ICI MUTUAL NEWSLETTER

Claims Trends

A Review of Claims Activity in the Mutual Fund Industry (January 2012-March 2013)

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Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CFTC	U.S. Commodity Futures Trading Commission
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
ERISA	Employee Retirement Income Security Act of 1974
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
OCIE	Office of Compliance Inspections and Examinations of the SEC
RICO	Racketeer Influenced and Corrupt Organizations Act
Sarbanes-Oxley	Sarbanes-Oxley Act of 2002
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

Since 1999, ICI Mutual's annual *Claims Trends* has reported on significant regulatory proceedings, civil lawsuits, and operational errors affecting the fund industry. This publication is designed to assist ICI Mutual's insureds in better assessing and managing the risks associated with such matters, thereby reducing the potential for associated losses and reputational damage.

ICI Mutual measures claims activity by both *frequency* and *severity*. With regard to *frequency,* in 2012, as in 2011, nearly one-third of fund groups insured by ICI Mutual submitted at least one claim notice under their directors and officers/errors and omissions (D&O/E&O) policies; over the five-year period 2008-2012, nearly two-thirds of insured fund groups did so. These figures suggest that even now—with the passage of time since the 2003-2004 mutual fund scandal and the 2007-2008 credit crisis—claims frequency remains an issue for fund industry insureds.

As noted in prior *Claims Trends*, the *severity* of new claims can be more difficult to assess, particularly in the case of regulatory proceedings and civil lawsuits, where the magnitude of losses (whether in the form of defense costs, settlements, or judgments) may take years to establish. On a positive note, in 2012 and early 2013, relatively few *new* claims were initiated of the types that have traditionally given rise to substantial severity (e.g., shareholder lawsuits challenging prospectus disclosure claims, shareholder lawsuits alleging "excessive fees").

On a less positive note, in 2012 and early 2013, fund groups continued to enter into multimillion dollar public settlements of claims that were initiated during the credit crisis and post-credit crisis period, with the total settlements announced to date now in excess of $400 million. 2012 and early 2013 also saw courts issuing decisions that permitted several high profile lawsuits initiated in 2011 to move forward into the "discovery" stage of the litigation process—i.e., the prolonged (and costly) stage in which the parties collect evidence in the form of documents (including emails), sworn testimony of witnesses, and expert reports and testimony. These developments suggest that severity, too, cannot be discounted in the current claims environment.

Along with developments in civil litigation, 2012 and early 2013 witnessed substantial regulatory enforcement activity, most notably by the SEC. Indeed, the SEC brought a record number of enforcement actions in the asset management area in its 2012 fiscal year, including noteworthy actions in the registered fund space. In perhaps the most high-profile SEC enforcement action in the registered fund space in recent years, the SEC initiated an administrative proceeding in December 2012 against eight former fund directors (including six former independent directors), over charges that the directors had failed to satisfy their obligations with regard to "fair valuation" of portfolio securities held by their funds. (As of the time this *Claims Trends* was published, the SEC staff and the directors had reportedly reached an agreement in principle to settle the proceeding.)

For fund groups faced with civil litigation and/or regulatory proceedings, legal defense costs remain high. Particularly in regulatory investigations and in shareholder litigation initiated by the plaintiffs' bar (i.e., private lawyers who specialize in seeking large-scale recoveries from financial institutions on behalf of investors), ICI Mutual's claims experience evidences that defense costs for affected fund groups can quickly reach seven figures, and can sometimes climb into eight figures.

As in past editions, this *Claims Trends* reports on developments in four traditional risk areas for fund groups: (1) *regulatory* investigations, administrative proceedings, and/or litigation initiated by the SEC or other federal or state authorities; (2) *disclosure* claims by fund shareholders, which challenge the accuracy or adequacy of disclosures made by funds and advisers; (3) *fee* claims by fund shareholders, which challenge fees received by investment advisers and other service providers; and (4) liabilities for *operational errors* committed by advisory personnel or other individuals or entities in the portfolio management process.

In addition, this *Claims Trends* reports on continued efforts by the plaintiffs' bar to target fund advisers and fund directors in civil litigation alleging violations of state (rather than federal) law, and reviews certain other noteworthy litigation developments from 2012 and early 2013.

Regulatory Enforcement

As noted in the Introduction, 2012 and early 2013 witnessed substantial regulatory enforcement activity, most notably by the SEC. Recent public remarks by SEC officials suggest that enforcement scrutiny of the asset management area—including registered funds, fund advisers, and associated individuals—is likely to continue in 2013.

SEC Enforcement Actions

In its 2012 fiscal year, the SEC filed a record number of enforcement actions in the asset management area (147 out of 734 total), surpassing a then-record number filed in its 2011 fiscal year.[1] In 2012, as in prior years, these actions focused largely on hedge fund managers and other actors outside the registered investment company space. But advisers to registered funds, advisory personnel, and fund directors and officers were by no means immune.

Indeed, in 2012 and the first quarter of 2013, the SEC initiated or resolved a number of noteworthy actions against fund advisers, advisory personnel, and/or fund officers, involving such issues as valuation and/or liquidity of portfolio securities;[2] side-by-side management;[3] failure to disclose principal risks;[4] failure to disclose conflicts of interests in the advisory contract approval process;[5] improper fee arrangements;[6] repurchase of closed-end fund shares;[7] and books and records violations.[8]

SEC enforcement actions were also initiated or resolved against fund advisers and/or advisory personnel with respect to their *non*-registered fund activities. These actions involved such issues as valuation of portfolio securities;[9] investment adviser registration;[10] and books and records violations.[11]

As noted in the Introduction, in December 2012, the SEC initiated an administrative proceeding against eight former mutual fund directors (including six former independent directors), over charges that the directors had failed to satisfy their obligations with regard to the "fair valuation" of certain portfolio securities held by their funds during the credit crisis period.[12] This was the first SEC enforcement action brought against fund independent directors in many years,[13] and the action has generated significant discussion in the fund industry—both for what it may mean with regard to the SEC's view of fund directors' valuation responsibilities, and for what it may portend with regard to future SEC enforcement activity in the registered fund space.[14]

In March 2013, before the administrative proceeding was scheduled to begin, the SEC staff and the directors reportedly reached an agreement in principle to settle the action.[15] No settlement will be effective unless and until it receives SEC approval.

Calendar year 2012 also witnessed another notable SEC enforcement action in the registered fund space, as the SEC proceeded to trial in a case involving a money market fund that "broke the buck" in 2008, following the bankruptcy of Lehman Brothers. The SEC sought to convince a federal court jury that the fund's investment adviser and the adviser's two principals had committed securities fraud by providing misleading assurances to the money market fund's shareholders, board of trustees, and rating agencies during the period surrounding Lehman Brothers' collapse. In what was viewed by the SEC as a partial victory (and by some industry observers as an SEC defeat),[16] the jury, after a month-long trial, cleared the two principals of fraud charges; the jury did find, however, that one of the principals had been negligent and that the adviser itself had committed fraud.[17] Penalties for the violations have yet to be determined.

Scrutiny by the SEC's Division of Enforcement of the asset management area—including registered funds, fund advisers, and associated individuals—is likely to continue in 2013, as evidenced by recent SEC initiatives (including the formation in 2010 of an Enforcement Division unit focusing on asset management and mutual fund issues) and public statements by SEC officials. In terms of subject areas, it appears that the Division may focus attention on valuation of assets, fee arrangements, conflicts of interest, and oversight and compliance.[18] Recent comments by SEC officials and industry observers suggest that fund boards, including fund independent directors, may be among those subject to scrutiny.[19]

Influences on Future SEC Enforcement Actions

2012 and early 2013 witnessed a number of developments with the potential to constrain—or to intensify—SEC enforcement in the coming years. As discussed below, these developments included: (1) objections raised by federal court judges to the SEC's use of "neither admit nor deny" settlements in regulatory enforcement actions; (2) a continuing evolution of the SEC's whistleblower program; and (3) a recent Supreme Court decision limiting the time period within which the SEC may institute actions seeking civil penalties.

Outside of the fund industry, several federal lower court judges have rejected or questioned proposed settlements of SEC enforcement actions over the past two years, on the grounds that the proposed settlements would have permitted the settling entities or individuals to "neither admit nor deny" the SEC's allegations against them.[20] The reasoning set forth by these judges, if widely adopted by the courts, could significantly disrupt SEC efforts to resolve the agency's enforcement proceedings—including those in the fund industry—short of trial.[21] The SEC views "neither admit nor deny" settlements as "both common and sound public policy,"[22] and has long utilized them to resolve enforcement actions in the fund industry and elsewhere. One of the lower court decisions rejecting a "neither admit nor deny" SEC settlement has been appealed to the Second Circuit; at the time this *Claims Trends* went to press, the Second Circuit had not yet ruled on the matter.[23]

The SEC's Office of the Whistleblower completed its first full year of operations in 2012. The SEC's whistleblower program provides significant financial incentives for corporate insiders and others to report tips to the agency, and in August 2012, the SEC

awarded its first "bounty" to a whistleblower under the program. The SEC reports that the program has generated a substantial increase in both the number of tips received (with over 3,000 tips received during fiscal year 2012), and in their quality.[24] While it is difficult, as yet, to trace any SEC enforcement actions in the registered fund space to whistleblower tips received pursuant to the new program, some industry observers anticipate that the program may lead to an increase in enforcement actions in the years ahead.[25]

In February 2013, the U.S. Supreme Court issued a decision that limits the period of time within which the SEC may initiate a fraud action seeking civil penalties. The Supreme Court ruled that the SEC must bring such an action within five years from the date of the *occurrence* of the alleged fraud, and not, as the SEC had argued, within five years from the date on which the alleged fraud was *discovered* (or could have been discovered).[26] The Supreme Court's decision addressed only the limitations period for actions seeking civil penalties (as opposed to other remedies, such as injunctions).[27] Even so, some industry observers suggest that the decision may prompt the SEC, in the future, to hasten its investigations and/or to seek tolling agreements (suspending the statute of limitations) from individuals and organizations under investigation.[28] The decision may also limit the SEC's ability to pursue additional fraud actions for civil penalties based on conduct that occurred during the credit crisis period.[29]

Enforcement Actions by Other Regulators

The SEC, of course, is not the only regulatory authority that may institute enforcement actions against fund advisers and distributors, funds, or fund directors and officers. In a noteworthy state enforcement proceeding filed in October 2012, the Massachusetts state securities division charged an investment adviser with fraud based on the adviser's role as collateral manager of certain collateralized debt obligations.[30]

In recent years, ICI Mutual has received several claim notices relating to FINRA investigations involving the distribution of fund shares and fund marketing materials. In a letter outlining its regulatory and examination priorities for 2013, FINRA cited concerns over, among other things: (1) the use of leveraging by business development companies; (2) return of capital by some closed-end funds; and (3) suitability issues with respect to variable annuities[31] It remains to be seen whether any of these concerns will result in future FINRA enforcement proceedings.

