Claims Trends

A Review of Claims Activity in the Mutual Fund Industry (January 2020–March 2021)

ICIMutual

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Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CEA	Commodity Exchange Act of 1936
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
EXAMS	Division of Examinations of the SEC (formerly OCIE)
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
OCIE	Office of Compliance Inspections and Examinations of the SEC (now EXAMS)
PROMESA	Puerto Rico Oversight, Management, and Economic Stability Act of 2016
SEC	U.S. Securities and Exchange Commission

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

Introduction

ICI Mutual's annual *Claims Trends* reports on significant civil lawsuits, regulatory enforcement proceedings, and operational errors involving fund advisers and their affiliates, registered investment companies, and fund directors and officers. The publication is designed to assist ICI Mutual's insureds to better assess and manage 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*. 2020 saw a year-over-year increase 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. Nearly 40% of ICI Mutual's insured fund groups submitted at least one claim notice over the five-year period 2016–2020. These figures suggest 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 remains a concern for the fund industry.

In its 2020 fiscal year, despite some shift in priorities and resources due to the COVID-19 pandemic, the SEC continued its active enforcement of the federal securities laws. Indeed, the SEC brought a significant number of enforcement actions, including many 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.

Note

This *Claims Trends* is current through March 31, 2021. For more recent information on the matters discussed herein, please refer to ICI Mutual's online *Litigation Notebook* (available at http://www.icimutual.com/litigation/notebook.php). The *Litigation Notebook* provides basic public information about recent lawsuits and regulatory proceedings involving funds, fund directors and officers, and fund advisers; free access to significant documents filed in those matters; and, to the extent applicable and available, additional public information about the matters, including procedural history and links to relevant federal or state docket sheets or to the relevant regulators' websites.

Fees

Over the past eleven years, the fund industry has defended against a wave of lawsuits initiated by the plaintiffs' bar that have challenged the fees paid by funds to investment advisers and other service providers, with many of these lawsuits having alleged violations of section 36(b) of the ICA.

With continued positive developments in 2020 and early 2021 in the industry's defense of these long-running lawsuits, this wave of section 36(b) litigation is nearly at an end. Indeed, as of the date of this *Claims Trends*, only a single such lawsuit remains active. (For developments in certain fee-based lawsuits alleging violations of ERISA, see "Other Litigation Developments – ERISA" below.)

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

By year-end 2019, all but six of these long-running section 36(b) lawsuits had been concluded. In 2020 and early 2021, five of the six remaining lawsuits reached a final resolution (see box, next page), leaving, as of the date of this *Claims Trends*, only a single section 36(b) lawsuit, now on appeal, still active.[4]

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 focused on disparities between fees of advisers and subadvisers. The first category, referred to here as "**manager-of-managers**" lawsuits, 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, focused on the 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) relied on different theories.

"Manager-of-Managers" Lawsuits: Fourteen of the 29 post-*Jones* lawsuits were "manager-of-managers" lawsuits. All but one of these lawsuits are concluded.

- *Lawsuit in the Post-Trial Stage:* In the remaining active manager-of-managers lawsuit, the district court, following a bench trial conducted in January 2020, issued "findings of fact and conclusions of law" in favor of the defendants in August 2020 (*Great-West*, see box, next page).[5] Plaintiffs filed an appeal to the Tenth Circuit in September 2020.[6] The appeal remains ongoing, with oral argument scheduled for May 2021.

- *Lawsuits That Have Reached Final Resolutions:* Thirteen manager-of-managers lawsuits have reached final resolutions—six by stipulation of the parties, and seven by court order in favor of the defendants.[7] Notably, in two lawsuits closed by stipulation, the parties publicly stipulated that the resolutions were not the result of a settlement or compromise or the "payment of any consideration" by the defendants to the plaintiffs.[8]

"Subadvisory" Lawsuits: Of the 29 post-*Jones* lawsuits, ten were subadvisory suits. All of these lawsuits are concluded.

- *Lawsuit Dismissed After Trial:* One subadvisory lawsuit was dismissed after trial in September 2019. The lawsuit is now concluded.[9]

- *Lawsuits Affirmed on Appeal:* In five subadvisory lawsuits, district court rulings were affirmed on appeal. In one lawsuit (*Goodman v. J.P. Morgan*, see box, below), the defendant's motion for summary judgment was granted in March 2018; this decision was affirmed on appeal by the Sixth Circuit in March 2020, thereby concluding the lawsuit.[10] In an earlier lawsuit involving the same fund group, the district court's dismissal was affirmed by the Second Circuit in March 2019, thereby concluding the lawsuit.[11] In a third lawsuit, the district court's February 2019 decision in favor of the defendants was affirmed by the Third Circuit in May 2020 (*BlackRock*, see box, below), bringing the lawsuit to a close.[12] In a fourth lawsuit, the district court granted the defendants' motion for summary judgment in May 2019 (*Davis*, see box, below) and in May 2020, the Second Circuit affirmed the district court's ruling in favor of defendants, bringing the lawsuit to a close.[13] In a fifth lawsuit, in August 2019, after a trial held in December 2018, the district court dismissed the lawsuit (*Met West*, see box, below).[14] In September 2020, the Ninth Circuit affirmed the district court's ruling in favor of the defendants, thereby concluding the lawsuit.[15]

