Claims Trends

A Review of Claims Activity in the Mutual Fund Industry (January 2017-March 2018)

ICIMutual

Table of Contents

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
MSRB	Municipal Securities Rulemaking Board
OCIE	Office of Compliance Inspections and Examinations of the SEC
PSLRA	Private Securities Litigation Reform Act of 1995
SEC	U.S. Securities and Exchange Commission
SLUSA	Securities Litigation Uniform Standards Act of 1998

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

Introduction

ICI Mutual's annual *Claims Trends* reports on significant civil lawsuits, regulatory enforcement proceedings, and operational errors affecting the fund industry. This publication is designed to assist ICI Mutual's member-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*. 2017 saw a modest decrease in the overall number of claims submitted by ICI Mutual's insured fund groups under their directors and officers/errors and omissions (D&O/E&O) policies. Nonetheless, over the five-year period 2013-2017, over half of ICI Mutual's insured fund groups submitted at least one claim notice. This figure suggests that, in the current environment, claims frequency remains an issue for the fund industry.

Unlike frequency, the *severity* of new claims can be more difficult to assess, particularly for civil lawsuits and regulatory proceedings, where it may take years to establish the magnitude of losses (in the form of defense costs, settlements, and judgments). Even so, severity continues to be a concern for the fund industry, as illustrated by the number of new shareholder lawsuits initiated over the past five years relating to allegations of "excessive fees," as well as by recent monetary settlements in disclosure and state law-based lawsuits.

Recent years have also witnessed significant regulatory enforcement activity by the SEC. Over the past fifteen months, with the new presidential administration and related appointments, the SEC has experienced extensive changes in its leadership. While the full impact of these changes on future SEC enforcement activity remains to be seen, it appears likely that the SEC will continue its active enforcement of the federal securities laws in the asset management area.

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

Note

This *Claims Trends* is current through March 31, 2018. For more recent information on the matters discussed herein, please refer to ICI Mutual's online *Litigation Notebook* (available at http://www.icimutual.com/litigation/notebook.php). The *Litigation Notebook* provides basic public information about recent lawsuits and regulatory proceedings involving funds, fund directors and officers, and fund advisers; free access to significant documents filed in those matters; and, to the extent applicable and available, additional public information about the matters, including procedural history and links to relevant federal or state docket sheets or to the relevant regulators' websites.

Fees

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

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 lawsuits to enforce this duty.[1]

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. Indeed, in the years since *Jones*, the plaintiffs' bar has initiated twenty-eight

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

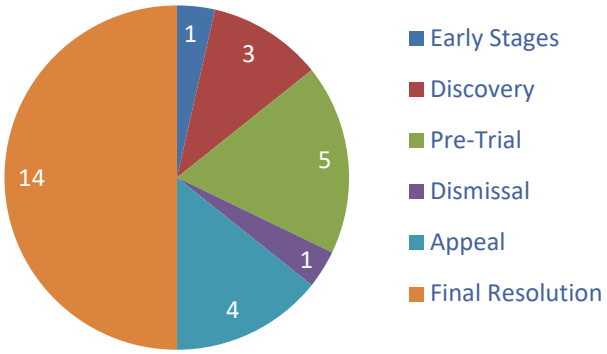
(Cases in **blue** were active as of March 31, 2018)

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), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 2013 U.S. Dist. LEXIS 103404 (July 24, 2013), *aff'd*, 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (2015) • **Southworth v. Hartford Inv. Fin. Serv., LLC**, No. 10-cv-878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011)
2011	• **Kasilag v. Hartford Inv. Fin. Serv., LLC**, No. 11-cv-1083 (D.N.J. filed Feb. 25, 2011), *dismissed*, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *appeal docketed*, No. 17-1653 (3d Cir. filed Mar. 23, 2017) • **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 (3d 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*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015) • **Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp.**, No. 13-cv-1601 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, (S.D. Iowa Feb. 8, 2016), *aff'd*, 864 F.3d 859 (8th Cir. 2017) • **In re Voya Global Real Estate Fund S'holder Litig.**, No. 13-cv-1521 (D. Del. filed Aug. 30, 2013), *closed per stipulation* (Oct. 19, 2017) • **In re Russell Inv. Co. S'holder Litig.**, No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013), *closed per order of closure* (Feb. 28, 2017) • **Curd v. SEI Invs. Mgmt. Corp.**, No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013), *closed per stipulation* (Nov. 21, 2016)
2014	• **Zehrer v. Harbor Capital Advisors, Inc.**, No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 40718 (N.D. Ill. Mar. 13, 2018) • **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014) • **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 14-cv-414 (S.D. Ohio filed May 5, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018), *appeal docketed*, No. 18-3239 (6th Cir. filed Mar. 15, 2018) • **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 14-cv-585 (D. Del. filed May 7, 2014), *closed per stipulation* (Aug. 8, 2017) • **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014) • **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), *closed per stipulation* (Oct. 17, 2017)
2016	• **Obeslo v. Great-West Capital Mgmt., LLC**, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016) • **Paskowitz v. Prospect Capital Mgmt., L.P.**, No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016), *dismissed*, 232 F. Supp. 3d 498 (S.D.N.Y. 2017), *appeal docketed*, No. 17-510 (2d Cir. filed Feb. 21, 2017), *closed per stipulation* (May 5, 2017) • **Zoidis v. T. Rowe Price Assocs., Inc.**, No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016) • **Karp v. Harris Assocs., L.P.**, No. 16-cv-8216 (N.D. Ill. filed Aug. 19, 2016), *closed per stipulation* (Nov. 28, 2016)
2017	• **Pirundini v. J.P. Morgan Inv. Mgmt. Inc.**, No. 17-cv-3070 (S.D.N.Y. filed Apr. 27, 2017), *dismissed*, 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018), *appeal docketed*, No. 18-733 (2d Cir. filed Mar. 16, 2018)

new section 36(b) lawsuits, including one filed in 2017, involving a total of twenty-four fund groups. Twenty-three of these twenty-eight lawsuits have been initiated since January 2013.[3]

2017 and early 2018 witnessed positive developments in the fund industry's ongoing defense efforts in this area (see box, below). Yet, as of the date of this *Claims Trends*, fourteen of the twenty-eight lawsuits remain active in various stages of the litigation process.[4] (See chart, right.) It remains too early to predict when or how these active post-*Jones* lawsuits will finally be resolved.

Procedural Status of Post-*Jones* Section 36(b) Lawsuits



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

The post-*Jones* section 36(b) lawsuits can largely be divided into two basic categories, both of which focus on disparities between fees paid to advisers and subadvisers. The first category, sometimes referred to as "**manager-of-managers**" lawsuits, focuses on the alleged disparities between fees charged by advisers and fees paid to unaffiliated subadvisers. The second category, sometimes referred to as "**subadvisory**" lawsuits, focuses on alleged disparities between fees charged by advisers for managing their *affiliated* funds and the lesser fees charged by those advisers in their roles as subadvisers to *unaffiliated funds*. In a third category (discussed in "Other Lawsuits" below) are a small number of lawsuits that rely on different theories in seeking to establish that the fees at issue are excessive.

Recent Positive Developments in Post-*Jones* Lawsuits

Federal district courts have recently issued judgments on the merits in favor of the defendants in three post-*Jones* lawsuits—one following a trial, and two on motions for summary judgment.

In February 2017, in *Kasilag v. Hartford Investment Financial Services, LLC* (the second post-*Jones* lawsuit to have proceeded through trial), a federal district court granted judgment to the defendant adviser.[5] This judgment, and the 2016 judgment in favor of the defendant adviser following trial in *Sivolella v. AXA Equitable Life Insurance Company*, both remain on appeal to the Third Circuit. Notably, the Third Circuit has determined to dispense with oral argument in these appeals.[6]

In March 2018, in *Goodman v. J.P. Morgan Investment Management, Inc.*, a federal district court granted the defendants' motion for summary judgment. A few days later, the plaintiffs filed a notice of appeal in the Sixth Circuit.[7] (In February 2018, the same fund group prevailed on the merits in a motion to dismiss in a separate section 36(b) lawsuit.[8]) Also in March 2018, the defendant's motion for summary judgment was granted in *Zehrer v. Harbor Capital Advisors, Inc.*; to date, no appeal has been filed.[9]

These developments give grounds for cautious optimism as to future results in the remaining post-*Jones* section 36(b) lawsuits still in the pre-trial stage of the litigation process.

"Manager-of-Managers" Lawsuits: Of the twenty-eight post-*Jones* section 36(b) lawsuits, fourteen are "manager-of-managers" lawsuits. As described below, three of these lawsuits currently remain in the pre-trial stage of the litigation process, three have been resolved by district courts in favor of the defendants but have been (or may be) appealed, and eight have reached final resolutions either by stipulation of the parties or by court order.

- *Lawsuits in the Pre-Trial Stage:* Three manager-of-managers lawsuits remain in the pre-trial stage. In one, the defendant's motion to dismiss remains pending.[10] (A motion to dismiss is a motion in the early stage of the litigation process in which defendants challenge the adequacy of plaintiffs'

allegations on purely legal grounds). A second lawsuit is in the discovery (fact-finding) stage, following a district court's denial of the defendant's motion to dismiss.[11] In a third lawsuit, the defendants' motion for summary judgment remains pending.[12] (A motion for summary judgment is a motion in the later stage of the litigation process in which either party may seek to obtain a favorable judgment prior to trial.)

- *Lawsuits That Have Been (Or May Be) Appealed:* Three manager-of-manager lawsuits have been resolved by district courts in favor of the defendants, but the decisions have been (or may be) appealed. In one, the defendants' motion for summary judgment was granted in March 2018; the time for an appeal has not yet run.[13] (See box, page 3.)

