Claims Trends

A Review of Claims Activity in the Mutual Fund Industry
(January 2014-March 2015)

ICIMutual

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Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CFTC	U.S. Commodity Futures Trading Commission
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
ERISA	Employee Retirement Income Security Act of 1974
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
NFA	National Futures Association
NIST	U.S. National Institute of Standards and Technology
OCIE	Office of Compliance Inspections and Examinations of the SEC
RICO	Racketeer Influenced and Corrupt Organizations Act
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. *Claims Trends* focuses on developments in four perennial risk areas for fund groups—fee-based claims, disclosure-related claims, regulatory enforcement activity, and operational errors—and also reports on other noteworthy litigation developments. 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 related losses and reputational damage.

ICI Mutual measures claims activity by both *frequency* and *severity*. 2014 saw a reduction in *frequency* of claims submitted by fund groups insured by ICI Mutual under their directors and officers/errors and omissions (D&O/E&O) policies. Even so, approximately a quarter of ICI Mutual's insured fund groups submitted at least one claim notice in 2014, and, over the five-year period 2010-2014, more than half of insured fund groups did so. These figures suggest that, even with a significant decline in claims since the 2003-2004 mutual fund scandal and the 2007-2008 subprime/credit crisis, claims frequency remains an issue for fund industry insureds.

In contrast to frequency, the *severity* of new claims can be more difficult to assess. Generally speaking, it may take years to establish the ultimate magnitude of losses (including defense costs, settlements, and judgments) in civil lawsuits and regulatory proceedings. Nonetheless, severity, too, remains a concern for the fund industry, as illustrated by more than a dozen new shareholder lawsuits initiated from 2013 to early 2015 alleging "excessive fees" (which lawsuits often result in significant defense costs), and by additional multimillion dollar public settlements announced in disclosure-related lawsuits that were first initiated during the credit crisis and post-credit crisis period.

Recent years have also witnessed significant regulatory enforcement activity, chiefly by the SEC, in the asset management area. While the overall number of asset management-related enforcement actions brought by the SEC in its 2014 fiscal year declined modestly from the agency's record-breaking numbers in its 2011-2013 fiscal years, the 2014 total remained above pre-2011 totals. Statements by SEC representatives suggest continued scrutiny of the asset management area, including in the registered fund sector, in 2015.

Fees

Over the years, the plaintiffs' bar has often challenged fees charged to mutual funds by investment advisers and other service providers. These lawsuits frequently 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 provides shareholders with the right to bring a lawsuit to enforce this duty.[1] Fees have also been challenged under other theories, including under ERISA and as state law claims for breach of fiduciary duty. A recent ICI Mutual publication, *Trends in Fee Litigation: Actions Brought under Section 36(b) and ERISA* (2014), provides additional information and expert insight on fee litigation under section 36(b) and under ERISA.

Section 36(b)

In 2010, the U.S. Supreme Court, in Jones v. Harris Associates, L.P., affirmed use of the longtime "*Gartenberg* standard" for assessing the liability of fund advisers in "excessive fee" lawsuits brought under section 36(b) of the ICA.[2] Five years later, the *Jones* lawsuit itself remains pending before the Seventh Circuit for further consideration in light of the Supreme Court's ruling.[3]

The *Jones* decision does not appear to have dampened the willingness of the plaintiffs' bar to devote time and resources to challenging fee arrangements involving registered funds. On a fund industry-wide basis, as of the end of March 2015, eighteen section 36(b) lawsuits involving sixteen fund groups had been initiated since the Supreme Court's decision in *Jones*.[4] All but four of these post-*Jones* lawsuits remain pending in the lower courts.[5] Meanwhile, one other section 36(b) lawsuit that was filed *prior* to the Supreme Court's decision remains on appeal.[6]

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

(Cases in blue were active as of March 31, 2015)

Year	Cases
2010	• **Santomenno v. John Hancock Life Ins. Co.**, No. 2:10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (as to section 36(b)) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013) (as to ERISA)), *aff'd*, 677 F.3d 178 (3d Cir. 2012) & 2014 U.S. App. LEXIS 18437 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (3d Cir. Nov. 24, 2014), *petition for cert. filed*, (U.S. Feb. 19, 2015) (No. 14-1054) • **Southworth v. Hartford Inv. Fin. Serv.**, LLC, No. 1:10-cv-00878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011)
2011	• **Kasilag v. Hartford Inv. Fin. Serv.**, LLC, No. 1:11-cv-01083 (D.N.J. filed Feb. 25, 2011) • **Reso v. Artisan Partners Ltd. P'ship**, No. 11-cv-873 (E.D. Wis. filed Sept. 16, 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)
2013	• **Laborer's Local 265 Pension Fund v. iShares Trust**, No. 13-cv-00046 (M.D. Tenn. filed Jan. 18, 2013), *dismissed*, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 2014 U.S. App. LEXIS 18627 (6th Cir. Sept. 30, 2014), *cert. denied* (U.S. Mar. 2, 2015) (No. 14-771) • **Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp.**, No. 2:13-cv-01601 (N.D. Ala. filed Aug. 28, 2013) • **Cox v. ING Invs. LLC**, No. 1:13-cv-01521 (D. Del. filed Aug. 30, 2013) • **McClure v. Russell Commodity Strategies Fund**, No. 1:13-cv-12631 (D. Mass. filed Oct. 17, 2013) • **Curd v. SEI Invs. Mgmt. Corp.**, No. 2:13-cv-07219 (E.D. Pa. filed Dec. 11, 2013)
2014	• **Zehrer v. Harbor Capital Advisors, Inc.**, No. 1:14-cv-00789 (N.D. Ill. filed Feb. 4, 2014) • **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 3:14-cv-01165 (D.N.J. filed Feb. 21, 2014) • **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 2:14-cv-414 (S.D. Ohio filed May 5, 2014) • **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 1:14-cv-00585 (D. Del. filed May 7, 2014) • **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014) • **Redus-Tarchis v. N.Y. Life Inv. Mgmt.**, No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014) • **Kenny v. PIMCO**, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014)
2015	• **Chill v. Calamos Advisors, LLC**, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015)

SECTION 36(B) LAWSUITS FILED IN 2013-15

Of the eighteen section 36(b) lawsuits filed since the Supreme Court's decision in *Jones*, thirteen were filed in 2013-2015. At the date this *Claims Trends* was published, twelve of these lawsuits remained pending in federal district courts.

As described below, nine of these recent lawsuits focus on alleged disparities between advisory fees and subadvisory fees, specifically either on (1) alleged disparities between fees paid to advisers and the fees paid to unaffiliated subadvisers (sometimes referred to as "manager-of-managers" lawsuits), or (2) alleged disparities between the fees charged by the advisers for managing their *affiliated* funds and the lesser fees charged by the advisers in their roles as subadvisers to *unaffiliated* funds (sometimes referred to as "subadvisory" lawsuits). The remaining four lawsuits rely on different theories in seeking to establish that the fees at issue are excessive.

"Manager-of-managers" lawsuits: Five of the thirteen section 36(b) lawsuits filed in 2013-2015 target "manager-of-managers" arrangements. Two of these lawsuits are in their earlier stages. In one, a motion to dismiss (i.e., a motion in which defendants challenge the adequacy of plaintiffs' allegations on purely legal grounds) is pending,[7] and in the other, to date, no motion to dismiss has been filed.[8]

The other three "manager-of-managers" lawsuits are now in the discovery (fact-finding) stage of the litigation process. A motion to dismiss was denied in one of these lawsuits, and no motions to dismiss were filed in the other two.[9]

"Subadvisory" lawsuits: Four of the thirteen section 36(b) lawsuits filed in 2013-2015 focus on "subadvisory" arrangements.[10] In March 2015, a motion to dismiss was denied in one of these lawsuits.[11] The remaining three cases are in the early stages of litigation, with motions to dismiss pending.

Other lawsuits: Four of the thirteen lawsuits filed in 2013-2015 cannot be characterized exclusively as either "manager-of-managers" or "subadvisory" lawsuits.

One of these four lawsuits harkens back to allegations made in *Jones* and contemporaneous cases—that is, allegations (1) that the adviser is charging an affiliated fund higher fees than it charges to institutional clients and (2) that the fees charged by the adviser to its affiliated fund are higher than the fees charged by other advisers to similarly managed mutual funds.[12] This case (which also includes a "subadvisory" allegation) was filed in February 2015; to date, no motion to dismiss has been filed.

A second lawsuit challenges advisory fees on a variety of theories, including an allegation that the adviser is charging an affiliated fund higher fees than it charges to institutional clients, and a more novel allegation that compares the fees charged to the mutual fund to those charged to a similarly managed exchange-traded fund (ETF). This case (which also includes a "subadvisory" allegation) was filed in December 2014. A motion to dismiss, filed in March 2015, is pending.[13]

The third of these four lawsuits sought to challenge the "split" between the securities lending revenue paid to several ETFs and the revenue paid to the ETFs' adviser and its affiliate (which provided securities lending services). In October 2013, the court granted the defendants' motion to dismiss; in September 2014, the Sixth Circuit upheld the lower court's dismissal. The plaintiffs' petition for writ of

certiorari was denied by the U.S. Supreme Court in March 2015.[14]

The fourth lawsuit targets the fees indirectly paid by investors in "funds-of-funds" (i.e., those mutual funds that invest solely in underlying mutual funds).[15] In this lawsuit, the plaintiff, an alleged shareholder in the funds-of-funds, challenges the level of fees (termed "acquired fund fees" in the complaint) paid to the adviser by the underlying funds (funds in which the plaintiff does not *directly* hold shares). In February 2014, this lawsuit was transferred to another federal district court,[16] which had previously considered the implications of the funds-of-funds structure in the context of a pre-*Jones* section 36(b) lawsuit (later dismissed by the parties) that was filed against the same defendant fund group.[17] In September 2014, the federal district court granted in part and denied in part the motion to dismiss.[18] The lawsuit remains pending and is now in the discovery stage.