- *Lawsuits That Have Reached Final Resolutions by Stipulations:* Four subadvisory lawsuits have reached final resolutions by stipulation of the parties.[16] One of these resolutions was reached in early 2021 (*T. Rowe*, see box, below). In two of these lawsuits (including *T. Rowe*), the parties publicly stipulated that the resolutions were not the result of a settlement or compromise or the "payment of any consideration" by the defendants to the plaintiffs.[17]

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. All of these lawsuits reached final resolutions prior to 2020, as discussed in past *Claims Trends*.[18]

Recent Positive Developments in Post-*Jones* Lawsuits

In 2020 and early 2021, four lawsuits were dismissed on appeal, one lawsuit was dismissed by stipulation of the parties, and an appeal remains pending in the sole remaining lawsuit.

- In March 2020, the district court's 2018 dismissal of *Goodman v. J.P. Morgan Investment Management, Inc.* was affirmed on appeal by the Sixth Circuit, bringing the lawsuit to a close.[19]
- In May 2020, the Second Circuit affirmed the district court's 2019 ruling in favor of defendants in *In re Davis N.Y. Venture Fund Fee Litigation*.[20] The lawsuit is now closed.
- In May 2020, the Third Circuit affirmed the district court's 2019 decision in favor of the defendants in *In re BlackRock Mutual Funds Advisory Fee Litigation*.[21] The lawsuit is now closed.
- Following a bench trial in January 2020, a district court ruled in favor of defendants in *Obeslo v. Great-West Capital Management, LLC* in August 2020. An appeal of this decision, filed in September 2020, remains pending.[22]
- In September 2020, the Ninth Circuit affirmed the district court's 2019 ruling in favor of the defendants in *Kennis v. Metropolitan West Asset Management, LLC*, bringing the lawsuit to a close.[23]
- In January 2021, the district court approved the parties' joint stipulation for dismissal in *Zoidis v. T. Rowe Price Associates, Inc.*, bringing the lawsuit to a close.[24]

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). In addition, as discussed in past *Claims Trends,* the fund industry has from time to time seen fee challenges in derivative claims brought under state law for breach of fiduciary duty.

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

(Case in **blue** was active as of March 31, 2021)

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), *aff'd*, 816 Fed. Appx. 637 (3d Cir. May 28, 2020) • **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), *aff'd*, 2020 U.S. App. LEXIS 9868 (6th Cir. Mar. 30, 2020) • **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), *dismissed*, 2019 U.S. Dist. LEXIS 111521 (S.D.N.Y. Jul. 2, 2019), *aff'd*, 805 Fed. Appx. 79 (2d Cir. May 22, 2020) • **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), *dismissed*, 2019 U.S. Dist. LEXIS 175641 (S.D.N.Y. Sep. 27, 2019) • **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), *dismissed*, 2019 U.S. Dist. LEXIS 162598 (C.D. Cal. Aug. 5, 2019), *aff'd,* No. 19-55934, 2020 U.S. App. LEXIS 29662 (9th Cir. Sept. 17, 2020) • **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), *dismissed*, 2020 U.S. Dist. LEXIS 141198, *appeal docketed,* No. 20-1310 (10th Cir. Sept. 2, 2020) • **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), *closed per stipulation* (Jan. 4, 2021) • **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), *closed per stipulation* (May 7, 2019)

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.[25] As discussed below, 2020 and early 2021 saw new developments in various prospectus liability lawsuits 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.

2020 and early 2021 witnessed the conclusion of earlier prospectus liability lawsuits and the filing of new prospectus liability lawsuits. In recent years, similar lawsuits have been filed against ETFs not registered under the ICA (see box, below).