In early 2012, the CFTC adopted rule changes, which, among other things, require investment advisers to certain funds that invest in commodities or commodity-linked derivatives to register with the CFTC as "commodity pool operators."[32] A federal district court decision upholding these rule changes is currently on appeal in the D.C. Circuit. If the rule changes are upheld on appeal, one result may be that the CFTC becomes a more visible enforcement presence in the fund industry.

Disclosure

As described in prior *Claims Trends*, "prospectus liability" lawsuits—i.e., shareholder class action lawsuits brought under the '33 Act—have proved over the years to be a major source of potential liability for funds and their directors, officers, advisers, and principal underwriters. (An ICI Mutual

risk management study published in 2010, entitled *Mutual Fund Prospectus Liability*, available at http://www.icimutual.com, provides a general introduction to such lawsuits and details the fund industry's experience in this area.)

No new noteworthy prospectus liability lawsuits were initiated against fund industry defendants in 2012 and early 2013. As discussed below, however, there were substantial developments in prospectus liability lawsuits filed in prior years.

Subprime/Credit Crisis Litigation

As reported in prior *Claims Trends*, the collapse of the subprime mortgage market and the credit crisis led to a sharp rise in litigation against fund groups and other financial institutions in 2007-2009. Eight fund groups had one or more funds involved in major prospectus liability lawsuits (which, in some cases, also alleged legal violations in addition to violations of the '33 Act). These prospectus liability lawsuits, filed primarily in federal court, challenged the adequacy of the disclosure provided by certain fixed-income funds that had significantly underperformed their peers during the subprime/credit crisis period.

Over the past several years, the courts have, with a single exception, ruled *against* fund group defendants at the motion to dismiss stage of these subprime/credit crisis lawsuits (i.e., at the early, pre-trial stage at which defendants challenge the adequacy of plaintiffs' allegations on purely legal grounds).[33] The fund industry's claims experience evidences that, where prospectus liability lawsuits survive motions to dismiss, they are likely to be settled, sooner or later, by agreement of the parties (with few, if any, ever reaching trial).

The subprime/credit crisis lawsuits have followed this pattern. By 2012, settlements had been reached in subprime/credit crisis lawsuits involving four fund groups.[34] In 2012, settlements were reached in lawsuits involving two additional fund groups.[35] All of these settlements have involved multimillion dollar payments by the defendants, including two settlements with payments in the nine figures, and one with a payment in the eight figures. To date, total settlements amounts announced in these subprime/credit crisis lawsuits exceed $400 million.

Meanwhile, several other prospectus liability lawsuits from the subprime/credit crisis period remain in progress and have yet to be resolved.[36] In early 2013, the parties in one of these remaining lawsuits reportedly reached an agreement in principle to settle the litigation, but no settlement agreement has yet been submitted for court approval.[37]

Exchange-Traded and Inverse Funds

Previous *Claims Trends* reported on prospectus liability class action lawsuits targeting leveraged exchange-traded funds (ETFs) and inverse funds. These lawsuits challenged the adequacy of prospectus disclosure relating to compounding, leverage, resets, and other attributes of the funds' investment strategies.

As in the subprime/credit crisis litigation discussed above, fund industry defendants have had limited success on their motions to dismiss these lawsuits. By early 2012, motions to dismiss two of these lawsuits had been denied by the courts. A seven-figure settlement of one of these two lawsuits was approved in early 2012;[38] in early 2013, a federal district court preliminarily approved a seven-figure settlement of the second.[39]

In a third case, in September 2012, a federal district court *granted* the defendants' motion to dismiss an ETF lawsuit. The plaintiffs subsequently appealed this decision to the Second Circuit. The appeal remained pending at the time this *Claims Trends* was published.[40]

Other Disclosure-Based Litigation

In addition to challenging mutual fund disclosure under the '33 Act in prospectus liability class action lawsuits, shareholders sometimes seek to challenge disclosure under the '34 Act (more specifically, under section 10(b) of the '34 Act and rule 10b-5 thereunder). Shareholders filing class action lawsuits under rule 10b-5 are subject to various legal requirements that can be difficult to satisfy in the mutual fund context, including the requirement to demonstrate that defendants engaged in intentional or reckless misconduct (i.e., "scienter"). As a result, fund industry defendants have historically enjoyed considerable—but by no means complete—success in defending against rule 10b-5 lawsuits initiated by the plaintiffs' bar.

As reported in a prior *Claims Trends*, the U.S. Supreme Court, in its 2011 decision in *Janus Capital Group v. First Derivative Traders*, held that an investment adviser to mutual funds did not itself "make" any of the alleged misstatements in the fund prospectus, and therefore could not be liable as a "primary" violator in shareholder litigation brought under rule 10b-5.[41] The *Janus* decision continues to be explored and interpreted by lower federal courts. Among the unsettled questions after *Janus* are: whether the *Janus* holding applies to the SEC; the extent to which courts should defer to the SEC's interpretation of its own rule; and the extent to which the *Janus* test for liability should apply to securities fraud claims brought under certain other provisions of the federal securities laws.[42]

The impact of *Janus* was felt in 2012 in a long-running rule 10b-5 lawsuit (originally filed in 2005) alleging that a fund adviser made false and misleading statements regarding a contract for transfer agency services for its managed funds. In an August 2012 ruling, the court relied on *Janus* to dismiss the rule 10b-5 claims against the investment adviser defendants. However, the court rejected efforts by an individual defendant (an officer of the adviser and principal accounting officer for many of the funds) to rely on *Janus*, as the individual had signed the disclosure documents, and therefore could be viewed as having "made" the statements in those documents.[43] The lawsuit remains pending with respect to the individual defendant.[44]

Fees

In lawsuits filed on behalf of mutual fund shareholders, the plaintiffs' bar has frequently challenged fees charged to mutual funds by investment advisers and other service providers. Most commonly, these lawsuits allege violations of section 36(b) of the ICA, which 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 affords shareholders the right to bring a lawsuit to enforce this duty.[45] Fees have also been challenged in litigation brought under ERISA and in derivative claims brought under state law for breach of fiduciary duty.

Section 36(b)

In March 2010, the U.S. Supreme Court, in its decision in *Jones v. Harris Associates, L.P.*, affirmed the longtime "*Gartenberg* standard" as the appropriate measure of liability under section 36(b).[46] Three years following the Supreme Court's decision, the *Jones* lawsuit continues to remain before the Seventh Circuit for further consideration in light of the Supreme Court's ruling.[47]

Even as *Jones* remained before the Seventh Circuit, 2012 and early 2013 saw developments in various other section 36(b) lawsuits that had been initiated prior to the Supreme Court's ruling in *Jones*. In January 2012, one of these lawsuits—which had proceeded through the fact-finding (discovery) stage of the litigation process—was resolved and dismissed by agreement of the parties.[48] In a second section 36(b) lawsuit filed pre-*Jones*, a federal district court refused in March 2013 to reconsider its earlier dismissal of the plaintiff's complaint.[49] In a third pre-*Jones* lawsuit, the court has scheduled a trial date for June 2013; the parties in that case have proceeded through the discovery stage of litigation, and have filed motions for summary judgment, which remain pending.[50]

Meanwhile, six *new* section 36(b) lawsuits have been initiated since the Supreme Court's decision in *Jones*, including one that was first filed in early 2013. The number of new post-*Jones* filings suggests that the plaintiffs' bar remains willing, in certain cases, to devote time and resources to challenging fee arrangements involving registered funds.

One of these six lawsuits has been dismissed voluntarily by the plaintiffs.[51] A second of these—which involved a traditional challenge to advisory fees charged to certain mutual funds—survived a motion to dismiss in 2011, and thereafter entered the discovery stage of the litigation process. In August 2012, with a trial scheduled for October 2012, the lawsuit was resolved and dismissed by agreement of the parties.[52]

At the time this *Claims Trends* was published, four of the six post-*Jones* lawsuits remained pending. In one of these lawsuits, the plaintiffs challenged as excessive the investment management and rule 12b-1 fees received by the adviser/principal underwriter for a family of funds, focusing on alleged disparities between (1) the defendant's advisory fees and the fees paid to its "subcontractors" (i.e., subadvisers), and (2) the advisory fees paid to the defendant by managed funds and the fees paid by the defendant's institutional accounts. In December 2012, the court granted the defendant's motion to dismiss the lawsuit as to the challenged rule 12b-1 fees, but denied the defendant's motion to dismiss as to the challenged advisory fees.[53] As a result, the lawsuit continues.

In a second of these pending lawsuits, the plaintiffs challenge fees paid to the investment advisers of certain funds offered in variable annuity products, and likewise focus on alleged disparities between the defendants' advisory fees and the fees paid to subadvisers. In 2012, the defendants pursued their motion to dismiss this lawsuit, arguing that the plaintiff, as a variable annuity investor, lacked statutory "standing" (i.e., the legal right) to challenge fund fees under section 36(b). In September 2012, the court denied the defendants' motion to dismiss the plaintiffs' section 36(b) allegations. As a result, the lawsuit continues.[54]

In this same lawsuit, the parties in early 2013 submitted opposing briefs to the court on the legal merits of the plaintiffs' demand that the lawsuit be tried before a jury (rather than before a judge). The

plaintiffs' demand follows efforts by plaintiffs in other recent section 36(b) lawsuits to have courts empanel "advisory juries."[55] The use of juries (or "advisory juries") in section 36(b) lawsuits is generally opposed by defendant advisers, and courts have previously ruled that there is no right to a jury trial in section 36(b) lawsuits.[56] Nonetheless, if permitted by courts, the prospect of a jury trial may inure to the tactical advantage of plaintiffs.

A third of these pending post-*Jones* lawsuits targets a fund adviser, fund distributors, and certain affiliated insurance companies. This lawsuit is unusual, in that it originally combined section 36(b) claims with claims of ERISA violations.[57] The trial court granted the defendants' motion to dismiss in 2011, and in April 2012, the Third Circuit affirmed the lower court's dismissal of the ICA claims, but vacated the lower court's dismissal of the ERISA claims.[58] As a result, the lawsuit has been sent back to the lower court for further proceedings, where the ERISA claims survive. The defendants have renewed their motion to dismiss the ERISA claims; this motion remains pending.