  In two other lawsuits, following trials, district courts granted judgments (in August 2016 and February 2017, respectively) in favor of the defendants. In both cases, plaintiffs have appealed the judgments to the Third Circuit, where the appeals remain pending. (See box, page 3.)

- *Lawsuits That Have Reached Final Resolutions:* Eight manager-of-manager lawsuits have reached final resolutions, either by stipulation of the parties or by court order.[14] Notably, in two of these, the parties publicly stipulated that the resolutions were not the result of a settlement or compromise or the "payment of any consideration" by the defendants to the plaintiffs.[15]

"Subadvisory" Lawsuits: Of the twenty-eight post-*Jones* lawsuits, ten are subadvisory suits. As described below, five of these lawsuits currently remain in the pre-trial stage, two have been resolved by district courts in favor of the defendants but have been appealed, and three have reached final resolutions by stipulation of the parties.

- *Lawsuits in the Pre-Trial Stage:* Five subadvisory lawsuits remain in the pre-trial stage. In one, the defendants' motion to dismiss was denied in March 2017.[16] This lawsuit, along with a second lawsuit in which the motion to dismiss had been denied in 2015,[17] are currently in discovery. In two other subadvisory lawsuits, motions for summary judgment have been filed and remain pending.[18] In a fifth lawsuit, the court denied the defendants' motion for summary judgment;[19] a trial is currently scheduled for September 2018.

- *Lawsuits That Have Been Appealed:* Two subadvisory lawsuits have been resolved by district courts in favor of the defendants, but the decisions have been appealed. In one, the defendant's June 2017 motion to dismiss was granted in February 2018, and the plaintiff thereafter appealed the district court's dismissal to the Second Circuit.[20] In a second lawsuit against the same fund group, the defendants' motion for summary judgment was granted in March 2018; the plaintiffs filed an appeal to the Sixth Circuit a few days later.[21] Both appeals remain pending. (See box, page 3.)

- *Lawsuits That Have Reached Final Resolutions:* Three subadvisory lawsuits have reached final resolutions by stipulation of the parties.[22] In one of these, the parties publicly stipulated that the resolution was not the result of a settlement or compromise or the "payment of any consideration" by the defendant to the plaintiffs.[23]

Other Lawsuits: Four of the twenty-eight post-*Jones* section 36(b) lawsuits cannot readily be characterized exclusively as either "manager-of-managers" or "subadvisory" lawsuits. As described below, one of these lawsuits remains in the pre-trial stage, and three have reached final resolutions.

- *Lawsuits in the Pre-Trial Stage:* One lawsuit in this category remains in the pre-trial stage. This lawsuit alleges that the adviser's fees charged to an affiliated fund are higher than those charged by the adviser to its institutional clients, and adds an allegation that the adviser's fees are higher than those it charged to its similarly managed exchange-traded fund (ETF). The defendants' motion for summary judgment and the plaintiff's motion for partial summary judgment, both filed in March 2018, remain pending.[24]

- *Lawsuits That Have Reached Final Resolutions:* Three lawsuits in this category have reached final resolutions. One lawsuit involved the fees charged by the adviser and administrator of a business development company (BDC), 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.[25] In May 2017, the Second Circuit approved the parties' stipulation to withdraw the appeal, thus bringing the lawsuit to a close.[26]

  In a second lawsuit, plaintiffs challenged the "split" between securities lending revenue paid to an ETF's adviser and its affiliate (which provided the securities lending services), a theory not shared by any other section 36(b) lawsuit. This lawsuit was dismissed by the district court in August 2013; the decision was affirmed by the Sixth Circuit in September 2014; and the U.S. Supreme Court denied a petition for certiorari in March 2015.[27] A third post-*Jones* section 36(b) lawsuit, which involved a traditional challenge to advisory fees charged to certain mutual funds, was resolved in 2012 by stipulation of the parties.[28]

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 the "ERISA" section below. As discussed in past *Claims Trends,* the fund industry has also from time to time seen fee challenges in derivative claims brought under state law.

Disclosure

"Prospectus liability" lawsuits—i.e., shareholder class action lawsuits brought under the '33 Act that allege misrepresentations or omissions in fund disclosure documents—have long been a source of significant potential liability for funds and their directors, officers, advisers, and principal underwriters.[29] As discussed below, several new prospectus liability lawsuits have been filed over the past several years against fund industry defendants.

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

Prospectus Liability Lawsuits

The fund industry's historical claims experience evidences that prospectus liability lawsuits sometimes arise from discrete issues affecting individual fund groups. Other times, such lawsuits are initiated in the wake of disruptions affecting certain industry sectors or the broader market. Lawsuits of both types are discussed below.

2015-2018 PROSPECTUS LIABILITY LAWSUITS

2015-2018 has witnessed new prospectus liability lawsuits arising from discrete and individualized issues involving four fund groups, as follows:

- *Alleged Use of Improper Performance Data:* In litigation 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 purported use of improper performance data in the public filings and marketing materials for the registered investment company. In July 2016, the federal district court granted in part and denied in part the defendants' motion to dismiss.[30] In December 2017, the parties filed a stipulation of voluntary dismissal with prejudice, thereby terminating the lawsuit.[31]

- *Alleged Improper Concentration in Illiquid Securities:* Following the suspension of redemptions by a high-yield bond fund in December 2015, prospectus liability lawsuits were filed that generally named 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 alleged that the fund failed to maintain an adequate level of liquidity to permit the fund to satisfy redemption requests.[32]

  Following consolidation of the actions in May 2016,[33] the parties filed a motion for preliminary approval of a settlement in March 2017,[34] which was approved in July 2017.[35] (Similar underlying facts were alleged in two lawsuits brought in state court against the same defendants.[36] These state court lawsuits were consolidated in September 2016, and the court approved the parties' proposed settlement in June 2017.[37] These lawsuits are also discussed in "Litigation Under State Law," below.)

- *Investments Alleged to be Inconsistent with Investment Objective:* In April 2017, plaintiffs filed a prospectus liability lawsuit against a newly registered fund (which had previously been a private fund), its investment adviser and distributor, and its trustees (including independent trustees) and certain officers, alleging that the adviser continued to manage the fund as a hedge fund by investing the fund's assets in complex derivatives that were inconsistent with the fund's investment objective of "capital preservation."[38] The lawsuit remains in the early stages of the litigation process.

- *Investments Alleged to be Inconsistent with Investment Objectives:* In February 2018, following market volatility that caused a mutual fund to lose a large percentage of its value, a plaintiff filed a prospectus liability lawsuit against the fund, its advisers, and its trustees (including independent trustees) and certain officers, alleging that the defendants caused the fund to make large investments in option spreads that were inconsistent with the fund's investment objectives of "capital appreciation and capital preservation with low correlation to the broader U.S. equity market."[39] Later the same month and early in March 2018, two additional lawsuits with substantially similar allegations were filed against the same parties.[40] The lawsuits remain in the early stages of the litigation process.

SUBPRIME/CREDIT CRISIS-RELATED LAWSUITS

As discussed in prior *Claims Trends,* in 2007-2009, eleven 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. All of these subprime/credit

crisis-related prospectus liability lawsuits have now effectively been concluded, with a number having involved multimillion dollar settlements. In one of the longest-running of these lawsuits, in November 2017, the district court granted final approval of a settlement.[41] Settlement amounts approved by the courts in these prospectus liability lawsuits from the subprime/credit crisis period have collectively totaled over $700 million.[42]

Other Disclosure-Based Litigation

Previous *Claims Trends* have reported on fund shareholders' challenges to disclosure in class action "securities fraud" lawsuits brought under the '34 Act. Because these lawsuits typically are subject to various legal requirements that can be difficult for shareholders to satisfy in the mutual fund context,[43] 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 against a fund, its directors (including independent directors), officers, investment adviser, subadviser, and distributor in a class action lawsuit filed in May 2015 in connection with the alleged use of improper performance data in the public filings and marketing materials for the registered investment company.[44] This lawsuit came to a close in December 2017 when the parties filed a stipulation of dismissal.[45] Certain of the same defendants were also named in a separate 2015 lawsuit that alleged only '34 Act violations. In that lawsuit, defendants filed a motion for summary judgment in October 2017, which remains pending.[46]

In addition, in December 2017 and January 2018, two class action lawsuits alleging '34 Act violations were filed against a business development company and two of its officers, in connection with the BDC's public communications with respect to its portfolio management team. More specifically, the complaints allege that the BDC failed to disclose, among other things, the departure of several key portfolio managers, thereby misleading investors who purchased or held shares of the BDC.[47] These lawsuits remain in their early stages.

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

Recent U.S. Supreme Court Decision on Securities Class Actions in State Courts

In 1998, in response to perceived abuses of the class action vehicle in securities litigation, Congress enacted SLUSA, which, among other things, prohibits the filing of certain securities class action lawsuits based on state law in state or federal courts. In 2018, in a case arising outside the mutual fund industry, the U.S. Supreme Court addressed the question of whether SLUSA precludes plaintiffs from filing securities class action lawsuits under federal law in state courts. In its March 2018 opinion, the Supreme Court unanimously held that SLUSA does not strip state courts of jurisdiction over class actions alleging '33 Act violations (i.e., state courts and federal courts have concurrent jurisdiction over such federal law class actions), and that SLUSA does not permit defendants to remove such federal law class actions from state court to federal court. The Court noted, however, that "sizable class actions that are founded on state law and allege dishonest practices respecting a nationally traded security's purchase or sale" are barred by SLUSA and may be removed to federal court and dismissed.[48]

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 such state law-based actions filed in 2016 and 2017.

