As with the SEC, however, the CFTC's enforcement agenda may potentially be affected by the change in the presidential administration and by personnel changes, including commissioner vacancies.[96]

Portfolio Management Errors

Since ICI Mutual's formation in 1987, a significant portion of all claim amounts paid by ICI Mutual have been for "costs of correction" claims—i.e., insurance claims by advisers 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.[97]

In the current environment, a number of factors—including the size of fund groups, the scale of their operations, and the magnitude of trades being executed on behalf of funds and other clients—may combine to create the potential for large operational errors. Over the course of ICI Mutual's history, "costs of correction" claims involving seven-figure losses or greater have occurred in a number of areas, including trade errors (e.g., inadvertent trading of securities), corporate action processing errors (e.g., failures to participate in rights offerings; errors in voting securities in corporate transactions), and valuation-related errors (e.g., miscalculations of net asset values for funds).

As business operations are increasingly outsourced to both affiliated and unaffiliated service providers, determining the extent to which "costs of correction" coverage is available may be particularly challenging, especially in the context of certain types of events, such as cyberattacks.[98] 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 loss history related to "costs of correction" claims emphasizes 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 lawsuits already discussed, 2016-2017 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.[99] The past year has seen an increase in the frequency of ERISA-based class action lawsuits involving asset managers and/or their affiliates.

Most notable among these recent lawsuits have been "proprietary funds" lawsuits, which challenge 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. There have also been litigation developments in other types of ERISA-based lawsuits.

"PROPRIETARY FUNDS" LAWSUITS

Since 2010, the plaintiffs' bar has initiated nearly two dozen proprietary funds lawsuits involving asset managers and/or their affiliates, with nineteen of these initiated since April 1, 2015.[100] These lawsuits are typically structured as putative class actions, and frequently allege that the named defendants (who may include one or more entities, committees, and/or individuals) 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 funds at issue, and/or failed to adequately investigate providing non-mutual fund alternatives such as collective trusts).

2016-2017 Proprietary Funds Lawsuits: Twelve new proprietary funds lawsuits were filed in 2016 and early 2017.[101] Nine of these lawsuits remain in their early stages, with motions to dismiss either yet to be filed or still pending before the federal district courts.[102] In a tenth lawsuit, a motion to dismiss was denied by the federal district court in January 2017.[103] In an eleventh lawsuit, a federal district court in February 2017 denied a motion to dismiss and also denied in part and granted in part the defendants' motion for summary judgment.[104] Also in February 2017, a district court in a twelfth lawsuit granted preliminary approval for a settlement reached by the parties to the lawsuit.[105]

Pre-2016 Proprietary Funds Lawsuits: Eleven proprietary funds lawsuits were first filed between 2011 and 2015.

Seven of these eleven lawsuits were filed in 2015.[106] The parties in two of these lawsuits have since reached settlements.[107] Motions to dismiss are pending in two more, and motions to dismiss have been denied or partially denied in two others.[108] In the seventh lawsuit, the district court issued two orders in March 2017—the first denying the parties' motions for summary judgment and the second ruling in defendants' favor with respect to the prohibited transactions claims.[109]

The remaining four of these eleven lawsuits were filed in 2011 and 2013. The parties in three of these lawsuits have since reached settlements.[110] In the fourth lawsuit, a district court granted the defendants' motion for summary judgment, which the plaintiffs subsequently appealed to the Eleventh Circuit.[111] The Eleventh Circuit initially affirmed the lower court's ruling in February 2014,[112] but, in June 2015, remanded the case to the district court for further proceedings to address, among other things, a then-recent decision by the U.S. Supreme Court that ruled that plan fiduciaries "…have a continuing

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.

duty of some kind to monitor investments and remove imprudent ones."[113] The lawsuit remains pending.[114]

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 a number of lawsuits challenging fees and compensation received directly or indirectly by asset managers and/or their affiliates as service providers to "third-party" plans. 2016 saw developments in some of these lawsuits.

In an older fee-based ERISA lawsuit alleging that the provider of retirement account services charged excessive fees through the structure of its retirement products, the Eighth Circuit affirmed, in January 2016, the district court's dismissal of the lawsuit, and denied a petition for rehearing *en banc* in February 2016.[115] This lawsuit is now closed.

Three other fee-based ERISA lawsuits filed in late 2015 and early 2016 alleged that the plan sponsors/administrators breached their fiduciary duties to the retirement plans through their negotiation of revenue sharing fees, which plaintiffs argued had the effect of increasing the overall management fees of the mutual funds in which the plans invested.[116] A motion for summary judgment, filed in December 2016, remains pending in one of these lawsuits.[117] In November 2016, a district court granted the defendants' motions to dismiss in a second lawsuit.[118] In March 2017, the district court granted the defendants' motions to dismiss in a third lawsuit.[119]

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."

As reported in prior *Claims Trends*, in a notable ERISA lawsuit outside of the mutual fund industry, the U.S. Supreme Court held, in July 2015, that an ERISA fiduciary's duty of prudence includes—"separate and apart from [a] duty to exercise prudence in selecting investments at the outset"—a "continuing duty to monitor plan investments and eliminate those that are no longer prudent."[120]

As reported in a prior *Claims Trends*, a lawsuit citing the Court's decision was filed in late 2015, in which plaintiffs alleged that the trustee (a fund group entity) intentionally mismanaged third-party plan assets by allowing the assets to remain in a high-cost, low-performing collective investment trust.[121] The district court denied a motion to dismiss in April 2016.[122] In February 2017, the defendant filed a motion for summary judgment, and the lawsuit remains pending.[123]

OTHER ERISA LAWSUITS

Asset managers and/or their affiliates have also been involved in other lawsuits brought under ERISA. As reported in prior *Claims Trends*, two fund group defendants—one, the directed trustee and recordkeeper for third-party ERISA plans, and the other, an investment adviser for the mutual funds offered as investment options in third-party plans—were involved in an ERISA lawsuit in which the plaintiffs challenged both fees and the handling of "float income" (i.e., the short-term income earned on plan assets cashed out by participants). In March

2012, the federal district court found, among other things, that the fund group defendants were ERISA "fiduciaries" (but not with respect to excessive fees) and that they breached their fiduciary duties to the third-party plan with respect to the handling of float income.[124] In March 2014, the Eighth Circuit vacated the federal district court's decision, ruling that, because the plaintiffs failed to demonstrate that the float income was a plan asset, the district court had erred in finding that the fund group defendants had breached their fiduciary duties.[125]

The same asset manager's treatment of float income was also challenged in separate lawsuits filed in another federal district court in early 2013. In December 2013, the cases were consolidated, and an amended complaint was filed in October 2014. In March 2015, the district court granted the defendants' motion to dismiss the amended complaint.[126] In July 2016, the First Circuit affirmed the district court's dismissal of the lawsuit.[127]

Bankruptcy Claims Involving Portfolio Securities

Mutual funds have occasionally been ensnared in proceedings arising from corporate bankruptcies, typically for no reason other than the funds' status as passive holders or former holders of securities of the bankrupt issuers. In these proceedings, sometimes referred to as "clawback" suits, bankrupt issuers and/or their creditors often seek a return of pre-bankruptcy payments made to security holders or other creditors, including funds.

