Claims Trends

A Review of Claims Activity in the Mutual Fund Industry (January 2018-March 2019)

ICIMutual

Table of Contents

Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CFTC	U.S. Commodity Futures Trading Commission
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
DOL	U.S. Department of Labor
ERISA	Employee Retirement Income Security Act of 1974
FCPA	Foreign Corrupt Practices Act of 1977
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
MSRB	Municipal Securities Rulemaking Board
OCIE	Office of Compliance Inspections and Examinations of the SEC
PSLRA	Private Securities Litigation Reform Act of 1995
SEC	U.S. Securities and Exchange Commission
SLUSA	Securities Litigation Uniform Standards Act of 1998

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

Introduction

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

ICI Mutual measures claims activity by both *frequency* and *severity*. 2018 saw a year-on-year decrease in the overall number of claims submitted by ICI Mutual's insured fund groups under their directors and officers/errors and omissions (D&O/E&O) policies. Nonetheless, over the five-year period 2014-2018, approximately half of ICI Mutual's insured fund groups submitted at least one claim notice. This figure suggests that in the current environment, claims frequency remains an issue for the fund industry.

Unlike frequency, the *severity* of new claims can be more difficult to assess, particularly for civil lawsuits and regulatory proceedings, where it may take years to establish the magnitude of losses (in the form of defense costs, settlements, and judgments). Even so, severity continues to be a concern for the fund industry, as discussed herein.

Recent years have also witnessed significant regulatory enforcement activity by the SEC. Even as its leadership has changed, the SEC has continued its active enforcement of the federal securities laws in the asset management area (i.e., involving registered investment companies and/or investment advisers). In its 2018 fiscal year, the SEC brought a near-record number of enforcement actions, including a significant number of actions in the asset management area.

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

Fees

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

Section 36(b) Lawsuits

Section 36(b) imposes a fiduciary duty on investment advisers with respect to the compensation they receive for providing advisory services to registered investment companies, and it provides fund shareholders with an express private right of action to enforce this duty.[1]

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

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

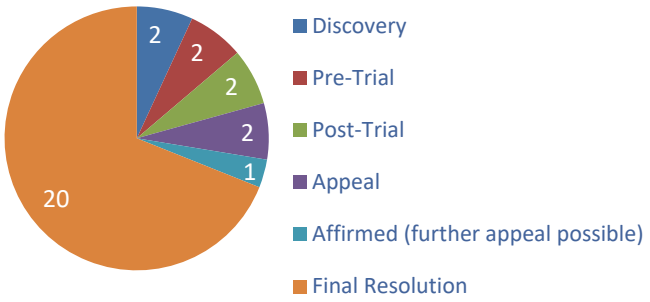
(Cases in **blue** were active as of March 31, 2019)

2010	• **Santomenno v. John Hancock Life Ins. Co.**, No. 10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013), *aff'd*, 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (2015) • **Southworth v. Hartford Inv. Fin. Serv., LLC**, No. 10-cv-878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011)
2011	• **Kasilag v. Hartford Inv. Fin. Serv., LLC**, No. 11-cv-1083 (D.N.J. filed Feb. 25, 2011), *dismissed*, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *aff'd*, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018) • **Reso v. Artisan Partners Ltd. P'ship**, No. 11-cv-3137 (N.D. Cal. filed June 24, 2011), *closed per stipulation* (Aug. 23, 2012) • **Sivolella v. AXA Equitable Life Ins. Co.**, No. 11-cv-4194 (D.N.J. filed July 21, 2011), *dismissed*, 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016), *aff'd,* 742 Fed. Appx. 604 (3d Cir. July 10, 2018)
2013	• **Laborers' Local 265 Pension Fund v. iShares Trust**, No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013), *dismissed*, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015) • **Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp.**, No. 13-cv-1601 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, No. 14-cv-44 (S.D. Iowa Feb. 8, 2016), *aff'd,* 864 F.3d 859 (8th Cir. 2017) • **In re Voya Glob. Real Estate Fund S'holder Litig.**, No. 13-cv-1521 (D. Del. filed Aug. 30, 2013), *closed per stipulation* (Oct. 19, 2017) • **In re Russell Inv. Co. S'holder Litig.**, No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013), *closed per order of closure* (Feb. 28, 2017) • **Curd v. SEI Invs. Mgmt. Corp.**, No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013), *closed per stipulation* (Nov. 21, 2016)
2014	• **Zehrer v. Harbor Capital Advisors, Inc.**, No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 40718 (N.D. Ill. Mar. 13, 2018) • **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014), *dismissed*, 2019 U.S. Dist. LEXIS 63547 (D.N.J. Feb. 8, 2019), *appeal filed* (3d Cir. filed Mar. 8, 2019) • **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 14-cv-414 (S.D. Ohio filed May 5, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018), *appeal docketed*, No. 18-3239 (6th Cir. filed Mar. 15, 2018) • **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 14-cv-585 (D. Del. filed May 7, 2014), *closed per stipulation* (Aug. 8, 2017) • **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014) • **Redus-Tarchis v. N.Y. Life Inv. Mgmt.**, No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 175309 (D.N.J. Oct. 10, 2018) • **Kenny v. PIMCO**, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014), *closed per stipulation* (Aug. 9, 2018)
2015	• **Chill v. Calamos Advisors, LLC**, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015) • **Ingenhutt v. State Farm Inv. Mgmt. Corp.**, No. 15-cv-1303 (C.D. Ill. filed July 22, 2015), *closed per stipulation* (Nov. 21, 2018) • **Wayne Cty. Emps.' Ret. System v. Fiduciary Mgmt. Inc.**, No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015), *closed per stipulation* (Jan. 4, 2016) • **Kennis v. Metropolitan West Asset Mgmt., LLC**, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015) • **North Valley GI Med. Group v. Prudential Invs. LLC**, No. 15-cv-3268 (D. Md. filed Oct. 30, 2015), *closed per stipulation* (Feb. 2, 2017) • **Ventura v. Principal Mgmt. Corp.**, No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015), *closed per stipulation* (Oct. 17, 2017)
2016	• **Obeslo v. Great-West Capital Mgmt., LLC**, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016) • **Paskowitz v. Prospect Capital Mgmt., L.P.**, No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016), *dismissed*, 232 F. Supp. 3d 498 (S.D.N.Y. 2017), *appeal docketed*, No. 17-510 (2d Cir. filed Feb. 21, 2017), *closed per stipulation* (May 5, 2017) • **Zoidis v. T. Rowe Price Assocs., Inc.**, No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016) • **Karp v. Harris Assocs., L.P.**, No. 16-cv-8216 (N.D. Ill. filed Aug. 19, 2016), *closed per stipulation* (Nov. 28, 2016)
2017	• **Pirundini v. J.P. Morgan Inv. Mgmt. Inc.**, No. 17-cv-3070 (S.D.N.Y. filed Apr. 27, 2017), *dismissed*, 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019)
2018	• **Winston v. Western Asset Mgmt. Co.**, No. 18-cv-3523 (C.D. Cal. filed Apr. 26, 2018), *dismissed as to Western Asset defendants* (C.D. Cal. Jan. 28, 2019)

jurisprudence, the *Jones* decision did not discourage the plaintiffs' bar from initiating new section 36(b) lawsuits. Indeed, over the nine years since the Supreme Court's decision in *Jones*, the plaintiffs' bar has initiated 29 new section 36(b) lawsuits, including one filed in 2018, involving a total of 26 fund groups.[3]

2018 and early 2019 saw continued positive developments in the fund industry's ongoing defense efforts in this area (see box, below), as additional post-*Jones* lawsuits reached the later stages of the litigation process. Yet, as of the date of this *Claims Trends*, nine of the 29 lawsuits still remain active in various stages of the litigation process.[4] (See chart, right.) It is not yet certain when or how these remaining post-*Jones* lawsuits will finally be resolved.

Procedural Status of Post-*Jones* Lawsuits



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

As discussed in past *Claims Trends,* the post-*Jones* lawsuits can largely be divided into two basic categories, both of which have focused on disparities between fees of advisers and subadvisers. The first category, referred to here as "**manager-of-managers**" lawsuits, has focused on the alleged disparities between fees charged by advisers and fees paid to unaffiliated subadvisers. The second category, referred to here as "**subadvisory**" lawsuits, has focused on alleged disparities between fees charged by advisers for managing their *affiliated* funds and the lesser fees charged by those advisers in their roles as subadvisers to *unaffiliated funds*. A small number of lawsuits (see "Other Lawsuits" below) have relied on different theories.

"Manager-of-Managers" Lawsuits: Fourteen of the 29 post-*Jones* lawsuits have been "manager-of-managers" lawsuits. All but one of these lawsuits have concluded—six by stipulation of the parties, and seven by court order in favor of the defendants.

- *Lawsuit in the Pre-Trial Stage:* In the one active manager-of-managers lawsuit, a district court denied the defendants' motion for summary judgment in September 2018.[10] The lawsuit remains pending.

- *Lawsuits That Have Reached Final Resolutions:* Thirteen of the manager-of-managers lawsuits have reached final resolutions—six by stipulation of the parties, and seven by court order.[11] Notably, in two lawsuits closed by stipulation, the parties publicly stipulated that the resolutions were not the result of a

Recent Positive Developments in Post-*Jones* Lawsuits

Over the fifteen months, federal district courts issued judgments on the merits in favor of the defendants in several post-*Jones* lawsuits. Most recently, in February 2019, after a trial, the court dismissed *In re BlackRock Mutual Funds Advisory Fee Litigation* in favor of the defendants; an appeal of this decision was filed in March 2019 and remains pending.[5]

In July and August 2018, respectively, the Third Circuit affirmed district court judgments in favor of the defendant advisers in the first two post-*Jones* lawsuits to proceed through trial (*Sivolella v. AXA Equitable Life Insurance Company* and *Kasilag v. Hartford Investment Financial Services, LLC*), bringing both of these lawsuits to a close.[6]

In March 2018, in *Goodman v. J.P. Morgan Investment Management, Inc.*, a district court granted the defendants' motion for summary judgment. A few days later, the plaintiffs filed a notice of appeal with the Sixth Circuit.[7] (In February 2018, the same fund group prevailed on the merits in a motion to dismiss in a separate section 36(b) lawsuit, which dismissal was then appealed to the Second Circuit; in March 2019, the Second Circuit affirmed the dismissal, although the plaintiff/appellant may yetseek to file a motion for a writ of certiorari with the U.S. Supreme Court.[8]) Also in March 2018, the defendant's motion for summary judgment was granted in *Zehrer v. Harbor Capital Advisors, Inc.*,[9] thereby bringing the lawsuit to a close.

settlement or compromise or the "payment of any consideration" by the defendants to the plaintiffs.[12]

"Subadvisory" Lawsuits: Of the 29 post-*Jones* lawsuits, ten have been subadvisory suits. Two of these lawsuits are currently in the pre-trial stage; two lawsuits have been through trial and are awaiting decisions; two are on appeal following district court decisions in favor of the defendants; one was affirmed on appeal; and three have reached final resolutions by stipulation of the parties.