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. A motion to dismiss the action, filed in June 2016, was granted in February 2017.[49] An appeal of this decision, filed in March 2017, came to a close in December 2017 when the plaintiffs voluntarily discontinued the lawsuit.[50]

Another previously reported derivative lawsuit, originally filed in New York state court in January 2016, followed the suspension of redemptions by a high-yield bond fund in December 2015.[51] (This event also gave rise to disclosure-based litigation, discussed under "Disclosure," above.) This derivative lawsuit alleged that the high-yield fund's investment adviser and certain officers (one of whom is also an interested director) committed breaches of fiduciary duty and/or breaches of contract by failing to ensure that the fund had sufficient liquidity in its portfolio to meet redemption requests from fund shareholders. In June 2017, following the lawsuit's removal to federal court, the plaintiff voluntarily dismissed the lawsuit with prejudice.[52]

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/or breaches of contract with respect to the funds' alleged investments in a start-up company.[53] This federal court lawsuit was voluntarily dismissed in February 2016 and was then re-filed in Kansas state court in April 2016.[54] The defendants' motions to dismiss were denied in November 2016, and an amended complaint was filed shortly thereafter.[55] In January 2017, the Kansas Supreme Court denied the defendants' petition for a writ of mandamus with respect to the denial of the defendants' motions to dismiss.[56]

Motions to dismiss the amended complaint, filed in January 2017, were granted in part and denied in part in April 2017.[57] In February 2018, the parties

Update on Pending Ninth Circuit Appeals in Securities Lawsuits

Previous *Claims Trends* have reported on a controversial 2015 Ninth Circuit decision that, broadly stated, permitted fund shareholders (1) to bring direct class action claims for breaches of fiduciary duty, (2) to enforce a fund prospectus' terms through state law claims for breach of contract, and (3) to sue an investment adviser directly in their capacity as third-party beneficiaries of the management contract between the adviser and the fund.[58] At the time, some industry observers viewed the appellate court's decision as thus having 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. This lawsuit is now back on appeal before the Ninth Circuit, following a lower court decision in favor of the defendants.[59]

Shortly after the Ninth Circuit issued its original 2015 decision, the complaint in a separate lawsuit involving a different fund group was amended to assert similar state law-based legal theories of recovery. In September 2017, the lower court dismissed the lawsuit without prejudice.[60]

To date, concerns that the 2015 Ninth Circuit decision would lead to a wave of state law-based claims against fund groups have not been realized. To the contrary, except as discussed above, it appears that no additional lawsuits seeking to capitalize on the Ninth Circuit's 2015 decision have been filed.

filed a stipulation of dismissal with prejudice with respect to the independent trustees, and also filed a joint motion for preliminary approval of a settlement involving one fund's investment adviser and an interested trustee.[61] A hearing on this motion is scheduled for April 2018.

In June 2016, plaintiffs filed a class action complaint in California state court against several ETFs, their adviser and distributor, and certain officers and trustees (including independent trustees), alleging that the defendants failed to advise investors of the risks associated with stop-loss orders, particularly under certain market conditions.[62] In September 2017, the court dismissed the lawsuit, determining that the plaintiffs in the lawsuit lacked standing.[63] The plaintiffs appealed the decision to the state appellate court in December 2017.[64] The appeal remains pending.

Regulatory Enforcement

In fiscal year 2017, the SEC continued to pursue an aggressive enforcement agenda, bringing a total of 446 enforcement actions, including a significant number of actions in the asset management area.[65]

Meanwhile, leadership changes continued at the SEC (see box, right). These changes may, over time, lead to a shift in the SEC's enforcement priorities, with potentially significant implications for SEC enforcement activity both in general and in the asset management area specifically.[66] Some observers have already commented on potential changes in the SEC's enforcement priorities, approach, and tone.[67]

Meanwhile, the SEC staff has promised continued "vigorous enforcement of the federal securities laws."[68] According to the Division of Enforcement's 2017 Annual Report, these enforcement efforts will be guided going forward by five core principles: (1) a focus on retail investors, (2) a focus on individual accountability, (3) keeping pace with technological changes, (4) imposing sanctions that most effectively further enforcement goals, and (5) constantly assessing how the staff's resources are being allocated.[69]

SEC Enforcement Actions

The Division of Enforcement reported that in fiscal year 2017, a total of 82 proceedings, or 18% of proceedings overall, directly involved investment advisers or investment companies. While the number of proceedings in the asset management area declined year-over-year on an absolute basis, the percentage of actions in this area remained unchanged.[70] As in prior years, enforcement actions against entities outside the registered investment company space (e.g., unregistered funds and their advisers) outnumbered those within the registered fund space.

Administrative proceedings initiated or resolved by the SEC in 2017 and early 2018 against advisers of registered funds, advisory personnel, and/or fund officers involved a number of different issues,

Leadership Changes at the SEC

Following President Trump's election and the change in administration, the SEC has undergone significant changes in its leadership, including a new chair (Walter J. Clayton) and two new commissioners (Robert Jackson and Hester Peirce). With the confirmation of Mr. Jackson and Ms. Peirce in January 2018, the SEC has a full complement of five commissioners for the first time since 2015. The SEC also has a number of new division directors, including the Director of the Division of Investment Management (Dalia Blass); the Co-Directors of the Division of Enforcement (Stephanie Avakian and Steven Peikin); and the Director of OCIE (Peter Driscoll).

The Constitutionality of SEC Administrative Law Judges

Over the years, the SEC has frequently brought enforcement actions before administrative law judges (ALJs) as an alternative to bringing the actions in federal district courts. Critics have contended that the use of an administrative forum deprives respondents of their rights to full discovery and evidentiary protections that are available in federal district courts.[71]

Two recent lawsuits have challenged the constitutionality of the ALJs themselves, contending that ALJs are "inferior officers" under the "Appointments Clause" of the U.S. Constitution and must be appointed by the President, a court of law, or a department head. In these two lawsuits, the D.C. Circuit and the Tenth Circuit have arrived at different conclusions.[72] In January 2018, the U.S. Supreme Court agreed to review this issue. To date, no oral argument has been scheduled in the case, and the matter remains pending.[73]

including the use of fund assets to finance distribution of mutual fund shares,[74] valuation,[75] misleading disclosures about fund investments,[76] sale of ETF shares without obtaining an exemptive order,[77] undisclosed conflicts of interest with respect to securities lending arrangements,[78] fraudulent use of fund assets,[79] and a fraudulent trading scheme in connection with options transactions.[80]

SEC administrative proceedings were also initiated or resolved against fund advisers and/or advisory personnel with respect to their *non*-registered fund activities. They included proceedings involving misleading disclosure regarding private fund investments,[81] use of unverified performance calculations,[82] failure to disclose fees,[83] failure to disclose conflicts of interest,[84] calculation of advisory fees,[85] and the failure to establish, maintain, and enforce policies and procedures to prevent misuse of material, non-public information.[86]

SEC Examination Priorities

SEC publications, as well as speeches and public statements from the chair, commissioners, and staff, often indicate future areas of potential enforcement risk. The SEC annually communicates its examination priorities through the publication of OCIE's National Exam Program Examination Priorities. In its Examination Priorities for 2018, OCIE stated that its priorities were organized around five themes: (1) retail investors, (2) critical market infrastructure, (3) FINRA and the MSRB, (4) cybersecurity, and (5) anti-money laundering programs.[87]

Of particular relevance to the asset management industry, OCIE indicated a going-forward focus on electronic investment advice, never-before examined investment advisers, ETFs, cryptocurrency and initial coin offerings, and cybersecurity.[88]

OCIE also issues periodic risk alerts that provide information about its examination findings and priorities. In 2017, OCIE's risk alerts covered various topics, including the "top five" investment adviser compliance topics,[89] cybersecurity with a focus on ransomware,[90] observations on cybersecurity practices identified during OCIE examinations,[91] and advertising rule compliance issues.[92]

Also of note, in September 2017, the SEC announced the creation of a Cyber Unit in the Division of Enforcement to focus on cyber-related misconduct, such as violations involving distributed

Statute of Limitations for SEC Actions

Historically, the SEC has often sought "disgorgement" in enforcement actions. In 2013, the U.S. Supreme Court held that a five-year statute of limitations, running from the time of the misconduct at issue, applies to SEC enforcement actions seeking civil penalties in the form of fines, penalties, and forfeiture.[93]

In 2017, a U.S. Supreme Court decision held that SEC disgorgement, as "a punitive, rather than a remedial, sanction," is also subject to a five-year statute of limitations.[94] Some observers have suggested that this decision could reduce the overall disgorgement amounts collected by the SEC, and might lead to the SEC filing enforcement actions more promptly and/or seeking tolling agreements earlier and more often in the enforcement process.[95]

ledger ("blockchain") technology and initial coin offerings, market manipulation schemes spread through social media communications, and hacking to obtain material nonpublic information.[96]

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.[97] Such whistleblowers are protected by Dodd-Frank's anti-retaliation provision.[98] In a 2018 decision, the U.S. Supreme Court held that this anti-retaliation provision does not extend to individuals who do not report alleged securities law violations to the SEC (but only report internally).[99]

Other Regulators

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

FINRA, which conducts examinations of broker-dealers, has announced that its annual priorities for 2018 include investigating insider trading, business continuity planning, cybersecurity, liquidity risks, short sales, and initial coin offerings.[100]

The CFTC, which regulates the trading of commodities (including many futures and derivatives), has disclosed its 2018 priorities through, among other avenues, public statements. The CFTC's chair and other commissioners have discussed, among other topics, derivatives,[101] spoofing and manipulation of futures markets,[102] virtual currencies,[103] and the CFTC's partnership with the SEC with respect to unregulated initial coin offerings.[104]

Portfolio Management Errors

Since ICI Mutual's formation in 1987, a significant portion of all claim amounts paid by ICI Mutual has been for "costs of correction" claims—i.e., insurance claims by advisers or other service providers for payments made by them, outside the litigation context, to remedy operational errors that have resulted in losses to funds or private accounts. Generally, "costs of correction" insurance coverage permits an insured entity to be reimbursed for costs incurred to correct an operational error, provided that the insured entity has actual legal liability for the resulting loss.[105]

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, 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.[106] 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.