A number of bankruptcy proceedings (including proceedings arising out of the bankruptcies of the Tribune Company, the Lyondell Chemical Company, and General Motors) have named numerous funds as parties.[128] These proceedings have raised a number of legal issues. Among them have been issues regarding the legal right (or "standing") of the plaintiffs to prosecute their claims, the timeliness of the plaintiffs' claims, and the applicability to the plaintiffs' claims of a "safe harbor" defense in the federal bankruptcy code for "settlement payments."

The *Tribune* and *Lyondell* proceedings variously involve "constructive fraudulent conveyance" and/or "intentional fraudulent conveyance" claims under state and/or federal law.

In September 2013, a federal district court in *Tribune* granted the defendants' motions to dismiss the state law constructive fraudulent conveyance claims (on standing grounds).[129] 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, filed in October 2016, is pending before the U.S. Supreme Court.[130] In January 2017, the federal district court in *Tribune* dismissed the federal law intentional fraudulent conveyance claim.[131] To date, no appeal of that dismissal has been filed.[132]

In *Lyondell*, the bankruptcy court in January 2014 denied the defendants' motion to dismiss the state law constructive fraudulent conveyance claims. The bankruptcy court granted the defendants' motion to dismiss the state law intentional fraudulent conveyance claims, but gave the plaintiffs permission to replead these claims to seek to correct their deficiencies.[133] An amended complaint was filed in April 2014 followed by motions to dismiss in August 2014.[134] In November 2015, the bankruptcy court dismissed the claims for federal law and state law intentional fraudulent conveyance, but once again declined to dismiss the claims for state law constructive fraudulent conveyance.[135]

Thereafter, in July 2016, the bankruptcy court in *Lyondell* did dismiss the state law constructive fraudulent conveyance claims, and recommended that the district court dismiss the action based on the Second Circuit's March 2016 opinion in the *Tribune* proceedings.[136] Later in July 2016, the district court reversed the bankruptcy court's dismissal of the federal law intentional fraudulent conveyance claim, and remanded the proceeding to the bankruptcy court.[137]

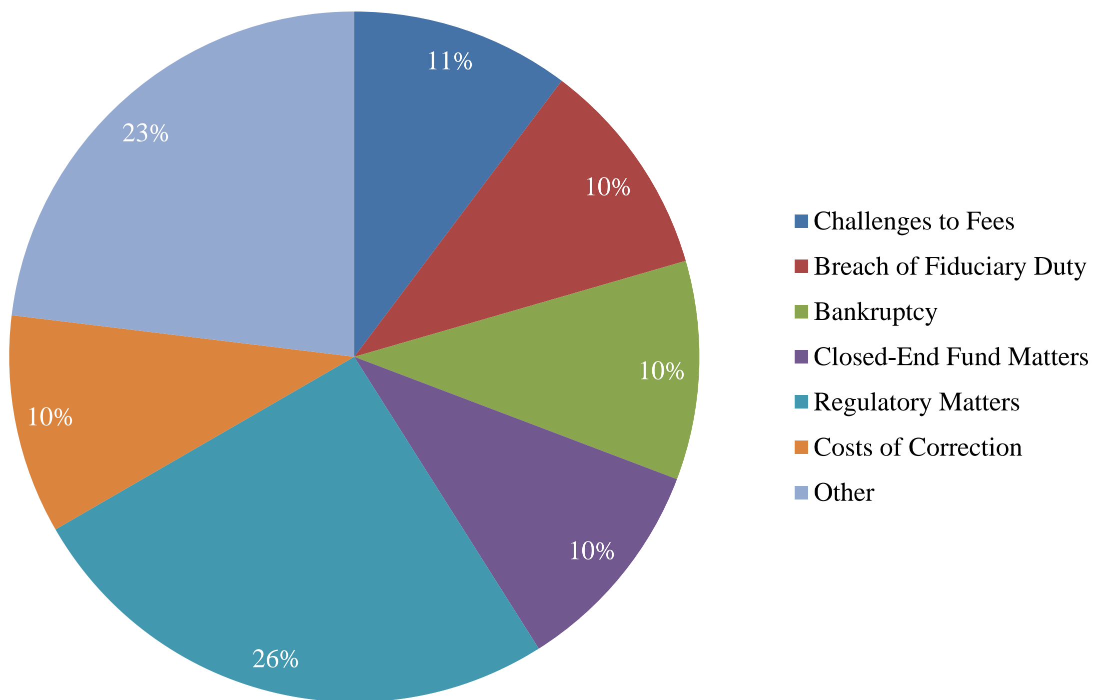
In the *General Motors* bankruptcy proceeding, various lenders (including a number of mutual funds) held interests in a term loan secured by collateral subject to a security interest. Due to an apparent clerical error, the security interest in certain collateral for the term loan was inadvertently released by the administrator for the term loan.[138] 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.[139] 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.[140]

An amended complaint, which names a number of mutual funds as defendants, was filed in May 2015.[141] Various dispositive motions were denied by the bankruptcy court in June 2016.[142] Certain of the defendant lenders have moved for leave to appeal the bankruptcy court's decision to the district court, which has not yet ruled on the motion.[143] The motion remains pending. In the interim, a trial to resolve disputed issues of fact regarding the identification and valuation of certain collateral is scheduled for April 2017.