- *Alleged Misrepresentations of Valuation Procedures:* In February 2021, two prospectus liability lawsuits were filed in New York state court, alleging that a mutual fund, its adviser, its trustees (including independent trustees) and certain officers, and distributor, among others, misrepresented, in the fund's registration statement, how the fund valued swap contracts for purposes of calculating the fund's net asset value.[26] The parties filed a joint stipulation to consolidate the lawsuits in March 2021.[27] As noted below, a parallel class action lawsuit against many of the same defendants, alleging '34 Act violations, was filed in federal court in February 2021.[28]

Recent Disclosure-Based Litigation Against Non-ICA Registered ETFs

Investment vehicles that are not registered investment companies under the ICA may also be involved in disclosure-based litigation that is substantially similar to disclosure-based litigation involving registered investment companies. For example:

- 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 sponsor, officers (and other individuals), and distributors, among others, misrepresented, in the ETF's registration statement, the degree to which the ETF was susceptible to market volatility risk.[29] The three lawsuits filed in 2019 were consolidated in April 2019.[30] The plaintiffs filed an amended complaint in June 2019 and a second amended complaint in September 2019.[31] A motion to dismiss the second amended complaint was granted in early January 2020. Plaintiffs appealed the decision to the Second Circuit in late January 2020. In March 2021, the Second Circuit affirmed the lower court's dismissal.[32] In the initial lawsuit filed in 2018 (which was not consolidated with the other three lawsuits), a district court granted defendants' motion to dismiss in March 2020.[33] The lawsuit is now closed.
- In June 2020, plaintiffs filed a class action lawsuit in federal court against the sponsor of an ETF that tracks crude oil prices, a commodity pool operator, certain officers, and various underwriters of the ETF's securities, challenging disclosures in the ETF's offering documents and alleging violations of the '33 Act and '34 Act.[34] Two additional lawsuits with similar allegations were filed in July and August 2020.[35] In September 2020, the district court granted the plaintiffs' motion to consolidate the three lawsuits.[36] The lawsuit is ongoing.
- A similar complaint, alleging '34 Act violations only, was filed in federal court in July 2020 with respect to another ETF that tracks crude oil prices.[37] This lawsuit alleged that the ETF, its adviser, and certain officers misled investors by failing to disclose material facts regarding the oil markets. This lawsuit was dismissed voluntarily by the parties in February 2021.[38]

- *Alleged Investments Inconsistent with Investment Objectives:* In February 2018, amidst market volatility in which a mutual fund lost 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."[39] Two additional lawsuits with substantially similar allegations were filed against the same parties in February and March 2018.[40] The three lawsuits were consolidated in March 2018.[41] In July 2020, the parties stipulated to a dismissal with prejudice of the consolidated lawsuit.[42] A parallel proceeding in state court, brought in September 2018, was settled in June 2020.[43]

- *Alleged Misrepresentations of Trading Risks under Certain Market Conditions:* In June 2016, plaintiffs filed a class action complaint in California state court against several ETFs, their adviser and distributor, and certain officers and trustees (including independent trustees) for alleged failure to advise investors of risks associated with stop-loss orders, particularly under certain market conditions.[44] In September 2017, the court dismissed the lawsuit, determining that the plaintiffs in the lawsuit lacked standing.[45] The plaintiffs appealed the decision to the state appellate court in December 2017.[46] The decision was affirmed on appeal in January 2020, thereby concluding the lawsuit.[47]

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 to satisfy in the mutual fund context,[48] plaintiffs have historically had limited success in pursuing these lawsuits against fund industry defendants.[49]

As noted above, '34 Act violations were alleged against a mutual fund, its adviser, and its trustees (including independent trustees) and certain officers in a class action lawsuit filed in February 2021 in connection with the valuation of swap contracts.[50] This lawsuit is pending.

Federal Forum Selection Provisions Upheld in Delaware and California State Courts

A March 2020 ruling outside the fund industry by the Supreme Court of Delaware (*Salzberg v. Sciabacucchi*) may prove helpful to fund groups in managing the forum in which securities class action lawsuits are initiated. The court determined that federal forum selection provisions set forth in corporate charters are enforceable under Delaware law and that Delaware corporations may add provisions to their charters requiring any lawsuit brought under the federal securities laws to be filed in federal court.[51]

Additional states have since adopted a similar view of federal forum selection provisions in Delaware corporate charters. California state courts have upheld the elections (as set forth in the corporations' bylaws) by Delaware corporations outside the fund industry of federal courts as the "exclusive forum" for litigating '33 Act claims brought against them.[52] Industry analysts have noted a marked decrease in securities class action lawsuits filed in state courts following the *Sciabacucchi* ruling, as well as a decline in parallel cases filed in both state and federal court. As perhaps an indication of the effectiveness of federal forum selection provisions, there has been over the past year a corresponding increase in '33 Act claims filed solely in federal courts.[53]

Litigation under State Law

Lawsuits against fund groups have sometimes taken the form of (1) state or common law-based 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 or common law–based 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 and in similar state or common law–based lawsuits brought directly (as opposed to derivatively or as purported class actions) by shareholders.