A fourth post-*Jones* lawsuit, filed in early 2013, represents a new variant on section 36(b) litigation, in that the plaintiffs have focused their attention on securities lending revenue. In this lawsuit, the plaintiffs (two pension funds) brought suit against several ETFs (as nominal defendants), their adviser, an advisory affiliate that provided securities lending services, and the trustees (including independent trustees) of the ETFs.[59] The plaintiffs challenge the "split" between the securities lending revenue paid to the ETFs, and that paid to the affiliate/adviser. Motions to dismiss, filed in March 2013, remain pending.[60]

Other Developments in Fee Litigation

Outside the context of section 36(b), fee payments have also been subject to challenge by the plaintiffs' bar under other legal theories involving different provisions of federal or state law.

Prior *Claims Trends* reported on one such challenge in a lawsuit involving a financial institution's sale of its fund advisory business to another firm. The lawsuit charged the trustees of the affected funds with various violations of law in connection with their consideration of the sale and their approval of new advisory agreements, and asserted, in essence, that the trustees "failed to avail themselves of the opportunity to negotiate lower fees or seek competing bids from other qualified investment advisors."[61]

As previously reported, the Second Circuit in 2011 affirmed the district court's dismissal of two counts of the lawsuit, but vacated on procedural grounds the dismissal of a third "derivative" count. The lawsuit was thereafter returned to the district court for further proceedings.[62] In July 2012, in a lengthy decision, the district court granted the defendants' motion for summary judgment.[63] An appeal of this decision remains pending before the Second Circuit.[64]

Portfolio Management Errors

Portfolio management and other operational errors continue to represent a significant portion of all insurance payments made by ICI Mutual over its history. Since its formation in 1987, approximately 10% of all claim amounts incurred by ICI Mutual have been for "costs of correction" claims—i.e., insurance claims by advisers for payments made by them, outside the litigation context, to remedy operational errors that have resulted in losses for their managed funds or private accounts. Generally, "costs of correction" insurance coverage permits an insured adviser (or other insured service provider) to be reimbursed for costs incurred to correct an operational error, provided that the adviser or other service provider has actual legal liability for the resulting loss.[65]

In 2012 and early 2013, certain claims of this type involved private accounts, and certain claims can be attributed, directly or indirectly, to misclassifications by advisers of portfolio securities in their compliance systems. One costs of correction claim received during this period related to a fund distributor's failure to prevent a financial intermediary's overbilling of a fund for certain services over the course of several years. While the distributor ultimately resolved this matter through recourse to the financial intermediary, the distributor's potential loss had been in the low seven-figure range.

State Law Actions and the Plaintiffs' Bar

As reported in prior *Claims Trends,* litigation challenges to fund groups sometimes take the form of (i) *state law derivative actions*—i.e., lawsuits filed ostensibly on behalf of funds themselves, that allege violations of state or common law by fund advisers and/or fund directors and officers, or (ii) *state law class actions*—i.e., lawsuits filed ostensibly 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.[66] As described below, the plaintiffs' bar had little success in these two areas in 2012 and early 2013.

Auction-Rate Preferred Securities

Past *Claims Trends* have reported on lawsuits involving closed-end funds that issued auction-rate preferred securities (ARPS), including lawsuits initiated in 2010 on behalf of common shareholders of ARPS funds. These lawsuits targeted at least ten fund groups, and alleged, in essence, breach of fiduciary duties to common shareholders through the defendants' authorizing or participating in the redemption of ARPS in favor of new, less favorable financing.[67]

In these ARPS cases, multiple *derivative actions* were filed in state courts against defendants in six fund groups. Defendants included fund advisers (and, in

some cases, their parent companies), as well as interested directors and executive officers of the funds. (The ARPS funds were named as nominal defendants.) The lawsuits involving three of the fund groups were dismissed in 2011, either by order of the court or voluntarily.[68] Derivative lawsuits involving the other three fund groups remain pending.[69]

Multiple ARPS lawsuits were also filed as *class actions* against defendants in four fund groups. Defendants in these class actions included the ARPS funds themselves, fund directors (including independent directors), and fund advisers (and in some cases, their parent companies). The class action lawsuits involving two of these fund groups were dismissed in 2011;[70] those involving a third fund group were concluded by early 2012;[71] and the last class action lawsuit involving a fourth fund group was dismissed in May 2012. [72] As a result, it appears that there are no remaining state law class action lawsuits involving ARPS.

Fund Investments in Gambling Industry Securities

Past *Claims Trends* have reported on federal lawsuits first filed five years ago against various fund groups, which, as originally formulated, alleged that fund investments in online gambling companies constituted illegal racketeering (in violation of RICO). Most of these federal lawsuits were subsequently dismissed by the courts.[73]

Following these dismissals, however, various plaintiffs refiled their lawsuits in either federal or state courts, recharacterizing them as derivative actions. The refiled lawsuits, based on essentially the same activities, chiefly alleged violations of state law or common law (e.g., breach of fiduciary duty and waste). The dismissal of one of these refiled lawsuits was affirmed by a state supreme court in January 2012.[74] Another was dismissed by a federal district court in February 2012, with the dismissal affirmed on appeal by the Eighth Circuit in March 2013.[75]

The long and tortuous procedural history of another of these lawsuits demonstrates how difficult it can sometimes be for defendants to bring a derivative lawsuit to conclusion. During the period 2009 to 2011, the plaintiff's original lawsuit (filed in federal court) was voluntarily dismissed by the plaintiff, refiled by the plaintiff in state court, removed by the defendants to federal court, and then dismissed by the federal court on procedural grounds.

But the lawsuit was not yet over. Following this dismissal, the plaintiff then refiled the lawsuit in August 2011 in another federal court. The refiled lawsuit was subsequently transferred back to the original federal court, where it was dismissed in June 2012 for failure to comply with the applicable state law's shareholder demand requirement.[76] Shortly thereafter, in July 2012, the plaintiff filed an amended complaint, which the court dismissed—without prejudice—in March 2013.[77] It remains to be seen whether the plaintiff will appeal the dismissal, file yet another amended complaint in the same court, or take some other action.

At the time this *Claims Trends* went to press, another of these "gambling industry" lawsuits appeared to remain pending. In this lawsuit, the federal district court denied the defendants' motion to dismiss in October 2012, ruling that the plaintiffs could "conduct limited discovery into whether the [special litigation committee that had reviewed the plaintiff's demand] was independent, acted in good faith, and followed reasonable procedures."[78] It appeared to be the court's expectation that, following the limited

discovery, the defendants would convert their motion to dismiss into a motion for summary judgment. To date, no motion for summary judgment has been filed.

Shareholder Derivative Suits

As described in the previous two subsections, the plaintiffs' bar has brought a number of derivative lawsuits in recent years. Derivative lawsuits in the fund industry typically allege that fund advisers or their affiliates, and/or fund officers or directors, have breached their fiduciary duties or otherwise engaged in violations of law with respect to their funds.

Prior to bringing derivative lawsuits, fund shareholders generally must first make "demands" on fund boards, in which they ask the boards to authorize and pursue litigation on behalf of the funds. As illustrated by a 2012 decision by the Delaware Supreme Court, where plaintiff shareholders fail to make such demands on fund boards, courts often dismiss the plaintiffs' lawsuits as a matter of law.[79]

In limited circumstances, however, courts may excuse fund shareholders from the "demand" requirement. In early 2013, this issue—i.e. when the demand requirement may be excused, an issue sometimes referred to as "demand futility"—was explored in a decision by the First Circuit.[80] The appellate court, in reviewing the particular facts of the case, ruled that a majority of directors on the fund boards at issue were not sufficiently independent and disinterested to impartially consider the shareholder demands; as a result, the appellate court concluded that the shareholders were excused from meeting the demand requirement.

Given the unusual circumstances involved in the case (including, among other things, the fact that the shareholder demands at issue were made on closed-end funds distributed exclusively in Puerto Rico and exempt from ICA registration), the First Circuit's ruling may have a limited effect on how other courts will view the issue of "demand futility" in derivative lawsuits involving registered funds organized in other jurisdictions. Even so, the court's ruling highlights the scrutiny which the courts may apply to efforts by funds to terminate derivative lawsuits at an early stage.

Where shareholders do, in fact, make demands on fund boards to authorize and pursue litigation, the boards often respond by appointing special committees of independent directors to conduct "shareholder derivative demand investigations" (SDDIs). Such SDDIs are conducted so that relevant facts and law can be examined and boards (or their special committees) can make informed decisions as to whether or not the pursuit of litigation is in the best interests of their funds.

It is not uncommon, following such SDDIs, for fund boards to reject the shareholder demands and determine that litigation should *not* be pursued. In such cases, the plaintiffs' bar may challenge the boards' determinations in court. In evaluating these challenges, courts typically look to such factors as whether the boards' determinations were made in good faith, by independent decision makers, and following reasonable inquiry.

As illustrated by several recent court decisions, judges may closely examine the process by which fund boards consider and respond to SDDIs. In one of these decisions, issued in July 2012 (and also discussed at p. 8 above), a federal district court, in a detailed and lengthy opinion, concluded that there was no genuine factual dispute regarding the

independence of fund directors or their good faith and reasonableness in investigating and rejecting a shareholder demand.[81] The judge granted summary judgment in favor of the defendants. The plaintiffs have appealed, and the appeal is pending before the Second Circuit.[82]

In a second of these lawsuits, a district court in 2011 found it appropriate to permit the plaintiff shareholder to conduct limited discovery with respect to "the independence and investigation" of a committee of a fund board that had conducted a SDDI prior to a rejection of the plaintiff's demand. In permitting this limited discovery, the court noted, among other things, that the plaintiff had "made specific and substantial allegations challenging the independence of the Review Committee, as well as the reasonableness of the Board's investigation."[83] In August 2012, the parties reached a seven-figure settlement of the lawsuit.[84]

In a March 2013 decision in another long-running derivative lawsuit (described at p. 10 above), the court dismissed the lawsuit following a review of the plaintiff's challenge to a decision of a committee of a fund board that had conducted a SDDI prior to rejecting the plaintiff's demand. The court concluded that the plaintiff's allegations failed "to rise to the level of specificity required to overcome the strong deference owed to a board under the business judgment rule."[85] However, because the dismissal was without prejudice, it remains to be seen whether the plaintiff will file yet another amended complaint (or take some other action).

Other Litigation Developments

ERISA

Unlike the federal securities laws, which do not generally permit direct actions against advisers for alleged mismanagement of assets, ERISA expressly provides for direct suits against plan "fiduciaries" for mismanagement of assets under their control—i.e., for failure to adhere to their duty of "prudent management." Mutual fund advisers are generally exempt from ERISA claims of imprudent management, but no such protection is available to advisers to unregistered pooled investment vehicles that contain plan assets.