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

The majority of the five post-*Jones* lawsuits filed in 2010 and 2011 also focused on alleged disparities between advisory fees and subadvisory fees.

As of the date of this *Claims Trends,* three of these 2010-2011 lawsuits remain pending in lower courts. Two of them can be characterized as "manager-of-managers" cases. In one case, which focuses on alleged disparities between (1) the defendant's advisory fees and the fees paid to unaffiliated subadvisers, and (2) the advisory fees paid to the defendant by managed funds and the fees paid by the defendant's institutional accounts, the federal district court denied the defendant's motion to dismiss in December 2012.[19] The lawsuit is currently in the discovery stage of the litigation process. In the other case, the court denied the defendants' motion to dismiss the plaintiffs' section 36(b) allegations in September 2012.[20] Motions for summary judgment were filed by the parties in January 2015.[21]

A third of these 2010-2011 lawsuits also remains active, but only with respect to non-section 36(b) claims. This lawsuit initially combined section 36(b) claims and another ICA claim with ERISA claims.[22] The lower court's dismissal of the ICA claims was affirmed by the Third Circuit in April 2012,[23] but the lawsuit remains open with respect to the ERISA claims, as discussed below in "Other Litigation Developments—ERISA."

As previously reported, two more of these five early post-*Jones* lawsuits were closed by stipulation of the parties.[24]

Other Developments in Fee Litigation

The plaintiffs' bar has also challenged fee payments under legal theories involving federal or state law provisions other than section 36(b). One such lawsuit, discussed in prior *Claims Trends*, involved 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."[25] As previously reported, in November 2013, the district court's dismissal of the lawsuit was affirmed by the Second Circuit. In January 2014, the Second Circuit denied the plaintiff's petition for rehearing.[26] The lawsuit is now closed.

The plaintiffs' bar has also challenged fee payments under ERISA. Some of these lawsuits are described below in "Other Litigation Developments—ERISA."

Disclosure

"Prospectus liability" lawsuits—i.e., shareholder class action lawsuits brought under the '33 Act—have historically been a major source of potential liability for funds and their directors, officers, advisers, and principal underwriters.[27]

No noteworthy prospectus liability lawsuits were brought under the '33 Act against fund industry defendants in 2014 and early 2015. There were, however, significant developments in prospectus liability lawsuits initiated during the subprime/credit crisis period and its aftermath.

Fund disclosure has also been at issue in a recent lawsuit challenging fund disclosure under the '34 Act (as opposed to under the '33 Act).

Prospectus Liability Litigation ('33 Act)

In 2007-2009, a number of fund groups were involved in lawsuits that challenged the adequacy of the disclosure provided by certain fixed-income funds that had significantly underperformed their peers during the subprime/credit crisis period. Eight fund groups had one or more funds involved in major prospectus liability lawsuits (which, in some cases, also alleged non-'33 Act violations).

As observed in prior *Claims Trends*, prospectus liability lawsuits that survive motions to dismiss are likely to be eventually settled by agreement of the parties (with few, if any, ever reaching trial). The subprime/credit crisis lawsuits have adhered to this pattern. Following court rulings *against* fund group defendants at the motion-to-dismiss stage in all but one of these subprime/credit crisis lawsuits, settlements were reached.[28]

Indeed, by year-end 2013, settlements had been reached in subprime/credit crisis lawsuits involving seven fund groups.[29] In 2014, final settlements were reached in two additional lawsuits.[30] In January 2015, a settlement was announced in yet another subprime/credit crisis lawsuit (although, as of the date of publication, this settlement is awaiting preliminary approval from the court).[31] Each of these settlements has involved multimillion dollar payments by the defendants—including three settlements with payments in the nine figures, and four with eight-figure payments. To date, settlement amounts announced in these prospectus liability lawsuits from the subprime/credit crisis period total well in excess of $650 million.

Other Disclosure-Based Litigation ('34 Act)

Over the years, fund shareholders have sometimes sought to challenge disclosure in "securities fraud" class action lawsuits brought under section 10(b) of the '34 Act and rule 10b-5 thereunder. Shareholders filing such lawsuits are subject to various legal requirements that can be difficult to satisfy in the mutual fund context.[32] As a result, fund industry defendants have historically enjoyed considerable success in defending against these lawsuits.

A new rule 10b-5 class action lawsuit filed in January 2015 asserts that a mutual fund and its adviser and distributor misled investors by stating in the fund's prospectuses and other disclosure documents that the fund would restrict its holdings in certain securities, while allegedly investing in those securities beyond the stated restrictions.[33] The lawsuit is in its early stages, and no motion to dismiss has been filed.

Recent Supreme Court Decision of Interest

In March 2015, the U.S. Supreme Court issued a decision, outside the fund industry context, that may have an impact on future prospectus liability litigation involving fund groups. The Court considered whether an opinion expressed in a registration statement can form the basis for liability under section 11 of the '33 Act, which provides purchasers with a right of action when a registration statement "contained an untrue statement of material fact or omitted to state a material fact … necessary to make the statements therein not misleading." The Court held that a "sincere statement of pure opinion," even if wrong, cannot by itself form the basis for liability as an untrue statement of fact, but a statement of opinion, under limited circumstances, could be rendered misleading by the omission of a material fact "going to the basis of the opinion."

It remains to be seen whether, and to what extent, the *Omnicare* decision has an impact on section 11 prospectus liability litigation involving fund groups or on litigation under similarly worded federal securities laws (e.g., rule 10b-5 under the '34 Act).

— Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 2015 U.S. LEXIS 2120 (U.S. Mar. 24, 2015)

Regulatory Enforcement

The SEC continues to emphasize an aggressive enforcement agenda, with the stated goal of ensuring that "the SEC's enforcement program is—and is perceived to be—everywhere."[34] While not without its critics,[35] this approach has been reflected in the SEC's enforcement actions in fiscal year 2014, in which the SEC brought a record-breaking 755 enforcement actions for a range of violations across the securities industry.[36]

In the asset management area, the overall number of investment adviser/investment company cases declined slightly to 130 in fiscal year 2014 from 140 in the agency's previous fiscal year.[37] As in prior years, the SEC's enforcement actions in the asset management area focused largely on actors outside the registered investment company space (e.g., unregistered funds and their advisers). But, as in the past, the registered fund space did not escape SEC scrutiny.

SEC Enforcement Actions

Administrative proceedings initiated or resolved by the SEC in 2014 and the first quarter of 2015 against advisers of registered funds, advisory personnel, and/or fund officers involved a variety of issues, including: material misrepresentations and omissions in public disclosures;[38] material misrepresentations of the performance history of ETFs;[39] cross trading violations;[40] and custody rule violations.[41] In addition, one fund group recently disclosed that it had reached a settlement with the SEC regarding a former portfolio manager's potential conflicts of interest in selecting securities for a mutual fund.[42]

SEC administrative proceedings were also initiated or resolved against fund advisers and/or advisory personnel with respect to their *non*-registered fund activities. These proceedings likewise involved a variety of issues, including failure to disclose violations of an issuer-imposed investment restriction;[43] cross trading violations;[44] custody rule violations;[45] collection of unearned fees from a client account;[46] and inadequate disclosure in connection with trade allocations.[47]

2014 also saw the conclusion of a long-running federal court case, discussed in last year's *Claims Trends*, in which the SEC sued a municipal bond

fund adviser and various executives for insider trading and other violations of securities laws, alleging that the defendants had fraudulently inflated the prices of bonds held by certain municipal bond funds, and that certain defendants had redeemed their fund shares prior to the devaluation of the bonds.[48] By 2011, only one individual defendant remained involved in this litigation. In 2011, the district court ruled that this individual had engaged in insider trading.[49] In 2013, the Seventh Circuit reversed the district court's decision, and remanded the lawsuit to the district court for additional consideration of the novel issue whether "insider trading theories apply to mutual fund redemptions."[50] In August 2014, the district court granted the individual defendant's motion for summary judgment.[51] The lawsuit is now closed.

Regulatory Priorities

The SEC and its staff often provide guidance as to the direction of future SEC enforcement actions. This guidance may come directly from the staff in the SEC's Division of Enforcement, or may be provided more indirectly in the form of speeches by commissioners and staff members, or in examination priorities released by OCIE.