In September 2018, a plaintiff filed a derivative and class action lawsuit in federal district court 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 duties and the adviser breached its contractual obligations by permitting one mutual fund to invest in and "prop up" a second mutual fund within the same trust.[54] In May 2020, the district court granted the defendants' motion to dismiss (which had been filed in March 2019). An appeal of this decision, filed in June 2020, remains pending.[55]

Litigation against fund groups under state or common law has often involved activist shareholders of closed-end funds (see box, below). Of note, in recent years, one activist shareholder has challenged governance practices of several closed-end funds offered by fund groups. These challenges have typically involved state law issues, although a recent lawsuit raises a federal law issue.

In June 2019, the activist shareholder filed a class action lawsuit in Delaware against the boards of two closed-end funds alleging that the boards (including the boards' independent trustees) breached their fiduciary duties and the funds' bylaws through "onerous" requests for information regarding prospective board nominees proposed by the shareholder.[56] Later that month, the Delaware state court granted the shareholder's request for injunctive relief, finding that the boards had improperly excluded the shareholder from presenting its slate of board nominees.[57] On appeal, in January 2020, the state appellate court overturned the lower court's grant of injunctive relief, and remanded the case to the lower court for further

Closed-End Fund Activism

In recent years, activist shareholders have sought to influence the management of closed-end funds (which funds have often been trading at a significant discount to their NAVs) in an effort to achieve a variety of goals, including seeking tender offers for fund shares, liquidations or open-ending of funds, terminations of existing investment advisory agreements, approvals of new investment advisory agreements, and/or elections of new board members.[58] As activist shareholders have increased their efforts, a number of fund boards appear to have enhanced their funds' defenses. Their efforts have been aided by a recent SEC staff statement regarding funds' ability to avail themselves of "control share acquisition" laws in a number of states.[59] Fund boards have also reportedly implemented other defensive measures (e.g., staggered or classified boards, super-majority voting requirements).

Increased shareholder activism and enhancement of defenses by closed-end funds have led in recent years to a rise in threatened and/or actual litigation against closed-end funds and their boards.[60] As discussed in the text, one shareholder has threatened and/or filed litigation against several closed-end funds in different fund groups.

proceedings.[61] In February 2020, the lower court approved the parties' stipulation of dismissal of the lawsuit without prejudice.[62]

Also in June 2019, the activist shareholder filed a class action lawsuit in Maryland state court against another closed-end fund board (in the same fund group) in an effort to declassify the board and to elect the shareholder's proposed slate of directors.[63] In July 2019, the court reportedly ruled that the shareholder failed to establish the need for an injunction requiring a vote on the proposed slate.[64] In September 2019, the defendants filed a motion to dismiss,[65] which the court granted in November 2019.[66] An appeal of this decision, filed in December 2019, was voluntarily dismissed in February 2020, thereby bringing the lawsuit to a close.[67]

In May 2020, this same activist shareholder filed a lawsuit and sought a preliminary injunction in Arizona state court against a closed-end fund, its trustees (including the board's independent trustees), and its adviser, challenging certain bylaw amendments that established the voting standard governing board elections.[68] The lower court granted the request for a preliminary injunction in June 2020. The defendants' requests to stay the preliminary injunction were denied in July 2020 by the lower court and subsequently by an appellate court.[69] The lawsuit was dismissed by stipulation of the parties in September 2020.[70]

In addition, in January 2021, the shareholder filed a direct lawsuit in federal court in New York against several closed-end funds and their trustees (including independent trustees).[71] This lawsuit raises a federal issue, alleging that the "control share acquisition" bylaw amendments adopted by the funds violate the ICA.[72] The lawsuit seeks rescission of those amendments, citing a recent Second Circuit decision that section 47(b) of the ICA provides an implied private right of action for rescission of contracts that violate the ICA.[73] A motion to dismiss the lawsuit, filed on March 30, 2021, remains pending.[74]

Regulatory Enforcement

The SEC pursued an active overall enforcement agenda in fiscal year 2020, bringing over 400 stand-alone enforcement actions (i.e., proceedings other than follow-on proceedings or deregistration proceedings). The SEC continued its focus on protecting retail investors, and on holding entities and individuals accountable for their misconduct. As might be expected, the agency also devoted "substantial resources" in the latter half of fiscal year 2020 to addressing COVID-19-related threats and challenges.[75]

It is too soon to predict how the SEC's enforcement agenda may be affected by the new presidential administration. Recent months have witnessed the departures of a number of individuals holding key positions at the SEC (see box, below). More broadly, it is possible that there could be future changes in SEC enforcement priorities, in federal securities regulations, or conceivably even in certain provisions of the federal securities laws themselves, that could have significant implications for SEC enforcement activity both in general and in the asset management area. The SEC has, for example, indicated that it will place greater emphasis on environmental, social, and governance (ESG) issues. (See boxes on the following pages with regard to ESG issues and other developments that may affect the SEC's enforcement agenda).