A court ruling in early 2012 illustrates the liability risks that may be faced by advisers under ERISA. In a lawsuit involving an investment adviser to certain unregistered funds that sustained significant losses during the subprime/credit crisis period, a federal district court ruled, following a bench trial, that the adviser violated its fiduciary duties under ERISA to invest prudently (or, more accurately, as a "prudent expert" would manage the assets) and to adequately diversify the unregistered funds' assets. The court ordered the adviser to pay damages in the eight figures.[86] The lawsuit was settled and dismissed in its entirety in January 2013.[87]

Two years ago, *Claims Trends* reported on other lawsuits brought under ERISA, in which retirement plan sponsors and various plan service providers (including fund advisers and affiliates) were charged with breaching their duties as ERISA fiduciaries by

permitting plans to pay unreasonable (i.e., excessive) fees. At that time, in a significant legal victory for the fund industry, the Seventh Circuit rejected the theory that two fund group defendants—one, the directed trustee and recordkeeper for the plans, and the other, an investment adviser for the mutual funds offered as investment options—were so-called "functional fiduciaries" to the plan participants and thus potentially liable under ERISA.[88]

The same fund group defendants, acting in the same capacities, were also involved in a separate ERISA lawsuit, in which the plaintiffs likewise made fee-based allegations. In March 2012, the federal district court in that lawsuit issued an opinion finding, among other things, that the fund group defendants were ERISA "fiduciaries" (although not with respect to excessive fees) and that they breached their fiduciary duties to the plan with respect to the handling of "float income."[89] An appeal of the federal district court's decision is pending before the Eighth Circuit.[90]

In February and March 2013, additional ERISA lawsuits that similarly focus on the handling of "float income" were filed against, among others, the same two fund group defendants for their services to other corporate 401(k) plans.[91] These lawsuits are in their early stages and remain pending.

Bankruptcy Claims by Issuers of Portfolio Securities

Mutual funds have occasionally been ensnared in proceedings brought under federal bankruptcy laws, typically for no reason other than the funds' status as passive holders or former holders of securities of the bankrupt issuers. In these proceedings, bankrupt issuers and/or their creditors often seek a return of pre-bankruptcy payments made to security holders or other creditors, including funds.

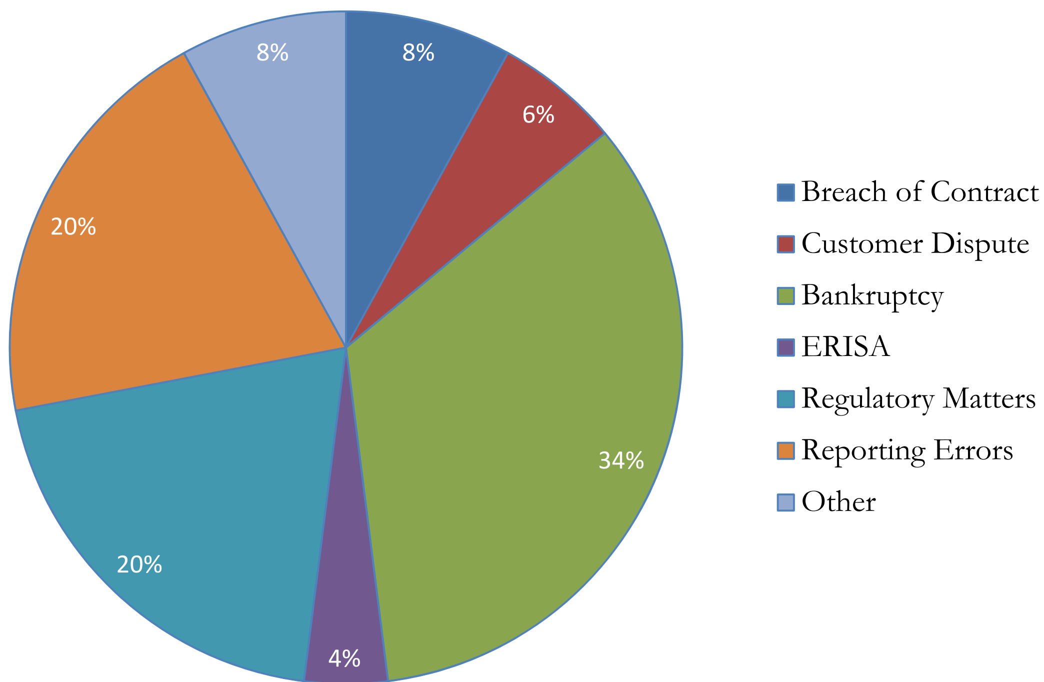
As reported in prior *Claims Trends,* recent bankruptcy proceedings (including proceedings arising out of the bankruptcies of the Tribune Company and the Lyondell Chemical Company) have named numerous funds as parties.[92] The Tribune and Lyondell proceedings raise a number of legal issues, including issues regarding the legal right (or "standing") of the plaintiffs to prosecute their claims, the timeliness of the plaintiffs' claims, and the applicability to the plaintiffs' claims of a "safe harbor" defense in the federal bankruptcy code for "settlement payments." Motions to dismiss in both proceedings remain pending.

D&O/E&O Claims Data

D&O/E&O Notices – 2012

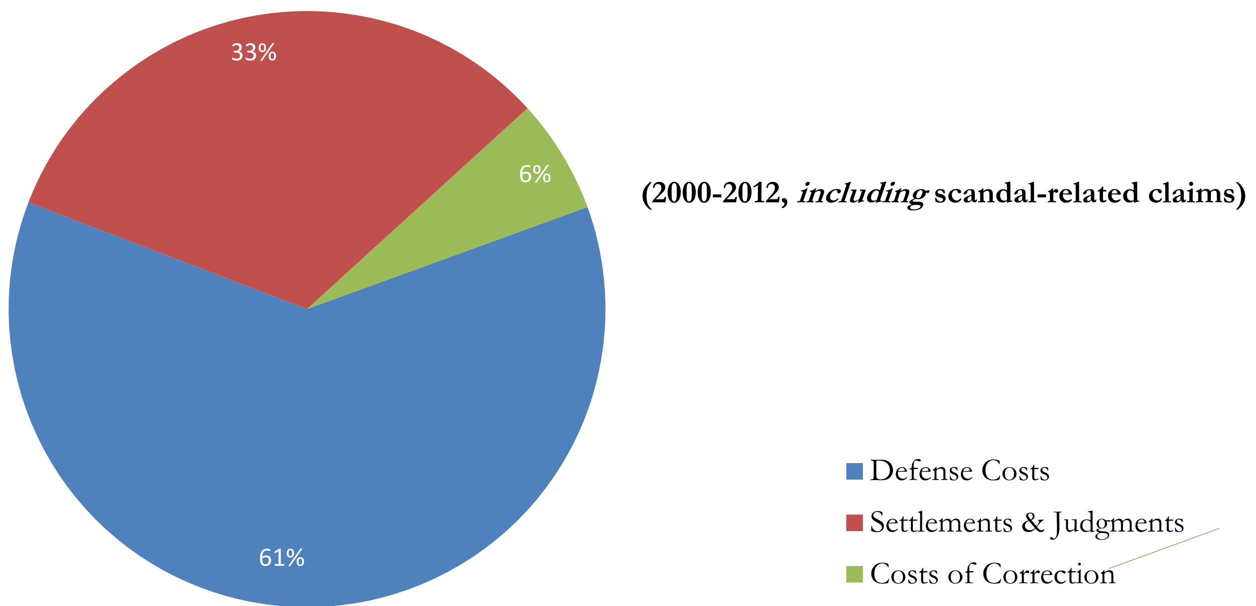
The most common subject matters in claims notices provided under ICI Mutual D&O/E&O policies in 2012 included (1) bankruptcy proceedings; (2) regulatory matters; and (3) reporting errors.

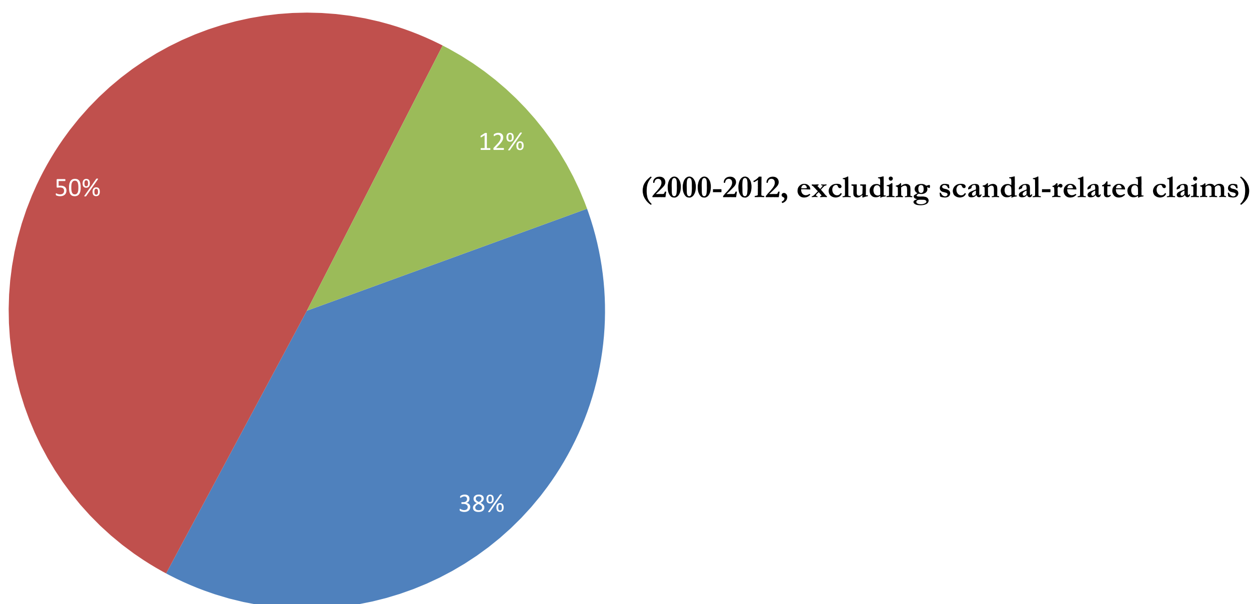
D&O/E&O Notices by Subject (2012)



D&O/E&O Insurance Payments by Category (2000-2012)

The first 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 from January 1, 2000 through December 31, 2012 under ICI Mutual D&O/E&O policies. The second chart shows the same information, but *excludes* payments made on insurance claims associated with the mutual fund trading scandal of 2003-2004.