The co-chief of the Asset Management Unit of the SEC's Division of Enforcement recently described the unit's priorities for 2015. Among the priorities potentially implicating the investment management industry are valuation and performance, performance advertising, adherence to investment strategies, the board's role in the oversight of advisers, and an ongoing focus on fund distribution.[52] A key enforcement theme for 2015—emphasized by Chair White and senior agency officials—appears to be "conflicts of interest," which has been reflected in recent actions taken by the SEC in the broader asset management space with respect to failure to seek best execution, undisclosed outside business activities, and related-party transactions.[53]

Insight into potential enforcement risks may also be found in the SEC's National Examination Program (NEP) priorities, which are released early each year.[54] These priorities for 2015 include a continuing focus on alternative investment companies, fixed income investment companies, and cybersecurity.[55]

In addition, over the past two years, OCIE has conducted so-called "sweep" examinations with respect to liquid alternative funds, payments to financial intermediaries (often referred to as "distribution in guise"), bond funds, and cybersecurity. While OCIE remains separate and apart from the Division of Enforcement, many industry observers have commented on the "increasing collaboration" of the two.[56] Indeed, one of OCIE's annual performance measures is the percentage of examinations that result in referrals to the Division of Enforcement. In its 2014 fiscal year, OCIE conducted more than 1,850 formal examinations and made over 200 referrals to the Division of Enforcement.[57] At least some of those referrals have involved fund industry participants.[58]

SEC's Asset Management Unit: Five Years On

The formation of the Asset Management Unit of the SEC's Division of Enforcement in 2010 signaled a focus on asset management and mutual fund issues. Five years later, the unit has grown to 75 employees and expanded to all 12 of the SEC's offices nationwide. The co-chief of the unit has attributed much of the unit's success to "its constant collaboration and coordination" with OCIE and the Division of Investment Management, a relationship she has characterized as a "three-legged stool of collaboration." The co-chief has also emphasized the unit's growing relationship with the SEC's Division of Economic and Risk Analysis, which provides, among other tools, proprietary risk analyses.[59]

Influences on Future SEC Enforcement Actions

2014 and early 2015 saw a number of developments with the potential to shape SEC enforcement in the coming years. As discussed below, these developments include: (1) a focus on cybersecurity; (2) increased use of administrative proceedings; and (3) continued developments with respect to "neither admit nor deny" settlements.

A FOCUS ON CYBERSECURITY

In the wake of extensive data breaches and significant hacking incidents involving large retailers and financial institutions outside the fund industry, increased governmental attention is being focused on cybersecurity matters. In February 2013, President Obama issued an executive order on "Improving Critical Infrastructure Cybersecurity,"[60] and a year later, NIST released a "Framework for Improving Critical Infrastructure Cybersecurity," which was subsequently updated in December 2014.[61] While the NIST Framework itself does not impose any requirements on the private sector, "there seems to be a growing consensus that the Framework is fast becoming the *de facto* standard for private sector cybersecurity as viewed by regulators and U.S. lawyers."[62]

Meanwhile—and of particular relevance to the fund industry—OCIE issued, in April 2014, its "OCIE Cybersecurity Initiative," which described proposed examinations to assess the cybersecurity preparedness of broker-dealers and registered investment advisers.[63] In February 2015, OCIE staff released preliminary findings from its examinations,[64] and FINRA issued its own report on its review of cybersecurity preparedness among its members.[65] A senior OCIE staff member has stated that OCIE will initiate another round of cybersecurity examinations of investment advisers, which will likely include onsite visits in many cases.[66]

To date, the SEC has not proposed specific rules or regulations in response to the OCIE Cybersecurity Initiative. Nonetheless, the intensified focus by the SEC and the federal government generally on these matters suggests that regulatory guidance (and perhaps enforcement actions) may be forthcoming.[67]

SEC'S USE OF ADMINISTRATIVE PROCEEDINGS

In recent years, the SEC has brought an increasing number of enforcement actions before administrative law judges (ALJs), who are appointed by the SEC, as an alternative to bringing the actions in federal district courts.[68] The SEC is not alone in its increased use of ALJs, as the CFTC is also turning to its administrative courts with greater frequency.[69]

For the SEC, the use of the administrative forum may provide advantages in terms of speed (ALJs tend to reach decisions in ten months or less) and procedural matters (federal rules governing procedure and evidence are not followed in administrative courts). Further, the administrative forum may provide some level of "home court" advantage to the SEC, with critics pointing to the SEC's 100% rate of success in front of ALJs in fiscal year 2014 (as compared to 61% in its district court cases).[70] The director of the SEC's Division of Enforcement has defended the administrative forum as fair to respondents and cited the benefit of having "specialized factfinders" hear cases sounding in federal securities laws.[71] Detractors, including defense lawyers and judges, have contended that not following federal rules governing procedure and evidence deprives respondents of their rights to full discovery and jury trials that are available in district courts.[72]

Two recent federal district court decisions have upheld the SEC's use of administrative proceedings. The district courts found that they lacked subject matter jurisdiction to address constitutional issues with respect to the choice of the administrative forum and that respondents in SEC administrative proceedings must first challenge the choice of forum in the proceedings themselves. One of these decisions has been appealed to the Second Circuit.[73]

There is no indication that the SEC will soon reverse the trend toward its increased use of administrative proceedings.[74] Indeed, with the addition in 2014 of both new ALJs and attorneys, the SEC nearly doubled the size of the staff dedicated to the Office of ALJs.[75]

"NEITHER ADMIT NOR DENY" SETTLEMENTS

As discussed in prior *Claims Trends*, the SEC has historically used "neither admit nor deny" settlements—in which entities and individuals are permitted to "neither admit nor deny" the SEC's allegations against them—to resolve enforcement actions in the fund industry and elsewhere. Beginning in 2011, however, a number of federal lower court judges, including Judge Rakoff in the Southern District of New York, rejected or challenged such settlements.[76]

In 2012, perhaps in part in response to these challenges, the SEC staff began to seek "admissions of wrongdoing" in certain proceedings.[77] As stated by Chair White, in determining whether to seek such admissions, the SEC would consider, among other things, the nature of the conduct at issue and the risk posed by the conduct.[78] In late 2014, the SEC's director of the Division of Enforcement expanded these criteria, stating that the SEC may also seek admissions where they would "significantly enhance the deterrence message of the action."[79]

In 2014, the SEC, on an agency-wide basis, required admissions in nine cases, bringing to twelve the total admissions since the current policy was initiated in 2013.[80] Of particular interest was an enforcement action in September 2014 where the SEC obtained an admission from a dually registered broker-dealer and investment adviser that violated provisions of the IAA and the '34 Act.[81]

In June 2014, Judge Rakoff's November 2011 decision rejecting an SEC settlement, which helped bring the issue of "neither admit nor deny" settlements to the fore, was vacated by the Second Circuit and remanded to the district court.[82] Some observers have suggested that the Second Circuit's decision "effectively restores the pre-November 2011 status quo with respect to judicial scrutiny" of these settlements.[83] While the SEC's longstanding use of "neither admit nor deny" settlements has arguably been validated by the Second Circuit's decision, it appears that the SEC will continue to seek admissions of wrongdoing in appropriate proceedings.[84]

Portfolio Management Errors

Since ICI Mutual's formation in 1987, over 10% of all claim amounts paid by ICI Mutual have been for "costs of correction" claims—i.e., insurance claims by advisers for payments made by them, outside the litigation context, to remedy operational errors that have resulted in losses for their managed 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.[85]

In a recent "costs of correction" claim involving the entry of a foreign currency exposure target for certain mutual funds and private advisory accounts, the portfolio manager entered the intended exposure target for one set of accounts, but a different, erroneous exposure target for another set of accounts. A secondary review of the exposure target entries failed to uncover the mistake.

Another recent "costs of correction" claim involved an error in corporate action processing. Here, a portfolio manager mistakenly elected a cash option (instead of a securities option) in response to a corporate action relating to certain debentures. The portfolio manager's mistake arose from a misreading of the relative economic merits of the two options, as described in the materials provided by the issuer of the debentures.

State Law Actions and the Plaintiffs' Bar

Litigation challenges to fund groups sometimes take the form of (1) *state law derivative actions*—i.e., lawsuits purporting to be filed on behalf of funds themselves, that allege violations of state or common law by fund advisers and/or fund directors and officers, or (2) *state law class actions*—i.e., lawsuits purporting to be filed on behalf of groups (or "classes") of fund shareholders, that allege violations of state or common law by fund advisers, funds themselves, and/or fund directors and officers.[86]

This section describes developments in state law derivative actions and class actions in 2014 and early 2015.

Fund Investments in Gambling Industry Securities

Past *Claims Trends* have reported on federal lawsuits first filed in 2008 against various fund groups, which originally alleged that fund investments in online gambling companies constituted illegal racketeering in violation of RICO. While most of these federal lawsuits were dismissed,[87] various plaintiffs subsequently refiled their lawsuits in either federal or state courts. In these refiled lawsuits, the plaintiffs characterized essentially the same activities as violations of state law or common law (e.g., breach of fiduciary duty and waste).

Gambling securities lawsuits continue for three fund groups. For one fund group, in June 2013, over a year after the conclusion of a refiled lawsuit in state court,[88] the plaintiffs filed yet another complaint in federal court in Delaware. In January 2015, the federal court dismissed the refiled lawsuit.[89] The dismissal is now on appeal to the Third Circuit.