The following are examples of recent "costs of correction" claims received by ICI Mutual:

- As a result of errors by a mutual fund's investment adviser, the fund failed to participate in a rights offering involving certain bonds.
- As a result of errors by an ETF's fund accounting services provider, the net asset value per share of the ETF was understated over a several-month period.
- As a result of errors by an investment adviser, certain of its advised mutual funds and institutional accounts were unable to participate in an appraisal action.

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

Other Litigation Developments

In addition to the fee, disclosure, and state law-based lawsuits already discussed, 2017-2018 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.[107] The past several years have seen an increase in the frequency of ERISA-based lawsuits involving asset managers and/or their affiliates.

"PROPRIETARY FUNDS" LAWSUITS

Most notable among the recent ERISA-based 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. From 2011 to the present, the plaintiffs' bar has initiated at least twenty-nine such lawsuits, with all but four of these initiated over the past three years.[108]

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

As described below, sixteen of these lawsuits remain in the pre-trial stage of the litigation process; four have been dismissed (with two of the lawsuits on appeal); and nine have reached preliminary or final settlements, which have collectively totaled over $115 million.[109]

- *Lawsuits in the Pre-Trial Stage:* Sixteen lawsuits remain in the pre-trial stage of the litigation process. Eight

are currently in an early phase, with motions to dismiss either yet to be filed or pending before the federal district courts.[110]

In four other lawsuits, motions to dismiss have been denied, in whole or in part.[111] In three more lawsuits, the defendants' motions for summary judgment are pending.[112] Finally, in a long-running lawsuit first filed in March 2011, the plaintiffs filed a second amended complaint in December 2017 and a motion to certify the class in January 2018.[113] This lawsuit remains pending.

- *Lawsuits That Have Been Dismissed (With Two on Appeal):* Four lawsuits have been dismissed, but two of the dismissals have been appealed. In one, the defendants' motion to dismiss was granted in January 2018; the plaintiff voluntarily dismissed the lawsuit in February 2018.[114]

  In a second lawsuit, following a bench trial, the district court issued an order in favor of the defendants in June 2017.[115] (The district court had previously issued two orders in March 2017, the first denying the parties' motions for summary judgment and the second ruling in the defendants' favor with respect to certain claims.[116]) In July 2017, the plaintiffs filed an appeal of the district court's decision to the First Circuit.[117] The appeal remains pending.

  In a third lawsuit, a district court in May 2017 granted the defendants' motion to dismiss; in June 2017, the plaintiff/appellants filed an appeal with the Eighth Circuit.[118] The appeal remains pending. (In another lawsuit against many of the same defendants, a district court ordered a stay pending the outcome of the appeal in January 2018, and the plaintiffs voluntarily dismissed this lawsuit in February 2018.[119])

- *Lawsuits That Have Reached Preliminary or Final Settlements:* Nine lawsuits have reached preliminary or final settlements. In one lawsuit, a district court approved a preliminary settlement in February 2018.[120] Eight other lawsuits have reached final settlements, with the most recent being in February 2018.[121] As noted above, the settlements to date collectively total over $115 million.

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. 2017 and early 2018 saw developments in some of these lawsuits.

Four such fee-based ERISA lawsuits were filed between 2015 and 2017. Three of these lawsuits alleged that the plan sponsors/administrators and certain affiliated parties breached their fiduciary

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). 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.

duties to the third-party 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 offered by the plans.[122] In one lawsuit, a motion for summary judgment, filed in December 2016, was denied in September 2017.[123] In a second lawsuit, in October 2017, the Second Circuit affirmed a district court's grant of the defendants' motions to dismiss.[124] In a third lawsuit, the district court granted the defendants' motions to dismiss in March 2017.[125] All three lawsuits are now concluded.

In a fourth lawsuit filed in September 2017, plaintiffs allege that a third-party provider of recordkeeping and other services to 401(k) plans breached its fiduciary duties by charging unreasonable fees for its services.[126] This lawsuit remains in the early stages of the litigation process.

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 a 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."[127] On remand to the district court, this lawsuit was concluded in August 2017 when the district court judge ruled that the defendants breached their fiduciary duties by making retail shares available to participants in a 401(k) plan, instead of the otherwise identical but less expensive institutional shares.[128] No further appeal was filed.

As previously reported, a lawsuit citing the Supreme Court's decision was filed in late 2015, in which plaintiffs alleged that the plan trustee (a fund group entity) mismanaged third-party plan assets by allowing the assets to remain in a high-cost, low-performing collective investment trust.[129] In February 2017, the defendant filed a motion for summary judgment, which was granted in June 2017.[130] In February 2018, the First Circuit affirmed the district court's decision.[131]

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.[132] 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.

The *Lyondell* proceeding (now resolved) involved, and the *Tribune* proceeding (still pending) involves, "constructive fraudulent conveyance" and/or "intentional fraudulent conveyance" claims under state and/or federal law.

In *Lyondell*, the bankruptcy court dismissed the claims for federal law and state law intentional fraudulent conveyance in November 2015, but declined to dismiss the claims for state law constructive fraudulent conveyance.[133] In July 2016 in *Lyondell*, the bankruptcy court dismissed the state law constructive fraudulent conveyance claims.[134] Later in July 2016, the district court reversed the bankruptcy court's November 2015 dismissal of the federal law intentional fraudulent conveyance claim, and remanded the proceeding to the bankruptcy court.[135] In September 2017, the bankruptcy court issued an order dismissing the proceeding with prejudice.[136] No appeal of the bankruptcy court's order was filed. The matter appears to be concluded with respect to the funds involved.

In *Tribune*, a federal district court in September 2013 granted the defendants' motions to dismiss the state law constructive fraudulent conveyance claims (on standing grounds).[137] 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.[138] In January 2017, the federal district court dismissed the federal law intentional fraudulent conveyance claim.[139] To date, no appeal of that dismissal has been filed.[140]

In August 2017, the district court denied a request to amend the complaint to add a federal law constructive fraudulent conveyance claim, but suggested that such an amendment might be appropriate based on the outcome of a pending U.S. Supreme Court case.[141] In February 2018, the Supreme Court issued its decision in that case,[142] which involved the application of the "safe harbor" to financial institutions serving as conduits. It is not yet clear what impact the Supreme Court decision will have on the *Tribune* proceeding.

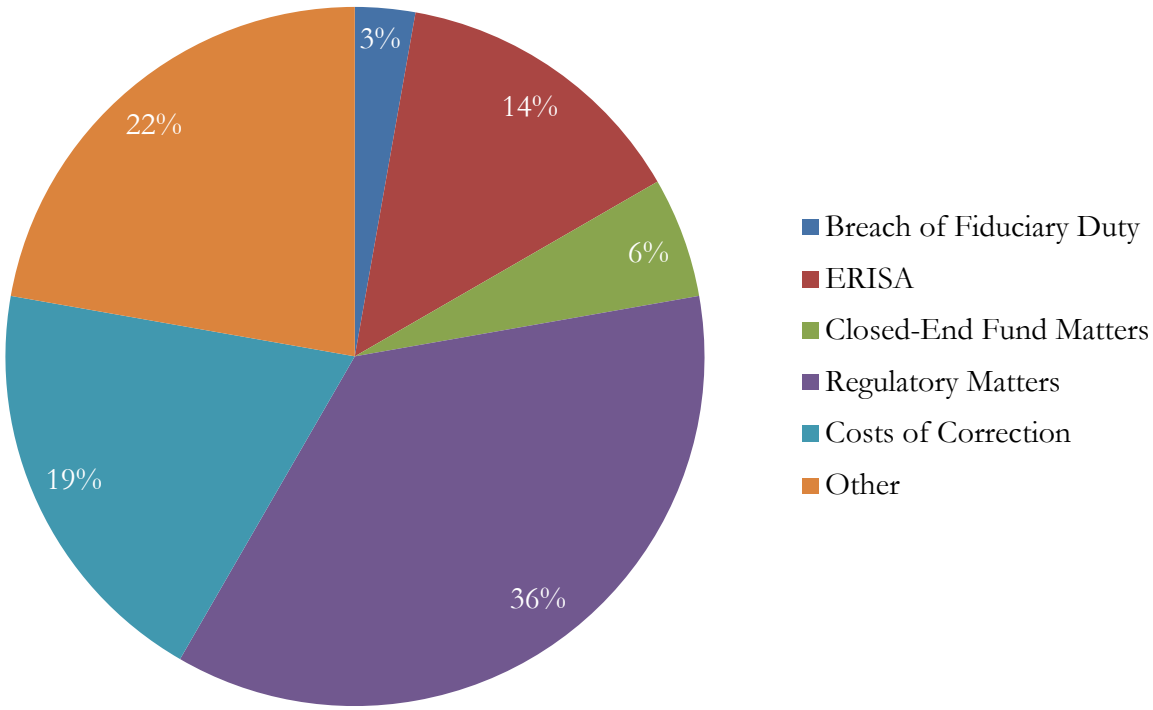
In the *General Motors* bankruptcy proceeding, various entities (including a number of mutual funds) held interests in a term loan secured by collateral subject to a security interest. Due to an apparent clerical error, the security interest in certain collateral for the term loan was inadvertently released by the administrator for the term loan.[143] 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.[144] 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.[145]

An amended complaint was filed in May 2015.[146] Various dispositive motions were denied by the bankruptcy court in June 2016.[147] In the interim, a trial to resolve certain disputed issues of fact regarding the identification and valuation of the remaining secured collateral took place in April 2017. In September 2017, the bankruptcy court issued an opinion regarding collateral valuation.[148] In October 2017, various parties filed motions to appeal the bankruptcy court's September valuation opinion.[149] The motions remain pending.