Endnotes

[1] Press Release, SEC, *SEC's Enforcement Program Continues to Show Strong Results in Safeguarding Investors and Markets: Last Two Years Reflect Two Highest Numbers of Total Actions Brought by SEC* (Nov. 14, 2012), https://www.sec.gov/news/press/2012/2012-227.htm.

[2] *See* In re UBS Fin. Servs. Inc. of P.R., Admin. Proc. No. 3-14863, '33 Act Rel. No. 9318 (SEC May 1, 2012), *available at* https://www.sec.gov/litigation/admin/2012/33-9318.pdf (SEC finds that UBS made misrepresentations and omissions of material facts regarding the secondary market liquidity and pricing of affiliated, non-exchange-traded closed-end funds); UBS Global Asset Mgmt. (Americas) Inc., Admin. Proc. No. 3-14699, ICA Rel. No. 29920 (SEC Jan. 17, 2012), *available at* http://www.sec.gov/litigation/admin/2012/ia-3356.pdf (SEC finds that adviser failed to cause fixed-income securities in fund portfolios to be valued in accordance with fund fair valuation procedures); In the Matter of Lisa B. Premo, Admin. Proc. No. 3-14697, ICA Rel. No. 29919 (SEC Jan. 17, 2012), *available at* http://www.sec.gov/litigation/admin/2012/ia-3355.pdf (SEC institutes proceeding against fund portfolio manager, alleging that portfolio manager failed to inform valuation committee of material information regarding a collateralized debt obligation held by the fund).

[3] *See* In re Martin Currie, Admin. Proc. No. 3-14873, ICA Rel. No. 30062, *available at* https://www.sec.gov/litigation/admin/2012/ia-3404.pdf (SEC filed May 10, 2012) (SEC finds that adviser caused its U.S. open-end fund to improperly acquire securities from the adviser's hedge fund in an effort to reduce the hedge fund's exposure to a single company during the credit crisis).

[4] *See* In re Top Fund Mgmt., Inc., Admin. Proc. No. 3-15154 (SEC Dec. 21, 2012), *available at* https://www.sec.gov/litigation/admin/2012/33-9377.pdf (SEC finds that adviser's options trading strategy for fund was contrary to fund's stated investment policy and was misrepresented in a shareholder report); In re Fiduciary Asset Mgmt., LLC, Admin. Proc. No. 3-15140, ICA Rel. No. 30309 (Dec. 19, 2012), *available at* https://www.sec.gov/litigation/admin/2012/ia-3520.pdf (SEC finds adviser's management of a fund was inconsistent with the investment strategies disclosed in the fund's registration statement); In re Claymore Advisors, LLC, Admin. Proc. No. 3-15139 (SEC Dec. 19, 2012), *available at* https://www.sec.gov/litigation/admin/2012/ia-3519.pdf (same); In re Riad and Swanson, Admin. Proc. No. 3-15141, ICA Rel. No. 30310 (SEC Dec. 19, 2012), *available at* https://www.sec.gov/litigation/admin/2012/34-68467.pdf (SEC finds portfolio managers used investment techniques that were not disclosed in the fund's registration statement); In re OppenheimerFunds, Inc., Admin. Proc. No. 3-14909, ICA Rel. No. 30099 (SEC June 6, 2012), *available at* https://www.sec.gov/litigation/admin/2012/33-9329.pdf (SEC finds adviser did not communicate accurate loss amounts to investors and prospective investors following the adviser's use of significant leverage and resulting loss during credit crisis).

[5] *See* In re Focus Point Solutions, Inc., Admin. Proc. No 3-15011, ICA Rel. No. 3458 (SEC Sept. 6, 2012), *available at* https://www.sec.gov/litigation/admin/2012/ia-3458.pdf (SEC finds that the adviser failed to disclose material conflicts of interest in three areas of its advisory business); In re Peak Wealth Opportunities, LLC, Admin. Proc. No. 3-14979, ICA Rel. No. 30165 (SEC Aug. 10, 2012), *available at* http://www.sec.gov/litigation/admin/2012/34-67640.pdf (SEC institutes proceeding against fund adviser for failing to make and keep required records and for failure to provide the board of directors with information requested in connection with the board's re-approval of the advisory agreement). *See also* Joe Morris, *SEC Hits Northern Lights with Wells Notice*, IGNITES, June 15, 2012 (SEC issued adviser a Wells Notice in connection with the manner in which the funds' advisory agreements were approved and disclosed), *available at* http://www.ignites.com/c/369992/41992?highlight=Northern%20Lights.

[6] *See* SEC v. AMMB Consultant Sendirian Berhad, No. 1:12-cv-01052 (D.D.C. July 13, 2012) (district court entered final judgment against sub-adviser that, as alleged by the SEC, charged investment advisory fees to a fund for advisory services that were not performed). This proceeding is related to Morgan Stanley Inv. Mgmt. Inc., Admin. Proc. No. 3-14628, ICA Rel. No. 29862 (SEC Nov. 16, 2011), *available at* https://www.sec.gov/litigation/admin/2011/ia-3315.pdf.

[7] *See* In the Matter of New America High Income Fund, Inc., Admin. Proc. No. 3-15146 (SEC Dec. 20, 2012), *available at* http://www.sec.gov/litigation/admin/2012/ic-30313.pdf (proceeding against an adviser for its improper repurchase of auction rate securities in its effort to avoid a failed auction).

[8] *See* In re Frances Guggino, Admin. Proc. No. 3-14995, IAA Rel. No. 3455 (SEC Aug. 23, 2012) https://www.sec.gov/litigation/admin/2012/ia-3449.pdf (SEC finds that an officer of a fund's adviser altered books and records of the fund).

[9] *See* In re Oppenheimer Asset Mgmt. Inc., Admin. Proc. No. 3-15238 (SEC Mar. 11, 2013), *available at* https://www.sec.gov/litigation/admin/2013/33-9390.pdf (SEC finds that the adviser misrepresented the value of a private fund to investors and prospective investors); SEC v. Yorkville Advisors, LLC, No. 12-cv-7728 (S.D.N.Y. filed Oct. 17, 2012) (lawsuit alleging that investment adviser and its president reported "false and inflated values" for portfolio securities held by hedge funds; a motion to dismiss is pending); SEC v. RKC Capital Mgmt., LLC, No. 12-cv-00408 (D.C. Utah filed Apr. 30, 2012) (lawsuit alleging that investment advisers and insider artificially inflated values of portfolio securities held by a hedge fund; this lawsuit is in its early stages).

[10] *See* In re Evans Barthelemy, Admin. Proc. No. 3-15102, ICA Rel. No. 30278 (SEC Nov. 20, 2012), *available at* https://www.sec.gov/litigation/admin/2012/ia-3503.pdf (SEC finds adviser improperly registered with the SEC, made materially false ADV filings and failed to maintain and follow proper compliance and record-keeping policies and procedures).

[11] *See* In re EM Capital Mgmt., LLC, No. 3-15101, IAA Rel. No. 3502 (SEC Nov. 20, 2012) *available at* https://www.sec.gov/litigation/admin/2012/ia-3502.pdf. (SEC institutes proceedings against adviser for failure to furnish required books and records upon the SEC's request).

[12] In re J. Kenneth Alderman, Admin. Proc. No. 3-15127, ICA Rel. No. 30300 (SEC Dec. 10, 2012), *available at* https://www.sec.gov/litigation/admin/2012/ic-30300.pdf. The Enforcement Division alleged, among other things, that the board (1) had not specified a fair valuation methodology to be used; (2) did not "continuously review the appropriateness of the method to be used" in valuing each portfolio security; (3) did not provide "any meaningful substantive guidance" to its valuation committee on how fair valuation determinations should be made; and (4) "made no meaningful effort to learn how fair values were actually being determined."

[13] While relatively uncommon, there have been SEC enforcement actions brought against fund independent directors in the past. *See, e.g.*, In re The Rockies Fund, Inc., Admin. Proc. No. 3-9615, ICA Rel. No. 27593 (Dec. 7, 2006), *available at* https://www.sec.gov/litigation/opinions/2006/34-54892.pdf (in SEC action involving a business development company, two independent directors received cease and desist orders, prohibitions on associating with investment companies for a period of three years, and civil monetary penalties of $20,000 each); In the Matter of Jon D. Hammes, ICA Rel. No. 26290 (Dec. 11, 2003), *available at* https://www.sec.gov/litigation/admin/33-8346.htm (independent directors of an investment company consented to an SEC order requiring them to cease and desist from committing or causing certain violations of the '33 Act and the ICA; no civil monetary penalties involved); In the Matter of Parnassus Investments, Admin. Proc. No. 3-9317, Init. Decisions Rel. No. 131 (Sept. 3, 1998), 1934 Act Rel. No. 40534 (Oct. 8, 1998), *available at* https://www.sec.gov/litigation/aljdec/1998/34-40534.pdf (in SEC action involving an open-end fund, two independent directors received cease and desist orders, but no civil monetary penalties).

[14] *See, e.g., Morgan Keegan Case Spurs Valuation Soul Searching*, IGNITES (Mar. 28, 2013), http://www.ignites.com/c/495621/55431 (reporting that the SEC action has prompted "numerous firms in the weeks and months following the December enforcement action [to seek] an external assessment or reassessment of their valuation policies and procedures"); *SEC Brings Enforcement Action Against Mutual Fund Directors For Alleged Failures in Oversight of Valuation Committee*, Ropes & Gray Alert, Dec. 13, 2012, http://www.ropesgray.com/files/Publication/e80be2f2-a9c5-48d8-98ca-eeb056d196c8/Presentation/PublicationAttachment/fd22df77-5aa9-40d8-8739-ef63704a1b4f/20121213_IM_Alert.pdf (noting the difficulties faced by fund directors in complying with fair valuation guidance "when overseeing complex funds that utilize a wide range of investment instruments

amidst challenging market conditions"; and commenting on the SEC enforcement staff's views regarding the role of directors in valuation).

[15] *See* In re J. Kenneth Alderman, Admin. Proc. No. 3-15127, (SEC Mar. 27, 2013) (in filing joint motion for stay, parties stated that they "have agreed in principle to a settlement on all major terms"); *see also* Joe Morris, *SEC, Morgan Keegan Directors Reach Settlement*, IGNITES (Mar. 28, 2013); Jean Eaglesham and Kirsten Grind, *Former Morgan Keegan Fund Directors to Settle With SEC*, WALL ST. J. (Mar. 28, 2013) (same).