For another fund group, the October 2012 dismissal of the original lawsuit was affirmed on appeal by the Eighth Circuit in March 2013. After making demand on the fund board, the plaintiff then refiled his lawsuit in federal district court in March 2014.[90] The lawsuit remains pending. Meanwhile, this same fund group also has another active gambling securities lawsuit, in which the defendants' motion for summary judgment, filed in April 2014, was granted

by a federal district court in July 2014.[91] The lower court's decision is on appeal to the Eighth Circuit, which heard oral argument in February 2015.[92]

A third fund group's gambling securities lawsuit, which had been refiled in state court, was dismissed in November 2013, and a notice of appeal was filed in March 2014.[93] The appeal remains pending.

Auction-Rate Preferred Securities

Previous *Claims Trends* have reported on lawsuits involving closed-end funds that issued auction-rate preferred securities (ARPS). A number of these lawsuits, filed as derivative lawsuits, effectively charged fund advisers (and, in some cases, their parent companies) with breaches of fiduciary duties to common shareholders through the defendants' authorizing or participating in the redemption of ARPS in favor of new financing that was allegedly less favorable to the common shareholders. In late 2014, the last two of these derivative lawsuits were dismissed, and no appeals were filed.[94]

Ninth Circuit Decision May Create Opening for New State Law Actions Against Fund Groups

A Ninth Circuit panel recently issued a decision with potentially broad-reaching implications for advisers and directors of funds, particularly of those funds organized as Massachusetts business trusts. In reversing, in part, a federal district court's dismissal of state law claims brought against the adviser and directors of a bond fund that incurred substantial credit crisis-related losses,[95] the Ninth Circuit panel made three significant rulings. First, it stated that the generally accepted distinction between "direct" and "derivative" actions did not apply in the mutual fund context, thereby allowing fund shareholders to bring direct class action claims against advisers and directors for breach of fiduciary duty. Second, the panel held that fund shareholders may enforce a fund prospectus's terms through state law claims for breach of contract. Finally, the Court allowed the shareholders to sue the adviser directly as third-party beneficiaries of the management contract between the fund and adviser.[96]

Some industry observers have asserted that the decision is "inconsistent with established principles of investment company governance and litigation," and have voiced concern that the decision's reasoning, if adopted more widely, could provide the plaintiffs' bar with additional legal avenues for pursuing fund industry defendants.[97]

The defendants' petition to the Ninth Circuit for panel rehearing and rehearing en banc is now pending.

— Northstar v. Schwab, 779 F.3d 1036 (9th Cir. 2015)

Other Litigation Developments

ERISA

Fund advisers and affiliated entities may face fee challenges under ERISA that are similar to those under the federal securities laws. In other lawsuits brought under ERISA, plan "fiduciaries" have been charged with mismanaging assets under their control.

FEE-BASED LAWSUITS

Separate and apart from challenges to fees and compensation received by fund advisers and their affiliates under section 36(b) of the ICA (see above at "Fees—Section 36(b)"), the plaintiffs' bar in recent years has also initiated numerous lawsuits under ERISA challenging fees and compensation received directly or indirectly by plan service providers. (As noted above, a recent ICI Mutual publication, *Trends in Fee Litigation: Actions Brought under Section 36(b) and ERISA*, provides additional information and expert insight on fee litigation under both ERISA and section 36(b).)

2014 and early 2015 saw developments in certain of these fee-based ERISA lawsuits. In a 2011 lawsuit alleging excessive fee claims under both ERISA and section 36(b), the Third Circuit upheld the trial court's dismissal of the ERISA claims (the only remaining claims) in September 2014, and denied a petition for rehearing in November 2014. A petition for certiorari was filed with the U.S. Supreme Court in February 2015.[98] In two other fee-based ERISA lawsuits, filed in 2013 and 2014, a motion to dismiss

(filed in January 2014) remains pending in one,[99] and was granted (in December 2014) in the other. This dismissal is now on appeal to the Eighth Circuit.[100]

In early 2015, two new ERISA fee-based lawsuits were initiated. Both of these lawsuits remain pending. In one, filed in February 2015, the plaintiff alleges that a profit sharing plan sponsor (also the plan's administrator and record keeper), affiliated entities, and plan trustees breached their fiduciary duties under ERISA with respect to the excessive "layers of fees" charged by the unregistered funds offered as plan investment options. Noting that the unregistered funds simply invest in mutual funds, which are, in turn, managed by subadvisers, the plaintiff argues the defendants could have reduced expenses by contracting with the subadvisers directly.[101] In the second lawsuit, filed in March 2015, the plaintiff alleges that the plan administrator/recordkeeper (which also served in other capacities) made available to the plan only high-cost proprietary mutual funds when other, lower-cost options should allegedly have been provided.[102]

Fund group entities have also been named in other recent ERISA lawsuits in which the plaintiffs allege that the defendants breached their fiduciary duties with respect to sponsoring and/or administering *their own* retirement plans. One of these lawsuits, filed in March 2013, charges that the plan's sponsor made available to the plan only high-cost proprietary mutual funds when other, lower-cost options should allegedly have been provided. In another lawsuit, filed in early 2014, the plaintiffs allege the sponsor's negotiation of recordkeeping arrangements benefitted the sponsor to the detriment of the plan participants. These lawsuits were consolidated and concluded in October 2014 after a settlement agreement was reached by the parties.[103] In addition, the parties in a 2011 lawsuit, which involves substantially the same allegations, recently reached a settlement and are awaiting preliminary approval of the settlement by the federal district court.[104]

Outside the fund industry, in an ERISA lawsuit currently before the U.S. Supreme Court, plaintiffs allege excessive fees were charged in connection with a 401(k) plan and specifically raise the issue of whether the plan sponsor has an ongoing duty to monitor the sponsored plan's investments.[105] In their legal briefs in this case, both the plaintiffs and defendants broadly agree on an ongoing duty to monitor, but appear to differ with respect to what precisely is required to fulfill that duty.[106] As of the date of publication, no decision had been issued by the Supreme Court.

MISMANAGEMENT LAWSUITS

The federal securities laws do not generally permit direct actions against advisers for alleged mismanagement of assets. By contrast, 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." While mutual fund advisers are generally exempt from ERISA claims of imprudent management, advisers to unregistered pooled investment vehicles that contain plan assets may be subject to such claims and, as a result, may face significant liability risks.

In an ERISA lawsuit filed in 2010, the plaintiffs alleged that an investment adviser to ERISA plans breached its fiduciary duty through its management of a securities lending program that allegedly resulted in losses and restricted investment liquidity.[107] The trial court approved a plan of settlement in May 2014.[108]

OTHER LAWSUITS

Fund groups have been involved in other lawsuits brought under ERISA. As reported in prior *Claims Trends*, two fund group defendants—one, the directed trustee and recordkeeper for ERISA plans, and the other, an investment adviser for the mutual funds offered as investment options—were involved in an ERISA lawsuit in which the plaintiffs challenged both fees and the handling of "float income" (i.e., the short-term income earned on plan assets cashed out by participants). In March 2012, the federal district court found, among other things, that the fund group defendants were ERISA "fiduciaries" (but not with respect to excessive fees) and that they breached their fiduciary duties to the plan with respect to the handling of float income.[109] In March 2014, the Eighth Circuit vacated the federal district court's decision, ruling that, because the plaintiffs failed to demonstrate that the float income was a plan asset, the district court had erred in finding that the fund group defendants had breached their fiduciary duties.[110] The case has been remanded to the district court for proceedings consistent with the appellate court's decision.[111]

In early 2013, a number of plaintiffs brought similar allegations in another federal district court against entities in the same fund group for the treatment of float income. In December 2013, four of the cases were consolidated, and an amended complaint was filed in October 2014. In March 2015, the district court granted the defendants' motion to dismiss the amended complaint.[112] To date, no appeal has been filed.

Bankruptcy Claims by Issuers of 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.

As reported in prior *Claims Trends,* a number of proceedings (including proceedings arising out of the bankruptcies of the Tribune Company and the Lyondell Chemical Company) have named numerous funds as parties.[113] 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."

Both the Lyondell and Tribune proceedings involve state law "constructive fraudulent conveyance" and "intentional fraudulent conveyance" claims. In September 2013, a federal district court in Tribune granted the defendants' motions to dismiss the constructive fraudulent conveyance claims, but left open the possibility that plaintiffs could re-file the claims at a later date.[114] This matter is on appeal to the Second Circuit, and oral argument was heard in November 2014.[115]