A Time of Transition at the SEC

In December 2021, former SEC chair Walter J. ("Jay") Clayton resigned his position, with Elad Roisman thereafter serving as Acting SEC Chair for the remainder of President Donald J. Trump's term. In January 2021, President Joseph R. Biden named Allison Herren Lee as Acting SEC Chair. Gary Gensler, former chair of the CFTC, has been nominated to be the SEC's next chair; as of March 31, 2021, Mr. Gensler had not been confirmed.

Of the remaining four SEC commissioners, one (Carolyn A. Crenshaw) was confirmed in August 2020, and three remain relatively new, having been confirmed in 2018–2019.

In addition to the changes at the commissioner level, there have been a number of recent senior staff departures at the SEC, leaving openings for new directors (and other senior officials) in the Divisions of Investment Management, Corporate Finance, Trading and Markets, and Enforcement. The director of the Division of Examinations has indicated his intention to remain at the SEC.

SEC Enforcement Actions

In fiscal year 2020, over 20% of the stand-alone actions of the SEC's Division of Enforcement were brought against investment advisers and/or investment companies (including unregistered investment companies).[76] As in prior years, enforcement actions against entities outside the registered investment company space (e.g., unregistered funds and their advisers) outnumbered those within the registered fund space.

Administrative proceedings initiated and/or resolved by the SEC in 2020 against advisers of registered funds involved various issues, including misleading disclosure regarding a fund's risk management processes,[77] misrepresentations and omissions in offering documents,[78] and exceeding the limits of an investment company's ownership interests in other investment companies.[79]

SEC Examination Priorities

The SEC communicates its examination priorities (which may indicate areas of future enforcement activity) in a variety of publications, speeches, and public statements from the chair, commissioners, and staff.

The SEC annually publishes the examination priorities of the SEC's Division of Examinations, or EXAMS (formerly called the Office of Compliance Inspections

and Examinations, or OCIE). The 2021 examination priorities (published in March) include (1) the protection of retail investors, (2) information security, (3) financial technology (fintech) and innovation (including digital assets and electronic investment advice), (4) anti-money laundering, and (5) LIBOR transition.[80]

For the SEC's current fiscal year, EXAMS has indicated that, with respect to registered investment advisers, it will focus its exams on portfolio management practices, custody, best execution, fees and expenses, business continuity plans, and valuation of client assets, and that it will continue to review advisers' compliance.[81] Disclosures around funds employing ESG strategies (or those that focus on sustainability, social issues, and/or impact investing) are of particular interest.[82]

With respect to registered investment companies, EXAMS has indicated a focus on compliance programs, risk disclosures (especially with respect to ETFs), valuation, liquidity, securities lending disclosure, and money market funds' compliance with stress-testing and other requirements.[83]

Throughout the year, EXAMS also issues risk alerts that provide information about its examination findings and priorities. In 2020, EXAMS issued alerts on a range of topics, including: LIBOR transition preparedness,[84] observations from examinations of investment advisers managing private funds,[85] ransomware,[86] COVID-19 compliance risks for broker-dealers and advisers,[90] safeguarding client accounts against credential compromise,[91] observations of investment adviser compliance programs,[92] and large trader obligations.[93]

In July 2020, EXAMS created a new team, the Event and Emerging Risks Examination Team (EERT), to help "respond to emerging and exigent risks."[94] EERT is intended, among other things, to assist in implementing EXAMS' exam priorities and to help respond to "significant market events that could have a systemic impact or that place investor assets at risk, such as exchange outages, liquidity events, and cyber-security or operational resiliency concerns."[95]

Expansion of SEC "Disgorgement" Authority

Historically, the SEC has frequently sought "disgorgement" in enforcement actions. Recent U.S. Supreme Court decisions have upheld, but limited, the SEC's ability to seek this remedy. In 2017, the Court held that disgorgement, as "a punitive, rather than a remedial, sanction," is subject to a five-year statute of limitations.[87] More recently, in June 2020, in a lawsuit challenging the SEC's ability to obtain disgorgement as equitable relief in federal courts, the Court broadly affirmed the power of federal courts to order disgorgement as an equitable relief in certain cases, but noted potential limits on its use.[88]

In January 2021, the 2021 National Defense Authorization Act (NDAA) was enacted into law. The NDAA includes a provision that gives the SEC the statutory ability to seek disgorgement in federal court in lawsuits involving federal securities laws. The NDAA also establishes a ten-year statute of limitations within which the SEC may seek disgorgement in cases involving scienter, effectively doubling the amount of time within which the SEC may bring such actions. The SEC has been reevaluating a number of current cases to determine whether and when the new law can extend the SEC's disgorgement reach.[89]