D&O/E&O Claims Data

D&O/E&O Notices by Subject – 2016

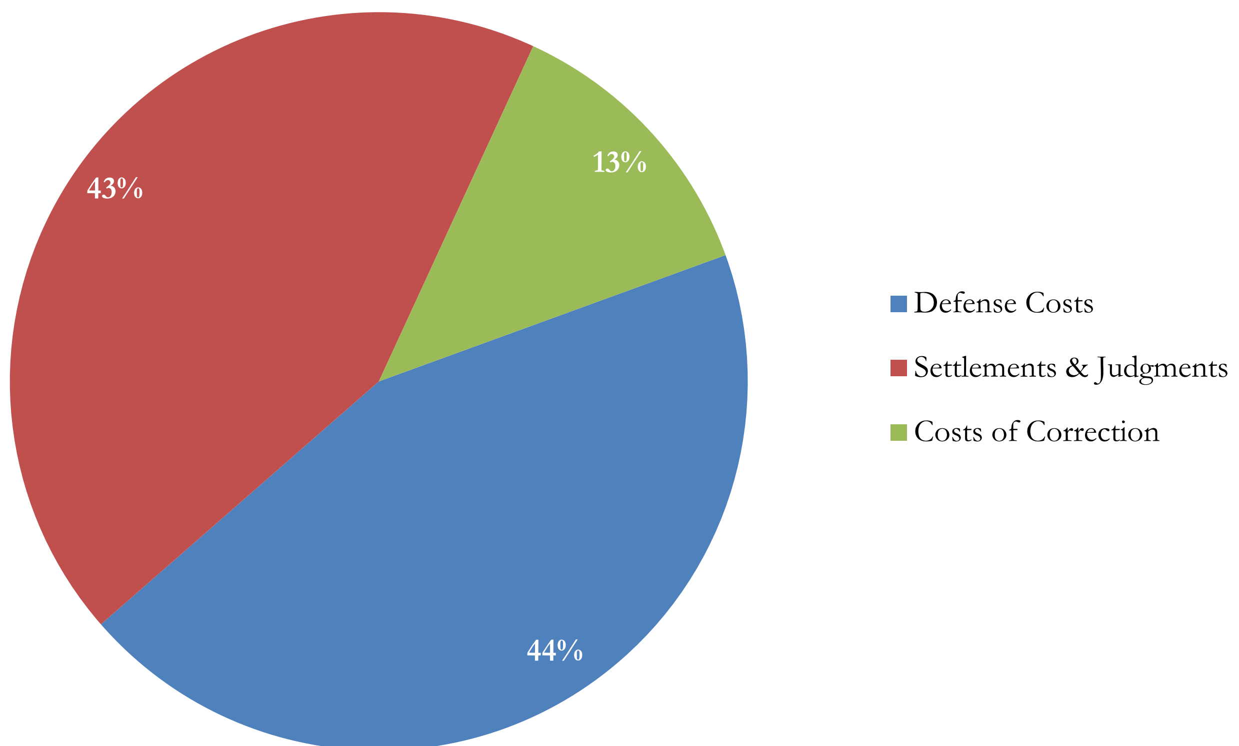
Regulatory matters, followed by fee lawsuits, constituted the most common subject of claims notices provided under ICI Mutual D&O/E&O policies in 2016. As shown in the chart below, a substantial percentage of notices received (the "Other" category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2007-2016)

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 over the ten-year period from January 1, 2007 through December 31, 2016 under ICI Mutual D&O/E&O policies.



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 Gartenburg 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 set forth in this publication does not include cases that were or are expected to be consolidated into other cases.

4. Nine of these post-*Jones* lawsuits have concluded. *See* Laborers' Local 265 Pension Fund v. iShares Trust, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied* (U.S. Mar. 2, 2015) (No. 14-771); 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)) & No. 10-cv-1655 (D.N.J. Aug. 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 (U.S. Apr. 20, 2015) (No. 14-1054); 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 County Employees' 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).

5. Sivolella v. AXA Equitable Life Ins. Co., 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016) (order dismissing lawsuit), *appeal docketed*, No. 16-4241 (3rd Cir. filed Dec. 6, 2016).

6. Kasilag v. Hartford Inv. Fin. Serv., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017) (order dismissing lawsuit) (notice of appeal filed on Mar. 23, 2017).

7. Sivolella v. AXA Equitable Life Ins. Co., 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016) (order dismissing lawsuit), *appeal docketed*, No. 16-4241 (3rd Cir. filed Dec. 6, 2016); Kasilag v. Hartford Inv. Fin. Serv., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017) (order dismissing lawsuit).

8. *See* Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. filed Oct. 16, 2015); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. filed July 22, 2015); Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014); Zehrer v. Harbor Capital Advisors, Inc., No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013); In re Voya Global Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. filed Aug. 30, 2013); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (N.D. Ala. filed Aug. 28, 2013).

9. Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. Feb. 28, 2017) (filing of motion to dismiss) (motion to dismiss also filed on Feb. 27, 2017 in a likely related case, Obeslo v. Great-West Life & Annuity Ins. Co., No. 16-cv-3162 (D. Colo. filed Dec. 23, 2016)); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. Dec. 15, 2015) (filing of motion to dismiss).

10. Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991, 2015 U.S. Dist. LEXIS 146007 (D.N.J. Oct. 28, 2015) (order denying motion to dismiss). An analogous case to *Redus-Tarchis*, filed in November 2013, similarly focused on the comparative level of fees paid to advisers and to subadvisers, but did so in the ERISA context

rather than under section 36(b). This case was settled in November 2016. *See* Gordan v. Mass. Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) (final order and judgment).

[11] In re Voya Global Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. filed Aug. 30, 2013); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015).

[12] Zehrer v. Harbor Capital Advisors, Inc., No. 14-cv-789 (N.D. Ill. Sept. 8, 2016) (filing of motion for summary judgment).

[13] Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (S.D. Iowa Feb. 8, 2016) (final judgment), *appeal docketed*, No. 16-1580 (8th Cir. filed Mar. 8, 2016).

[14] In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. Feb. 28, 2017) (order for closure); 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).

[15] *See* Karp v. Harris Assocs., L.P., No. 16-cv-8216 (N.D. Ill. filed Aug. 19, 2016); Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016); Kennis v. Metropolitan West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015); Wayne County Employees' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015); Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015); In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. filed May 7, 2014); Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 14-cv-414 (S.D. Ohio filed May 5, 2014); In re BlackRock Mut. Funds Advisory Fee Litig., No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014).

[16] Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2289 (N.D. Cal. Mar. 31, 2017) (order denying motion to dismiss); Kennis v. Metropolitan West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. June 16, 2016) (order denying motion to dismiss); Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. Mar. 28, 2016) (order denying motion to dismiss); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585, 2015 U.S. Dist. LEXIS 167849 (D. Del. Dec. 8, 2015) (order denying motion to dismiss); In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318, 2015 U.S. Dist. LEXIS 155821 (S.D.N.Y. Nov. 18, 2015) (order denying motion to dismiss); In re BlackRock Mut. Funds Advisory Fee Litig., No. 14-cv-1165, 2015 U.S. Dist. LEXIS 39514 (D.N.J. Mar. 27, 2015) (order denying motion to dismiss); Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 14-cv-414, 2015 U.S. Dist. LEXIS 26361 (S.D. Ohio Mar. 4, 2015) (order denying motion to dismiss).