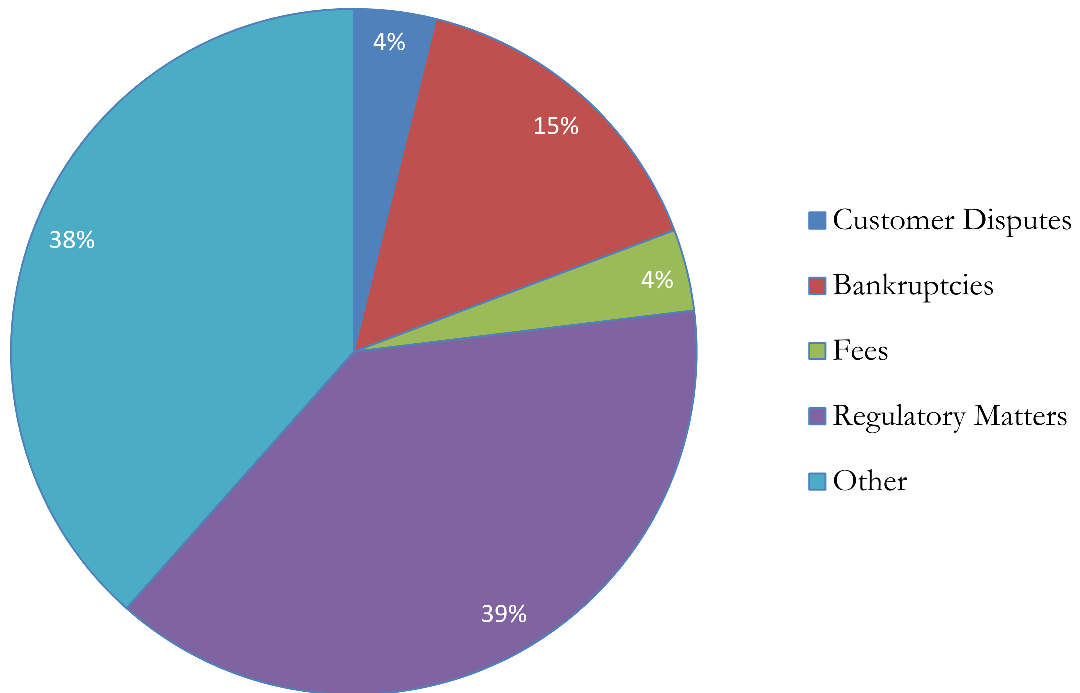
In Lyondell, the bankruptcy court in January 2014 denied the defendants' motion to dismiss the state law constructive fraudulent conveyance claims. The

court granted the defendants' motion to dismiss the state law intentional fraudulent conveyance claims, but gave the plaintiffs permission to replead these claims to correct their deficiencies.[116] An amended complaint was filed in April 2014. Motions to dismiss the amended complaint were filed in August 2014 and remain pending.[117]

D&O/E&O Claims Data

D&O/E&O Notices by Subject – 2014

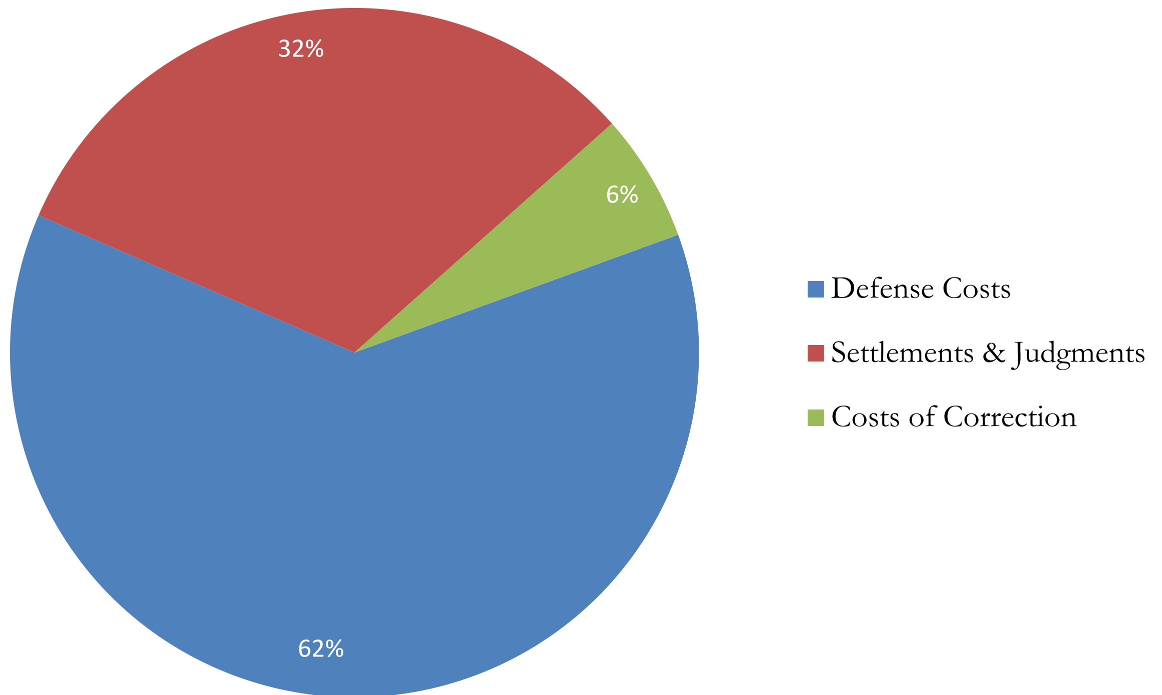
Regulatory matters constituted the most common subject of claims notices provided under ICI Mutual D&O/E&O policies in 2014. As shown in the chart below, a substantial percentage of notices received (the "Other" category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2000-2014)

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 from January 1, 2000 through December 31, 2014 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., 130 S. Ct. 1418 (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).

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

[4] The count of post-*Jones* lawsuits set forth in this publication does not include cases that were consolidated into other cases.

[5] Two of these post-*Jones* lawsuits were dismissed in 2013; the other two were dismissed in 2011 and 2012. *See* Laborers' Local 265 Pension Fund v. iShares Trust, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied* (U.S. Mar. 2, 2015) (No. 14-771); Santomenno v. John Hancock Life Ins. Co., 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (dismissed as to section 36(b)) & No. 2:10-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), *petition for cert. filed*, (U.S. Feb. 19, 2015) (No. 14-1054); 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); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. filed Oct. 14, 2010) (voluntarily dismissed by the plaintiffs in November 2011).

[6] In this lawsuit, a federal district court in March 2013 refused to reconsider its earlier dismissal of the plaintiff's complaint. 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), *appeal docketed*, No. 13-15742 (9th Cir. Apr. 16, 2013).

[7] Curd v. SEI Invs. Mgmt. Corp., No. 2:13-cv-7219 (E.D. Pa. filed Dec. 11, 2013) (motion to dismiss filed on Nov. 24, 2014 is pending; earlier motion to dismiss filed on Feb. 24, 2014 was granted with leave to re-file). Another recent case, filed in November 2013, similarly focuses on the comparative level of fees paid to advisers and to subadvisers, but does so in the ERISA context rather than under section 36(b). Gordan v. Mass. Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. filed Nov. 5, 2013) (motion to dismiss filed on Mar. 14, 2014 was denied without prejudice on March 30, 2015).

[8] Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014).

[9] Zehrer v. Harbor Capital Advisors, Inc., No. 1:14-cv-789 (N.D. Ill. filed Feb. 4, 2014) (motion to dismiss filed on Mar. 31, 2014 was denied on Nov. 18, 2014); McClure v. Russell Commodity Strategies Fund, No. 1:13-cv-12631 (D. Mass. filed Oct. 17, 2013) (no motion to dismiss filed); Cox v. ING Invs. LLC, No. 1:13-cv-1521 (D. Del. filed Aug. 30, 2013) (no motion to dismiss filed).

[10] In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014) (motion to dismiss filed on Mar. 9, 2015 remains pending); Kennis v. First Eagle Inv. Mgmt., LLC, No. 1:14-cv-00585 (D. Del. filed May 7, 2014) (motion to dismiss filed on July 14, 2014 remains pending); Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 2:14-cv-414 (S.D. Ohio filed May 5, 2014) (motion to dismiss filed on July 10, 2014 denied on March 4, 2015); In re BlackRock Mut. Funds Advisory Fee Litig., No. 3:14-cv-01165 (D.N.J. filed Feb. 21, 2014) (motion to dismiss filed on June 26, 2014 denied on March 27, 2015).

[11] In re BlackRock Mut. Funds Advisory Fee Litig., No. 3:14-cv-01165 (D.N.J. Mar. 27, 2015) (denying motion to dismiss).

[12] Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015).

[13] Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014) (motion to dismiss filed on March 6, 2015).

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

[15] Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 2:13-cv-1601 (N.D. Ala. filed Aug. 28, 2013).

[16] Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 4:14-cv-44 (S.D. Iowa filed Feb. 7, 2014).

[17] Curran v. Principal Mgmt. Corp., LLC, No. 09-cv-433 (S.D. Iowa June 12, 2013) (dismissed with prejudice after parties reached settlement).

[18] Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., 2014 U.S. Dist. LEXIS 146679 (S.D. Iowa Sept. 10, 2014).

[19] Kasilag v. Hartford Inv. Fin. Servs. LLC, No. 1:11-cv-1083 (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).

[20] 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 and 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.

[21] Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Jan. 23, 2015) (motions for summary judgment filed by parties).

[22] 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. 2:11-cv-736 (D.N.J. filed Feb. 8, 2011). That lawsuit also challenged fees under ERISA and sought to recover advisory fees, but, rather than alleging a violation of section 36(b), the lawsuit sought to recover certain fees based on the allegation that one defendant acted as an unregistered investment adviser in violation of IAA section 203. The lawsuit was transferred to a federal district court in California, 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).

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

[24] Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. filed Sept. 16, 2011), *closed per stipulation* (Aug. 23, 2012); Southworth v. Hartford Inv. Fin. Serv., LLC, No. 1:10-cv-00878 (D. Del. filed Oct. 14, 2010), *closed per stipulation*, (Nov. 7, 2011).