- *Lawsuits in the Pre-Trial Stage:* Two subadvisory lawsuits remain in the pre-trial phase of litigation. In one lawsuit, the defendants' motion to dismiss, filed in July 2016, was denied in March 2017, and the lawsuit is currently in the discovery phase.[13] In a second lawsuit, a motion for summary judgment remains pending.[14]

- *Lawsuits in the Post-Trial Stage:* In two subadvisory lawsuits, motions for summary judgment were denied in whole or in part.[15] Trials have been held in both lawsuits, but, to date, no decisions have been issued.[16]

- *Lawsuits on Appeal:* District court decisions in favor of defendants in two lawsuits are on appeal. In one lawsuit, the defendants' motion for summary judgment was granted in March 2018; the plaintiffs filed an appeal with the Sixth Circuit a few days later.[17] In a second lawsuit, after a trial, the district court dismissed the lawsuit in favor of the defendants in February 2019; an appeal of this decision was filed with the Third Circuit in March 2019.[18] The two appeals remain pending.

- *Lawsuit Affirmed on Appeal:* In one lawsuit, the district court granted the defendant's motion to dismiss in February 2018; this decision was appealed to the Second Circuit in March 2018 and was affirmed in March 2019.[19] The time for the plaintiff/appellant to file a petition for a writ of certiorari with the U.S. Supreme Court has not expired.

- *Lawsuits That Have Reached Final Resolutions:* Three subadvisory lawsuits have reached final resolutions by stipulation of the parties.[20] In one, the parties publicly stipulated that the resolution was not the result of a settlement or compromise or the "payment of any consideration" by the defendant to the plaintiffs.[21]

Other Lawsuits: Five of the post-*Jones* section 36(b) lawsuits cannot readily be characterized as having been either pure "manager-of-managers" or pure "subadvisory" lawsuits. One lawsuit remains in the discovery stage, and four have reached final resolutions.

- *Lawsuit in the Pre-Trial Stage:* The one active lawsuit in this category (the only section 36(b) lawsuit filed in 2018) is in the discovery stage.[22] While styled as a manager-of-managers lawsuit, this lawsuit is unusual in that it involves two relatively small closed-end funds and two unrelated investment advisers as defendants. The lawsuit appears to stem from prior efforts by the plaintiff to attempt to force a conversion of the funds into open-end funds. In July 2019, both defendants filed motions to dismiss, which were denied in October 2018. In January 2019, one of the adviser defendants was dismissed from the lawsuit by stipulation of the parties.[23]

- *Lawsuits That Have Reached Final Resolutions:* Four lawsuits in this category have reached final resolutions. In one lawsuit, the plaintiffs alleged that the adviser's fees charged to an affiliated fund were higher than those charged by the adviser to its institutional clients and a similarly managed exchange-traded fund (ETF). The lawsuit was

closed by stipulation of the parties in August 2018.[24]

A second lawsuit involved the fees charged by the adviser and administrator of a business development company, an uncommon target for plaintiffs. In January 2017, a district court granted the defendants' motion to dismiss, and the plaintiffs filed an appeal with the Second Circuit in February 2017.[25] In May 2017, the Second Circuit approved the parties' stipulation to withdraw the appeal, thus bringing the lawsuit to a close.[26]

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

The last lawsuit in this category, which involved a traditional challenge to advisory fees charged to certain mutual funds, was resolved in 2012 by stipulation of the parties.[28]

Other Developments in Fee Litigation

Fees in the fund industry have also been challenged, directly or indirectly, under ERISA (see "Other Litigation Developments – ERISA" section below). As discussed in past *Claims Trends,* the fund industry has also, from time to time, seen fee challenges in derivative claims brought under state law for breach of fiduciary duty.

Disclosure

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

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

Prospectus Liability Lawsuits

The fund industry's historical claims experience evidences that prospectus liability lawsuits are often initiated in the wake of disruptions affecting certain industry sectors or the broader market, but also sometimes arise from discrete issues affecting individual fund groups. The currently active prospectus liability lawsuits are of the latter type.

2018-2019 witnessed new prospectus liability lawsuits, as well as developments in earlier lawsuits.

- *Alleged Misrepresentations of Market Volatility Risk:* In one prospectus liability lawsuit filed in July 2018 and three prospectus liability lawsuits filed in the first quarter of 2019, plaintiffs alleged that an ETF's adviser, interested trustees and officers, and distributors, among others, misrepresented, in the ETF's registration statement, the degree to which the ETF was susceptible to market volatility risk.[30]

These lawsuits (some of which may be consolidated) remain in their early stages.

- *Alleged Investments Inconsistent with Investment Objectives:* In February 2018, following market volatility that caused a mutual fund to lose a large percentage of its value, a fund shareholder filed a prospectus liability lawsuit against the fund, its advisers, and its trustees (including independent trustees) and certain officers, alleging that the defendants caused the fund to make large investments in option spreads that were inconsistent with the fund's investment objectives of "capital appreciation and capital preservation with low correlation to the broader U.S. equity market."[31] Two additional lawsuits with substantially similar allegations were filed against the same parties later in February 2018 and March 2018.[32] The three lawsuits were consolidated in mid-2018;[33] in February 2019, the defendants filed a motion to dismiss the consolidated lawsuit, which remains pending.[34]

- *Alleged Investments Inconsistent with Investment Objective:* In April 2017, plaintiffs filed a prospectus liability lawsuit against a newly registered fund (which had previously been a private fund), its investment adviser and distributor, and its trustees (including independent trustees) and certain officers, alleging that the adviser continued to manage the fund as a hedge fund by investing the fund's assets in complex derivatives that were inconsistent with the fund's investment objective of "capital preservation."[35] In June 2018, the defendants filed a motion to dismiss, which remains pending.[36]

- *Alleged Misrepresentations of Trading Risks under Certain Market Conditions:* In June 2016, plaintiffs filed a class action complaint in California state court against several exchange-traded funds (ETFs), their adviser and distributor, and certain officers and trustees (including independent trustees) for alleged failure to advise investors of risks associated with stop-loss orders, particularly under certain market conditions.[37] In September 2017, the court dismissed the lawsuit, determining that the plaintiffs in the lawsuit lacked standing.[38] The plaintiffs appealed the decision to the state appellate court in December 2017.[39] The appeal remains pending.

Other Disclosure-Based Litigation

Previous *Claims Trends* have reported on fund shareholders' challenges to disclosure in class action "securities fraud" lawsuits brought under the '34 Act. Because these lawsuits typically are subject to legal requirements that can be difficult for plaintiffs

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

In 1998, in response to perceived abuses of the class action vehicle in securities litigation, Congress enacted SLUSA, which, among other things, prohibits the filing of certain securities class action lawsuits based on *state* law in state or federal courts. In March 2018, in a case arising outside the mutual fund industry, the Supreme Court addressed the question of whether SLUSA precludes plaintiffs from filing certain securities class action lawsuits under *federal* law in state courts. In *Cyan, Inc. v. Beaver County Employees Retirement Fund*, the Court unanimously held that SLUSA does *not* strip state courts of jurisdiction over class actions alleging '33 Act violations (i.e., state courts and federal courts have concurrent jurisdiction over such federal law class actions), and that SLUSA does *not* permit defendants to remove such federal law class actions from state court to federal court. The Court noted, however, that "covered class actions" (i.e., "sizable class actions that are founded on state law and allege dishonest practices respecting a nationally traded security's purchase or sale") are barred by SLUSA and may be removed to federal court and dismissed.[40]

Some observers have expressed concerns that the *Cyan* decision could potentially (1) encourage plaintiffs to bring more '33 Act class actions in state court and/or (2) put defendants in the position of having to simultaneously defend against both a '33 Act class action in state court and a related '34 Act class action in federal court (and be unable to force the consolidation of the lawsuits).[41] To date, at least in the fund industry area, it appears that these concerns have yet to be realized.

to satisfy in the mutual fund context,[42] plaintiffs have historically had limited success in pursuing these lawsuits against fund industry defendants.[43]

Prior issues of *Claims Trends* have monitored one such lawsuit filed in February 2015, which alleged '34 Act violations against an investment adviser and certain of its directors and officers. The district court granted preliminary approval of a settlement in June 2018, and issued its final approval of the settlement in December 2018.[44] The lawsuit is now closed.

In addition, in December 2017 and January 2018, two class action lawsuits alleging '34 Act violations were filed against a business development company (BDC) and two of its officers, in connection with the BDC's public communications with respect to its portfolio management team. More specifically, the complaints allege that the BDC failed to disclose, among other things, the departure of several key portfolio managers, thereby misleading investors who purchased or held shares of the BDC.[45] One of these lawsuits was voluntarily dismissed by the plaintiff in February 2018.[46] In the second lawsuit, following an August 2018 filing of a motion to dismiss, a magistrate judge in January 2019 recommended that the district court deny the motion.[47] To date, the district court has not acted on the magistrate judge's recommendation.

Litigation under State Law

Lawsuits against fund groups have sometimes taken the form of (1) state law derivative actions—i.e., lawsuits purporting to be filed on behalf of funds themselves, that allege violations of state or common law by fund advisers and/or fund directors and officers, or (2) state law class actions—i.e., lawsuits purporting to be filed on behalf of groups (or "classes") of fund shareholders, that allege violations of state or common law by fund advisers, funds themselves, and/or fund directors and officers. This section describes recent developments in such actions.

In a derivative lawsuit, initially filed in federal district court in February 2016, shareholders alleged that the investment advisers to two mutual funds, as well as fund officers and trustees (including independent trustees), committed breaches of fiduciary duty and/or breaches of contract with respect to the funds' alleged investments in a start-up company.[48] This federal court lawsuit was voluntarily dismissed in February 2016 and was then re-filed in Kansas state court in April 2016.[49] The defendants' motions to dismiss were denied in November 2016, and an amended complaint was filed shortly thereafter.[50] In

Update on Pending Ninth Circuit Appeals in Securities Lawsuits

2018 saw new developments in a long-running lawsuit based initially on allegations of misrepresentations and omissions by a mutual fund during the credit crisis. In 2015, a controversial Ninth Circuit decision in the lawsuit permitted (broadly stated) the fund's shareholders (1) to bring direct class action claims for breaches of fiduciary duty, (2) to enforce the fund prospectus' terms through state law claims for breach of contract, and (3) to sue the fund's investment adviser directly in its capacity as a third-party beneficiary of the management contract between the adviser and the fund.[51] The lawsuit was subsequently remanded back to the district court, which ruled in favor of the defendants, holding that the plaintiff's claims were barred by SLUSA from being brought in state court.[52] The plaintiff thereafter again appealed. In September 2018, the Ninth Circuit concluded that the district court had correctly dismissed the plaintiff/appellant's claims on SLUSA grounds, and again remanded the lawsuit to district court, concluding that the court had erred in dismissing the claims with prejudice.[53] Finally, in December 2018, the parties filed a stipulation of dismissal, terminating the lawsuit.[54]

At the time of the Ninth Circuit's 2015 decision, some industry observers viewed the appellate court's decision as having the potential to introduce new legal avenues (i.e., new state law-based avenues) for use by the plaintiffs' bar in pursuing fund industry defendants. With the exception of a single subsequent lawsuit (since dismissed without prejudice), concerns that the 2015 Ninth Circuit decision would lead to a wave of state law-based claims against fund groups have not been realized.[55]

January 2017, the Kansas Supreme Court denied the defendants' petition for a writ of mandamus with respect to the denial of the defendants' original motions to dismiss.[56] Motions to dismiss the amended complaint, filed in January 2017, were granted in part and denied in part in April 2017.[57]