D&O/E&O Claims Data

D&O/E&O Notices by Subject – 2017

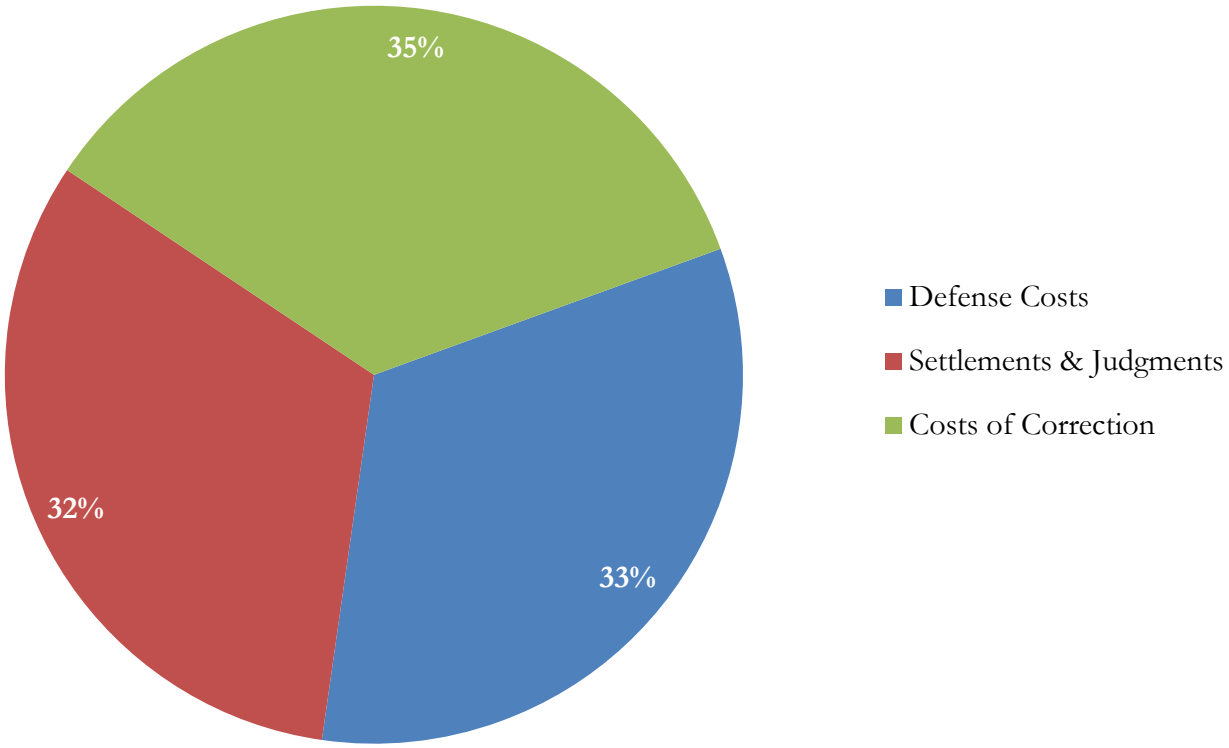
Regulatory matters and potential costs of correction matters constituted the most common subjects of claims notices provided under ICI Mutual D&O/E&O policies in 2017. As shown in the chart below, a substantial percentage of notices received (the "Other" category) does not fall neatly into any of the designated broader categories.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2008-2017)

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, 2008 through December 31, 2017 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 consolidated into other cases.

4 Fourteen 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*, 135 S. Ct. 1500 (2015); Santomenno v. John Hancock Life Ins. Co., 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (dismissed as to section 36(b)) & 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 (2015); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. Feb. 28, 2017) (closed by order of closure without prejudice); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (closed by stipulation); Karp v. Harris Assocs., L.P., No. 16-cv-8216 (N.D. Ill. Nov. 28, 2016) (closed by stipulation); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219 (E.D. Pa. Nov. 21, 2016) (closed by stipulation); Wayne 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); In re Voya Global Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. Oct. 19, 2017) (closed by stipulation); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, (S.D. Iowa Feb. 8, 2016), *aff'd*, 864 F.3d 859 (8th Cir. 2017); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (closed by stipulation); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 9, 2017) (closed by stipulation); Paskowitz v. Prospect Capital Mgmt., L.P., No. 17-510 (2d Cir. May 15, 2017) (closed by stipulation).

5 Kasilag v. Hartford Inv. Fin. Serv., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017) (order dismissing lawsuit), *appeal docketed*, No. 17-1653 (3d Cir. filed Mar. 23, 2017).

6 Sivolella v. AXA Equitable Life Ins. Co., No. 16-4241 (3d Cir. Jan. 11, 2018) (order advising counsel that the court had withdrawn its request for oral argument); Kasilag v. Hartford Inv. Fin. Servs., LLC, No. 17-1653 (3d Cir. Feb. 12, 2018) (order advising counsel that the case would be submitted on the briefs and that no argument would be conducted).

7 Goodman v. J.P. Morgan Inv. Mgmt., Inc., 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018) (order granting motion for summary judgment), *appeal docketed*, No. 18-3239 (6th Cir. filed Mar. 15, 2018).

8 Pirundini v. J.P. Morgan Inv. Mgmt. Inc., 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018) (order granting motion to dismiss), *appeal docketed*, No. 18-733 (2d Cir. filed Mar. 16, 2018).

9 Zehrer v. Harbor Capital Advisors, Inc., 2018 U.S. Dist. LEXIS 40718 (N.D. Ill. Mar. 13, 2018) (order granting motion for summary judgment).

10 Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. Oct. 11, 2017) (filing of motion to dismiss third amended complaint).

11 Ingenhutt v. State Farm Inv. Mgmt. Corp., 2017 U.S. Dist. LEXIS 58553 (C.D. Ill. Apr. 18, 2017) (order denying motion to dismiss).

[12] Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991 (D.N.J. filed Dec. 15, 2017) (filing of motion for summary judgment).

[13] Zehrer v. Harbor Capital Advisors, Inc., 2018 U.S. Dist. LEXIS 40718 (N.D. Ill. Mar. 13, 2018) (order granting motion for summary judgment).

[14] Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (S.D. Iowa Feb. 8, 2016), *aff'd*, 864 F.3d 859 (8th Cir. 2017); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. Feb. 28, 2017) (order for closure); 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); In re Voya Global Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. Oct. 19, 2017) (stipulation of dismissal with prejudice); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa filed Oct. 17, 2017) (stipulation of dismissal with prejudice); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011); 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), *aff'd*, 677 F.3d 178 (3d Cir. 2012) & 2013 U.S. Dist. LEXIS 103404 (July 24, 2013) (as to ERISA), *aff'd*, 768 F.3d 284 (3d Cir. 2014), *reh'g denied*, No. 13-3467 (3d Cir. Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (2015).

A case similar to *Santomenno v. John Hancock Life Ins. Co.* 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. In September 2016, the defendants made an interlocutory appeal to the 9th Circuit and the district court's proceedings were stayed pending the outcome of the appeal. Santomenno v. Transamerica Life Ins. Co., No. 16-56418 (9th Cir. filed Sept. 27, 2016). In February 2018, the 9th Circuit reversed the district court's denial of defendants' motion to dismiss, vacated the district court's grant of class certification, and remanded the case to the district court with instructions to grant defendants' motion to dismiss. Santomenno v. Transamerica Life Ins. Co., No. 16-56418 (9th Cir. Feb. 23, 2018).

[15] Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (closed by stipulation); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (closed by stipulation).

[16] Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2289 (N.D. Cal. Mar. 31, 2017) (order denying motion to dismiss).

[17] 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).

[18] In re BlackRock Mut. Funds Advisory Fee Litig., No. 14-cv-1165 (D.N.J. Sept. 25, 2017) (filing of motion for summary judgment); Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. Oct. 13, 2017) (filing of motion for summary judgment).

[19] Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. Sept. 27, 2017) (order denying motion for summary judgment).

[20] Pirundini v. J.P. Morgan Inv. Mgmt. Inc., 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018) (order granting motion to dismiss), *appeal docketed*, No. 18-733 (2d Cir. filed Mar. 16, 2018).

[21] Goodman v. J.P. Morgan Inv. Mgmt., Inc., 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018) (order granting motion for summary judgment), *appeal docketed*, No. 18-3239 (6th Cir. filed Mar. 15, 2018).

[22] 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); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 8, 2017) (closed by stipulation).

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

[24] Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Mar. 15, 2018) (filing of defendants' motion for summary judgment); Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Mar. 16, 2018) (filing of plaintiff's motion for partial summary judgment).

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

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

[27] 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*, 135 S. Ct. 1500 (2015).

[28] Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. filed Sept. 16, 2011), *closed per stipulation* (Aug. 23, 2012).

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

[30] Youngers v. Virtus Inv. Partners, Inc., 195 F. Supp. 3d 499 (S.D.N.Y. July 1, 2016) (order granting in part and denying in part the defendants' motion to dismiss the second amended complaint).