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

[26] Halebian v. Berv, 2013 U.S. App. LEXIS 22801 (2d Cir. 2013), *aff'g*, Halebian v. Berv, 869 F. Supp. 2d 420 (S.D.N.Y. 2012), *reh'g denied*, No. 12-3360 (2d Cir. 2014).

[27] ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY, *available at* http://www.icimutual.com, provides an overview of such lawsuits and the fund industry's experience in this area.

[28] 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). The one exception was Yu v. State Street Corp., 774 F. Supp. 2d 584 (S.D.N.Y. 2011), in which the court granted the motion to dismiss.

[29] In re Morgan Keegan Closed-End Fund Litig., No. 2:07-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. 1:08-cv-8235 (S.D.N.Y. Sept. 6, 2012) (final settlement); In re Oppenheimer Champion Fund Secs. Fraud Class Actions, No. 1:09-cv-386 (D. Colo. Sept. 30, 2011) & Ferguson v. OppenheimerFunds, Inc., No. 1:09-cv-1186 (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); 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).

[30] In re Oppenheimer Rochester Funds Group Secs. Litig., No. 1:09-md-2063 (D. Colo. July 28, 2014) (final settlement); In re Reserve Primary Fund Secs. & Derivative Class Action Litig., No. 1:08-cv-8060 (S.D.N.Y. Jan. 13, 2014) (final settlement).

[31] In re Morgan Keegan Open-End Mut. Fund Litig., No. 2:07-cv-2784 (W.D. Tenn. Jan. 22, 2015) (motion seeking preliminary court approval of settlement).

[32] One such requirement is that a plaintiff demonstrate that defendants engaged in intentional or reckless misconduct (i.e., "scienter"). *See generally* ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY, 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).

[33] Hampton v. PIMCO LLC, No. 8:15-cv-131 (C.D. Cal. filed Jan. 28, 2015). The plaintiff also asserts the defendants misled investors by investing in certain securities in excess of the amounts allowed under the fund's investment restrictions.

[34] *See* Mary Jo White, Chair, SEC, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539872100. Invoking the "broken windows" approach taken in New York City in the 1990s by the mayor and the police department, Chair White stated that "the smallest infractions are very often just the first step toward bigger ones down the road." To that end, she indicated that the SEC would enforce any and all of its rules, to "avoid an environment of disorder that would encourage more serious crimes to flourish." *Id.*

[35] Two SEC commissioners have raised concerns about this approach. *See* William R. McLucas, *Top SEC Enforcement Events of 2014*, SECURITIES DOCKET (Feb. 19, 2015), http://www.securitiesdocket.com/2015/02/19/top-sec-enforcement-events-of-2014/ (noting Commissioner Michael S. Piwowar's concern that, "[i]f every rule is a priority, then no rule is a priority," and Commissioner Kara Stein's concern that the approach may result in a poor allocation of enforcement resources).

[36] *See* SEC Press Release, SEC's FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases, (Oct. 16, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543184660. Many of these actions appear to involve significant violations. *See, e.g.*, Max Stendahl, *SEC Wins Big As Wyly Brothers Found Liable in $550M Trial*, LAW360 (May 12, 2014), http://www.law360.com/articles/536500/sec-wins-big-as-wyly-brothers-found-liable-in-550m-trial; Sarah Lynch, *SEC Scores Partial Victory in Case Against Hedge Fund Manager*, REUTERS (Feb. 11, 2014), http://www.reuters.com/article/2014/02/11/court-sec-quan-idUSL2N0LG24Q20140211. Some observers caution against overemphasizing the number of actions, noting that a single investigation may give rise to multiple proceedings and that many proceedings involved seemingly

minor infractions, including over 100 actions against issuers for delinquent filings and 80 actions arising from a half dozen "sweeps" conducted by the Division of Enforcement. *See* Marc J. Fagel, *What the SEC Enforcement Stats Really Tell Us*, LAW360 (Mar. 3, 2015), *available at* http://www.gibsondunn.com/publications/Documents/Fagel-What-The-SEC-Enforcement-Stats-Really-Tell-Us-Law360-3.3.2015.pdf; Securities Enforcement 2014 Year-End Review, Shearman & Sterling LLP (Jan. 2015), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/01/Securities-Enforcement-2014-Year-End-Review-LT-012915.pdf; SEC Press Release, SEC Announces Charges Against Corporate Insiders for Violating Laws Requiring Prompt Reporting of Transactions and Holdings (Sept. 10, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678.

[37] *See* SEC, *Year-by-Year SEC Enforcement Statistics* (Oct. 16, 2014), www.sec.gov/news/newsroom/images/enfstats.pdf.

[38] *See* In re Navigator Money Mgmt., Inc., ICA Rel. No. 30897, File No. 3-15707 (SEC Jan. 30, 2014), http://www.sec.gov/litigation/admin/2014/33-9521.pdf (The SEC found that investment adviser and its president, majority owner, and chief compliance officer issued misleading advertisements regarding, among other things, the performance of a mutual fund managed by the adviser.).

[39] In re F-Squared Invs., Inc., ICA Rel. No. 31393, File No. 3-16325 (SEC Dec. 22, 2014), http://www.sec.gov/litigation/admin/2014/ia-3988.pdf (The SEC found that investment adviser materially overstated the performance track record for an ETF sector rotation strategy for an extended period.).

[40] In re Western Asset Mgmt. Co., ICA Rel. No. 13893, File No. 3-15688 (SEC Jan. 27, 2014), http://www.sec.gov/litigation/admin/2014/ia-3762.pdf (The SEC found that investment adviser engaged in cross trading violations with respect to the accounts of mutual fund and other advisory clients.).

[41] In re Water Island Capital LLC, IAA Rel. No. 31455, File No. 3-16385 (SEC Feb. 12, 2015), http://www.sec.gov/litigation/admin/2015/ic-31455.pdf (The SEC found that investment adviser did not custody certain securities with a qualified bank, but instead permitted broker-dealers to hold the securities.).

[42] *See* Jackie Noblett, *BlackRock to Settle With SEC Over Ex-PM's Conflicts*, IGNITES (Mar. 5, 2015), http://ignites.com/c/1076173/112443/blackrock_settle_with_over_conflicts.

[43] *See* In re Western Asset Mgmt. Co., IAA Rel. No. 3763, File No. 3-15689 (SEC Jan. 27, 2014), http://www.sec.gov/litigation/admin/2014/ia-3763.pdf (The SEC found that investment adviser failed to disclose violations of an issuer-imposed investment restriction to its advisory clients.).

[44] *See* In re Highland Capital Mgmt., IAA Rel. No. 3939, File No. 3-16169 (SEC Sept. 25, 2014), http://www.sec.gov/litigation/admin/2014/ia-3939.pdf (The SEC found that, in violation of certain provisions of the IAA, investment adviser traded securities between client accounts and accounts in which the adviser held an interest.).

[45] *See* In re Sands Brothers Asset Mgmt., IAA Rel. No. 3960, File No. 3-16223 (SEC Oct. 29, 2014), http://www.sec.gov/litigation/admin/2014/ia-3960.pdf (The SEC found that investment adviser failed to timely distribute audited financial statements to investors of pooled investment vehicles managed by adviser.).

[46] *See* In re WestEnd Capital Mgmt., LLC, IAA Rel. No. 3919, File No. 3-16129 (SEC Sept. 17, 2014), http://www.sec.gov/litigation/admin/2014/ia-3919.pdf (The SEC found that an investment adviser collected unearned fees from a client account.).

[47] *See* In re Structured Portfolio Mgmt., LLC, IAA Rel. No. 3906, File No. 3-16046 (SEC Aug. 28, 2014), http://www.sec.gov/litigation/admin/2014/ia-3906.pdf (The SEC found inadequate disclosure regarding conflicts of interest in connection with trade allocations by a portfolio manager who was trading across several private accounts.).

[48] In re Heartland Advisors, Inc., ICA Rel. No. 28136, File No. 3-12936 (SEC Jan. 25, 2008) (settlement with SEC), http://www.sec.gov/litigation/admin/2008/33-8884.pdf; SEC v. Heartland Advisors, Inc., No. 2:03-cv-1427 (E.D. Wis. Feb. 21, 2008) (stipulation of dismissal).

[49] SEC v. Bauer, 2011 U.S. Dist. LEXIS 56780 (E.D. Wis. May 25, 2011).

[50] The Seventh Circuit observed that no federal court had directly considered the issue, and that the SEC had not previously tested the issue in the mutual fund context. SEC v. Bauer, 723 F.3d 758, 769 (7th Cir. 2013).

[51] SEC v. Heartland Advisors, Inc., No. 2:03-cv-1427 (E.D. Wis. Aug. 29, 2014) (granting defendant's motion for summary judgment).

[52] Julie Riewe, Co-Chief, SEC Div. of Enforcement's Asset Mgmt. Unit, Conflicts, Conflicts Everywhere – Remarks to the IA Watch 17th Annual IA Compliance Conference: The Full 360 View (Feb. 26, 2015), http://www.sec.gov/news/speech/conflicts-everywhere-full-360-view.html.

[53] *Id.*; Mary Jo White, Chair, SEC, Enhancing Risk Monitoring and Regulatory Safeguards for the Asset Management Industry – Remarks at NY Times Dealbook Opportunities for Tomorrow Conference (Dec. 11, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370543677722.