[16] *Compare, e.g.*, Kirsten Grind and Julie Steinberg, *Reserve Primary Managers Cleared in SEC Fraud Case*, WALL ST. J. (Nov. 12, 2012) (quoting Robert Khuzami, then Director of the SEC's Division of Enforcement, as saying, "Today's verdict of liability sends the message that fund executives cannot withhold from investors and trustees key information about their fund's vulnerability") *with* Peter Ortiz, *Both Sides Claim Victory in Reserve Fraud Trial*, IGNITES (Nov. 13, 2012), http://www.ignites.com/pc/435202/48962 (reporting that two industry observers viewed the verdict as a "very significant" loss for the SEC).

[17] *See* SEC v. Reserve Mgmt. Co., No. 1:09-cv-4346 (S.D.N.Y. Nov. 13, 2012) (jury verdict form).

[18] *See, e.g.*, Jeffrey O. Himstreet, *Lessons for Investment Advisers from a Reinvigorated SEC Enforcement Staff*, NSCP CURRENTS (May/June 2012), *available at* http://www.bingham.com/Publications/Files/2012/06/NSCP-Currents (discussing, among other things, the Division's new unit and its "Aberrational Performance Inquiry" initiative that seeks to detect signs of fraud); Randall J. Fons, Brian Hoffman and Tiffany A. Rowe, *United States: The SEC Speaks: Reflections and Enforcement Initiatives in 2013*, Morrison Foerster Client Alert (Mar. 12, 2013), *available at* http://www.mofo.com/files/Uploads/Images/130305-SEC-Enforcement-Initiatives.pdf (reporting on remarks by Bruce Karpati, Chief of the Asset Management Unit of the SEC's Division of Enforcement at the 2013 "SEC Speaks" conference); Christian Bartholomew, Christopher Garcia and Jill Baisinger, *SEC Speaks 2013: Waiting for the new guard*, THOMSON REUTERS NEWS & INSIGHT (Mar. 22, 2013), *available at* http://newsandinsight.thomsonreuters.com/Securities/Insight/2013/03_-_March/SEC_Speaks_2013__Waiting_for_the_new_guard/ (same).

[19] *See, e.g.*, Jean Eaglesham and Kirsten Grind, *Fund Directors Are Feeling the Heat*; WALL ST. J. (Mar. 24, 2013), *available at* http://online.wsj.com/article/SB10001424127887323466204578380502371722698.html (quoting Bruce Karpati, Chief of the Asset Management Unit of the SEC's Division of Enforcement, that the SEC is "looking at directors very closely"); *Fund Directors Charged in Recent SEC Enforcement Case Targeting Valuation*, Debevoise Client Update, Dec. 12, 2012, *at* 2, http://www.debevoise.com/files/Publication/76cc2b68-5b1a-4b58-9823-6e850693503e/Presentation/PublicationAttachment/df1713e1-7c59-427d-8145-0df56b25b77c/Fund%20Directors%20Charged%20in%20Recent%20SEC%20Enforcement%20Case%20Targeting%20Valuation.pdf ("The SEC's targeting of fund directors is a stark warning to fund directors and all fund personnel charged with management or oversight duties that they need to take their responsibilities for overseeing fund management seriously, even with respect to the complex and technical area of asset valuation.").

[20] *See* SEC v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (rejecting "neither admit nor deny" settlement); SEC v. Bridge Premium Finance, LLC, No. 12-cv-2131 (D. Colo. Jan. 17, 2013) (judge "refuse[s] to approve penalties against a defendant who remains defiantly mute as to the veracity of the allegations against him. A defendant's options in this regards are binary: he may admit the allegation or he may go to trial."); SEC v. Koss Corp., No. 11-991 (E.D. Wis. Dec. 20, 2011) (letter from court requesting that SEC justify to the court why the proposed settlement (which was later approved) is "fair, reasonable, adequate, and in the public interest"). *See also* Bob Van Voris, *SAC Judge Questions Record $602 Million SEC Settlement*, BLOOMBERG (Mar. 28, 2013), *available at* (reporting that federal district court judge "expressed concern about the SEC's use of the 'neither admit nor deny' provision" in proposed SEC settlement of insider trading case against SAC Capital Advisors LP, and that judge said "he may condition approval" of the settlement on the results of the Second Circuit appeal in the SEC v. Citigroup Global Mkts. Inc., No. 11-5227 (2d Cir. Mar. 15, 2012)).

[21] In January 2012, Robert Khuzami, then the Director of the SEC's Enforcement Division, announced that the SEC was modifying its approach to "neither admit nor deny" settlements. Under the new approach, a defendant in a civil proceeding cannot use the "neither admit nor deny" formulation if there is a parallel criminal

investigation or proceeding against it. *See* Robert Khuzami, Director, Division of Enforcement, SEC, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), https://www.sec.gov/news/speech/2012/spch010712rsk.htm (also noting that the policy change does not affect the "neither admit nor deny" approach in settlements (such as the one in *Citigroup*) that do not involve criminal convictions or admissions of criminal law violations); 17 C.F.R. § 202.5(e) (2012).

[22] *See* Robert Khuzami, Director, Division of Enforcement, SEC, *Testimony on "Examining the Settlement Practices of U.S. Financial Regulators" Before the Committee on Financial Services, U.S. House of Representatives* (May 17, 2012), https://www.sec.gov/news/testimony/2012/ts051712rk.htm.

[23] SEC v. Citigroup Global Mkts. Inc., No. 11-5227 (2d Cir. Mar. 15, 2012).

[24] *See* Press Release, SEC, *SEC Issues First Whistleblower Program Award* (Aug. 21, 2012), https://www.sec.gov/news/press/2012/2012-162.htm; *Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2012*, Appendix A, SEC (Nov. 2012), https://www.sec.gov/about/offices/owb/annual-report-2012.pdf (providing chart with breakdown of whistleblower tips by allegation type).

[25] *See, e.g.*, *SEC Releases Whistleblower Program's 2012 Annual Report*, Ropes & Gray Client Alert, Nov. 19, 2012, http://www.ropesgray.com/files/Publication/6ae8cc90-380f-415c-9605-7b790b45937a/Presentation/PublicationAttachment/6ba987a9-1e54-4a07-9cd4-814ea7da527f/20121119_Sec_Enf_Alert.pdf (forecasting increased SEC activity with respect to whistleblowers, and predicting that "sophisticated counsel [will likely] recruit and vet tipsters and help craft impressive whistleblower submissions"). Pursuant to Sarbanes-Oxley and Dodd-Frank, whistleblowers are generally protected against retaliatory actions by their employers. In 2012, the First Circuit held that the Sarbanes-Oxley whistleblower protection does not extend to employees of private companies, such as a privately held adviser to a registered fund. *See* Lawson v. FMR LLC, 724 F. Supp. 2d 141 (D. Mass. 2010), *rev'd and remanded*, 670 F.3d 61 (1st Cir. 2012), *cert. filed*, No. 12-3 (June 28, 2012). More recently, a fund group employee filed—and shortly thereafter, dropped—a lawsuit, in which the plaintiff alleged that he was wrongfully terminated and suffered retaliation because of his knowledge of allegedly illegal activity. *See* Williams v. Pac. Inv. Mgmt. Co., No. 30-2013-00635253 (Cal. Super. Ct. Mar. 5, 2013); *see also Former Pimco VP Makes, Then Drops, Scandalous Claims*, IGNITES (Mar. 13, 2013), http://www.ignites.com/c/488001/54561/former_pimco_makes_then_drops_scandalous_claims.

[26] Gabelli v. SEC, 133 S. Ct. 1216 (2013).

[27] In another case, SEC v. Bartek, 484 Fed. Appx. 949 (5th Cir. Aug. 7, 2012), the Fifth Circuit ruled that the SEC actions seeking injunctions or officer-and-director bars are also subject to the same limitations period that was at issue in *Gabelli*. The SEC filed a petition for a writ of certiorari with the Supreme Court, but, shortly after the issuance of the *Gabelli* decision, the SEC moved to dismiss its petition, and the Supreme Court granted the SEC's motion.

[28] *See, e.g.*, Gabelli v. SEC*: The Supreme Court Limits the Statue of Limitations for SEC Actions*, Cozen O'Connor Client Alert, Mar. 20, 2013, http://www.cozen.com/cozendocs/Outgoing/alerts/2013/GIG_Liability_032013.pdf; Gabelli: *The Supreme Court Rejects the SEC's Reliance on the "Discovery Rule" in Civil Penalty Actions*, Fried Frank Client Alert, Mar. 6, 2013, http://www.friedfrank.com/siteFiles/Publications/FINAL_3-6-2013_TOC_Memo_Gabelli_The_Supreme_Court_Rejects_the_SECs_Reliance_on_the_Discovery_Rule_in_Civil_Penalty_Actions.pdf.

[29] *See High Court Ruling May Shut Out SEC Financial Crisis Cases*, BOARDIQ (Mar. 12, 2013), http://www.boardiq.com/pc/484821/54251.

[30] *See* In the Matter of Putnam Advisory Co., LLC (PYXIS ABS CDOs), No. 2011-0035 (Mass. Secs. Div. filed Oct. 17, 2012), *available at* http://www.sec.state.ma.us/sct/current/sctputnam/Putnam-Complaint-10-17-2012.pdf.

[31] *See 2013 Regulatory and Examination Priorities Letter*, FINRA (Jan. 11, 2013), http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p197649.pdf.

[32] *See* 17 C.F.R. 4.5. The CFTC is generally charged with regulating the trading of commodity futures and swaps by certain types of pooled investment vehicles. Broadly speaking, until the recent rule changes, mutual funds had been able to engage in trading of commodities or commodity-linked derivatives without causing their investment advisers to be required to register as commodity pool operators. As noted in the text, the rule changes were challenged in federal district court, which upheld them. An appeal is currently pending before the D.C. Circuit. *See* ICI v. CFTC, 2012 U.S. Dist. LEXIS 175941 (D.D.C. Dec. 12, 2012) (upholding CFTC's rule changes), *appeal docketed*, No. 12-5413 (D.C. Cir. filed Dec. 28, 2012). *See generally* Michael Philipp et al., *What the CFTC Rule Revisions Mean for Registered Investment Companies and Their Investment Advisers*, THE INVESTMENT LAWYER (May 2012), *available at* http://www.morganlewis.com/pubs/InvestmentLawyer_CFTCRuleRevisions_May2012.pdf.