In October 2015, a complaint similar to (and subsequently consolidated with) *Goodman* was filed and named the same investment adviser as in *Goodman*, but also named the funds' administrator and sub-administrator as defendants. Campbell Family Trust v. J.P. Morgan Inv. Mgmt. Inc., No. 15-cv-2923 (S.D. Ohio filed Oct. 16, 2015). In February 2016, in granting in part and denying in part the motion to dismiss filed in *Campbell* prior to its consolidation with *Goodman*, the district court dismissed the action against the sub-administrator, but not the administrator, because, while the administrator was paid directly by the funds, the sub-administrator was paid by the administrator. Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 14-cv-414, 2016 U.S. Dist. LEXIS 23815 (S.D. Ohio Feb. 26, 2016) (order granting in part and denying in part motion to dismiss).

[17] Karp v. Harris Assocs., L.P., No. 16-cv-8216 (N.D. Ill. Nov. 28, 2016) (closed by stipulation); Wayne County Employees' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (closed by stipulation).

[18] Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Nov. 21, 2016) (order granting plaintiffs' motion to compel).

[19] Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. Mar. 7, 2017) (order denying plaintiffs' motion to compel).

[20] Chill v. Calamos Advisors, LLC, No. 17-cv-1658 (N.D. Ill. filed Mar. 2, 2017) (filing of motion to compel, which relates to Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015), but is being handled by another court for jurisdictional reasons).

[21] *See, e.g.*, Morrison Foerster, Client Alert, U.S. District Court: Fund Trustees Cannot Rely on Attorney-Client Privilege in Section 36(b) Case (Dec. 2, 2016), https://media2.mofo.com/documents/161202-fund-trustees-attorney-client-privilege.pdf; Beagan Wilcox Volz, *Court Ruling in Fee Case Could 'Destabilize' Industry: Pimco*, IGNITES.COM (Dec. 1, 2016), http://ignites.com/c/1511643/175363.

[22] *See* Paskowitz v. Prospect Capital Mgmt., L.P., No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016); Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. filed Dec. 21, 2014); Laborers' Local 265 Pension Fund v. iShares Trust, No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013).

[23] Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Aug. 26, 2015) (order denying motion to dismiss).

[24] Paskowitz v. Prospect Capital Mgmt., L.P., No. 16-cv-2990 (S.D.N.Y. Jan. 24, 2017) (order granting motion to dismiss), *appeal docketed*, No. 17-510 (2d Cir. filed Feb. 21, 2017).

[25] Laborers' Local 265 Pension Fund v. iShares Trust, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, (U.S. Mar. 2, 2015) (No. 14-771).

[26] Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Aug. 6, 2015) (motions for summary judgment denied).

[27] Sivolella v. AXA Equitable Life Ins. Co., 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016) (order dismissing lawsuit).

[28] Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Dec. 1, 2016) (order denying motion to alter judgment and to amend/correct the opinion).

[29] Sivolella v. AXA Equitable Life Ins. Co., No. 16-4241 (3rd Cir. filed Dec. 6, 2016).

[30] Kasilag v. Hartford Inv. Fin. Servs., LLC, 2016 U.S. Dist. LEXIS 47063 (D.N.J. Mar. 24, 2016) (order granting in part and denying in part the defendants' motion for summary judgment and the plaintiffs' motion for partial summary judgment).

[31] Kasilag v. Hartford Inv. Fin. Servs., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017) (order dismissing lawsuit) (notice of appeal filed on Mar. 23, 2017).

[32] Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. filed Sept. 16, 2011), *closed per stipulation* (Aug. 23, 2012); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011).

[33] *See* Judicial Vacancies, http://www.uscourts.gov/judges-judgeships/judicial-vacancies (last visited Mar. 20, 2017).

[34] *See* Jonathan H. Adler, *How President Trump will shape the federal courts*, WASHINGTON POST (Jan. 20, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/20/how-president-trump-will-shape-the-federal-courts/?utm_term=.5c88e4e91885.

[35] 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 (May 23, 2011) (as to section 36(b) & 2013 U.S. Dist. LEXIS 103404 (July 24, 2013) (as to ERISA), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (U.S. Apr. 20, 2015) (No. 14-1054).

A similar case was filed in early 2011 by the same plaintiffs' lawyers against another insurance company and certain affiliated investment advisers. Santomenno v. Transamerica 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 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, and in February 2013, the court granted a motion to dismiss with respect to the IAA claim, but denied the motion with respect to the ERISA claims. Santomenno v. Transamerica Life Ins. Co., 2013 U.S. Dist. LEXIS 22354 (C.D. Cal. Feb. 19, 2013). In March 2016, the district court granted the plaintiffs' motion for class certification. Santomenno v. Transamerica Life Ins. Co., No. 12-cv-2782 (C.D. Cal. Mar. 14, 2016) (order granting motion for class certification).

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

[37] Youngers v. Virtus Inv. Partners, Inc., No. 15-cv-8262 (S.D.N.Y. July 1, 2016) (order granting in part and denying in part the defendants' motion to dismiss the second amended complaint).

[38] Matthews v. Third Ave. Mgmt. LLC, No. 16-cv-770 (C.D. Cal. filed Feb. 3, 2016); Bhat v. Third Ave. Mgmt. LLC, No. 16-cv-904 (C.D. Cal. filed Feb. 9, 2016); Inter-Marketing Group USA, Inc. v. Third Ave. Trust, No.

16-cv-736 (C.D. Cal. filed Feb. 2, 2016); Tran v. Third Ave. Mgmt, LLC, No. 16-cv-602 (C.D. Cal. filed Jan. 27, 2016).

39 In May 2016, these four lawsuits were consolidated under In re Third Ave. Mgmt. LLC Secs. Litig., No. 16-cv-2758 (S.D.N.Y. Apr. 13, 2016) (order consolidating lawsuits).

40 In re Third Ave. Mgmt. LLC Secs. Litig., No. 16-cv-2758 (S.D.N.Y. Feb. 27, 2017) (order withdrawing motion to dismiss the consolidated amended complaint and staying the litigation). While not a prospectus liability suit, a state court derivative action (since removed to federal court) was filed based on the same facts and circumstances. *See* Engel v. Third Ave. Mgmt. Co., LLC, No. 16-cv-1118 (S.D.N.Y. filed Feb. 12, 2016) (originally, Engel v. Third Ave. Mgmt. Co., LLC, No. 650196-2016 (N.Y. Sup. Ct. filed Jan. 15, 2016)). A motion to dismiss filed in that lawsuit remains pending. Engel v. Third Ave. Mgmt. Co., LLC, No. 16-cv-1118 (S.D.N.Y. June 17, 2016) (filing of motion to dismiss).

41 In re Third Ave. Mgmt. LLC Secs. Litig., No. 16-cv-2758 (S.D.N.Y. Mar. 31, 2017) (filing of joint motion for preliminary approval of settlement).

42 Wagner v. Third Ave. Mgmt. LLC, No. 12184 (Del. Ch. Ct. filed Apr. 13, 2016); Krasner v. Third Ave. Mgmt. LLC, No. 12681 (Del. Ch. Ct. filed Aug. 24, 2016).