In February 2018, the parties filed a stipulation of dismissal with prejudice with respect to the independent trustees, and also filed a joint motion for preliminary approval of a settlement involving the fund's investment adviser and an interested trustee.[58] In July 2018, the court issued a final approval order, thereby ending the litigation.[59]

In September 2018, a plaintiff filed a derivative and class action lawsuit alleging violations of state and common law, which named a mutual fund's investment adviser and trustees (including independent trustees) as defendants, along with the fund as a nominal defendant. The lawsuit alleges that the trustees breached their fiduciary duty and the adviser breached its contractual obligations by permitting one mutual fund to invest in and "prop up" a second, failing mutual fund within the same trust.[60] The defendants filed a motion to dismiss in March 2019, which remains pending.[61]

Regulatory Enforcement

The SEC continues to pursue an aggressive enforcement agenda, as evidenced by its 490 stand-alone enforcement actions (i.e., proceedings other than follow-on proceedings or deregistration proceedings) in fiscal year 2018 (representing a 10% increase in stand-alone enforcement actions over the prior fiscal year). Notably, the SEC has, in the view of some observers, modified its enforcement approach in recent years in a number of ways, including through a renewed focus on protecting retail investors, a move away from the "broken windows" approach to enforcement, incentives to self-report violations, and a de-emphasis on admissions of wrongdoing.[62]

According to the Division of Enforcement's 2018 Annual Report, the SEC's enforcement efforts continue to be guided by five core principles: (1) focusing on "Main Street" investors, (2) focusing on individual accountability, (3) keeping pace with technological changes; (4) imposing remedies that most effectively further enforcement goals, and (5) constantly assessing how the staff's resources are being allocated.[63]

SEC Enforcement Actions

The Division of Enforcement's 2018 Annual Report indicates that 108, or approximately 22%, of its stand-alone actions in fiscal year 2018 were against investment companies/investment advisers, up from 82 (approximately 18%) in fiscal year 2017.[64] As in prior years, enforcement actions against entities

The Constitutionality of SEC Administrative Law Judges

Following the passage of Dodd-Frank, the SEC began bringing more enforcement actions before administrative law judges (ALJs) instead of in federal district courts. Over the last several years, various lawsuits contended that use of an administrative forum deprived respondents of their rights to full discovery and evidentiary protections that are available in federal district courts.[65] Among other things, these lawsuits argued that ALJs are "inferior officers" subject to the "Appointments Clause" of the U.S. Constitution and therefore are not authorized to preside over SEC administrative actions.

One such lawsuit reached the U.S. Supreme Court, which ruled in June 2018 that ALJs are "officers of the United States" under the U.S. Constitution and must be appointed by the President, a court of law, or a department head.[66] Even before the Supreme Court issued its ruling, the SEC had ratified the appointments of its ALJs and offered to rehear administrative proceedings.[67] As of early September 2018, the SEC had identified 136 pending administrative cases eligible for a rehearing, of which 23 involve registered investment advisers.[68]

Statute of Limitations on SEC "Disgorgement" Actions

Historically, the SEC has often sought "disgorgement" in enforcement actions. In 2017, the U.S. Supreme Court held that disgorgement, as "a punitive, rather than a remedial, sanction," is subject to a five-year statute of limitations.[69] The SEC, as well as some observers, have suggested that this decision could reduce the overall disgorgement amounts collected by the SEC, and might lead to the SEC's filing enforcement actions more promptly and/or seeking tolling agreements earlier and more often in the enforcement process.[70]

In 2017, a plaintiff filed a lawsuit against the SEC, citing the Supreme Court's ruling to support an allegation that the SEC had collected money from a liquidating trust as "disgorgement" without the proper statutory authority. The district court granted the SEC's motion to dismiss in August 2018; the plaintiff's appeal of that decision to the First Circuit remains pending.[71]

outside the registered investment company space (e.g., unregistered funds and their advisers) outnumbered those within the registered fund space.

Administrative proceedings initiated or resolved by the SEC in 2018 and early 2019 against advisers of registered funds, advisory personnel, and/or fund officers involved a number of different issues, including the custody of fund assets,[72] valuation,[73] transactions with affiliated funds,[74] improper sales disclosure regarding the use of a proprietary investment model,[75] undisclosed conflicts of interest with respect to securities lending arrangements,[76] fraudulent use of fund assets,[77] improper cross trades,[78] and improper allocation of expenses to a registered investment company.[79]

SEC administrative proceedings were also initiated or resolved against fund advisers and/or advisory personnel with respect to their *non*-registered fund activities. They included proceedings involving alleged misleading disclosure regarding performance data,[80] cybersecurity failures,[81] and FCPA violations.[82]

SEC Examination Priorities

The SEC communicates its examination priorities and potential enforcement risks in a variety of publications, speeches, and public statements from the chair, commissioners, and staff.

The SEC annually communicates its examination priorities through the publication of OCIE's National Exam Program Examination Priorities. OCIE's 2019 examination priorities retained all five of 2018's priorities—(1) retail investors, (2) critical market infrastructure, (3) FINRA and the MSRB, (4) cybersecurity, and (5) anti-money laundering programs—and added digital assets as a sixth priority.[83]

Of particular relevance to the investment management space, OCIE indicated a going-forward focus on disclosure of fees and expenses, never-before or not-recently-examined investment advisers, mutual funds and ETFs, conflicts of interest, portfolio management and trading, and cybersecurity.[84]

Throughout the year, OCIE also issues risk alerts that provide information about its examination findings and priorities. In 2018, OCIE's risk alerts

The SEC's Focus on Data Analytics

In recent years, the SEC has enhanced its use of data analytics. As described in its Strategic Plan for fiscal years 2018–2022, the SEC views data analytics as critical to its ability to effectively allocate resources. The plan states that "[t]he SEC will continue to invest in the data and tools needed for our enforcement and examination programs to uncover and prosecute violations of the federal securities laws."[85] In testimony before Congress, the SEC chair noted OCIE's use of data analytics to identify (and appropriately examine) potentially problematic activities and firms (i.e., registered entities), and credited data analytics with leading to a number of administrative actions.[86] The Division of Enforcement's 2018 Annual Report describes the use of data analytics in uncovering various types of misconduct affecting retail investors.[87]

covered various topics including advisory fee and expense compliance issues identified in examinations of investment advisers,[88] best execution issues cited in investment adviser examinations,[89] investment adviser compliance issues related to the cash solicitation rule,[90] risk-based examination initiatives focused on registered investment companies,[91] observations from investment adviser examinations relating to electronic messaging,[92] and transfer agent safeguarding of funds and securities.[93]

Other Regulators

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

FINRA, which conducts examinations of broker-dealers, announced its annual priorities in January 2019; these priorities include investigating online distribution platforms, regulatory technology, suitability, supervision of digital assets, best execution, and liquidity planning.[94]

The CFTC, which regulates the trading of commodities (including many futures and derivatives), often discusses its annual priorities through, among other avenues, public statements. The CFTC's chair and other commissioners have recently discussed, among other topics, the impact of Brexit,[95] derivatives,[96] benchmark reform in light of the 2021 LIBOR phase-out,[97] oversight of service providers,[98] and vendor risk management.[99]

As one of the regulators responsible for administering and enforcing ERISA, the DOL may also regulate asset management industry participants with respect to their provision of services to retirement plans. Following the filing of a lawsuit alleging that a recordkeeper to retirement plans charged an undisclosed fee to third-party fund providers that distribute products through its platform, the DOL has reportedly begun an investigation of the recordkeeper.[100] The Secretary of the Commonwealth of Massachusetts also announced that his department was opening an investigation into this matter.[101]

Portfolio Management Errors

Over ICI Mutual's history, a significant portion of all claim amounts paid by ICI Mutual has been for "costs of correction" claims—i.e., insurance claims by advisers or other service providers for payments made by them, outside the litigation context, to remedy operational errors that have resulted in losses to funds or private accounts. Generally, "costs of correction" insurance coverage permits an insured entity to be reimbursed for costs incurred to correct an operational error, provided that the insured entity has actual legal liability for the resulting loss.[102]

In the current environment, a number of factors—including the size of fund groups, the scale of their operations, and the magnitude of trades being executed on behalf of funds and other clients—may combine to create the potential for large operational errors. In ICI Mutual's experience, "costs of correction" claims involving seven-figure losses or greater have occurred in a number of areas, including trades of portfolio securities, corporate action processing, and valuation.

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

- As a result of errors, an investment adviser failed to execute a securities trade that had been executed for other similarly managed advisory clients.
- As a result of errors by a mutual fund's investment adviser, the net asset value per share of the fund was misstated for months.
- As a result of errors by an investment adviser to several mutual funds, the funds' cash balances were misstated for months.

As business operations continue to be outsourced to both affiliated and unaffiliated service providers, determining the extent to which "costs of correction" coverage is available may be particularly challenging, especially in the context of certain types of events, such as cyberattacks.[103] In such events, the actual legal liability of an insured fund service provider (as well as any measure of "damages" incurred) may be far from clear-cut.

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

Other Litigation Developments

In addition to the fee, disclosure, and state law-based lawsuits already discussed, 2018-2019 also saw other noteworthy litigation developments.

ERISA

As reported in past *Claims Trends*, the plaintiffs' bar has used ERISA as an additional avenue to attack the fund industry.[104] This trend continued over the past year, with new filings of ERISA-based lawsuits, as well as developments in existing lawsuits, involving asset managers and/or their affiliates.

"PROPRIETARY FUNDS" LAWSUITS

Past *Claims Trends* have tracked ERISA-based lawsuits challenging the inclusion of "proprietary" mutual funds within the offerings of "in-house" 401(k) or similar employee benefit plans sponsored by asset managers and/or their affiliates. Since 2011, the plaintiffs' bar has initiated at least 35 such lawsuits (with five of these lawsuits having been initiated since January 2018).[105] Of the 35 lawsuits, 21 remain active at some stage of the litigation process.

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

Of the 21 active lawsuits, fifteen are in the pre-trial stage of the litigation process; one lawsuit has been stayed with a pending petition for writ of certiorari

before the U.S. Supreme Court; and preliminary settlements have been reached in five lawsuits.

Of the fourteen lawsuits that are fully resolved, ten were resolved through final monetary settlements; two were dismissed by the courts (with one dismissal affirmed on appeal); and two were voluntarily dismissed by the parties.

The preliminary and final monetary settlements in these "proprietary funds" lawsuits collectively total over $200 million.[106]

- *Lawsuits in the Pre-Trial Stage:* Fifteen lawsuits remain in the pre-trial stage of the litigation process. Seven are currently in an early phase, with motions to dismiss either yet to be filed or pending before the federal district courts.[107] In seven other lawsuits, motions to dismiss have been denied, in whole or in part.[108] In one other lawsuit, the defendants' motion for summary judgment remains pending.[109]

- *Lawsuit on Appeal:* One lawsuit has been resolved by a district court in favor of the defendants. In this lawsuit, following a bench trial, the district court issued an order in favor of defendants in June 2017.[110] In July 2017, the plaintiffs filed an appeal of this decision to the First Circuit,[111] which, in October 2018, affirmed in part and vacated in part the district court's decision, and remanded the lawsuit to district court.[112] The First Circuit then stayed the lawsuit to give the defendants/appellees leave to file a petition for a writ of certiorari with the U.S. Supreme Court; the defendants/appellees filed such petition in January 2019.[113] The petition remains pending.