[31] Youngers v. Virtus Inv. Partners, Inc., No. 15-cv-8262 (S.D.N.Y. Dec. 27, 2017) (order approving stipulation of dismissal with prejudice).

[32] Bhat v. Third Ave. Mgmt. LLC, No. 16-cv-904 (C.D. Cal. filed Feb. 9, 2016); Matthews v. Third Ave. Mgmt. LLC, No. 16-cv-770 (C.D. Cal. filed Feb. 3, 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).

[33] 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).

[34] 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).

[35] In re Third Ave. Mgmt. LLC Secs. Litig., No. 16-cv-2758 (S.D.N.Y. July 12, 2017) (order approving $14.25 million settlement).

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

[37] In re Third Ave. Trust S'holder & Derivative Litig., No. 12184 (Del. Ch. Ct. June 22, 2017) (order approving $25 million settlement).

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

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

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

[41] In re Oppenheimer Rochester Funds Group Secs. Litig., No. 09-md-2063 (D. Colo. Nov. 6, 2017) (final settlement).

[42] *Id.*; In re Morgan Keegan Open-End Mut. Fund Litig., No. 07-cv-2784 (W.D. Tenn. Aug. 2, 2016) (final settlement); In re Oppenheimer Rochester Funds Group Secs. Litig., No. 09-md-2063 (D. Colo. July 28, 2014) (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 Morgan Keegan Closed-End Fund Litig., No. 07-cv-2830 (W.D. Tenn.

Aug. 5, 2013) (final settlement); In re Evergreen Ultra Short Opportunities Fund Secs. Litig., 2012 U.S. Dist. LEXIS 174711 (D. Mass. Dec. 10, 2012) (final settlement); Yu v. State St. Corp., No. 08-cv-8235 (S.D.N.Y. Sept. 6, 2012) (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); In re Charles Schwab Corp. Secs. Litig., 2011 U.S. Dist. LEXIS 44547 (N.D. Cal. Apr. 19, 2011) (final settlement); Gosselin v. First Trust Advisors L.P., 2009 U.S. Dist. LEXIS 117737 (N.D. Ill. Dec. 17, 2009) (final settlement).

[43] Under section 10(b) of the '34 Act and rule 10b-5 thereunder, one such requirement is that plaintiffs 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).

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

[45] Youngers v. Virtus Inv. Partners, Inc., No. 15-cv-8262 (S.D.N.Y. Dec. 27, 2017) (order approving stipulation of dismissal with prejudice).

[46] In re Virtus Inv. Partners, Inc. Secs. Litig., No. 15-cv-1249 (S.D.N.Y. Oct. 6, 2017) (filing of motion for summary judgment).

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

[48] Cyan, Inc. v. Beaver County Employees Ret. Fund, 200 L. Ed. 2d 332, 341 (U.S. Mar. 20, 2018).

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

[50] Epstein v. Ruane, Cunniff & Goldfarb, Inc., No. 650100-2016 (N.Y. Sup. Ct. Dec. 20, 2017) (stipulation of voluntary discontinuance).

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

[52] Engel v. Third Ave. Mgmt. Co., LLC, No. 16-cv-1118 (S.D.N.Y. June 27, 2017) (notice of voluntary dismissal).

[53] 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. Haymon, 2015 U.S. Dist. LEXIS 164676 (C.D. Cal. Oct. 16, 2015) (dismissal with prejudice); Golden Boy Promotions v. Haymon, No. 15-cv-3378 (C.D. Cal. June 29, 2015) (notice of dismissal).

[54] 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)).

[55] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Nov. 10, 2016) (order denying motions to dismiss); Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Dec. 1, 2016) (plaintiffs' filing of second amended verified petition).

[56] 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).

[57] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Apr. 27, 2017) (order granting in part and denying in part motions to dismiss second amended verified petition, and dismissing one investment adviser and certain trustees from the proceeding).

[58] Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036 (9th Cir. Mar. 9, 2015) (reversing the lower court's decision and remanding the case to the lower court).

[59] Northstar Fin. Advisors, Inc. v. Schwab Invs., 2016 U.S. Dist. LEXIS 22660 (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).

[60] This lawsuit was initially dismissed *with* prejudice; on appeal, the Ninth Circuit affirmed the lower court's decision in August 2017, but remanded the case on the issue of whether the lower court had appropriately dismissed the lawsuit with prejudice. Hampton v. PIMCO LLC, 869 F.3d 844 (2017) (affirming lower court decision, but vacating as to issue of dismissal with prejudice); Hampton v. PIMCO LLC, No. 15-cv-131 (C.D. Cal. Sept. 21, 2017) (amending earlier order and dismissing lawsuit *without* prejudice).

The fund group was also named in another lawsuit, filed in August 2017 by the same plaintiff, which lawsuit was dismissed without prejudice in October 2017. Hampton v. PIMCO LLC, No. 17-cv-1412 (C.D. Cal. Oct. 4, 2017) (order dismissing lawsuit without prejudice).

[61] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Feb. 22, 2018) (filing of joint motion for preliminary approval of $19.9 million settlement; filing of stipulation of dismissal with prejudice of independent trustees).

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

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

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

[65] While the number of enforcement actions declined from the record number in the SEC's 2016 fiscal year, the decline appears to be largely due to the conclusion of a temporary initiative that resulted in 84 actions in fiscal year 2016, and the types of actions pursued by the SEC have remained relatively constant since fiscal year 2016. *See* SEC, Division of Enforcement, *Annual Report: A Look Back at Fiscal Year 2017*, at 15 (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

[66] *See generally* Speech, SEC Chair Jay Clayton, Governance and Transparency at the Commission and in Our Markets (Nov. 8, 2017), https://www.sec.gov/news/speech/speech-clayton-2017-11-08; Testimony, SEC Chair Jay Clayton, Testimony on "Oversight of the U.S. Securities and Exchange Commission," (Sept. 26, 2017), https://www.sec.gov/news/testimony/testimony-clayton-2017-09-26.

[67] *See, e.g.*, Dave Michaels, *SEC Signals Pullback From Prosecutorial Approach to Enforcement*, WALL ST. J., Oct. 26, 2017, https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200 (indicating a movement away from the "broken windows" strategy of pursuing both small and large violations, and a potential moderating of the SEC's policy of seeking admissions of wrongdoing in SEC settlements); Matthew C. Solomon, SEC Releases Enforcement Division FY 2017 Annual Report: Shift in Tone and Likely Approach, CLEARY GOTTLIEB (Nov. 20, 2017), https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/2017/publications/alert-memos/sec-releases-enforcement-division-fy-2017-annual-report-shift-in-tone-and-likely-approach.pdf (predicting a more measured approach to enforcement and remedies going forward); Matt Robinson & Benjamin Bain, *When Trump's SEC Punishes Wall Street, It's Often Done Quietly*, BLOOMBERG.COM (Feb. 15, 2018) https://www.bloomberg.com/news/articles/2018-02-15/when-trump-s-sec-punishes-wall-street-it-s-often-done-quietly (noting that the SEC did not issue press releases in connection with certain recent enforcement actions and that the number of SEC enforcement actions and penalties appeared to be decreasing as compared to prior years).

[68] *See* SEC, Division of Enforcement, *Annual Report: A Look Back at Fiscal Year 2017*, at 1 (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf (message from the Division of Enforcement's co-directors stating, "Vigorous enforcement of the federal securities laws is critical to combat wrongdoing, compensate harmed investors, and maintain confidence in the integrity and fairness of our markets.").

[69] *See id.*

[70] *See id.*, at 15 (noting that, in fiscal year 2017, 82, or 18%, of the 446 enforcement actions reported related to the investment management area; in fiscal year 2016, 98, or 18%, of the 548 enforcement actions reported related to the investment management area).

[71] *See, e.g.*, Breon S. Peace, Elizabeth Vicens & Daniel D. Queen, *Changes and Challenges in the SEC's ALJ Proceedings*, CLEARY M&A AND CORPORATE GOVERNANCE WATCH (Oct. 20, 2016), https://www.clearymawatch.com/

2016/10/2220/. For the SEC, the use of the administrative forum may also provide a "home court" advantage (the SEC's success rate before ALJs has historically exceeded its success rate in federal court). *See, e.g.*, Andrew Chung, *U.S. Supreme Court takes up challenge to SEC in-house judges*, REUTERS (Jan. 12, 2018), https://www.reuters.com/article/us-usa-court-sec/u-s-supreme-court-takes-up-challenge-to-sec-in-house-judges-idUSKBN1F12JC.

[72] Lucia v. SEC, 832 F.3d 277 (D.C. Cir. 2016); Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2017).

[73] Lucia v. SEC, *cert. granted*, 2018 U.S. LEXIS 621 (Jan. 12, 2018). "To put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause," the SEC ratified the appointments of the SEC's ALJs in November 2017. The SEC also prescribed certain steps to be taken by ALJs with respect to matters pending before them or on appeal to the SEC. In re Pending Administrative Proceedings, '33 Act Rel. 10440 (Nov. 30, 2017), https://www.sec.gov/litigation/opinions/2017/33-10440.pdf.

[74] *See* In re Calvert Inv. Dist., Inc. & Calvert Inv. Mgmt., Inc., ICA Rel. No. 32624, File No. 3-17964 (SEC May 2, 2017), https://www.sec.gov/litigation/admin/2017/ia-4696.pdf (finding that the adviser and affiliated distributor to registered funds improperly used fund assets to distribute mutual fund shares outside of a written 12b-1 plan); In re William Blair & Co., LLC, ICA Rel. No. 32621, File No. 3-17960 (SEC May 1, 2017), https://www.sec.gov/litigation/admin/2017/ia-4695.pdf (finding that the adviser to registered funds negligently used mutual fund assets to pay for distribution and marketing of fund shares outside of a written Rule 12b-1 plan).