43 Wagner v. Third Ave. Mgmt. LLC, No. 12184 (Del. Ch. Ct. Sept. 15, 2016) (order granting consolidation with *Krasner*).

44 In re Morgan Keegan Open-End Mut. Fund Litig., No. 07-cv-2784 (W.D. Tenn. Aug. 2, 2016) (order granting final approval of settlement).

45 In re Morgan Keegan Open-End Mut. Fund Litig., No. 07-cv-2784 (W.D. Tenn. Aug. 2, 2016) (final settlement); In re Reserve Primary Fund Secs. & Derivative Class Action Litig., No. 08-cv-8060 (S.D.N.Y. Jan. 13, 2014) (final settlement); In re Oppenheimer Rochester Funds Group Secs. Litig., No. 09-md-2063 (D. Colo. July 28, 2014) (final settlement); Gosselin v. First Trust Advisors L.P., No. 08-cv-5213, 2009 U.S. Dist. LEXIS 117737 (N.D. Ill. Dec. 17, 2009) (final settlement); In re Charles Schwab Corp. Secs. Litig., No. 08-cv-1510, 2011 U.S. Dist. LEXIS 44547 (N.D. Cal. Apr. 19, 2011) (final settlement); Zametkin v. Fidelity Mgmt. & Research Co., No. 08-cv-10960 (D. Mass. May 11, 2012) (final settlement); In re Oppenheimer Champion Fund Secs. Fraud Class Actions, No. 09-cv-386 (D. Colo. Sept. 30, 2011) & Ferguson v. OppenheimerFunds, Inc., No. 09-cv-1186 (D. Colo. Sept. 30, 2011) (final settlement of both lawsuits); Yu v. State St. Corp., No. 08-cv-8235 (S.D.N.Y. Sept. 6, 2012) (final settlement); In re Evergreen Ultra Short Opportunities Fund Secs. Litig., No. 08-cv-11064, 2012 U.S. Dist. LEXIS 174711 (D. Mass. Dec. 10, 2012) (final settlement); In re Morgan Keegan Closed-End Fund Litig., No. 07-cv-2830 (W.D. Tenn. Aug. 5, 2013) (final settlement).

46 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, http://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).

47 Youngers v. Virtus Inv. Partners, Inc., No. 15-cv-8262 (S.D.N.Y. filed May 8, 2015).

48 Youngers v. Virtus Inv. Partners, Inc., No. 15-cv-8262 (S.D.N.Y. Jul. 1, 2016) (order granting in part and denying in part the defendants' motion to dismiss the second amended complaint).

49 NexPoint Advisors, L.P. v. TICC Capital Corp., No. 15-cv-1465 (D. Conn. filed Oct 8, 2015).

50 Barnes v. TICC Capital Corp., No. 15-cv-1564 (D. Conn. filed Oct. 27, 2015).

51 NexPoint Advisors, L.P. v. TICC Capital Corp., No. 15-cv-1465 (D. Conn. Feb. 2, 2016) (notice of voluntary dismissal without prejudice); Barnes v. TICC Capital Corp., No. 15-cv-1564 (D. Conn. Feb. 1, 2016) (notice of voluntary dismissal without prejudice).

52 Epstein v. Ruane, Cunniff & Goldfarb, Inc., No. 650100-2016 (N.Y. Sup. Ct. Feb. 28, 2017) (order of dismissal).

53 Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Nov. 10, 2016) (order denying motion to dismiss).

54 Epstein v. Ruane, Cunniff & Goldfarb, Inc., No. 650100-2016 (N.Y. Sup. Ct. filed Jan. 8, 2016).

[55] Epstein v. Ruane, Cunniff & Goldfarb, Inc., No. 650100-2016 (N.Y. Sup. Ct. Feb. 28, 2017) (order of dismissal).

[56] Epstein v. Ruane, Cunniff & Goldfarb, Inc., No. 650100-2016 (N.Y. Sup. Ct. Mar. 22, 2017) (filing of notice of appeal).

[57] Engel v. Third Ave. Mgmt. Co., LLC, No. 650196-2016 (N.Y. Sup. Ct. filed Jan. 15, 2016).

[58] Engel v. Third Ave. Mgmt. Co., LLC, No. 16-cv-1118 (S.D.N.Y. Feb. 27, 2017) (order staying proceeding and withdrawing motions to dismiss).

[59] Kapor v. Ivy Inv. Mgmt. Co., No. 16-cv-2106 (D. Kan. filed Feb. 18, 2016). Two similar lawsuits were filed in federal district court in May and July 2015 against many of the same fund group defendants, which were later dismissed from the lawsuits. *See* Top Rank, Inc. v. Alan Haymon, No. 15-cv-4961, 2015 U.S. Dist. LEXIS 164676 (C.D. Cal. Oct. 16, 2015) (dismissal with prejudice); Golden Boy Promotions v. Alan Haymon, No. 15-cv-3378 (C.D. Cal. June 29, 2015) (notice of dismissal).

[60] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. filed Apr. 19, 2016) (formerly captioned as Kapor v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. filed Apr. 19, 2016)).

[61] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Nov. 10, 2016) (order denying motions to dismiss).

[62] Ivy Inv. Mgmt. Co. v. Elliott, No. 116,958 (Kan. Sup. Ct. Jan. 24, 2017) (order denying defendants' petition for a writ of mandamus and stay of the lower court proceedings).

[63] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Jan. 5, 2017) (filing of motions to dismiss second amended verified petition).

[64] Northstar Fin. Advisors, Inc. v. Schwab Invs., No. 08-cv-4119 (C.D. Cal. filed Aug. 28, 2008), *rev'd*, 779 F.3d 1036 (9th Cir. Mar. 9, 2015), *cert. denied* (U.S. Oct. 5, 2015) (No. 15-134).

[65] Hampton v. PIMCO LLC, 146 F. Supp. 3d 1207 (C.D. Cal. 2015) (granting motion to dismiss), *appeal docketed*, No. 15-56841 (9th Cir. filed Nov. 30, 2015).

[66] Northstar Fin. Advisors, Inc. v. Schwab Invs., 2015 U.S. Dist. LEXIS 135847, No. 08-cv-4119 (C.D. Cal. Oct. 5, 2015) (order granting in part and denying in part motion to dismiss) & 2016 U.S. Dist. LEXIS 22660, No. 08-cv-4119 (C.D. Cal. Feb. 23, 2016) (order granting motion for judgment on the pleadings), *appeal docketed*, No. 16-15303 (9th Cir. filed Feb. 26, 2016).