- *Lawsuits That Have Reached Preliminary Settlements:* In 2018, district courts preliminarily approved monetary settlements in three other lawsuits, a motion for preliminary approval of a monetary settlement was filed in a fourth lawsuit, and an agreement in principle was reached in a fifth lawsuit.[114]

- *Lawsuits Resolved by Final Settlements:* Ten lawsuits have reached final monetary settlements.[115]

- *Lawsuit Dismissed by Court:* In one lawsuit, a district court granted in part and denied in part the defendants' June 2018 motion for summary judgment. Following a bench trial, the district court issued a judgment in favor of the defendants in January 2019.[116] No appeal was filed, and the lawsuit is now closed.

- *Lawsuit Resolved on Appeal:* In one lawsuit, a district court in May 2017 granted defendants' motion to dismiss, which decision was appealed to the Eighth Circuit in June 2017. In August 2018, the Eighth Circuit affirmed the district court's dismissal.[117] The lawsuit is now concluded.

- *Lawsuits That Have Otherwise Terminated:* Two lawsuits closed in 2018 pursuant to voluntary dismissals.[118]

FEE-BASED LAWSUITS

The previous section described lawsuits challenging the inclusion of proprietary mutual funds as investment options in "in-house" plans sponsored

Insurance Considerations for ERISA Litigation Involving In-House Plans

Broadly stated, "fiduciary liability" insurance insures against liabilities arising out of third-party claims brought against company-sponsored employee benefit plans, the sponsoring companies themselves, and/or certain other persons or entities associated with such plans, by reason of their breach of fiduciary duties under ERISA (and/or common and other statutory law) in providing services to "in-house" retirement plans. Historically, fiduciary liability coverage has been viewed by insurance markets as separate and distinct from other types of liability coverages, including both "directors and officers" (D&O) coverage and "errors and omissions" (E&O) coverage. Indeed, fiduciary liability coverage is generally offered as a separate, stand-alone insurance product.

by asset managers and/or their affiliates. As reported in previous *Claims Trends*, there have also been a number of lawsuits challenging fees and compensation received directly or indirectly by asset managers and/or their affiliates as service providers to "third-party" plans. 2018 and early 2019 saw developments in some of these lawsuits, as well as two new lawsuits.

In a fee-based ERISA lawsuit filed in 2016, the plaintiff alleged that the plan sponsors/administrators and certain affiliated parties breached their fiduciary duties to third-party retirement plans through their negotiation of revenue sharing fees, which, plaintiff argued, had the effect of increasing the overall management fees of the mutual funds in which the plans invested.[119] A motion for summary judgment, filed in December 2016, was denied in September 2017.[120] The parties stipulated to a dismissal in January 2019.[121]

In a lawsuit filed in September 2017, plaintiffs alleged that a third-party provider of recordkeeping and other services to third-party 401(k) plans breached its fiduciary duties by charging "unreasonable" fees for its services.[122] Defendants filed a motion to dismiss in February 2018, which remains pending.[123]

In two new lawsuits respectively filed in February and March 2019, plaintiffs participating in third-party plans alleged that plan service providers that operated a mutual fund platform (or "supermarket") charged an undisclosed "infrastructure" fee to funds distributed through the platform.[124] The lawsuits remain in their early stages. As noted in the "Other Regulators" section above, the DOL and the Commonwealth of Massachusetts have both reportedly opened investigations with respect to the "infrastructure" fee.

MISMANAGEMENT LAWSUITS

The federal securities laws do not, in general, permit direct lawsuits against advisers for alleged mismanagement of assets. ERISA, however, provides an express right of action against plan "fiduciaries" for mismanagement of plan assets under their control—i.e., for failure to adhere to their duty of "prudent management."

In a class action lawsuit filed in April 2018, plaintiffs participating in their employers' retirement plans alleged that certain plan fiduciaries mismanaged participants' assets through the selection and retention of affiliated mutual funds as underlying investments for plan assets.[125] Participants' assets were placed in collective investment trusts ("CITs"), which, in turn, invested in index mutual funds managed by the defendants. These affiliated mutual funds, according to the plaintiffs, had higher fees and lower performance than the fees and performance of similar funds. The plaintiffs allege that the defendants breached their fiduciary duties to the participants by investing the CITs' assets in affiliated mutual funds. The defendants' motion to dismiss was granted in part and denied in part in January 2019. A motion for reconsideration of the court's decision remains pending. Trial is scheduled for February 2021.[126]

Bankruptcy Claims Involving Portfolio Securities

Mutual funds have occasionally been ensnared in proceedings arising from corporate bankruptcies, typically for no reason other than the funds' status as passive holders or former holders of securities of the bankrupt issuers. In these "clawback" proceedings, bankrupt issuers and/or their creditors often seek a

return of pre-bankruptcy payments made to security holders or other creditors, including funds.

A number of bankruptcy proceedings—including those involving the Tribune Company and General Motors—have named funds as parties.[127] These proceedings have raised various legal issues, including the legal right (or "standing") of the plaintiffs to prosecute their claims, the timeliness of the plaintiffs' claims, and the applicability to the plaintiffs' claims of a "safe harbor" defense in the federal bankruptcy code for "settlement payments."

The *Tribune* proceeding involves "constructive fraudulent conveyance" and/or "intentional fraudulent conveyance" claims under state and/or federal law. In September 2013, a federal district court dismissed the *state* law *constructive* fraudulent conveyance claims (on standing grounds).[128] In March 2016, the Second Circuit affirmed the district court's decision (on the grounds of preemption by federal law). A petition for a writ of certiorari was filed in October 2016 with the U.S. Supreme Court (the result of which is discussed below).[129]

In January 2017, the federal district court in *Tribune* dismissed the *federal* law *intentional* fraudulent conveyance claim.[130] To date, no appeal of that dismissal has been filed.[131]

In August 2017, the district court denied a request in *Tribune* to amend the complaint to add a federal *constructive* fraudulent transfer claim, but suggested that such an amendment might be appropriate based on the outcome of a pending Supreme Court case (*Merit*).[132] In February 2018, the Court issued its decision in *Merit*,[133] which involved the application of the "safe harbor" to financial institutions serving as conduits.

In April 2018, following its *Merit* decision, the Supreme Court issued a statement that the Court would defer consideration of the October 2016 petition for a writ of certiorari in *Tribune*, which would allow the Second Circuit to consider whether to recall its March 2016 decision (or take other action).[134] In May 2018, the Second Circuit issued an order recalling its earlier decision "in anticipation of further panel review."[135] The district court in *Tribune* thereafter ordered the parties to submit a letter to the court by July 2018 setting forth their positions on how to proceed with global settlement discussions.[136] (To date, no settlement appears to have been reached.)

In the *General Motors* bankruptcy proceeding, various entities (including a number of mutual funds) held interests in a term loan secured by collateral subject to a security interest. Due to an apparent clerical error, the security interest in certain collateral for the term loan was inadvertently released by the administrator for the term loan.[137] Concluding that the release of the security interest was unauthorized, the bankruptcy court granted summary judgment in favor of the defendant lenders in March 2013.[138] On a direct appeal from the bankruptcy court, the Second Circuit reversed the bankruptcy court's decision in January 2015, and remanded the proceeding to the bankruptcy court.[139]

An amended complaint was filed in May 2015.[140] Various dispositive motions were denied by the bankruptcy court in June 2016.[141] In the interim, a trial to resolve certain disputed issues of fact regarding the identification and valuation of the remaining secured collateral took place in April 2017. In September 2017, the bankruptcy court issued an opinion regarding collateral valuation.[142] Various parties filed motions to appeal the bankruptcy court's valuation opinion.[143] The parties subsequently agreed to seek to resolve certain

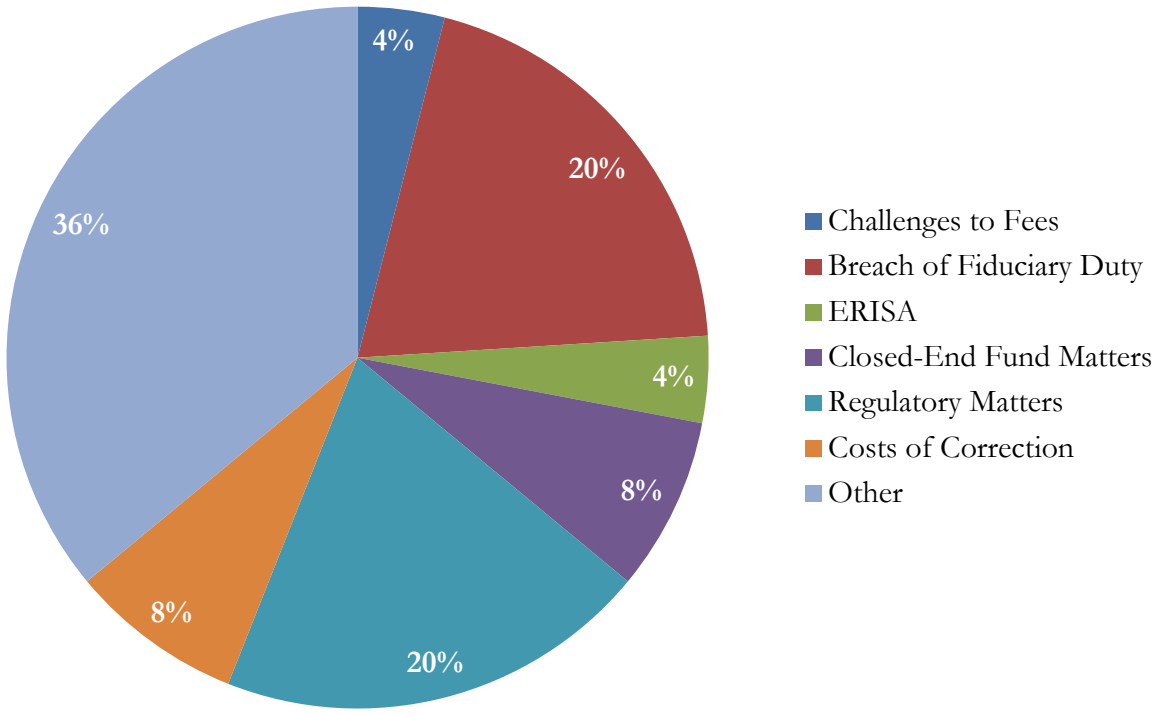
miscellaneous issues in order to "facilitate a consensual resolution" of the action.[144]

In January 2019, the bankruptcy court issued two opinions, one related to whether certain assets were "secured" and another related to an "earmarking" defense raised by defendants.[145] Shortly thereafter, in January 2019, the parties reached an agreement in principle to fully resolve this action.[146] To date, a motion to approve the settlement has not been filed.