[33] In re Reserve Primary Fund Secs. & Derivative Class Action Litig., No. 1:08-cv-8060 (S.D.N.Y. Sept. 30, 2012); In re Oppenheimer Rochester Funds Group Secs. Litig., 2012 U.S. Dist. LEXIS 6975 (D. Colo. Jan. 20, 2012); Zametkin v. Fidelity Mgmt. & Research Co., No. 1:08-cv-10960 (D. Mass. Nov. 16, 2010); In re Morgan Keegan Secs., Derivative & ERISA Litig., 2010 U.S. Dist. LEXIS 104246 (W.D. Tenn. Sept. 30, 2010); In re Evergreen Ultra Short Opportunities Fund Secs. Litig., 705 F. Supp. 2d 86 (D. Mass. 2010); Gosselin v. First Trust Advisors L.P., 2009 U.S. Dist. LEXIS 117737 (N.D. Ill. Dec. 17, 2009); In re Charles Schwab Corp. Secs. Litig., 257 F.R.D. 534, 2009 U.S. Dist. LEXIS 8125 (N.D. Cal. 2009).

[34] In re Oppenheimer Champion Fund Secs. Fraud Class Actions, No. 1:09-cv-00386 (D. Colo. Sept. 30, 2011) & Ferguson v. OppenheimerFunds, Inc., No. 1:09-cv-01186 (D. Colo. Sept. 30, 2011) (final settlement of both lawsuits); Zametkin v. Fidelity Mgmt. & Research Co., No. 1:08-cv-10960 (D. Mass. May 11, 2012) (final settlement); Gosselin v. First Trust Advisors L.P., 2009 U.S. Dist. LEXIS 117737 (N.D. Ill. Dec. 17, 2009) (final settlement); In re Charles Schwab Corp. Secs. Litig., 2011 U.S. Dist. LEXIS 44547 (N.D. Cal. Apr. 19, 2011) (final settlement).

[35] 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. 1:08-cv-08235 (S.D.N.Y. Sept. 6, 2012) (final settlement).

[36] *See* In re Oppenheimer Rochester Funds Group Secs. Litig., No. 1:09-md-2063 (D. Colo. filed June 24, 2009); In re Morgan Keegan Closed-End Fund Litig., No. 2:07-cv-2830 (W.D. Tenn. filed Dec. 21, 2007) (preliminary settlement awaiting court approval); In re Morgan Keegan Open-End Mutual Fund Litig., No. 2:07-cv-2784 (W.D. Tenn. filed Dec. 6, 2007) (partial settlement awaiting court approval); In re Reserve Primary Fund Secs. & Derivative Class Action Litig., No. 1:08-cv-8060 (S.D.N.Y. Mar. 5, 2013).

[37] In re Reserve Primary Fund Secs. & Derivative Class Action Litig., No. 1:08-cv-8060 (S.D.N.Y. Mar. 5, 2013) (in stipulation filed with court, parties state they "have reached an agreement in principle to settle this case," but "require further time to prepare a final settlement agreement for submission to the Court for approval").

[38] Rafton v. Rydex Series Funds, No. 5:10-cv-1171 (N.D. Cal. Feb. 10, 2012) (final approval of settlement); Rafton v. Rydex Series Funds, 2011 U.S. Dist. LEXIS 707 (N.D. Cal. Jan. 5, 2011) (order granting in part and denying in part motion to dismiss).

[39] In re Direxion Shares ETF Tr., No. 1:09-cv-8011 (S.D.N.Y. Feb. 5, 2013) (preliminarily approving proposed settlement); In re Direxion Shares ETF Tr., 2012 U.S. Dist. LEXIS 29709 (S.D.N.Y. Mar. 6, 2012) (denying motion to dismiss).

[40] In re ProShares Tr. Secs. Litig., 889 F. Supp. 2d 644 (S.D.N.Y. 2012) (granting motion to dismiss), *appeal filed*, No. 12-3981 (2d Cir. filed Oct. 5, 2012).

[41] Janus Capital Group v. First Derivative Traders, 131 S. Ct. 2296 (2011).

[42] On the issue of whether the *Janus* holding applies to the SEC, see, e.g., SEC v. Pentagon Capital Mgmt. PLC, 844 F. Supp. 2d 377 (S.D.N.Y. 2012) (stating that the SEC is not limited by the *Janus* holding in actions alleging violations of rule 10b-5(a) or rule 10b-5 (c) or violations of section 17(a) of the '33 Act); SEC v. CJ's Fin., 2012 U.S. Dist. LEXIS 117934 (E.D. Mich. July 30, 2012) (apparently assuming the applicability of *Janus* to SEC actions), *adopted by* SEC v. CJ's Fin., 2012 U.S. Dist. LEXIS 117879 (E.D. Mich. Aug. 21, 2012); SEC v. Brown, 878 F. Supp. 2d 109 (D.D.C. 2012) (SEC seemingly conceding that *Janus* applies to SEC actions alleging

violations of rule 10b-5(b)). On the issue of court deference to the SEC's interpretation of its own rule, *see* M. Wynne, Rule 10b-5(b) Enforcement Actions in Light of *Janus*: Making the Case for Agency Deference, Note, 81 FORDHAM L. REV. 102 (2013) (discussing extent to which SEC's interpretation of rule 10b-5 is entitled to deference from the courts). On the issue of the extent to which *Janus* applies to claims brought under certain other provisions of the federal securities laws, *see*, *e.g.*, SEC v. Daifotis, 2011 U.S. Dist. LEXIS 83872 (N.D. Cal. Aug. 1, 2011) (declining to apply *Janus* to securities fraud claims under section 17(a) of the '33 Act); SEC v. Sells, 2012 U.S. Dist. LEXIS 112450 at *22 (N.D. Cal. Aug. 10, 2012) (same, noting that "the word, 'make,' on which *Janus* focused, is absent from the operative language of § 17(a)"); *but see* SEC v. Kelly, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011) (applying *Janus* to securities fraud claims under section 17(a)). *See generally 2012 Year-End Securities Litigation Update*, Gibson Dunn Report, at 11-15 (Jan. 2013), http://www.gibsondunn.com/publications/Documents/2012-Year-End-Securities-Litigation-Update.pdf.

[43] *See* In re Smith Barney Fund Transfer Agent Litig., 884 F. Supp. 2d 152 (S.D.N.Y. 2012).

[44] *See* In re Smith Barney Fund Transfer Agent Litig., No. 1:05-cv-7583 (S.D.N.Y. filed Aug. 26, 2005).

[45] 15 U.S.C. § 80a-35(b) (2007).

[46] Jones v. Harris Assocs. L.P., 130 S. Ct. 1418, 1426 (2010). This standard was first articulated by a federal appellate court in Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923 (2d Cir. 1982).

[47] Jones v. Harris Assocs. L.P., No. 07-1624 (7th Cir. filed Mar. 20, 2007), *remanded from* Jones v. Harris Assocs. L.P., 130 S. Ct. 1418 (2010).

[48] Bennett v. Fidelity Mgmt. & Research Co., No. 1:04-cv-11651 (D. Mass. Jan. 27, 2012).

[49] Turner v. Davis Selected Advisers, L.P., No. 4:08-cv-421 (D. Ariz. Mar. 19, 2013) (order denying motion to alter or amend the judgment).

[50] Curran v. Principal Mgmt. Corp., LLC, No. 09-cv-433 (S.D. Iowa filed Oct. 28, 2009) (both parties' motions for summary judgment remain pending).

[51] Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. filed Oct. 14, 2010). The defendant's motion to dismiss the *Southworth* lawsuit was granted in part and denied in part in September 2011; in November 2011, the plaintiffs voluntarily dismissed the lawsuit.

[52] 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).

[53] Kasilag v. Hartford Inv. Fin. Servs. LLC, No. 1:11-cv-01083 (D.N.J. filed Feb. 25, 2011). In September 2011, the court granted in part and denied in part the defendant's original motion to dismiss. Thereafter, the plaintiffs filed an amended complaint; in December 2012, the court denied in part and granted in part the defendant's motion to dismiss the amended complaint. Kasilag v. Hartford Inv. Fin. Servs. LLC, 2012 U.S. Dist. LEXIS 178234 (D.N.J. Dec. 17, 2012).

[54] Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Sept. 25, 2012) (motion to dismiss denied in part and granted in part). In early 2013, a similar section 36(b) complaint was filed against the same fund group; this lawsuit was subsequently consolidated into *Sivolella.* Sanford v. AXA Equitable Funds Mgmt. Group, LLC, No. 3:13-cv-312 (D.N.J., filed Jan. 15, 2013). On April 15, 2013, the plaintiffs filed a second amended complaint, in which they also challenged, under section 36(b), the *administrative* fees paid to the advisers by the funds.

[55] *See*, *e.g.*, Reso v. Artisan Partners Ltd. P'ship, 11-cv-873 (E.D. Wis. Dec. 16, 2011) (plaintiff's motion requesting that the court exercise its discretion to impanel an advisory jury). A court may also impanel an advisory jury on its own motion. *See* In re Federated Mut. Funds Excessive Fee Litig., No. 2:04-cv-352 (W.D. Pa. Mar. 7, 2011).

[56] *See* Gilliam v. Fid. Mgmt. & Research Co., 2005 U.S. Dist. LEXIS 10478, *9 (D. Mass. May 3, 2005); Kalish v. Franklin Advisers, Inc., 928 F.2d 590, 592 (2d Cir. 1991); Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1340 (7th Cir. 1990); Krinsk v. Fund Asset Mgmt., Inc., 875 F.2d 404, 414 (2d Cir. 1989); Schuyt v. Rowe Price

Prime Reserve Fund, Inc., 835 F.2d 45, 46 (2d Cir. 1987); In re Evangelist, 760 F.2d 27, 30-31 (1st Cir. 1985); In re Gartenberg, 636 F.2d 16, 17-18 (2d Cir. 1980).

[57] Specifically, in addition to alleging a section 36(b) violation with respect to the advisory fees charged to mutual funds offered as investment options in certain retirement plans, the plaintiffs in the underlying lawsuit alleged that the defendants charged the plans and, indirectly, plan participants, "unreasonable and excessive fees," and thereby breached their fiduciary duties under ERISA and engaged in prohibited transactions in violation of ERISA. Santomenno v. John Hancock Life Ins. Co., 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011).

A similar case was filed in early 2011 by the same plaintiffs' lawyers against another insurance company and certain affiliated investment advisers. Santomenno v. Transamerica Life Ins. Co., No. 11-736 (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).

[58] Santomenno v. John Hancock Life Ins. Co., 677 F.3d 178 (3d Cir. 2012).

[59] Laborer's Local 265 Pension Fund v. iShares Tr., No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013).