[67] These dismissals came in 2009 and 2010, with the Second Circuit affirming the dismissals of two of these lawsuits in November 2009 and June 2011, respectively, and with the Ninth Circuit affirming the dismissal of another lawsuit in May 2011. *See* McBrearty v. Vanguard Group, Inc., 353 Fed. Appx. 640 (2d Cir. 2009); Seidl v. Am. Century Cos., 427 Fed. Appx. 35 (2d Cir. 2011); Wodka v. Causeway Capital Mgmt. LLC, 433 Fed. Appx. 563 (9th Cir. 2011). One lawsuit was voluntarily dismissed by the plaintiff. *See* Gamoran v. Neuberger Berman Mgmt. LLC, No. 08-cv-10807 (S.D.N.Y. filed Dec. 12, 2008).

[68] Hartsel v. Vanguard Group, Inc., 38 A.3d 1254 (Del. 2012).

[69] Hartsel v. Vanguard Group, Inc., 2015 U.S. Dist. LEXIS 8413 (D. Del. Jan. 26, 2015).

[70] Hartsel v. Vanguard Group Inc., 648 Fed. Appx. 265 (3rd Cir. 2016).

[71] SEC Press Rel., SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016), https://www.sec.gov/news/pressrelease/2016-212.html.

[72] *See* Leslie Picker, *Donald Trump Nominates Wall Street Lawyer to Head S.E.C.*, NY TIMES (Jan. 4, 2017), https://www.nytimes.com/2017/01/04/business/dealbook/donald-trump-sec-jay-clayton.html.

[73] *See, e.g.,* Jill Gregorie, *Trump Names Acting SEC Chair; New Rules Likely on Hiatus*, IGNITES (Jan. 27, 2017), http://ignites.com/c/1552873/179663.

[74] *See, e.g.,* Melanie Waddell, *'Business as Usual' at SEC Despite Staff Vacancies*, THINK ADVISOR (Jan. 4, 2017), http://www.thinkadvisor.com/2017/02/27/business-as-usual-at-sec-despite-staff-vacancies.

[75] SEC Press Rel., SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016), https://www.sec.gov/news/pressrelease/2016-212.html. In its 2016 fiscal year, the SEC also brought a record number of independent or stand-alone cases involving investment advisers or investment companies (98).

[76] In re Aviva Investors Americas, LLC, IAA Rel. No. 4534, File No. 3-17567 (SEC Sept. 23, 2016), https://www.sec.gov/litigation/admin/2016/ia-4534.pdf (The SEC found that an investment adviser to registered funds and private accounts failed to adopt and implement adequate policies and procedures to prevent unlawful cross and principal trading effectuated by its trading personnel.).

[77] *See* In re PIMCO LLC, ICA Rel. No. 23276, File No. 3-17701 (SEC Dec. 1, 2016), https://www.sec.gov/litigation/admin/2016/ia-4577.pdf (The SEC found that the adviser failed to accurately value certain fund securities and provided investors with misleading information about the performance of one of its exchange-traded funds.); In re Calvert Inv. Mgmt., Inc., IAA Rel. No. 4554, File No. 3-17630 (SEC Oct. 18, 2016), https://www.sec.gov/litigation/admin/2016/ia-4554.pdf (The SEC found that the adviser had not disclosed that the process used by the adviser to correct a valuation error compensated shareholders differently, depending on whether the shareholders invested directly or through an intermediary.).

[78] *See* In re GL Capital Partners, LLC, IAA Rel. No. 4629, File No. 3-17818 (SEC Jan. 30, 2017), https://www.sec.gov/litigation/admin/2017/ia-4629.pdf & In re GL Inv. Servs., LLC, IAA Rel. No. 4630, File No. 3-17819 (SEC Jan. 30, 2017), https://www.sec.gov/litigation/admin/2017/ia-4630.pdf (The SEC found that the registered investment advisers mischaracterized certain loans included in a registered fund's portfolio, misused investors' assets, and misrepresented the firm's assets under management in their form ADV filings.).

[79] *See* In re Orinda Asset Mgmt., IAA Rel. No. 4513, File No. 3-17506 (SEC Aug. 25, 2016), https://www.sec.gov/litigation/admin/2016/ia-4513.pdf (The SEC found the adviser did not disclose key terms in its application for exemptive relief.).

[80] *See* In re Federated Global Inv. Mgmt. Corp., IAA Rel. No. 4401, File No. 3-17264 (SEC May 27, 2016), https://www.sec.gov/litigation/admin/2016/ia-4401.pdf (The SEC found the adviser did not establish, maintain, or enforce policies and procedures to prevent the misuse of material, nonpublic information in connection with the adviser's use of outside consultants.).

[81] *See* In re Laurence I. Balter d/b/a Oracle Inv. Research, ICA Rel. No. 32301, File No. 3-17614 (SEC Oct. 4, 2016), http://www.sec.gov/litigation/admin/2016/33-10228.pdf (The SEC found that an investment adviser to a registered fund and private accounts had allocated favorable trades to himself ahead of his clients, misrepresented the nature of fees to be paid by certain clients, and deviated from fundamental investment limitations.).

[82] *See* In re Cambridge Inv. Research Advisors, Inc., IAA Rel. No. 4361, File No. 3-17195 (SEC Apr. 5, 2016), https://www.sec.gov/litigation/admin/2016/ia-4361.pdf (The SEC found that a registered adviser failed to have reasonable policies, procedures, and systems in place to supervise a representative, which representative misappropriated client assets.).

[83] SEC, OCIE Nat'l Exam Program, Examination Priorities for 2017, (Jan. 12, 2017), https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2017.pdf.

[84] *Id.*

[85] *See also* SEC, OCIE Nat'l Exam Program Risk Alert, Retirement-Targeted Industry Reviews and Examinations Initiative, vol. IV, issue 6 (June 22, 2015), http://www.sec.gov/about/offices/ocie/retirement-targeted-industry-reviews-and-examinations-initiative.pdf (describing a multi-year examination initiative focused on retirement-based savings).

[86] *See* SEC, OCIE Nat'l Exam Program Risk Alert, OCIE's 2016 Share Class Initiative (July 13, 2016), https://www.sec.gov/ocie/announcement/ocie-risk-alert-2016-share-class-initiative.pdf.

[87] *See* SEC, OCIE Nat'l Exam Program Risk Alert, Examinations of Supervision Practices at Registered Investment Advisers (Sept. 12, 2016), https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-supervision-registered-investment-advisers.pdf.

[88] *See* SEC, OCIE Nat'l Exam Program Risk Alert, Examining Whistleblower Rule Compliance (Oct. 24, 2016), https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-examining-whistleblower-rule-compliance.pdf.

[89] *See* SEC, OCIE Nat'l Exam Program Risk Alert, The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers (Feb. 7, 2017), https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf.

[90] *See* SEC Press Rel., SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290 (award reportedly related to "information about an ongoing fraud that would have been very difficult to detect," according to the then-Director of the SEC's Division of Enforcement).