D&O/E&O Claims Data

D&O/E&O Notices by Subject – 2018

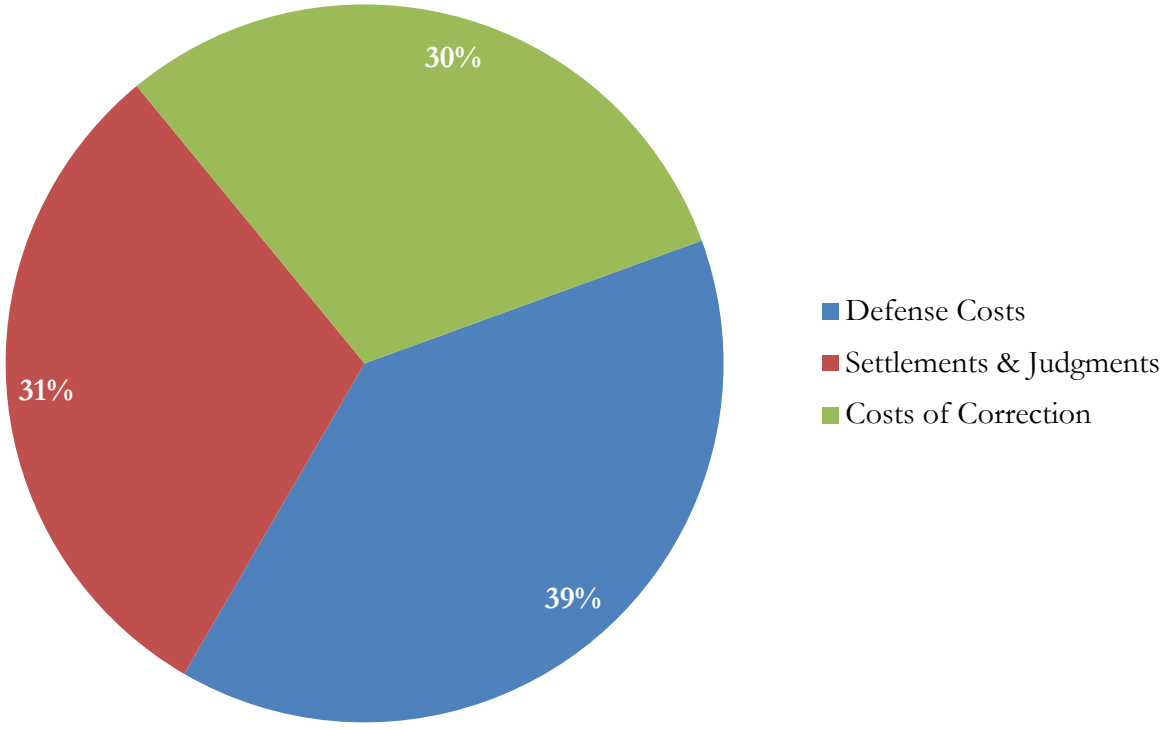
Regulatory matters and breach of fiduciary duty matters constituted the most common subjects of claims notices provided under ICI Mutual D&O/E&O policies in 2018. As shown in the chart below, a substantial percentage of notices received (the "Other" category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2009-2018)

The chart below shows the breakdown of payments (i.e., defense costs, settlements and judgments, and costs of correction) made by ICI Mutual on claims submitted over the ten-year period from January 1, 2009 through December 31, 2018 under ICI Mutual D&O/E&O policies.



Endnotes

1 15 U.S.C. § 80a-35(b) (2007).

2 Jones v. Harris Assocs. L.P., 559 U.S. 335 (2010). This standard was first articulated by a federal appellate court in *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923 (2d Cir. 1982). The court set forth six factors—the "*Gartenberg* factors"—which are generally viewed to include: (1) the nature and quality of services provided to the fund and its shareholders; (2) the profitability of the fund to the adviser-manager; (3) "fall-out benefits" accruing to the adviser-manager or its affiliates; (4) "economies of scale" realized by the adviser-manager (and the extent to which they are shared); (5) comparative fee structure; and (6) the independence, expertise, care, and conscientiousness of the fund's board in evaluating adviser compensation. *Id.* at 928-32.

3 The count of post-*Jones* lawsuits herein does not include cases that were consolidated into other cases.

4 Twenty of the post-*Jones* lawsuits have concluded. *See* Laborers' Local 265 Pension Fund v. iShares Tr., 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015); Santomenno v. John Hancock Life Ins. Co., 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (dismissed as to section 36(b)) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013) (dismissed as to ERISA), *aff'd*, 677 F.3d 178 (3d Cir. 2012) (as to section 36(b)) & 768 F.3d 284 (3d Cir. 2014) (as to ERISA), *reh'g denied*, No. 13-3467 (3d Cir. Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (2015); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. Feb. 28, 2017) (closed by order of closure without prejudice); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (closed by stipulation); Karp v. Harris Assocs., L.P., No. 16-cv-8216 (N.D. Ill. Nov. 28, 2016) (closed by stipulation); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219 (E.D. Pa. Nov. 21, 2016) (closed by stipulation); Wayne Cty. Emps.' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (closed by stipulation); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. Nov. 7, 2011) (voluntarily dismissed); Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. Aug. 23, 2012) (order dismissing with prejudice pursuant to a stipulation of the parties); In re Voya Glob. Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. Oct. 19, 2017) (closed by stipulation); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, (S.D. Iowa Feb. 8, 2016), *aff'd*, 864 F.3d 859 (8th Cir. 2017); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (closed by stipulation); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 9, 2017) (closed by stipulation); Paskowitz v. Prospect Capital Mgmt., L.P., No. 17-510 (2d Cir. May 15, 2017) (closed by stipulation); Kasilag v. Hartford Inv. Fin. Servs., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *aff'd*, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018); Sivolella v. AXA Equitable Life Ins. Co., 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016), *aff'd*, 742 Fed. Appx. 604 (3d Cir. July 10, 2018); Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Aug 9, 2018) (closed by stipulation); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. Nov. 21, 2018) (closed by stipulation); Zehrer v. Harbor Capital Advisors, Inc., 2018 U.S. Dist. LEXIS 40718 (N.D. Ill Mar. 13, 2018) (order granting summary judgment); Redus-Tarchis v. N.Y. Life Inv. Mgmt., 2018 U.S. Dist. LEXIS 175309 (D.N.J. Oct. 10, 2018) (order granting summary judgment).

5 In re BlackRock Mut. Funds Advisory Fee Litig., 2019 U.S. Dist. LEXIS 63547 (D.N.J. Feb. 8, 2019) (order dismissing lawsuit after trial), *appeal docketed*, No. 19-1557 (3d Cir. Mar. 15, 2019).

6 Sivolella v. AXA Equitable Life Ins. Co., 742 Fed. Appx. 604 (3d Cir. July 10, 2018); Kasilag v. Hartford Inv. Fin. Servs., LLC, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018).

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

8 Pirundini v. J.P. Morgan Inv. Mgmt. Inc., 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018) (order granting motion to dismiss), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019).

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

10 Obeslo v. Great-West Capital Mgmt., No. 16-cv-230 (D. Colo. Sept. 28, 2018) (order denying motion for summary judgment). The plaintiffs filed a fourth amended complaint in early October 2018.

[11] The following six lawsuits were closed by stipulation of the parties: Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 15-cv-1303 (C.D. Ill. Nov. 21, 2018) (closed by stipulation); In re Voya Glob. Real Estate Fund S'holder Litig., No. 13-cv-1521 (D. Del. Oct. 19, 2017) (stipulation of dismissal with prejudice); Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (stipulation of dismissal with prejudice); North Valley GI Med. Group v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (stipulation of dismissal with prejudice); Curd v. SEI Invs. Mgmt. Corp., No. 13-cv-7219 (E.D. Pa. Nov. 21, 2016) (stipulation of dismissal with prejudice); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. Nov. 7, 2011) (closed by stipulation).

The following seven lawsuits were closed by court order (with district court decisions affirmed on appeal in four of these lawsuits): Redus-Tarchis v. N.Y. Life Inv. Mgmt., 2018 U.S. Dist. LEXIS 175309 (D.N.J. Oct. 10, 2018) (order granting summary judgment); Sivolella v. AXA Equitable Life Ins. Co., 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016), *aff'd*, 742 Fed. Appx. 604 (3d Cir. July 10, 2018); Zehrer v. Harbor Capital Advisors, Inc., 2018 U.S. Dist. LEXIS 40718 (N.D. Ill Mar. 13, 2018); Kasilag v. Hartford Inv. Fin. Serv., LLC, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *aff'd*, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44 (S.D. Iowa Feb. 8, 2016), *aff'd*, 864 F.3d 859 (8th Cir. 2017); In re Russell Inv. Co. S'holder Litig., No. 13-cv-12631 (D. Mass. Feb. 28, 2017) (order for closure); Santomenno v. John Hancock Life Ins. Co., No. 10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (as to section 36(b)), *aff'd*, 677 F.3d 178 (3d Cir. 2012) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013) (as to ERISA), *aff'd*, 768 F.3d 284 (3d Cir. 2014).

A case similar to *Santomenno* was filed in 2011 by the same plaintiffs' lawyers against another insurance company and certain affiliated investment advisers. Santomenno v. Transam. Life Ins. Co., No. 11-cv-736 (D.N.J. filed Feb. 8, 2011). That lawsuit also challenged fees under ERISA and sought to recover advisory fees, but, rather than alleging 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, which, in February 2013, granted a motion to dismiss with respect to the IAA claim, but denied the motion with respect to the ERISA claims. Santomenno v. Transam. Life Ins. Co., 2013 U.S. Dist. LEXIS 22354 (C.D. Cal. Feb. 19, 2013). On an interlocutory appeal of the partial denial of the motion to dismiss, the Ninth Circuit, in February 2018, reversed the district court's denial of defendants' motion to dismiss and remanded to the district court with orders to grant defendants' motion to dismiss. Santomenno v. Transam. Life Ins. Co., 883 F.3d 833 (9th Cir. Feb. 23, 2018) (order reversing and remanding the district court's decision). The district court dismissed the lawsuit with prejudice in April 2018, thereby bringing the lawsuit to a close. Santomenno v. Transam. Life Ins. Co., No. 12-cv-2782 (C.D. Cal. Apr. 24, 2018) (order dismissing lawsuit with prejudice).

[12] Ventura v. Principal Mgmt. Corp., No. 15-cv-481 (S.D. Iowa Oct. 17, 2017) (stipulation of dismissal with prejudice); North Valley GI Med. Grp. v. Prudential Invs. LLC, No. 15-cv-3268 (D. Md. Feb. 2, 2017) (stipulation of dismissal with prejudice).

[13] Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2289 (N.D. Cal. Apr. 27, 2016) (filing of motion to dismiss) & (N.D. Cal. Mar. 31, 2017) (order denying motion to dismiss).

[14] In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318 (S.D.N.Y. May 15, 2018) (filing of motion for summary judgment).

[15] Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. Oct. 25, 2018) (order denying motion for summary judgment); Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. Sept. 30, 2018) (order granting in part and denying in part motion for summary judgment).

[16] Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015) (trial held in November 2018); Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015) (trial held in December 2018).

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

[18] In re BlackRock Mut. Funds Advisory Fee Litig., 2019 U.S. Dist. LEXIS 63547 (D.N.J. Feb. 8, 2019) (order dismissing lawsuit after trial), *appeal docketed*, No. 19-1557 (3d Cir. Mar. 15, 2019).

[19] Pirundini v. J.P. Morgan Inv. Mgmt. Inc., 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018) (order granting motion to dismiss), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019).

[20] Karp v. Harris Assocs., L.P., No. 16-cv-8216 (N.D. Ill. Nov. 28, 2016) (closed by stipulation); Wayne Cty. Emps.' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (closed by stipulation); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 9, 2017) (closed by stipulation).