Formation of a Climate and ESG Task Force in the Division of Enforcement

Recent years have seen an increased political and societal focus on environmental, social, and governance (ESG) issues. In March 2021, the SEC announced the formation of a new Climate and ESG Task Force in the Division of Enforcement that will seek to identify misconduct in connection with climate and ESG-related disclosure and investments. Of particular relevance to the asset management industry, the task force will "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies."[96]

Industry observers note that the task force is expected, at least initially, to focus on compliance with existing rules governing disclosure, and that the task force's work may inform future ESG-related rulemaking initiatives. The formation of the task force appears to signal an enhanced focus on ESG matters, which could lead to increased SEC enforcement activity even in the absence of new ESG-related regulatory requirements.[97]

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 that may involve and/or impact registered funds and/or their affiliated service providers.

FINRA, which conducts examinations of broker-dealers, in February 2021, published a report incorporating its annual findings from its Risk Monitoring and Examination Program. The report also discussed FINRA's priorities, which include digital assets, liquidity management, best execution, communication with the public, cybersecurity, and technology governance.[98]

The CFTC, which regulates the trading of commodities (including many futures and derivatives), often discusses its annual priorities through speeches and other public statements. The CFTC's chair (or acting chair) and other commissioners have recently discussed, among other priorities, completing Dodd-Frank rules,[99] transition away from LIBOR,[100] climate-related market risk,[101] and cooperation with the SEC, including on work to clarify digital currency innovations.[102] (In another instance of SEC/CFTC cooperation, the agencies brought parallel enforcement actions in January 2020 when they settled with a registered fund's investment adviser for misrepresenting how the adviser managed risks associated with certain futures and options trading.[103])

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 civil lawsuit in February 2019 alleging that a recordkeeper to retirement plans charged an undisclosed fee to third-party fund providers that distributed products through the recordkeepers' platform, the DOL and the Secretary of the Commonwealth of Massachusetts reportedly began investigations of the recordkeeper.[104] To date, there appears to be no publicly available information regarding the status of these investigations. Meanwhile, the original civil lawsuit was dismissed in February 2020.[105]

Other Potential Influences on Future SEC Enforcement Activity

Waivers: In February 2021, Acting SEC Chair Allison Herren Lee announced that "the Division of Enforcement will no longer recommend to the Commission a settlement offer that is conditioned on granting a waiver" from automatic disqualifications to which settling parties would otherwise be subject due to certain federal securities laws violations.[106] Under the new policy, the SEC will no longer view waivers as a "bargaining chip" in settlement negotiations, although waivers may be granted outside the context of an enforcement proceeding. Some observers have suggested that the new policy might hamper respondents' willingness to engage in settlement negotiations with the SEC.[107]

Delegation: Also in February 2021, Acting SEC Chair Lee restored the authority (previously delegated by the SEC's commissioners but discontinued during the Trump administration) of senior SEC Division of Enforcement officials to approve the issuance of formal orders of investigation. According to Lee, "[t]his delegation of authority will enable investigative staff to act more swiftly to detect and stop ongoing frauds, preserve assets, and protect vulnerable investors."[108] Some observers view this policy change as evidencing a more aggressive enforcement stance by the SEC.[109]

Portfolio Management Errors

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 their affiliates 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 seek insurance reimbursement for certain costs incurred to correct an operational error, provided that the insured entity has actual legal liability for the resulting loss.[110]

A number of factors—including the size of fund groups, the scale of their operations, the magnitude of trades being executed on behalf of funds and other clients, the volatility of the securities markets, and operational challenges—may create the potential for operational errors resulting in costs of correction claims.

Over the years, ICI Mutual has received claims associated with operational errors in a number of areas. Examples include claims associated with errors relating to valuation, portfolio composition, compliance with investment restrictions, and trades of portfolio securities.

When business operations are outsourced to affiliated or unaffiliated service providers, determining the extent to which costs of correction insurance coverage is available may be particularly challenging, especially in the context of certain types of events (e.g., cyberattacks),[111] where 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.

Costs of Correction Severity Risk

"Costs of correction" insurance coverage, long a feature of ICI Mutual's D&O/E&O policies, is highly valued by insured advisers for its role in facilitating timely and efficient remediations of operational errors and other operational mishaps.