[91] Rule 21F-17, 17 CFR 240.21F-17, provides that "…no person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement…with respect to such communications."

[92] SEC, OCIE Nat'l Exam Program Risk Alert, Examining Whistleblower Rule Compliance (Oct. 24, 2016), https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-examining-whistleblower-rule-compliance.pdf.

[93] In re BlackRock, Inc., '34 Act Rel. No. 79804, File No. 3-17786 (SEC Jan. 17, 2017), http://www.sec.gov/litigation/admin/2017/34-79804.pdf (The SEC found that the adviser had included language in its separation agreements requiring terminated employees to waive any financial incentive available to the employees under the Dodd-Frank Whistleblower Program in connection with reporting incidents of misconduct at the adviser to the SEC.). The SEC has also pursued other actions for impeding communication with the SEC and for retaliation against whistleblowers. *See, e.g.*, In the Matter of Merrill Lynch, Pierce, Fenner & Smith Inc., '34 Act Rel. No 78141, File No. 3-17312 (June 23, 2016), https://www.sec.gov/litigation/admin/2016/34-78141.pdf (The SEC found that the dually-registered broker-dealer and investment adviser included language in certain disclosures and agreements that unduly limited disclosure of certain information.).

[94] FINRA, 2017 Regulatory and Examination Priorities Letter (Jan. 4, 2017), http://www.finra.org/sites/default/files/2017-regulatory-and-examination-priorities-letter.pdf.

[95] *See, e.g.,* Timothy Massad, Chair CFTC, Remarks of Chairman Timothy Massad Before the Economic Club of New York (Dec. 6, 2016), http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-52.

[96] *See, e.g., Trump's pick to lead US CFTC unveils major new policy agenda*, REUTERS (Mar. 15, 2017), http://www.cnbc.com/2017/03/14/trump-to-nominate-cftc-acting-head-giancarlo-as-permanent-chairman.html.

[97] The coverage also requires the insured to obtain ICI Mutual'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, http://www.icimutual.com (at 35-36, discussing insurance for the costs of correcting operations-based errors).

[98] *See, e.g.*, ICI MUTUAL, *D&O/E&O Insurance Coverage For Network Security Events: Frequently Asked Questions*, Question 8 (Jan. 2017), http://www.icimutual.com/sites/default/files/Network%20Security%20Event%20Endorsement%20FAQs%20-%20January%202017.pdf.

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

[100] The count of "proprietary funds" lawsuits set forth in this publication does not include cases that were or are expected to be consolidated into other cases.

[101] *See* Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich. filed Mar. 29, 2017); Feinberg v. T. Rowe Price Group, Inc., No. 17-cv-427 (D. Md. filed Feb. 14, 2017); Beach v. JPMorgan Chase Bank, N.A., No. 17-cv-563 (S.D.N.Y. filed Jan. 25, 2017); Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. filed Jan. 19, 2017); Meiners v. Wells Fargo & Co., No. 16-cv-3981 (D. Minn. filed Nov. 22, 2016); Patterson v. Morgan Stanley, No. 16-cv-6568 (S.D.N.Y. filed Aug. 19, 2016); Bekker v. Neuberger Berman Group, LLC, No. 16-cv-6123 (S.D.N.Y. filed Aug. 2, 2016); Cryer v. Franklin Resources, Inc., No. 16-cv-4265 (N.D. Cal. filed July 28, 2016); Andrus v. New York Life Ins. Co., No. 16-cv-5698 (S.D.N.Y. filed July 18, 2016); Wildman v. Am. Century Servs., LLC, No. 16-cv-737 (W.D. Mo. filed June 30, 2016); Habib v. M&T Bank Corp., No. 16-cv-375 (W.D.N.Y. filed May 11, 2016); Main v. Am. Airlines Inc., No. 16-cv-473 (N.D. Tex. filed Apr. 15, 2016).

[102] Meiners v. Wells Fargo & Co., No. 16-cv-3981 (D. Minn. Feb. 27, 2017) (filing of motion to dismiss); Patterson v. Morgan Stanley, No. 16-cv-6568 (S.D.N.Y. Feb. 9, 2017) (filing of motion to dismiss); Main v. Am. Airlines Inc., No. 16-cv-473 (N.D. Tex. Aug. 5, 2016) (filing of motion to dismiss); Bekker v. Neuberger Berman Group, LLC, No. 16-cv-6123 (S.D.N.Y. Oct. 5, 2016) (filing of motion to dismiss and for summary judgment). Motions to dismiss have yet to be filed in the following lawsuits: Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich. filed Mar. 29, 2017); Feinberg v. T. Rowe Price Group, Inc., No. 17-cv-427 (D. Md. filed Feb. 14, 2017); Beach v. JPMorgan Chase Bank, N.A., No. 17-cv-563 (S.D.N.Y. filed Jan. 25, 2017); Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. filed Jan. 19, 2017); Habib v. M&T Bank Corp., No. 16-cv-375 (W.D.N.Y. July 22, 2016).

[103] Cryer v. Franklin Resources, Inc., No. 16-cv-4265 (N.D. Cal. Jan. 17, 2017) (order denying motion to dismiss).

[104] Wildman v. Am. Century Servs., LLC, No. 16-cv-737 (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).

[105] Andrus v. New York Life Ins. Co., No. 16-cv-5698 (S.D.N.Y. Feb. 16, 2017) (order granting preliminary approval to settlement).

[106] Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. filed Dec. 21, 2015); Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. filed Nov. 13, 2015); Richards-Donald v. TIAA-CREF, No. 15-cv-8040 (S.D.N.Y. filed Oct. 13, 2015); Urakhchin v. Allianz Asset Mgmt. of Am., L.P., No. 15-cv-1614 (C.D. Cal. filed Oct. 7, 2015); Bowers v. BB&T Corp., No. 15-cv-732 (M.D.N.C. filed Sept. 4, 2015); Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa filed Apr. 17, 2015); Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa filed Apr. 3, 2015).

[107] Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa Oct. 28, 2016) (final settlement); Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa Nov. 13, 2015) (final settlement).

[108] Patterson v. Morgan Stanley, No. 16-cv-6568 (S.D.N.Y. Feb. 9, 2017) (filing of motion to dismiss); Bowers v. BB&T Corp., No. 15-cv-732 (M.D.N.C. Feb. 7, 2017) (filing of motion to dismiss); Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. Oct. 13, 2016) (order granting in part and denying in part motion to dismiss); Urakhchin v. Allianz Asset Mgmt. of Am., L.P., No. 15-cv-1614 (C.D. Cal. Aug. 5, 2016) (order granting in part and denying in part motion to dismiss).