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

[22] Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. filed Apr. 26, 2018).

[23] Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. Oct. 9, 2018) (order denying motion to dismiss). The district court subsequently granted a stipulation to dismiss the Western Asset defendants from the lawsuit. Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. Jan. 28, 2019).

[24] Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Aug. 9, 2018) (closed by stipulation).

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

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

[27] Laborers' Local 265 Pension Fund v. iShares Tr., 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015).

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

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

[30] Drapeau v. ProShare Tr., No. 18-cv-107 (D. Vt. filed July 3, 2018); Ford v. ProShares Tr. II, No. 19-cv-886 (S.D.N.Y. filed Jan. 29, 2019); Bittner v. ProShares Tr. II, No. 19-cv-1840 (S.D.N.Y. filed Feb. 27, 2019); Mareno v. ProShares Tr. II, No. 19-cv-1955 (S.D.N.Y. filed Mar. 1, 2019).

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

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

[33] The three lawsuits were consolidated into Sokolow v. LJM Funds Mgmt., Ltd., No. 18-cv-1039 (N.D. Ill. filed Feb. 9, 2018).

[34] Sokolow v. LJM Funds Mgmt., Ltd., No. 18-cv-1039 (N.D. Ill. Feb. 4, 2019) (filing of motion to dismiss).

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

[36] Emerson v. Mut. Fund Series Tr., No. 17-cv-2565 (E.D.N.Y. June 5, 2018) (filing of motion to dismiss).

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

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

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

[40] Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061 (U.S. Mar. 20, 2018).

[41] *See, e.g.*, Doug Greene et al., *The Coming Securities Class Action Storm: Multijurisdictional Litigation After* Cyan, PLUS JOURNAL (3d Qtr. 2018), *available at* https://www.wileyrein.com/media/publication/486_Q32018.pdf; Kevin LaCroix, *Guest Post: Baker Hostetler, The State of Securities Litigation After* Cyan, THE D&O DIARY (Apr. 23, 2018), https://www.dandodiary.com/2018/04/articles/securities-litigation/guest-post-state-securities-litigation-cyan/; Fried Frank, *Securities Litigation Update* (Summer 2018), https://www.friedfrank.com/siteFiles/Publications/FriedFrankSecuritiesLitigationUpdateSummer2018.pdf.

[42] Under section 10(b) of the '34 Act and rule 10b-5 thereunder, one such requirement is that a plaintiff demonstrate that defendants engaged in intentional or reckless misconduct (i.e., "scienter"). *See generally* ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY: UNDERSTANDING AND MANAGING THE RISK, http://www.icimutual.com (at pp. 6-7, discussing legal requirements applicable to "securities fraud" class action lawsuits brought under section 10(b) of the '34 Act and rule 10b-5 thereunder).

[43] As reported in prior *Claims Trends*, a noteworthy development in the rule 10b-5 area came in 2011 with the Supreme Court's decision in *Janus Capital Group v. First Derivative Traders*, 131 S. Ct. 2296 (2011). In considering whether an investment adviser to mutual funds (and the adviser's parent company) could be held liable for allegedly deceptive statements included in mutual fund prospectuses, the Court in *Janus* held that the adviser did not itself "make" any of the alleged prospectus misstatements at issue, and therefore could not be liable as a "primary" violator in shareholder litigation brought under rule 10b-5.

In March 2019, in a lawsuit outside the fund area, *Lorenzo v. SEC*, 2019 U.S. LEXIS 2295 (Mar. 27, 2019), the Supreme Court appears to have expanded the scope of "primary" liability under rule 10b-5, holding that an individual who did not "make" false and misleading statements within the meaning of the *Janus* decision could nonetheless be held liable under rule 10b-5 for *disseminating* false and misleading statements with intent to defraud. The effect of *Lorenzo* on mutual fund litigation under the '34 Act remains to be seen.

[44] In re Virtus Inv. Partners, Inc. Secs. Litig., No. 15-cv-1249 (S.D.N.Y. June 28, 2018) (order granting preliminary approval of $22 million settlement) & 2018 U.S. Dist. LEXIS 205304 (S.D.N.Y. Dec. 4, 2018) (order granting final approval of $22 million settlement). As previously reported in *Claims Trends*, the same investment adviser and other defendants (including a fund's directors, officers, subadviser, and distributor) were named in a class action lawsuit filed in May 2015 that alleged '34 Act violations (in addition to '33 Act violations) in connection with an adviser's alleged use of improper performance data in the public filings and marketing materials for the registered fund. Youngers v. Virtus Inv. Partners, Inc., No. 15-cv-8262 (S.D.N.Y. filed May 8, 2015). This lawsuit came to a close in December 2017 when the parties filed a stipulation of dismissal. Youngers v. Virtus Inv. Partners, Inc., No. 15-cv-8262 (S.D.N.Y. Dec. 27, 2017) (order approving stipulation of dismissal with prejudice).

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

[46] Sandifer v. Capitala Fin. Corp., No. 18-cv-63 (W.D.N.C. filed Feb. 5, 2018) (voluntarily dismissed on February 28, 2018).

[47] Paskowitz v. Capitala Fin. Corp. No. 18-cv-96 (W.D.N.C. Jan. 7, 2019) (magistrate judge's recommendation to district court to deny defendants' motion to dismiss).

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

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

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

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

[52] Northstar Fin. Advisors, Inc. v. Schwab Invs., 2015 U.S. Dist. LEXIS 135847 (C.D. Cal. Oct. 5, 2015) (order granting in part and denying in part motion to dismiss) & 2016 U.S. Dist. LEXIS 22660 (C.D. Cal. Feb. 23,

2016) (order granting motion for judgment on the pleadings), *appeal docketed*, No. 16-15303 (9th Cir. Feb. 26, 2016).

[53] Northstar Fin. Advisors, Inc. v. Schwab Invs., 904 F.3d 821 (9th Cir. Sept. 14, 2018). Later in September 2018, the plaintiff filed a petition for a panel rehearing and a rehearing *en banc*, which was denied in October 2018. Northstar Fin. Advisors, Inc. v. Schwab Invs., 2018 U.S. App. LEXIS 29918 (9th Cir. Cal. Oct. 23, 2018).

[54] Northstar Fin. Advisors, Inc. v. Schwab Invs., No. 08-cv-4119 (N.D. Cal. Dec. 13, 2018) (filing of stipulation of dismissal).

[55] This other lawsuit was initially dismissed with prejudice; on appeal, the Ninth Circuit affirmed the lower court's decision in August 2017, but remanded the case on the issue of whether the lower court had appropriately dismissed the lawsuit with prejudice. Hampton v. PIMCO LLC, 869 F.3d 844 (2017) (affirming lower court decision, but vacating as to issue of dismissal with prejudice); Hampton v. PIMCO LLC, No. 15-cv-131 (C.D. Cal. Sept. 21, 2017) (amending earlier order to dismiss lawsuit without prejudice). The fund group was also named in another lawsuit, filed in August 2017 by the same plaintiff, which lawsuit was dismissed without prejudice in October 2017. Hampton v. PIMCO LLC, No. 17-cv-1412 (C.D. Cal. Oct. 4, 2017) (order dismissing lawsuit without prejudice).

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

[57] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. Apr. 6, 2017) (order granting in part and denying in part motions to dismiss second amended verified petition).

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

[59] Phan v. Ivy Inv. Mgmt. Co., No. 16-cv-2338 (Kan. Dist. Ct. July 30, 2018) (order approving amended stipulation and agreement of settlement).

[60] Lanotte v. Highland Capital Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. filed Sept. 5, 2018).

[61] Lanotte v. Highland Capital Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. Mar. 25, 2019) (filing of motion to dismiss).

[62] *See, e.g.*, Hester Peirce, Commissioner, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118 (noting the SEC's focus on "meaningful enforcement actions," such as protecting retail investors, and also suggesting a move by the SEC away from the "broken windows" approach to enforcement, which, in her view, resulted in pressure to increase the number of enforcement actions). In its "Share Class Disclosure Initiative," the SEC offered to refrain from imposing certain fines on investment advisers that self-reported their failures to make required disclosures related to share-class selection. Nearly 80 advisory firms self-reported under this initiative, agreeing to return money to investors. *See*, *e.g.,* Press Release, SEC Share Class Initiative Returning More Than $125 Million to Investors (Mar. 11, 2019), https://www.sec.gov/news/press-release/2019-28. In the non-fund space, the SEC has indicated its willingness to not pursue entities that self-report and cooperate with investigations. *See, e.g.*, Andrea Cataneo & Winnie Weil, *With the SEC, Cooperation is Key*, Sheppard Mullin Corp. & Secs. Law Blog (Mar. 8, 2019), https://www.corporatesecuritieslawblog.com/2019/03/cooperation-gladius/. Other observers have noted that the SEC appears to have moved away from requiring respondents to admit wrongdoing. *See, e.g.*, *SEC Enforcement Developments of Note for Mutual Funds and Their Advisers: The Year in Review and a Look Ahead*, Fund Alert, Stradley Ronon Client Alert (Mar. 14, 2019), https://www.stradley.com/insights/publications/2019/03/fund-alert-march-2019 (noting that "[t]he SEC's past emphasis on admissions of wrongdoing seems to be on the verge of becoming another casualty of the new leadership at the Commission and in the Division of Enforcement.").

[63] *See* SEC, Div. of Enforcement, *Annual Report 2018*, at 1 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

[64] *See id.* at 9.

[65] *See, e.g.*, Raymond J. Lucia Companies, Inc. v. SEC, No. 15-1345 (D.C. Cir. Aug. 9, 2016); Tilton v. SEC, No. 15-2103 (2d Cir. June 1, 2016).

[66] Lucia v. SEC, 138 S. Ct. 2044 (2018).

[67] *See* Press Release, SEC, SEC Ratifies Appointment of Administrative Law Judges (Nov. 30, 2017), https://www.sec.gov/news/press-release/2017-215.

[68] *See* Kenneth Corbin, *Advisors in Flux as SEC's In-House Courts Get a Reset*, FINANCIAL PLANNING (Sept. 7, 2018), https://www.financial-planning.com/news/following-supreme-court-ruling-secs-in-house-courts-get-a-reset.

[69] Kokesh v. SEC, 137 S. Ct. 1635 (2017). The Court had previously applied a five-year statute of limitations, running from the time of the misconduct at issue, to SEC enforcement actions seeking civil penalties, such as fines, penalties, and forfeiture. Gabelli v. SEC, 568 U.S. 442 (2013).

In March 2018, the Tenth Circuit remanded the lawsuit to the district court, ruling that actions that took place within the limitations period remained subject to disgorgement. SEC v. Kokesh, 884 F.3d 979 (10th Cir. Mar. 5, 2018). On remand, the district court ordered prejudgment interest on the disgorgement amount sought by the SEC. SEC v. Kokesh, 2018 U.S. Dist. LEXIS 186412 (D.N.M. Oct. 31, 2018).