[75] *See* In re Gemini Fund Servs., LLC, IAA Rel. No. 4847, File No. 3-18348 (SEC Jan. 22, 2018), https://www.sec.gov/litigation/admin/2018/ia-4847.pdf (finding that the fund administrator for a registered fund had included fictitious assets in the calculation of the fund's NAV, despite discrepancies between the administrator's records and the fund custodian's records with respect to the assets). This matter is related to In re GL Capital Partners, LLC and In re GL Inv. Servs., LLC, in n. 76 below.

[76] *See* In re Team Fin. Asset Mgmt., LLC, ICA Rel. No. 32951, File No. 3-18320 (SEC Dec. 22, 2017), https://www.sec.gov/litigation/admin/2017/33-10448.pdf (finding that a registered adviser misrepresented the investment strategy and principal risks of an advised fund); In re Vertical Capital Asset Mgmt., LLC, ICA Rel. No. 32788, File No. 3-18125 (SEC Aug. 22, 2017), https://www.sec.gov/litigation/admin/2017/33-10404.pdf (finding that a registered adviser made material misrepresentations in offering documents for a registered closed-end fund and private funds); In re GL Capital Partners, LLC, IAA Rel. No. 4629, File No. 3-17818 (SEC filed 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 filed Jan. 30, 2017), https://www.sec.gov/litigation/admin/2017/ia-4630.pdf (alleging that registered advisers mischaracterized certain loans included in a registered fund's portfolio, misused investors' assets, and misrepresented assets under management in their form ADV filings).

[77] *See* In re BlackRock Fund Advisors, ICA Rel. No. 32613, File No. 3-17942 (SEC Apr. 25, 2017), https://www.sec.gov/litigation/admin/2017/ic-32613.pdf (finding that the adviser sold shares of an ETF without first obtaining required exemptive relief from the SEC).

[78] *See* In re Voya Inv., LLC, IAA Rel. No. 4868, File No. 3-18393 (SEC Mar. 8, 2018), https://www.sec.gov/litigation/admin/2018/34-82837.pdf (finding that a registered adviser had not disclosed conflicts of interest with respect to securities lending arrangements for registered funds).

[79] *See* In re DMS Advisors, Inc., IAA No. 4866, File No. 3-18390 (SEC Mar. 7, 2018), https://www.sec.gov/litigation/admin/2018/ia-4866.pdf (finding that a registered adviser solicited investors to invest in mutual funds, then used the money for other purposes); In re Peter R. Kohli, IAA No. 4865, File No. 3-18389 (SEC Mar. 7, 2018), https://www.sec.gov/litigation/admin/2018/34-82818.pdf (same).

[80] *See* SEC v. Amell, No. 17-cv-10707 (D. Mass. Apr. 24, 2017) (ruling by a district court that the portfolio manager defrauded registered funds through the purchase and sale of options between registered funds and his own account). *See also* In re Kevin J. Amell, IAA Rel. No. 4798, File No. 3-18260 (SEC Oct. 23, 2017), https://www.sec.gov/litigation/admin/2017/ia-4798.pdf (settling with the portfolio manager).

[81] *See* In re Vertical Capital Asset Mgmt., LLC, ICA Rel. No. 32788, File No. 3-18125 (SEC Aug. 22, 2017), https://www.sec.gov/litigation/admin/2017/33-10404.pdf (finding that an investment adviser made material misrepresentations in offering documents for a registered closed-end fund and private funds).

[82] *See* SEC v. Navellier & Assocs., No. 17-cv-11633 (D. Mass. filed Aug. 31, 2017) (alleging that the registered adviser used investment strategy models provided by a third party without verifying the claimed performance track record).

[83] *See* In re Coachman Energy Partners LLC & Randall D. Kenworthy, IAA Rel. No. 4743, File No. 3-18109 (SEC Aug. 14, 2017), https://www.sec.gov/litigation/admin/2017/ia-4743.pdf (finding that a registered adviser did not adequately disclose the fees or methodology for calculating fees for private funds that it managed); In re KMS Fin. Servs., Inc., IAA Rel. No. 4730, File No. 3-18068 (SEC July 19, 2017), https://www.sec.gov/litigation/admin/2017/34-81169.pdf (finding that a dually registered adviser and broker-dealer had failed to disclose to its private advisory clients compensation received from third party broker-dealers).

[84] *See* In re Centre Partners Mgmt., LLC, IAA Rel. No. 4604, File No. 3-17764 (SEC Jan. 10, 2017), https://www.sec.gov/litigation/admin/2017/ia-4604.pdf (finding that a registered adviser failed to disclose to private fund clients certain conflicts of interest with regard to the adviser's relationships with certain service providers); In re SunTrust Inv. Servs., Inc., IAA Rel. No 4769, File No. 3-18178 (SEC Sept. 14, 2017), https://www.sec.gov/litigation/admin/2017/34-81611.pdf (finding a dually registered investment adviser and broker-dealer breached its fiduciary duties to clients, failed to adequately disclose conflicts of interests, and had deficient policies and procedures in connection with its selection of share classes). *See also* Press Release, SEC Launches Share Class Selection Disclosure Initiative to Encourage Self-Reporting and the Prompt Return of Funds to Investors (Feb. 12, 2018), https://www.sec.gov/news/press-release/2018-15 (announcing the Division of Enforcement's Share Class Selection Disclosure Initiative intended to protect advisory clients from undisclosed conflicts of interest with respect to mutual fund share class selection issues).

[85] *See* In re Morgan Stanley Smith Barney, LLC, IAA Rel. No. 4607, File No. 3-17773 (SEC Jan. 13, 2017), https://www.sec.gov/litigation/admin/2017/34-79794.pdf (finding that a dually registered investment adviser and broker-dealer overcharged advisory fees, failed to fulfill custody rule requirements, and failed to maintain certain books and records required under the IAA); In re Citigroup Global Mkts., Inc., IAA Rel. No. 4626, File No. 3-17817 (SEC Jan. 26, 2017), https://www.sec.gov/litigation/admin/2017/34-79882.pdf (same).

[86] *See* In re Deerfield Mgmt. Co., L.P., IAA Rel. No. 4749, File No. 3-18120 (SEC Aug. 21, 2017), https://www.sec.gov/litigation/admin/2017/ia-4749.pdf (finding that a registered adviser to private funds failed to establish, maintain, and enforce policies and procedures to protect against the misuse of material, non-public information by its analysts).

[87] SEC, OCIE, 2018 Nat'l Exam Program Examination Priorities (Feb. 7, 2018), https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2018.pdf.

[88] *Id.*

[89] SEC, OCIE Nat'l Exam Program Risk Alert, The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers, vol. VI, issue 3 (Feb. 7, 2017), https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf.

[90] SEC, OCIE Nat'l Exam Program Risk Alert, Cybersecurity: Ransomware Alert, vol. VI, issue 4 (May 17, 2017), https://www.sec.gov/files/risk-alert-cybersecurity-ransomware-alert.pdf.

[91] SEC, OCIE Nat'l Exam Program Risk Alert, Observations from Cybersecurity Examinations, vol. VI, issue 5 (Aug. 7, 2017), https://www.sec.gov/files/observations-from-cybersecurity-examinations.pdf.

[92] SEC, OCIE Nat'l Exam Program Risk Alert, The Most Frequent Advertising Rule Compliance Issues Identified in OCIE Examinations of Investment Advisers, vol. VI, issue 6 (Sept. 14, 2017), https://www.sec.gov/ocie/Article/risk-alert-advertising.pdf.

[93] Gabelli v. SEC, 568 U.S. 442 (2013).

[94] Kokesh v. SEC, 137 S. Ct. 1635 (2017).

[95] *See, e.g.*, Mary P. Hansen & Mira E. Baylson, *The Supreme Court Unanimously Curbs SEC's Power to Obtain Disgorgement*, DRINKER BIDDLE INSIGHTS & EVENTS PUBLICATION (June 8, 2017), https://www.drinkerbiddle.com/insights/publications/2017/06/the-supreme-court-curbs-secs-power; *King & Spalding Discusses Potential Effects of SEC Disgorgement As a Penalty*, THE CLS BLUE SKY BLOG (Columbia Law School Blog on Corporations and the Capital Markets, New York, NY) (June 21, 2017), http://clsbluesky.law.columbia.edu/2017/06/21/king-spalding-discusses-potential-effects-of-sec-disgorgement-as-penalty/.

[96] Press Release, SEC Announces Enforcement Initiatives to Combat Cyber-Based Threats and Protect Retail Investors (Sept. 25, 2017), https://www.sec.gov/news/press-release/2017-176.

[97] *See* 17 CFR 240.21F-1.

[98] *See* 17 CFR 240.21F-2.

[99] Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018), *rev'g*, Somers v. Digital Realty Trust, Inc., 850 F.3d 1045 (9th Cir. 2017).

[100] FINRA, 2018 Regulatory and Examination Priorities Letter (Jan. 8, 2018), http://www.finra.org/industry/2018-regulatory-and-examination-priorities-letter.

[101] Remarks of CFTC Chair J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference, Naples, FL (Jan. 19, 2018), http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo34.

[102] Statement of CFTC Director of Enforcement James McDonald (Jan. 29, 2018), http://www.cftc.gov/PressRoom/SpeechesTestimony/mcdonaldstatement012918.