[109] Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. Mar. 3, 2017) (order denying motions for summary judgment); Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. Mar. 30, 2017) (order ruling in defendants' favor on prohibited transactions claims).

[110] Krueger v. Ameriprise Fin., Inc., No. 11-cv-2781 (D. Minn. July 13, 2015) (final settlement); Gordan v. Mass Mutual Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) (final settlement); Bilewicz v FMR LLC, No. 13-cv-10636 (D. Mass. Oct. 16, 2014) (final settlement).

[111] Fuller v. SunTrust Banks, Inc., No. 11-cv-784 (N.D. Ga. filed Mar. 11, 2011) (order granting motion for summary judgment).

[112] Fuller v. SunTrust Banks, Inc., 744 F.3d 685 (11th Cir. Feb. 26, 2014).

[113] Stargel v. SunTrust Banks, Inc., 791 F.3d 1309, 1311 (11th Cir. June 30, 2015), *citing* Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828-29 (2015).

[114] In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., No. 11-cv-784 (N.D. Ga. May 19, 2016) (filing of first amended consolidated complaint).

[115] McCaffree Fin. Corp. v. Principal Life Ins. Co., 65 F. Supp. 3d 653 (S.D. Iowa Dec. 10, 2014) (order granting motion to dismiss), *aff'd*, 811 F.3d 998 (8th Cir. Jan. 8, 2016), *reh'g en banc denied*, No. 15-1007 (8th Cir. Feb. 17, 2016).

[116] Krikorian v. Great-West Life & Annuity Ins. Co., No. 16-cv-94 (D. Colo. filed Jan. 14, 2016); Rosen v. Prudential Ret. Ins & Annuity Co, No. 15-cv-1839 (D. Conn. filed Dec. 18, 2015); Walker v. Merrill Lynch & Co. Inc., No. 15-cv-1959 (S.D.N.Y. filed Mar. 16, 2015).

[117] Krikorian v. Great-West Life & Annuity Ins. Co., No. 16-cv-94 (D. Colo. Dec. 30, 2016) (filing of motion for summary judgment).

[118] Rosen v. Prudential Ret. Ins. & Annuity Co, No. 15-cv-1839 (D. Conn. Nov. 30, 2016) (order granting motions to dismiss).

[119] Walker v. Merrill Lynch & Co. Inc., No. 15-cv-1959 (S.D.N.Y. Mar. 31, 2017) (order granting motions to dismiss).

[120] Tibble v. Edison Int'l, 135 S. Ct. 1823 (May 18, 2015).

[121] Ellis v. Fidelity Mgmt. Trust Co., No. 15-cv-14128 (D. Mass. filed Dec. 11, 2015).

[122] Ellis v. Fidelity Mgmt. Trust Co., No. 15-cv-14128 (D. Mass. Apr. 7, 2016) (order denying motion to dismiss).

[123] Ellis v. Fidelity Mgmt. Trust Co., No. 15-cv-14128 (D. Mass. Feb. 17, 2017) (filing of defendant's motion for summary judgment).

[124] Tussey v. ABB Inc., No. 06-cv-4305, 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012).

[125] Tussey v. ABB Inc., 746 F.3d 327 (8th Cir. 2014).

[126] Brown v. Fidelity Mgmt. & Research Co., No. 13-cv-11011 (D. Mass. filed Apr. 25, 2013); Columbia Air Servs. Inc. v. Fidelity Mgmt. Tr. Co., No. 13-cv-10570 (D. Mass. filed Mar. 11, 2013); Boudreau v. Fidelity Mgmt. & Trust Co., No. 13-cv-10524 (D. Mass. filed Mar. 7, 2013); Kelley v. Fidelity Mgmt. & Trust Co., No. 13-cv-10222 (D. Mass. filed Feb. 5, 2013). The cases were consolidated as In re Fidelity ERISA Float Litig., No. 13-cv-10222 (D. Mass. Mar. 11, 2015) (order granting motion to dismiss in the consolidated lawsuits).

[127] In re Fidelity ERISA Float Litig., No. 15-1445 (1st Cir. Jul. 13, 2016) (opinion and order dismissing case).

[128] *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); Weisfelner v. Fund 1, No. 10-ap-4609 (Bankr. S.D.N.Y. filed Dec. 1, 2010) & Weisfelner v. Hofmann, No. 10-ap-5525 (Bankr. S.D.N.Y. filed Dec. 23, 2010) (both adversarial proceedings in In re Lyondell Chem. Co., No. 09-bk-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009)); Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., No. 09-504 (Bankr. S.D.N.Y filed July 31, 2009).

[129] In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310, No. 11-md-2296 (S.D.N.Y. Sept. 23, 2013).

[130] 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), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317).

[131] In re Tribune Co. Fraudulent Conveyance Litig., 2017 U.S. Dist. LEXIS 3039, No. 11-md-2296 (S.D.N.Y. Jan. 6, 2017).

[132] In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. Feb. 28, 2017) (order stating that, while an interlocutory appeal of the court's Jan. 6, 2017 order was appropriate, the district court would delay certifying the earlier order until the remaining motions to dismiss have been resolved).

[133] Weisfelner v. Fund 1, 503 B.R. 348, No. 10-ap-4609 (Bankr. S.D.N.Y. Jan. 14, 2014).

[134] Weisfelner v. Fund 1, No. 10-ap-4609 (Bankr. S.D.N.Y. filed Dec. 1, 2010) (amended complaint filed on Apr. 18, 2014; motion to dismiss filed on Aug. 1, 2014; oral argument held on Jan. 15, 2015).

[135] Weisfelner v. Fund 1, 541 B.R. 172, No. 10-ap-4609 (Bankr. S.D.N.Y. Nov. 18, 2015) (decision on motions to dismiss amended intentional fraudulent conveyance claims).

[136] Weisfelner v. Fund 1, 554 B.R. 655, No. 10-ap-4609 (Bankr. S.D.N.Y. July 20, 2016) (bankruptcy court's recommendation that the district court dismiss the matter). To date, the district court has not ruled on the bankruptcy court's recommendation.

[137] Weisfelner v. Hofmann (In re Lyondell Chem. Co.), 554 B.R. 635 (S.D.N.Y. July 27, 2016), *motion for reconsideration denied*, 2016 U.S. Dist. LEXIS 138449 (S.D.N.Y. Oct. 5, 2016) (order denying motion for reconsideration and remanding the case for further proceedings).

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

[139] Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., 486 B.R. 596, No. 09-ap-504 (Bankr. S.D.N.Y. Mar. 1, 2013) (motion granting summary judgment).

[140] 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).

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

[142] Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., 553 B.R. 253, No. 09-ap-504 (Bankr. S.D.N.Y. June 30, 2016) (order denying dispositive motions).

[143] Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. July 14, 2016) (filing of motion for leave to appeal).

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