[70] *See* SEC, Div. of Enforcement, *Annual Report 2018*, at 12 (Nov. 2, 2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf (estimated that the *Kokesh* decision cost the SEC as much as $900 million in forgone disgorgement with respect to the matters already filed); *see also* Milbank, The SEC And FCA Enforcement Reports: Some Common Themes (Jan. 15, 2019), https://www.milbank.com/images/content/1/0/v2/109138/Client-Alert-FCA-SEC-Enforcement-2019-v2.pdf; Mary P. Hansen & Mira E. Baylson, *The Supreme Court Unanimously Curbs SEC's Power to Obtain Disgorgement*, Drinker Biddle Insights & Events Publ'n (June 8, 2017), https://www.drinkerbiddle.com/insights/publications/2017/06/the-supreme-court-curbs-secs-power; *King & Spalding Discusses Potential Effects of SEC Disgorgement As a Penalty*, The CLS Blue Sky Blog (Colum. L. Sch. Blog on Corps. & Capital Mkts.) (June 21, 2017), http://clsbluesky.law.columbia.edu/2017/06/21/king-spalding-discusses-potential-effects-of-sec-disgorgement-as-penalty/.

[71] Jalbert v. SEC, 327 F. Supp. 3d 287 (D. Mass. Aug. 22, 2018) (order granting motion to dismiss), *appeal docketed*, No. 18-2043 (1st Cir. Oct. 24, 2018).

[72] *See* In re Clayborne Grp., LLC, ICA Rel. No. 33067, File No. 3-18423 (SEC Apr. 5, 2018), https://www.sec.gov/litigation/admin/2018/ia-4875.pdf (finding that an adviser had custody of client assets without complying with provisions of the custody rule under the ICA).

[73] *See* In re Fifth St. Mgmt., LLC, ICA Rel. No. 33312, File No. 3-18909 (SEC Dec. 3, 2018), https://www.sec.gov/litigation/admin/2018/33-10581.pdf (finding that an adviser improperly valued securities held by two business development companies); In re SEI Invs. Glob. Fund Servs., ICA Rel No. 33087, File No. 3-18457 (SEC Apr. 26, 2018), https://www.sec.gov/litigation/admin/2018/ic-33087.pdf (finding that a fund administrator failed to comply with rule 2a-7 requirements in valuing assets of an affiliated unregistered money market fund that served as a collateral investment pool for a securities lending program for registered funds); In re Gemini Fund Servs., LLC, IAA Rel. No. 4847, File No. 3-18348 (SEC Jan. 22, 2018), https://www.sec.gov/litigation/admin/2018/ia-4847.pdf (finding that the fund administrator for a registered fund had included fictitious assets in calculating the fund's NAV, notwithstanding discrepancies between the administrator's records and the fund custodian's records with respect to the assets).

[74] *See* In re SEI Invs. Glob. Fund Servs., ICA Rel No. 33087, File No. 3-18457 (SEC Apr. 26, 2018), https://www.sec.gov/litigation/admin/2018/ic-33087.pdf (finding that an unregistered money market fund that served as a collateral investment pool for a securities lending program engaged in transactions with affiliated registered funds prohibited under the ICA in the absence of an appropriate exemption).

[75] *See* In re Aegon USA Inv. Mgmt., LLC, ICA Rel. No. 33215, File No. 3-18681 (SEC Aug. 27, 2018), https://www.sec.gov/litigation/admin/2018/33-10539.pdf (finding that respondents made misrepresentations in marketing registered investment companies and other products that used a proprietary quantitative model that contained errors and was not confirmed to work as intended).

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

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

[78] *See* In re Putnam Inv. Mgmt., LLC, ICA Rel. No. 33257, File No. 3-18844 (SEC Sept. 27, 2018), https://www.sec.gov/litigation/admin/2018/ia-5050.pdf (finding that a portfolio manager to registered investment companies entered into dealer-interposed cross trades in violation of ICA rules).

[79] *See* In re Fifth St. Mgmt, LLC, ICA Rel. No. 33312, File No. 3-18909 (SEC Dec. 3, 2018), https://www.sec.gov/litigation/admin/2018/33-10581.pdf (finding that an adviser improperly allocated expenses to two business development companies).

[80] *See* In re Howard B. Present, IAA Rel. No. 4900, File No. 3-18417 (SEC Mar. 29, 2018), https://www.sec.gov/litigation/admin/2018/ia-4900.pdf (finding that a registered investment adviser materially misrepresented the performance history of a proprietary investment strategy). In 2014, the SEC filed a lawsuit alleging that Mr. Present misrepresented the performance history of an investment strategy for seven years. Following a trial, the jury found for the SEC on all counts in October 2017, and final judgment was entered against Mr. Present in March 2018. SEC v. Present, 2018 U.S. Dist. LEXIS 45056 (D. Mass. Mar. 20, 2018). In May 2018, Mr. Present appealed the district court's ruling to the First Circuit, which affirmed the ruling in January 2019. SEC v. Present, No. 18-1477 (1st Cir. Jan. 15, 2019). In re Mass. Fin. Servs. Co., IAA Rel. No. 4999, File No. 3-18704 (SEC Aug. 31, 2018), https://www.sec.gov/litigation/admin/2018/ia-4999.pdf (finding that a registered investment adviser made material misstatements regarding the returns of its blended research strategies).

[81] *See* In re Voya Fin. Advisors, Inc., IAA Rel. No. 5048, File No. 3-18840 (SEC Sept. 26, 2018), https://www.sec.gov/litigation/admin/2018/34-84288.pdf (finding that a registered investment adviser failed to adopt policies and procedures to protect customer records); In re Ameriprise Fin. Servs. Inc., IAA Rel. No. 4985, File No. 3-18642 (SEC Aug. 15, 2018), https://www.sec.gov/litigation/admin/2018/34-83848.pdf (finding that a dually registered investment adviser and broker-dealer failed to adopt policies and procedures to safeguard retail investor assets against misappropriation).

[82] *See* In re Legg Mason, Inc., '34 Act Rel. No. 83948, File No. 3-18684 (SEC Aug. 27, 2018), https://www.sec.gov/litigation/admin/2018/34-83948.pdf. (finding that an investment adviser's parent company violated the FCPA through a wholly owned asset management subsidiary).

[83] SEC, OCIE, 2019 Nat'l Exam Program Examination Priorities (Dec. 20, 2018), https://www.sec.gov/files/OCIE%202019%20Priorities.pdf. *See also* T. Gorman, SEC Continues to Focus on Retail Investors, SEC ACTIONS (Mar. 19, 2019), http://www.secactions.com/sec-continues-to-focus-on-retail-investors/. In line with its continued focus on cybersecurity, OCIE recently announced a third cyber security sweep in March 2019, with a focus on advisers with multiple branches or those that have recently undergone a merger. *See* Beagan Wilcox Volz, SEC Launches New Cyber-Security Sweep, IGNITES (Mar. 22, 2019), http://ignites.com/c/2232813/273063/launches_cyber_security_sweep.

[84] SEC, OCIE, 2019 Nat'l Exam Program Examination Priorities (Dec. 20, 2018), https://www.sec.gov/files/OCIE%202019%20Priorities.pdf.

[85] *See* SEC Strategic Plan, Fiscal Years 2018-2022, at 9-10 (Oct. 11, 2018), https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf.

[86] *See* Chairman Jay Clayton, SEC, Testimony on "Oversight of the U.S. Securities and Exchange Commission" Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Dec. 11, 2018), https://www.sec.gov/news/testimony/testimony-oversight-us-securities-and-exchange-commission-0. *See, e.g.*, Press Release, SEC Uses Data Analysis to Detect Cherry-Picking by Broker (Sept. 12, 2018), https://www.sec.gov/news/press-release/2018-189 ("SEC data analysis played an important role in identifying

the alleged securities law violations…. We will continue to develop and use data analytics to root out cherry-picking and other frauds.").

87 *See* SEC, Div. of Enforcement, *Annual Report 2018*, at 3, 6 (Nov. 2, 2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

88 SEC, OCIE Nat'l Exam Program Risk Alert, Most Frequent Advisory Fee and Expense Compliance Issues Identified in Examinations of Investment Advisers, vol. VII, issue 2 (Apr. 12, 2018), https://www.sec.gov/ocie/announcement/ocie-risk-alert-advisory-fee-expense-compliance.pdf.

89 SEC, OCIE Nat'l Exam Program Risk Alert, Most Frequent Best Execution Issues Cited in Adviser Exams, vol. VII, issue 3 (July 11, 2018), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20IA%20Best%20Execution.pdf.

90 SEC, OCIE Nat'l Exam Program Risk Alert, Investment Adviser Compliance Issues Related to the Cash Solicitation Rule, vol. VII, issue 4 (Oct. 31, 2018), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Cash%20Solicitation.pdf.

91 SEC, OCIE Nat'l Exam Program Risk Alert, Risk-Based Examination Initiatives Focused on Registered Investment Companies, vol. VII, issue 5 (Nov. 8, 2018), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20RIC%20Initiatives_0.pdf.

92 SEC, OCIE Nat'l Exam Program Risk Alert, Observations from Investment Adviser Examinations Relating to Electronic Messaging, vol. VII, issue 6 (Dec. 14, 2018), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Electronic%20Messaging.pdf.

93 SEC, OCIE Nat'l Exam Program Risk Alert, Transfer Agent Safeguarding of Funds and Securities, vol. VIII, issue 1 (Feb. 13, 2019), https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Transfer%20Agent%20Safeguarding.pdf.

94 FINRA, 2019 Risk Monitoring and Examination Priorities Letter (Jan. 22, 2019), http://www.finra.org/sites/default/files/2019_Risk_Monitoring_and_Examination_Priorities_Letter.pdf.

95 Statement of CFTC Chairman J. Christopher Giancarlo on Financial Stability Concerns regarding Brexit (Dec. 6, 2018), https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement120618.

96 Remarks of Chairman J. Christopher Giancarlo before 2018 Financial Stability Conference, Federal Reserve Bank of Cleveland, Office of Financial Research, Washington, D.C. (Nov. 29, 2018), https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo61.

97 *Id.*

98 CFTC, Opening Statement of Commissioner Rostin Behnam before the Market Risk Advisory Committee (Dec. 4, 2018), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement120418.

99 *Id.*

100 *See* Gretchen Morgenson, *Government Probes Fidelity Over Obscure Mutual-Fund Fees*, WALL ST. J. (Feb. 27, 2019), https://www.wsj.com/articles/fidelitys-fees-on-low-cost-funds-eyed-in-government-probe-11551263401. The lawsuit that reportedly called attention to the "infrastructure" fee is *Wong v. FMR LLC*, No. 19-cv-10335 (D. Mass. filed Feb. 21, 2019). *Wong* and *Summers v. FMR LLC*, No. 19-cv-10501 (D. Mass. filed Mar. 18, 2019), filed a month later, are discussed in "Other Litigation Developments – ERISA – Fee-Based Lawsuits." *See infra* note 124 and accompanying text.

101 Micheal McDonald, Fidelity Faces State Inquiry Over Fees Charged for 401(k) Plans, BLOOMBERG (Mar. 4, 2019), https://www.bloomberg.com/news/articles/2019-03-04/fidelity-faces-state-inquiry-over-fees-charged-for-401-k-plans.

102 The coverage also typically requires the insured to obtain the insurer's advance consent before incurring any costs for which the insured may seek reimbursement. *See generally* ICI Mutual's 2009 Risk Management Study, MUTUAL FUND D&O/E&O INSURANCE: A GUIDE FOR INSUREDS, at 35-36, http://www.icimutual.com (discussing insurance for the costs of correcting operations-based errors).