Over its history, ICI Mutual has received and paid scores of insurance claims under this coverage. The *frequency* of costs of correction insurance claims received by ICI Mutual has remained relatively stable over time. Until fairly recently, the *severity* of such claims had likewise remained relatively stable, with dollar amounts at issue in individual claims rarely exceeding the mid-seven figures. Over the past several years, however, in a marked break from past experience, ICI Mutual has received multiple *high severity* costs of correction insurance claims—i.e., claims that have involved (or that have had the clear potential to involve) dollar amounts of eight figures or more. Of note, none of these recent high severity claims (with one possible exception) have resulted from pandemic-related mishaps.

Other Litigation Developments

In addition to the fee, disclosure, and state law–based lawsuits already discussed, 2020 and early 2021 also saw other noteworthy litigation developments.

ERISA

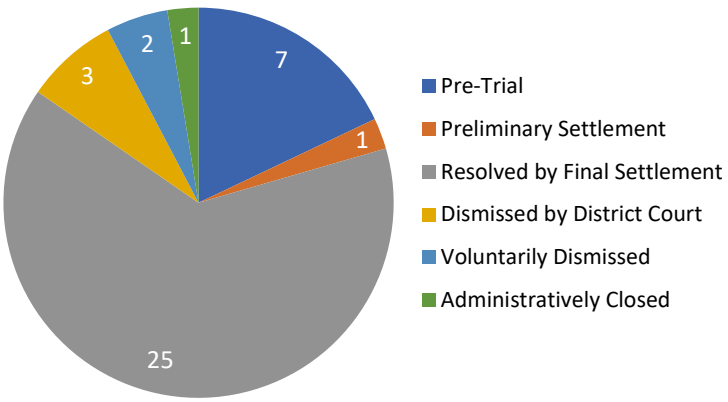
As reported in past *Claims Trends*, the plaintiffs' bar has used ERISA as an avenue to attack the fund industry.[112] 2020 and early 2021 have seen the filing of a number of new lawsuits, and there have been developments in existing lawsuits involving asset managers and/or their affiliates.

"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.

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).

Procedural Status of Proprietary Funds Lawsuits
Initiated 2011–2021 (as of March 31, 2021)



Since 2011, the plaintiffs' bar has initiated at least 39 such lawsuits (with two of these lawsuits having been initiated since January 2020).[113] Thirty-one of the 39 lawsuits have been fully resolved, with 25 resolved through final monetary settlements, three dismissed by the courts (with one of these dismissals affirmed on appeal), two voluntarily dismissed by the parties, and one administratively closed by the court. The eight active lawsuits are in the pre-trial stage of the litigation process. In one of these, a settlement in principle has been reached.

The preliminary and final monetary settlements in these "proprietary funds" lawsuits collectively total nearly $360 million.[114]

- *Lawsuits in the Pre-Trial Stage:* Eight lawsuits remain in the pre-trial stage of the litigation process. Two of these eight lawsuits are currently in their early phases, with one that was filed in February 2021,[115] and another with a pending motion to dismiss.[116] In four other lawsuits, motions to dismiss have been denied in whole or in part.[117] In the seventh lawsuit, following the district court's denial of the defendants' motion for

summary judgment in January 2021, the parties announced that they had reached a settlement in principle, and a motion for preliminary approval of the settlement was filed in March 2021.[118] In the eighth lawsuit, in February 2021, the district court denied the plaintiffs' motion for partial summary judgment and granted in part and denied in part the defendants' cross-motion for summary judgment.[119]

- *Lawsuits Resolved by Final Settlements:* Twenty-five of the lawsuits have reached final monetary settlements. Nine of these final monetary settlements were approved by district courts in 2020 and early 2021.[120]

- *Lawsuits Dismissed by the Courts:* Three of the lawsuits have been dismissed by the courts. In one, following a bench trial, the district court issued a judgment in favor of the defendants in January 2019.[121] No appeal was filed, and the lawsuit is now closed. A second lawsuit was concluded following a ruling granting defendants' motion to dismiss.[122] In the third lawsuit, in August 2018, the Eighth Circuit affirmed the district court's dismissal, thereby concluding the lawsuit.[123]

- *Lawsuits Voluntarily Dismissed by the Parties:* Two lawsuits closed in 2018 pursuant to voluntary dismissals.[124]

- *Lawsuit Administratively Closed by the Court:* In one lawsuit, the district court stayed the action, noting that the plaintiff's individual claims were subject to an enforceable arbitration provision, and administratively closed the case.[125]

In addition to the lawsuits described above challenging the inclusion of proprietary *registered* funds as investment options in in-house retirement plans, at least one lawsuit (filed in March 2020) has challenged an asset manager's inclusion of proprietary *non-registered* funds (specifically, proprietary target-date collective investment trusts) as investment options in in-house retirement plans.[126] A motion to dismiss, filed in February 2021, remains pending.[127]

FEE-BASED LAWSUITS

The previous section described lawsuits challenging the inclusion of proprietary mutual funds as investment options in "in-house" plans sponsored by asset managers and/or their affiliates. As reported in previous *Claims Trends*, there have also been lawsuits challenging fees and compensation received directly or indirectly by asset managers and/or their affiliates as service providers to "third-party" plans. 2020 and early 2021 saw developments in some of these lawsuits.