[54] *See* OCIE, Examination Priorities for 2015 (Jan. 13, 2015), http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

Other regulators, such as the CFTC and FINRA, also publicly discuss their examination priorities. The chair of the CFTC has outlined examination priorities for the CFTC in 2015, which include a focus on benchmark integrity (i.e., ensuring that currency, foreign exchange, and other benchmarks are free from manipulation), other market manipulation, and disruptive trading practices. *See* Timothy G. Massad, Testimony of Chairman Timothy G. Massad Before the U.S. House Appropriations Committee, Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies, Wash., DC (Feb. 11, 2015), http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-10; *The Commodity Futures Trading Commission: Effective Enforcement and the Future of Derivatives Regulation: Hearing Before the S. Comm. on Agriculture, Nutrition, & Forestry*, 113th Cong. 23 (Dec. 10, 2014) (statement of Timothy Massad, Chairman, CFTC), http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-6.

In its annual letter, FINRA set forth its examination and regulatory priorities for 2015, which include: (1) cyber security and data breaches; (2) fixed income investments; (3) alternative mutual funds; (4) exchange-traded products; and (5) anti-money laundering. *See* 2015 Regulatory and Examination Priorities Letter, FINRA (Jan. 6, 2015), http://www.finra.org/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=P602239.

[55] *See* OCIE, Examination Priorities for 2015 (Jan. 13, 2015), http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

[56] *See, e.g.*, Marc Schonfeld, *The Blurring Line Between SEC Examinations and Enforcement*, THE HARVARD LAW SCHOOL FORUM ON CORP. GOVERNANCE AND FIN. REG. (May 28, 2012), http://blogs.law.harvard.edu/corpgov/2012/03/28/the-blurring-line-between-sec-examinations-and-enforcement/; Catherine Botticelli, Dechert, LLP, *Setting the Fund Menu in Today's Regulatory Climate*, ACLI Ann. Conference, Wash., D.C., (Oct. 20, 2014), *available at* http://www.dechert.com/Setting_the_Fund_Menu_in_Todays_Regulatory_Climate_10-20-2014/.

[57] *See* SEC, *FY 2014 Annual Performance Report and FY 2016 Annual Performance Plan*, at 36 (Feb. 2, 2015), http://www.sec.gov/about/reports/sec-fy2014-fy2016-annual-performance.pdf (providing percentage of OCIE examinations referred to the Division of Enforcement); SEC, *Summary of Performance and Financial Information, Fiscal Year 2014*, at 4 (Feb. 12, 2015), http://www.sec.gov/reportspubs/annual-reports/sec-fy-2014-summary-of-performance-information.pdf (providing number of formal examinations conducted by OCIE and the number of referrals to the Division of Enforcement).

[58] *See, e.g.*, In re Water Island Capital LLC, IAA Rel. No. 31455, File No. 3-16385 (SEC Feb. 12, 2015), http://www.sec.gov/litigation/admin/2015/ic-31455.pdf; In re Navigator Money Mgmt., Inc., Admin. Proc. No. 3-15707, ICA Rel. No. 30897 (SEC Jan. 30, 2014), http://www.sec.gov/litigation/admin/2014/33-9521.pdf; In re Western Asset Mgmt. Co., ICA Rel. No. 13893, File No. 3-15688 (SEC Jan. 27, 2014), http://

www.sec.gov/litigation/admin/2014/ia-3762.pdf; In re Western Asset Mgmt. Co., Admin. Proc. No. 3-15689, IAA Rel. No. 3763 (SEC Jan. 27, 2014), http://www.sec.gov/litigation/admin/2014/ia-3763.pdf.

59 *See* Riewe, *supra* note 52.

60 Exec. Order No. 13,636, 78 C.F.R. § 11739 (2013), https://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity.

61 NIST, Framework for Improving Critical Infrastructure Cybersecurity (Feb. 12, 2014), http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214-final.pdf.

62 *See* Richard Raysman and Francesca Morris, *CIOs Ignore the NIST Cybersecurity Framework at Their Own Peril*, WALL ST. J. (Dec. 18, 2014), http://blogs.wsj.com/cio/2014/12/18/cios-ignore-the-nist-cybersecurity-framework-at-their-own-peril/tab/print/.

63 Nat'l Exam Program Risk Alert, OCIE Cybersecurity Initiative (Apr. 15, 2014), http://www.sec.gov/ocie/announcement/Cybersecurity+Risk+Alert++%2526+Appendix+-+4.15.14.pdf.

64 Nat'l Exam Program Risk Alert, OCIE Cybersecurity Examination Sweep Summary (Feb. 3, 2015), http://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf.

65 Report on Cybersecurity Practices, FINRA (Feb. 3, 2015), https://www.finra.org/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=P602363.

66 *See* Melanie Waddell, *Second Round of Cyber Exams Coming in Summer: SEC's Jarcho*, THINKADVISOR (Mar. 6, 2015), http://www.thinkadvisor.com/2015/03/06/second-round-of-cyber-exams-coming-in-summer-secs.

67 *See* Jackie Noblett, *Cyber Scrutiny Portends More Rules in 2015*, IGNITES (Jan.6, 2015), http://ignites.com/c/1037493/106493/cyber_scrutiny_portends_more_rules.

68 Some observers have attributed this trend, at least in part, to Dodd-Frank, which authorized the SEC, in administrative proceedings, to obtain penalties against individuals that are not registered with it, and to seek disgorgement and civil penalties. *See, e.g.*, Jean Eaglesham, *SEC is Steering More Trials to Judges It Appoints*, WALL ST. J. (Oct. 21, 2014), http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590.

69 *See* CFTC, Annual Report on Whistleblower Program and Consumer Education Initiatives (Oct. 30, 2014), http://www.cftc.gov/ConsumerProtection/WhistleblowerProgram/ReportsToCongress/ssLINK/wb_fy2014reporttocongress. In fiscal year 2014, the CFTC filed 67 new enforcement proceedings and obtained a record $3.27 billion in monetary penalties.

70 *See* Jed S. Rakoff, Federal Judge, S.D.N.Y., Is the S.E.C. Becoming a Law unto Itself?, PLI Securities Regulation Institute Keynote Address (Nov. 5, 2014), https://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf. For fiscal year 2015, the SEC's success rate will be less than 100%, as an ALJ ruled against the agency in an administrative proceeding in March 2015. *See* Bruce Carton, *March Madness! SEC Loses an AP for First Time Since FY 2013*, COMPLIANCE WEEK (Mar. 20, 2015), http://www.complianceweek.com/blogs/enforcement-action/march-madness-sec-loses-an-ap-for-first-time-since-fy-2013#.VRVGc-F2BSA.

71 *See* Andrew Ceresney, Director, SEC Div. of Enforcement, Remarks at the A.B.A.'s Bus. Law Section Fall Meeting (Nov. 21, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370543515297.

72 *See* Kobi Kastiel, *2014 Securities Enforcement Update*, THE HARVARD L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG., (Jan. 28, 2015), http://blogs.law.harvard.edu/corpgov/2015/01/28/2014-year-end-securities-enforcement-update/.

73 *See* Bebo v. SEC, 2015 U.S. Dist. LEXIS 25660 (E.D. Wis. Mar. 3, 2015); Chau v. SEC, 2014 U.S. Dist. LEXIS 171658 (S.D.N.Y. Dec. 11, 2014), *appeal docketed*, No. 15-461 (2d Cir. filed Feb. 13, 2015). Another lawsuit challenging the SEC's use of administrative proceedings was voluntarily dismissed in March 2015. Stilwell v. SEC, No. 14-cv-7931 (S.D.N.Y. filed Oct. 1, 2014) (voluntarily dismissed on Mar. 16, 2015). At least one other

recent lawsuit has challenged the SEC's use of administrative proceedings. *See* Duka v. SEC, No. 15-cv-357 (S.D.N.Y filed Jan. 16, 2015).

[74] *See* Kastiel, *supra* note 72.

[75] SEC Press Release, SEC Announces New Hires in the Office of Administrative Law Judges (June 30, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542202073.

[76] *See, e.g.*, SEC v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (rejecting "neither admit nor deny" settlement reached by the SEC).

[77] *See* Gretchen Morgenson, *S.E.C. Wants the Sinners to Own Up*, NY TIMES (Mar. 14, 2015), http://www.nytimes.com/2015/03/15/business/sec-wants-the-sinners-to-own-up.html?ref=business; Joe Harris, *SEC to Start Demanding Wrongdoing Admissions*, IGNITES (June 19, 2013), http://ignites.com/pc/537841/60121. The change in policy follows a prior modification to the policy announced in January 2012. At that time, the Director of the SEC's Enforcement Division announced that the SEC was modifying its approach to "neither admit nor deny" settlements, so that a defendant in a civil proceeding could not use the "neither admit nor deny" formulation if there were a parallel criminal investigation or proceeding. *See* Robert Khuzami, Director, SEC Div. of Enforcement, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), https://www.sec.gov/news/speech/2012/spch010712rsk.htm; 17 C.F.R. § 202.5(e) (2012).

[78] In particular, Chair White stated that the SEC would seek admissions of wrongdoing where (1) harm to a large number of investors or particularly egregious conduct has occurred; (2) there is conduct that poses significant risk to the market or to investors; (3) admissions would help investors to determine whether to deal with the party again in the future; and (4) an admission would send a crucial message to the market about the case. *See* Mary Jo White, Chair, SEC, Deploying the Full Enforcement Arsenal, SEC (Sept. 26, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539841202.