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

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

[105] The count of "proprietary funds" lawsuits set forth herein does not include cases that were consolidated into other cases.

[106] The preliminary settlements are as follows: Price v. Eaton Vance Corp., No. 18-cv-12098 (D. Mass. Mar. 20, 2019) (notice of agreement in principle; amount of proposed settlement not disclosed); Cryer v. Franklin Resources, Inc., No. 16-cv-4265 (N.D. Cal. Dec. 6, 2018) (notice of $26.75 million preliminary settlement); Bowers v. BB&T Corp., No. 15-cv-732 (M.D.N.C. Nov. 30, 2018) (notice of $24 million preliminary settlement); Schapker v. Waddell & Reed Fin., Inc., No. 17-cv-2365 (D. Kan. Nov. 28, 2018) (notice of $4.9 million preliminary settlement); Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich. Nov. 1, 2018) (notice of $4.5 million preliminary settlement).

The final settlements are as follows: Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. Oct. 9, 2018) ($21.9 million); Urakhchin v. Allianz Asset Mgmt. of Am., L.P., 2018 U.S. Dist. LEXIS 54681 (C.D. Cal. July. 30, 2018) ($12 million); Main v. Am. Airlines Inc., No. 16-cv-473 (N.D. Tex. Feb. 21, 2018) ($22 million); Richards-Donald v. TIAA-CREF, No. 15-cv-8040 (S.D.N.Y. Oct. 20, 2017) ($5 million); Andrus v. New York Life Ins. Co., No. 16-cv-5698 (S.D.N.Y. June 15, 2017) ($3 million); Gordan v. Mass Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) ($30.9 million); Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa Oct. 28, 2016) ($3.8 million); Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa Nov. 13, 2015) ($3 million); Krueger v. Ameriprise Fin., Inc., 2015 U.S. Dist. LEXIS 91385 (D. Minn. July 13, 2015) ($27.5 million); Bilewicz v FMR LLC, 2014 U.S. Dist. LEXIS 183213 (D. Mass. Oct. 15, 2014) ($12 million).

[107] Karg v. Transam. Corp., No. 18-cv-134 (N.D. Iowa Mar. 18, 2019) (filing of motion to dismiss); Cervantes v. Invesco Holding Co. (U.S.), Inc., No. 18-cv-2551 (N.D. Ga. Oct. 5, 2018) (filing of motion to dismiss); Stevens v. SEI Invs. Co., No. 18-cv-4205 (E.D. Pa. filed Sept. 28, 2018); Moitoso v. Fidelity, No. 18-cv-12122 (D. Mass. filed Oct. 10, 2018); Patterson v. Morgan Stanley, No. 16-cv-6568 (S.D.N.Y. Nov. 22, 2017) (filing of motion to dismiss); Baird v. BlackRock Inst'l Tr. Co., N.A., No. 17-cv-01892 (N.D. Cal. Oct. 22, 2018) (filing of motion to dismiss); Karpik v. Huntington Bancshares Inc., No. 17-cv-1153 (S.D. Ohio Mar. 23, 2018) (filing of motion to dismiss).

[108] In re G.E. ERISA Litig., No. 17-cv-12123 (D. Mass. Dec. 14, 2018) (order granting in part and denying in part motion to dismiss); Velazquez v. Mass. Fin. Servs. Co., 320 F. Supp. 3d 252 (D. Mass. July 19, 2018) (order granting in part and denying in part motion to dismiss); Feinberg v. T. Rowe Price Grp., Inc., No. 17-cv-427 (D. Md. Aug. 20, 2018) (order denying motion to dismiss); Beach v. JPMorgan Chase Bank, N.A., No. 17-cv-563 (S.D.N.Y. Mar. 29, 2018) (order granting in part and denying in part motion to dismiss), In re M&T Bank Corp. ERISA Litig. No. 16-cv-375 (W.D.N.Y. Sept. 11, 2018) (order granting in part and denying in part motion to dismiss); Bekker v. Neuberger Berman Grp., LLC, 2018 U.S. Dist. LEXIS 166690 (S.D.N.Y. Sept. 27, 2018) (order granting in part and denying in part motion to dismiss and for summary judgment) (granting defendants' motion to dismiss with respect to breach of fiduciary duties, which released all defendants from the lawsuit except the Investment Committee, which remains subject to a prohibited transactions claim); Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Jan. 18, 2018) (order denying motion to compel arbitration, dismiss, and stay claims). In *Severson*, the decision denying the motion to compel arbitration, dismiss, and stay claims is the subject of a pending interlocutory appeal by the defendants to the Ninth Circuit. Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Feb. 20, 2018) (notice of appeal) & (N.D. Cal. July 13, 2018) (amended notice of appeal). The plaintiffs subsequently filed a second amended complaint. Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Jan. 31, 2019), which the district court granted in part and denied in part in February 2019. Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Feb. 8, 2019).

[109] In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., No. 11-cv-784 (N.D. Ga. Dec. 19, 2017) (filing of second amended consolidated complaint), (N.D. Ga. Jan. 16, 2018) (filing of motion for class certification) & No. 11-cv-784 (N.D. Ga. Mar. 8, 2019) (filing of motion for summary judgment).

[110] Brotherston v. Putnam Invs., LLC, 2017 U.S. Dist. LEXIS 93654 (D. Mass. June 19, 2017) (order in favor of defendants on motion for judgment on partial findings). The district court had previously issued two orders in March 2017, the first denying the parties' motions for summary judgment and the second ruling for defendants on the prohibited transactions claims. Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. Mar. 3, 2017) (order denying motions for summary judgment) & 2017 U.S. Dist. LEXIS 48223 (D. Mass. Mar. 30, 2017) (order ruling for defendants on prohibited transactions claims).

[111] Brotherston v. Putnam Invs., LLC, *appeal docketed*, No. 17-1711 (1st Cir. July 20, 2017).

[112] Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. Oct. 15, 2018) (order affirming in part, vacating in part, and remanding to district court for further proceedings), *petition for cert. filed* (Jan. 11, 2019) (No. 18-926).

[113] Brotherston v. Putnam Invs., LLC, No. 17-1711 (1st Cir. Oct. 29, 2018) (order granting 90-day stay of the First Circuit's mandate to allow defendants/appellees to file a petition for writ of certiorari with the U.S. Supreme Court). The defendants/appellees' petition was filed in January 2019. Brotherston v. Putnam Invs., LLC, *petition for cert. filed* (Jan. 11, 2019) (No. 18-926).

[114] *See supra* note 106; Cryer v. Franklin Resources, Inc., No. 16-cv-4265 (N.D. Cal. Feb. 15, 2019) (filing of motion for preliminary approval of settlement); Price v. Eaton Vance Corp., No. 18-cv-12098 (D. Mass Mar. 20, 2019) (notice of agreement in principle; amount of proposed settlement not disclosed) & (D. Mass. Mar. 21, 2019) (order for closure, subject to re-opening by either party).

[115] *See supra* note 106.

[116] Wildman v. Am. Century Servs., LLC, No. 16-cv-737 (W.D. Mo. Nov. 8, 2017) (filing of motion for summary judgment) & 237 F. Supp. 3d 902 & 237 F. Supp. 3d 918 (W.D. Mo. Feb. 27, 2017) (orders denying motion to dismiss and granting in part and denying in part the defendants' motion for summary judgment); Wildman v. Am. Century Servs., LLC, 2019 U.S. Dist. LEXIS 10672 (W.D. Mo. Jan. 23, 2019) (order dismissing lawsuit).

[117] Meiners v. Wells Fargo & Co., 2017 U.S. Dist. LEXIS 80606 (D. Minn. May 26, 2017) (order granting motion to dismiss), *aff'd*, No. 17-2397 (8th Cir. Aug. 3, 2018).

[118] Patterson v. Capital Grp. Cos., Inc., No. 17-cv-4399 (C.D. Cal. Feb. 14, 2018) (notice of voluntary dismissal); Wayman v. Wells Fargo & Co., No. 17-cv-5153 (D. Minn. Feb. 13, 2018) (notice of voluntary dismissal).

[119] Krikorian v. Great-West Life & Annuity Ins. Co., No. 16-cv-94 (D. Colo. filed Jan. 14, 2016).

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

[121] Krikorian v. Great-West Life & Annuity Ins. Co., No. 16-cv-94 (D. Colo. Jan. 14, 2019) (order granting parties' stipulation of dismissal).

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

[123] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. Feb. 8, 2018) (filing of motion to dismiss).

[124] Summers v. FMR LLC, No. 19-cv-10501 (D. Mass. filed Mar. 18, 2019); Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. filed Feb. 21, 2019).

[125] Nelsen v. Principal Glob. Inv'rs. Tr. Co., No. 18-cv-115 (S.D. Iowa filed Apr. 16, 2018).

[126] Nelsen v. Principal Glob. Inv'rs. Tr. Co., No. 18-cv-115 (S.D. Iowa Jan. 24, 2019) (order granting in part and denying in part motion to dismiss), No. 18-cv-115 (S.D. Iowa Feb. 7, 2019) (defendants' motion for partial reconsideration of district court's ruling on motion to dismiss), No. 18-cv-115 (S.D. Iowa Feb. 27, 2019) (order scheduling trial for February 1, 2021).

[127] *See, e.g.*, Official Comm. of Unsecured Creditors of Tribune Co. v. JPMorgan Chase Bank, N.A., No. 10-ap-55841 (Bankr. D. Del. Mar. 26, 2013) (dismissed) & Kirschner v. FitzSimons, No. 10-ap-54010 (Bankr. D. Del.

filed Nov. 1, 2010) (both adversarial proceedings in In re Tribune Co., No. 08-bk-13141 (Bankr. S.D.N.Y. filed Dec. 8. 2008)); In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. filed Dec. 20, 2011); Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y filed July 31, 2009).

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

[129] Deutsche Bank Tr. Co. Americas v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 818 F.3d 98 (2d Cir. 2016) (affirming district court's decision, on grounds that the appellants' claims are preempted by section 546(e) of the Bankruptcy Code), *reh'g denied* (July 22, 2016), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317).

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

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

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

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

[134] Deutsche Bank Tr. Co. Americas v. Robert R. McCormick Found., 138 S. Ct. 1162 (2018).

[135] Note Holders v. Large Private Beneficial Owners (In re Tribune Co.), No. 13-3992 (2d Cir. May 15, 2018).

[136] In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. June 18, 2018) (order regarding settlement discussions).

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

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

[139] Official Comm. of Unsecured Creditors v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 777 F.3d 100 (2d Cir. Jan. 21, 2015) (order reversing bankruptcy court decision).

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

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

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

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

[144] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. Sept. 14, 2018) (scheduling order, noting that obtaining expedited rulings on certain issues "could materially facilitate a consensual resolution" of the action).

[145] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. Jan. 29, 2019) (order granting in part and denying in part motion for summary judgment regarding certain assets); *id.* (order granting motion for partial summary judgment dismissing defendants' earmarking defense).

[146] Motors Liquidation Co. Avoidance Action Tr. v. JPMorgan Chase Bank, N.A., No. 09-ap-504 (Bankr. S.D.N.Y. February 1, 2019) (letter regarding agreement in principle).

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

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

1401 H Street NW, Suite 1000
Washington, DC 20005

800.643.4246
info@icimutual.com
www.icimutual.com

© 2019 ICI Mutual Insurance Company,
a Risk Retention Group