[60] Laborer's Local 265 Pension Fund v. iShares Tr., No. 13-cv-46 (M.D. Tenn. filed Mar. 11-12, 2013) (motions to dismiss filed by various defendants).

[61] Halebian v. Berv, 631 F. Supp. 2d 284, 289 (S.D.N.Y. 2007).

[62] Halebian v. Berv, 644 F.3d 122 (2d Cir. 2011).

[63] Halebian v. Berv, 869 F. Supp. 2d 420 (S.D.N.Y. 2012).

[64] Halebian v. Berv, No. 12-3360 (2d Cir. filed Aug. 23, 2012).

[65] 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 (at pp. 35-36, discussing insurance for the costs of correcting operations-based errors).

[66] Efforts by the plaintiffs' bar to utilize state law class actions and state law derivative actions may reflect the narrowing in recent years of other legal avenues available to them for attacks on the fund industry. In particular, the courts, in a number of decisions over the past decade, have refused to find "implied" rights of action under various provisions of the ICA. *See, e.g.*, Smith v. Oppenheimer Funds Distrib., Inc., Nos. 10-cv-7387 & 10-cv-7394, (S.D.N.Y. June 6, 2011) (ICA § 47(b)); Northstar Fin. Advisors, Inc. v. Schwab Invs., 615 F.3d 1106 (9th Cir. 2010) (ICA § 13(a)); Bellikoff v. Eaton Vance Corp., 481 F.3d 110, 117 (2d Cir. 2007) (ICA §§ 34(b), 36(a), and 48(a)); Olmsted v. Pruco Life Ins. Co. of N.J., 283 F.3d 429, 436 (2d Cir. 2002) (ICA §§ 26(f) and 27(i)).

[67] As reported in prior editions of *Claims Trends,* in an earlier wave of ARPS lawsuits, initiated in 2008-09, ARPS holders themselves pursued litigation against funds, fund officers and directors, and/or fund advisers. Only one of these lawsuits appears to remain active. *See* Kastel v. Nuveen Invs. Inc., No. 1:09-cv-646 (M.D.N.C. filed Aug. 21, 2009) (motions to dismiss, filed in December 2010, remain pending).

[68] *See* Safier v. Nuveen Asset Mgmt., No. 2010-ch-32166 (Ill. Cir. Ct. Dec. 16, 2011); Klein v. Cohen & Steers Capital Mgmt., Inc., No. 651467-2010 (N.Y. Sup. Ct. Apr. 15, 2011); Gammon v. Cohen & Steers Capital Mgmt., Inc., No. 651378-2010 (N.Y. Sup. Ct. Apr. 14, 2011); Richelson v. John Hancock Advisers, LLC, No. 10-3355A (Mass. Super. Ct. Mar. 3, 2011).

[69] *See* Curbow v. BlackRock Advisors, LLC, No. 651104-2010 (N.Y. Sup. Ct. filed July 27, 2010); Curbow Family LLC v. Morgan Stanley Inv. Advisors, Inc., No. 651059-2010 (N.Y. Sup. Ct. filed July 22, 2010); Rotz v. Van Kampen Asset Mgmt., Inc., No. 651060-2010 (N.Y. Sup. Ct. filed July 22, 2010).

[70] *See* Rutgers Enhanced Ins. Co. v. Esty, No. 10-4111 (Mass. Super. Ct. July 25, 2011); Manuszak v. Esty, Nos. 10-3456 & 10-3457 (Mass. Super. Ct. July 6, 2011); Beckham v. Keith, No. 10-cv-3574 (Mass. Super. Ct. June 15, 2011).

[71] *See* Brown v. Calamos, 777 F. Supp. 2d 1128 (N.D. Ill. 2011), *aff'd*, 664 F.3d 123 (7th Cir. 2011); Rutgers Cas. Ins. Co. v. Calamos, No. 11-cv-462 (N.D. Ill. Mar. 15, 2012); Bourrienne v. Calamos, 2011 U.S. Dist. LEXIS 86135 (N.D. Ill. Aug. 4, 2011) (appeal to Seventh Circuit voluntarily dismissed by parties). As noted in last year's *Claims Trends,* the Seventh Circuit, in affirming the federal district court's decision in Brown v. Calamos, staked out an expansive view of SLUSA preclusion, which, if widely adopted, would appear to leave little room for the plaintiffs' bar to pursue state law class actions against fund industry defendants. Notwithstanding that the Seventh Circuit's opinion arguably widened an existing split in federal appellate court approaches to the scope of SLUSA preclusion, the U.S. Supreme Court in 2012 declined to review the Seventh Circuit's decision. Brown v. Calamos, 664 F.3d 123 (7th Cir. 2011), *cert. denied* 132 S. Ct. 2774 (2012).

[72] Protas v. Cavanagh, 2012 Del. Ch. LEXIS 88 (Del. Ch. May 4, 2012).

[73] These dismissals came in 2009 and 2010, with the Second Circuit affirming the dismissals of two of these lawsuits in November 2009 and June 2011, respectively, and with the Ninth Circuit affirming the dismissal of another lawsuit in May 2011. *See* McBrearty v. Vanguard Group, Inc., 353 Fed. Appx. 640 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3411 (2010); Seidl v. Am. Century Cos., 427 Fed. Appx. 35 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 846 (2011); Wodka v. Causeway Capital Mgmt. LLC, 433 Fed. Appx. 563 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 769 (2011).

[74] Hartsel v. Vanguard Group, Inc., 2012 Del. LEXIS 23 (Del. 2012).

[75] Gomes v. Am. Century Cos., 2012 U.S. Dist. LEXIS 187426 (W.D. Mo. Feb. 16, 2012), *aff'd* No. 12-1639 (8th Cir. Mar. 28, 2013).

[76] Gamoran v. Neuberger Berman, LLC, 2012 U.S. Dist. LEXIS 82085 (S.D.N.Y. June 12, 2012).

[77] Gamoran v. Neuberger Berman LLC, No. 1:11-cv-7957 (S.D.N.Y. Mar. 29, 2013) (granting motion to dismiss amended complaint).

[78] Seidl v. Am. Century Co., No. 4:10-cv-04152 (W.D. Mo. Oct. 31, 2012) (denying motion to dismiss).

[79] Hartsel v. Vanguard Group, Inc., 2011 Del. Ch. LEXIS 89 (2011), *aff'd* 38 A.3d 1254 (Del. 2012); *see also, e.g.,* Seidl v. Am. Century Cos., Inc., 713 F. Supp. 2d 249, 257-262 (S.D.N.Y. 2010), *aff'd* 427 Fed. Appx. 35 (2d Cir. 2011); In re Eaton Vance Mut. Funds Fee Litig., 380 F. Supp. 2d 222 (S.D.N.Y. 2005), *aff'd* Bellikoff v. Eaton Vance Corp., 481 F.3d 110 (2d Cir. 2007).

[80] Union de Empleados de Muelles de P.R. PRSSA Welfare Plan v. UBS Fin. Servs. Inc. of P.R., 704 F.3d 155 (1st Cir. 2013).

[81] The lawsuit had essentially asserted that the trustees "failed to avail themselves of the opportunity to negotiate lower fees or seek competing bids from other qualified investment advisors." Halebian v. Berv, 631 F. Supp. 2d 284, 289 (S.D.N.Y. 2007). After a lengthy procedural saga (involving an earlier appeal to the Second Circuit, and a referral to the Massachusetts Supreme Judicial Court), the case returned to the district court, which issued the decision referenced in the text. Halebian v. Berv, 869 F. Supp. 2d 420 (S.D.N.Y. 2012).

[82] Halebian v. Berv, No. 12-3360 (2d Cir. filed Aug. 23, 2012).

[83] Ryskamp v. Looney, 2011 U.S. Dist. LEXIS 41506 (D. Colo. Apr. 15, 2011) (denying motion to dismiss).

[84] Ryskamp v. Looney, 2012 U.S. Dist. LEXIS 114190 (D. Colo. Aug. 14, 2012) (dismissing lawsuit with prejudice).

[85] Gamoran v. Neuberger Berman LLC, at 9, 2013 U.S. Dist. LEXIS 45887 (S.D.N.Y. Mar. 29, 2013) (granting motion to dismiss amended complaint). In its decision, the court also observed that, by filing a demand with the board, the plaintiff "tacitly acknowledge[d] the absence of facts to support a finding of [demand] futility" and was therefore precluded under Delaware law from challenging the independence or disinterestedness of the

committee of the fund board that had conducted a SDDI prior to a rejection of the plaintiff's demand. The court also determined that the plaintiff's allegations did "not implicate the reasonableness of the board's investigation and fail[ed] to demonstrate that the board's refusal was made in bad faith."

[86] Prudential Ret. Ins. and Annuity Co. v. State St. Bank and Tr. Co., 2012 U.S. Dist. LEXIS 13556 (S.D.N.Y. Feb. 3, 2012).

[87] Prudential Ret. Ins. and Annuity Co. v. State St. Bank and Tr. Co., No. 07-8488 (S.D.N.Y. Jan. 28, 2013).

[88] Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009), *reh'g denied*, 569 F.3d 708 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1141 (2010).

[89] Tussey v. ABB Inc., 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012).

[90] Tussey v. ABB Inc., No. 12-2056 (8th Cir. filed May 3, 2012).

[91] Bilewicz v. FMR LLC, No. 1:13-cv-10636 (D. Mass. filed Mar. 19, 2013); Columbia Air Srvs. Inc. v. Fidelity Mgmt. Tr. Co., No. 1:13-cv-10570 (D. Mass. filed Mar. 11, 2013); Boudreau v. Fidelity Mgmt. & Tr. Co., No. 1:13-cv-10524 (D. Mass. filed Mar. 7, 2013); Kelley v. Fidelity Mgmt. & Tr. Co., No: 1:13-cv-10222 (D. Mass. filed Feb. 5, 2013).

[92] *See*, *e.g.*, Off. Comm. of Unsecured Creditors of Tribune Co. v. JPMorgan Chase Bank, N.A., 1:10-ap-55841 (Bankr. D. Del. Mar. 26, 2013) (dismissed) & Off. Comm. of Unsecured Creditors of Tribune Co. v. FitzSimons, No. 1:10-ap-54010 (Bankr. D. Del. filed Nov. 1, 2010) (both adversarial proceedings in In re Tribune Co., No. 1:08-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-04609 (Bankr. S.D.N.Y. filed Dec. 1, 2010) & Weisfelner v. Holmes, No. 10-ap-05525 (Bankr. S.D.N.Y. filed Dec. 23, 2010) (adversarial proceedings in In re Lyondell Chemical Co., No. 1:09-bk-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009)).

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