[79] *See* Ceresney, *supra* note 71.

[80] *See* Jean Eaglesham, *As SEC Enforcement Cases Rise, Big Actions Are Sparse*, WALL ST. J. (Sept. 29, 2014), http://www.wsj.com/articles/as-sec-enforcement-cases-rise-big-actions-are-sparse-1412028262. *See also* Kastiel, *supra* note 72, http://blogs.law.harvard.edu/corpgov/2015/01/28/2014-year-end-securities-enforcement-update/; SEC Press Release, Scottrade Agrees to Pay $2.5 Million and Admits Providing Flawed "Blue Sheet" Trading Data (Jan. 29, 2014), www.sec.gov/News/PressRelease/Detail/PressRelease/1370540696906.

[81] *See* In re Wells Fargo Advisors, LLC, IAA Rel. No. 3928, File No. 3-16153 (SEC Sept. 22, 2014), http://www.sec.gov/litigation/admin/2014/34-73175.pdf; SEC Press Release, Wells Fargo Advisers Admits Failing to Maintain Controls and Producing Altered Document, Agrees to Pay $5 Million Penalty, Rel. No. 2014-207 (Sept. 22, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543012047.

[82] SEC v. Citigroup Global Mkts. Inc., 752 F.3d 285 (2d. Cir. 2014).

[83] *See* Bradley J. Bondi, *What Rakoff Reversal Means For "Neither Admit Nor Deny"*, LAW360 (June 5, 2014), http://www.law360.com/articles/544972/what-rakoff-reversal-means-for-neither-admit-nor-deny.

[84] *See* Ceresney, *supra* note 71.

[85] 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, http://www.icimutual.com (at pp. 35-36, discussing insurance for the costs of correcting operations-based errors).

[86] 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 it for attacks on the fund industry. For example, 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. OppenheimerFunds 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)). Even the use of state law by the plaintiffs' bar is limited, particularly by SLUSA, which broadly precludes plaintiffs from bringing state law class actions—whether in state or in federal court—that allege misrepresentations or omissions of material fact in connection with the purchase or sale of fund shares.

[87] These dismissals came in 2009 and 2010, with the Second Circuit affirming the dismissals of two of these lawsuits in November 2009 and June 2011, respectively, and with the Ninth Circuit affirming the dismissal of another lawsuit in May 2011. *See* McBrearty v. Vanguard Group, Inc., 353 Fed. Appx. 640 (2d Cir. 2009); Seidl v. Am. Century Cos., 427 Fed. Appx. 35 (2d Cir. 2011); Wodka v. Causeway Capital Mgmt. LLC, 433 Fed. Appx. 563 (9th Cir. 2011). One lawsuit was voluntarily dismissed by the plaintiff. *See* Gamoran v. Neuberger Berman Mgmt. LLC, No. 1:08-cv-10807 (S.D.N.Y. filed Dec. 12, 2008).

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

[89] Hartsel v. Vanguard Group Inc., No. 13-cv-1128 (D. Del. Jan. 26, 2015), *appeal docketed*, No. 15-1516 (3d Cir. filed Mar. 2, 2015).

[90] 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); Gomes v. Am. Century Cos., No. 14-cv-283 (W.D. Mo. filed Mar. 26, 2014).

[91] Seidl v. Am. Century Cos., No. 4:10-cv-4152 (W.D. Mo. July 2, 2014) (granting motion for summary judgment).

[92] Seidl v. Am. Century Cos., No. 14-2796 (8th Cir. filed July 31, 2014).

[93] Wodka v. Causeway Capital Mgmt. LLC, No. BC463623 (Cal. Super. Ct. Nov. 26, 2013) (judgment entered on Jan. 23, 2014), *appeal docketed*, Docket No. B255454 (Cal. Ct. App. Mar. 19, 2014).

[94] *See* Curbow Family LLC v. Morgan Stanley Inv. Advisors, Inc., No. 651059-2010 (N.Y. Sup. Ct. Oct. 22, 2014) (motion to dismiss granted); Rotz v. Van Kampen Asset Mgmt., Inc., No. 651060-2010 (N.Y. Sup. Ct. Oct. 22, 2014) (motion to dismiss granted).

[95] Northstar Fin. Advisors, Inc. v. Schwab Invs., 781 F. Supp. 2d 926 (N.D. Cal. 2011); Northstar Fin. Advisors, Inc. v. Schwab Invs., 807 F. Supp. 2d 871 (N.D. Cal. 2011), *aff'd in part, rev'd in part*, 2015 U.S. App. LEXIS 3670 (9th Cir. 2015). In these decisions, the federal district court judge dismissed the state law claims, finding, among other things, that most of the claims were precluded by SLUSA because they alleged misrepresentations or omissions of material fact in connection with the purchase or sale of fund shares.

[96] Northstar Fin. Advisors, Inc. v. Schwab Invs., 2015 U.S. App. LEXIS 3670 (9th Cir. 2015) (reversing in part and vacating in part the lower court's dismissal of the state law claims, and remanding the proceeding to the lower court to reconsider the state law claims and to determine whether any of the claims were precluded by SLUSA).

[97] *See, e.g.*, K&L Gates, Investment Management Alert: Ninth Circuit Opinion May Open Litigation Doors Most Thought Closed (Mar. 19, 2015), http://www.klgates.com/ninth-circuit-opinion-may-open-litigation-doors-most-thought-closed-03-19-2015/.

[98] Santomenno v. John Hancock Life Ins. Co., No. 2:10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, (May 23, 2011 (as to section 36(b)) & Aug. 24, 2013 (as to ERISA)), *aff'd*, No. 11-2529 (3d Cir. Apr. 16, 2012) & No. 13-4367 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *petition for cert. filed*, (U.S. Feb. 19, 2015) (No. 14-1054).

[99] Gordan v. Mass. Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. filed Nov. 5, 2013) (motion to dismiss filed on Jan. 14, 2014).

[100] McCaffree Fin. Corp. v. Principal Life Ins. Co., No. 4:14-cv-102 (S.D. Iowa Dec. 10, 2014) (granting motion to dismiss), *appeal docketed*, No. 15-1007 (8th Cir. filed Dec. 22, 2014).

[101] Dennard v. Aegon USA LLC, No. 2:15-cv-896 (C.D. Cal. filed Feb. 6, 2015).

[102] Walker v. Merrill Lynch & Co. Inc., No. 15-cv-01959 (S.D.N.Y. filed Mar. 16, 2015).

[103] Bilewicz v. FMR LLC, No. 1:13-cv-10636 (D. Mass. Oct. 16, 2014) (consolidated with Yeaw v. FMR LLC, 1:14-cv-10035 (D. Mass. filed Jan. 7, 2014)).

[104] Krueger v. Ameriprise Fin., Inc., No. 11-cv-2781 (D. Minn. filed Sept. 28, 2011) (joint motion for preliminary approval of settlement filed on Mar. 26, 2015).

[105] Tibble v. Edison Int'l, 711 F.3d 1061 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 43 (Oct. 2, 2014) (No. 13-550).

[106] *See, e.g.*, Ronald Mann, *Not much of a dispute in ERISA case about duty to monitor,* SCOTUSBLOG (Feb. 17, 2015), http://www.scotusblog.com/2015/02/not-much-of-a-dispute-in-erisa-case-about-duty-to-monitor/.

[107] Glass Dimensions, Inc. v. State Street Bank & Tr. Co., No. 1:10-cv-10588 (D. Mass. filed Apr. 8, 2010).

[108] Glass Dimensions, Inc. v. State Street Bank & Tr. Co., No. 1:10-cv-10588 (D. Mass. May 12, 2014) (order approving settlement).

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

[110] Tussey v. ABB Inc., 2014 U.S. App. LEXIS 5118 (8th Cir. 2014).

[111] *Id.*

[112] Brown v. Fidelity Mgmt. & Research Co., No. 1:13-cv-11011 (D. Mass. filed Apr. 25, 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); and Kelley v. Fidelity Mgmt. & Tr. Co., No. 1:13-cv-10222 (D. Mass. filed Feb. 5, 2013). The cases have been consolidated as In re Fidelity ERISA Float Litig., No. 1:13-cv-10222 (D. Mass. Mar. 11, 2015) (order granting motion to dismiss).

[113] *See*, *e.g.*, Off. Comm. of Unsecured Creditors of Tribune Co. v. JPMorgan Chase Bank, N.A., No. 1:10-ap-55841 (Bankr. D. Del. Mar. 26, 2013) (dismissed) & Kirschner 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-4609 (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) (both adversarial proceedings in In re Lyondell Chem. Co., No. 1:09-bk-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009)).

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

[115] In re Tribune Co. Fraudulent Conveyance Litig., No. 13-3992 (2d Cir. filed Oct. 1, 2013), Nos. 13-3875 & 13-4178 (2d Cir. filed Oct. 29, 2013), and No. 13-4196 (2d Cir. filed Oct. 31, 2013).

[116] Weisfelner v. Fund 1, No. 10-ap-4609 (Bankr. S.D.N.Y. Jan. 14, 2014) (adversarial proceeding in In re Lyondell Chem. Co., No. 1:09-bk-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009)).

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

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