[103] *See* CFTC Chair J. Christopher Giancarlo Statement on Virtual Currencies (Jan. 4, 2018), http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement010418.

[104] *See* Joint Statement from CFTC and SEC Enforcement Directors Regarding Virtual Currency Enforcement Actions (Jan. 19, 2018), http://www.cftc.gov/PressRoom/SpeechesTestimony/mcdonaldstatement011918.

[105] 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).

[106] *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 Security Event Endorsement FAQs - January 2017.pdf.

[107] *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.

[108] 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.

[109] Main v. American Airlines Inc., No. 16-cv-473 (N.D. Tex. Feb. 21, 2018) ($22 million final settlement); Urakhchin v. Allianz Asset Mgmt. of America, L.P., 2018 U.S. Dist. LEXIS 54681 (C.D. Cal. Feb. 6, 2018) (preliminary approval of $12 million settlement); Richards-Donald v. TIAA-CREF, No. 15-cv-8040 (S.D.N.Y. Oct. 20, 2017) ($5 million final settlement); Andrus v. New York Life Ins. Co., No. 16-cv-5698 (S.D.N.Y. June 15, 2017) ($3 million final settlement); Gordan v. Mass Mutual Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) ($30.9 million final settlement); Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa Oct. 28, 2016) ($3.8 million final settlement); Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa Nov. 13, 2015) ($3 million final settlement); Krueger v. Ameriprise Fin., Inc., No. 11-cv-2781 (D. Minn. July 13, 2015) ($27.5 million final settlement); Bilewicz v. FMR LLC, 2014 U.S. Dist. LEXIS 183213 (D. Mass. Oct. 15, 2014) ($12 million final settlement).

[110] In re G.E. ERISA Litig., No. 17-cv-12123 (D. Mass. Oct. 30, 2017) (to date, no filing of motion to dismiss); Velazquez v. Mass. Fin. Servs. Co., No. 17-cv-1124 (D. Mass. Sept. 25, 2017) (filing of motion to dismiss);

Baird v. BlackRock Institutional Trust Co., N.A., No. 17-cv-1892 (N.D. Cal. Nov. 8, 2017) (filing of motion to dismiss or alternatively for summary judgment); 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. Sept. 12, 2017) (filing of motion to dismiss); Patterson v. Morgan Stanley, No. 16-cv-6568 (S.D.N.Y. Nov. 22, 2017) (filing of motion to dismiss); Bekker v. Neuberger Berman Group, LLC, No. 16-cv-6123 (S.D.N.Y. Oct. 3, 2017) (filing of motion to dismiss and for summary judgment); In re M&T Bank Corp. ERISA Litig., No. 16-cv-375 (W.D.N.Y. Oct. 10, 2017) (filing of motion to dismiss).

[111] Beach v. JPMorgan Chase Bank, N.A., No. 17-cv-563 (S.D.N.Y. Mar. 29, 2018) (order granting in part and denying in part motion to dismiss); Schapker v. Waddell & Reed Fin., Inc., 2018 U.S. Dist. LEXIS 28458 (D. Kan. Feb. 22, 2018) (order denying motion to dismiss); Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Feb. 20, 2018) (order denying defendants' motion to compel arbitration, dismiss, and stay claims); Cryer v. Franklin Resources, Inc., 2017 U.S. Dist. LEXIS 34040 (N.D. Cal. Jan. 17, 2017) (order denying motion to dismiss and motion for summary adjudication).

[112] Wildman v. Am. Century Servs., LLC, No. 16-cv-737 (W.D. Mo. Nov. 8, 2017) (filing of motion for summary judgment) & 237 F. Supp. 3d 902 & 237 F. Supp. 3d 918 (W.D. Mo. Feb. 27, 2017) (orders denying motion to dismiss and granting in part and denying in part the defendants' motion for summary judgment); Sims v. BB&T Corp., No. 15-cv-732 (M.D.N.C. Jan. 31, 2018) (filing of motion for summary judgment) & (M.D.N.C. Apr. 18, 2016) (order denying motion to dismiss); Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. Feb. 5, 2018) (filing of motion for summary judgment) & (S.D.N.Y. Oct. 13, 2016) (order granting in part and denying in part motion to dismiss).

[113] In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., No. 11-cv-784 (N.D. Ga. Dec. 19, 2017) (filing of second amended consolidated complaint) & (N.D. Ga. Jan. 16, 2018) (filing of motion for class certification).

The defendants had initially prevailed on their motion to dismiss in October 2012. After initially affirming the lower court's ruling, Fuller v. SunTrust Banks, Inc., 744 F.3d 685 (11th Cir. Feb. 26, 2014), the Eleventh Circuit 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 duty of some kind to monitor investments and remove imprudent ones." 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] Patterson v. Capital Group Cos., Inc., 2018 U.S. Dist. LEXIS 24237 (C.D. Cal. Jan. 23, 2018) (order granting motion to dismiss) & (C.D. Cal. Feb. 14, 2018 (plaintiff's filing of voluntary dismissal).

[115] Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. June 19, 2017) (order in favor of defendants on motion for judgment on partial findings).

[116] 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, 2017 U.S. Dist. LEXIS 48223 (D. Mass. Mar. 30, 2017) (order ruling for defendants on prohibited transactions claims).

[117] Brotherston v. Putnam Invs., LLC, No. 17-1711 (1st Cir. filed July 20, 2017).

[118] Meiners v. Wells Fargo & Co., 2017 U.S. Dist. LEXIS 80606 (D. Minn. May 26, 2017) (order granting motion to dismiss), *appeal docketed*, No. 17-2397 (8th Cir. filed June 22, 2017).

[119] Wayman v. Wells Fargo & Co., No. 17-cv-5153 (D. Minn. Jan. 2, 2018) (filing of order to stay case) & (D. Minn. Feb. 13, 2018 (plaintiffs' filing of voluntary dismissal).

[120] Urakhchin v. Allianz Asset Mgmt. of America, L.P., No. 15-cv-1614 (C.D. Cal. Feb. 6, 2018) (order granting motion for preliminary approval of a $12 million class action settlement).

[121] Main v. American Airlines Inc., No. 16-cv-473 (N.D. Tex. Feb. 21, 2018) ($22 million final settlement); Richards-Donald v. TIAA-CREF, No. 15-cv-8040 (S.D.N.Y. Oct. 20, 2017) ($5 million final settlement); Andrus v. New York Life Ins. Co., No. 16-cv-5698 (S.D.N.Y. June 15, 2017) ($3 million final settlement); Gordan v. Mass Mutual Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) ($30.9 million final settlement); Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa Oct. 28, 2016) ($3.8 million final settlement);

Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa Nov. 13, 2015) ($3 million final settlement); Krueger v. Ameriprise Fin., Inc., No. 11-cv-2781 (D. Minn. July 13, 2015) ($27.5 million final settlement); Bilewicz v. FMR LLC, No. 13-cv-10636 (D. Mass. Oct. 16, 2014) ($12 million final settlement).

[122] 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).

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

[124] Rosen v. Prudential Ret. Ins. & Annuity Co, 2017 U.S. App. LEXIS 19821 (2d Cir. Oct. 25, 2017) (2d Cir. summary order and judgment affirming the lower court's decision). The appellant/plaintiff's petition for a hearing *en banc* was denied in December 2017. Rosen v. Prudential Ret. Ins & Annuity Co, No. 17-239 (2d Cir. Dec. 11, 2017).

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

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

[127] Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015).

[128] Tibble v. Edison Int'l, 2017 U.S. Dist. LEXIS 130806 (C.D. Cal. Aug. 16, 2017) (filing of findings of fact and conclusions of law).

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

[130] Ellis v. Fidelity Mgmt. Trust Co., 257 F. Supp. 3d 117 (D. Mass. June 19, 2017) (order granting motion for summary judgment).

[131] Ellis v. Fidelity Mgmt. Trust Co., 883 F.3d 1 (1st Cir. 2018) (affirming district court's grant of summary judgment in favor of defendant).

[132] *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-ap-504 (Bankr. S.D.N.Y filed July 31, 2009).

[133] Weisfelner v. Fund 1, 541 B.R. 172 (Bankr. S.D.N.Y. Nov. 18, 2015) (decision on motions to dismiss amended intentional fraudulent conveyance claims).

[134] Weisfelner v. Fund 1, 554 B.R. 655 (Bankr. S.D.N.Y. July 20, 2016) (dismissing the state law constructive fraudulent conveyance claims; also recommending that the district court dismiss the action based on the Second Circuit's March 2016 opinion in the *Tribune* proceeding).

[135] 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).

[136] Weisfelner v. Hofmann (In re Lyondell Chem. Co.), No. 10-ap-4609 (Bankr. S.D.N.Y. Sept. 5, 2017) (order dismissing adversary proceedings with prejudice).

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

[138] 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).

[139] In re Tribune Co. Fraudulent Conveyance Litig., 2017 U.S. Dist. LEXIS 3039 (S.D.N.Y. Jan. 6, 2017).

[140] 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 district 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).

[141] In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. Aug. 24, 2017) (order denying trustee's request to amend his complaint, but noting that, if the Supreme Court were to affirm the Seventh Circuit in a pending decision, the trustee would have a stronger argument in support of amending his complaint).

[142] Merit Mgmt. Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883 (2018).

[143] 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).

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

[145] 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).

[146] 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).

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

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

[149] Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. Oct. 24, 2017) (filing of conditional notice of cross appeal) & (Bankr. S.D.N.Y. Oct. 10, 2017) (filing of notice of appeal).

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

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

1401 H Street NW, Suite 1000
Washington, DC 20005

800.643.4246
info@icimutual.com

www.icimutual.com