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.[128] Defendants filed a motion to dismiss in February 2018, which the district court granted in part and denied in part in February 2020.[129] The lawsuit was referred to mediation in March 2020 and remains pending.[130]

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.

In four lawsuits filed in early and mid-2019, plaintiffs participating in third-party plans alleged that a plan service provider that operated a mutual fund platform (or "supermarket") charged an undisclosed "infrastructure" fee to funds distributed through the platform.[131] The lawsuits were consolidated in August 2019.[132] In February 2020, the district court granted the defendants' motion to dismiss the consolidated lawsuit, on the grounds that the defendants did not owe a fiduciary duty under ERISA with respect to the fees at stake.[133] Defendants filed an appeal with the First Circuit in March 2020,[134] which heard oral arguments in January 2021. The appeal remains pending.

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 "proprietary funds"–like class action lawsuit filed in April 2018, plaintiffs participating in their employers' retirement plans alleged that certain plan fiduciaries mismanaged participants' assets (and breached their fiduciary duties) through the selection and retention of affiliated mutual funds as underlying investments for plan assets.[135] Participants' assets were placed in collective investment trusts, 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 defendants' motion to dismiss was granted in part and denied in part in January 2019. The parties filed a joint stipulation of dismissal with prejudice in October 2020; the lawsuit is now closed.[136]

ESG and the Department of Labor

In October 2020, the DOL issued a rule that, among other things, established standards for ERISA plan fiduciaries in selecting plan investments. The final rule specifies that plan fiduciaries, in seeking to satisfy their duties of prudence and loyalty, should consider only pecuniary factors in determining the appropriateness of a given investment as an investment option for a plan. Under the final rule, a plan fiduciary could appropriately consider pecuniary ESG factors in selecting plan investments, but it is generally not permitted to consider non-pecuniary factors.[137]

In March 2021, the DOL announced that it would not enforce the rule's constraints on considering ESG factors in selecting plan investments.[138] Some observers caution that the DOL's non-enforcement policy would not shield fiduciaries from litigation by plan participants alleging non-compliance with the rule.[139]

Bankruptcy Claims Involving Issuers of Portfolio Securities

Mutual funds have sometimes been ensnared in proceedings arising from 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. While these bankruptcy proceedings—including those involving the Tribune Company, Nine West Holdings, and Sears Holdings—have typically involved corporate issuers, a recent bankruptcy-like proceeding has involved the Commonwealth of Puerto Rico, an American territory.[140]

***Tribune* Bankruptcy:** 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).[141] 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, which dismissed the petition in May 2019.[142] The Second Circuit subsequently (1) recalled its earlier decision (in May 2018) in light of a February 2018 decision by the U.S. Supreme Court (the *Merit* decision, which involved the application of a "safe harbor" provision of the federal bankruptcy laws to financial institutions serving as conduits) and (2) issued, in December 2019, an amended decision, which held that the payments to the funds and other defendants were entitled to the protection of the "safe harbor." The plaintiffs filed a petition for a writ of certiorari with the Supreme Court in July 2020.[143] In March 2021, the U.S. Solicitor General filed an amicus brief recommending the denial of the petition.[144] As of March 31, 2021, the petition remained pending.

In April 2019, the district court denied a request in *Tribune* to amend the complaint to add a *federal* constructive fraudulent transfer claim.[145] In June 2019, the district court in *Tribune* issued a judgment that dismissed the *federal* law *intentional* fraudulent conveyance claim.[146] The district court's decisions were appealed to the Second Circuit in July 2019. Oral argument was held in August 2020. The appeal remains pending.[147]

Nine West Holdings Bankruptcy: The *Nine West Holdings* proceeding involves actual and constructive fraudulent conveyance claims under state law.[148] In August 2020, the district court issued an order dismissing certain claims as barred by the "safe harbor" provision.[149] An appeal of the dismissal of the "safe harbor" claims is pending before the Second Circuit.[150]

Sears Holdings Bankruptcy: The *Sears Holdings* proceeding involves actual and constructive fraudulent conveyance claims under state and/or federal law.[151] This adversary proceeding was filed in October 2020 and consolidated with another adversary proceeding in March 2021.[152] The consolidated action remains pending in its early stages.

***Puerto Rico* Adversary Proceedings:** The *Puerto Rico* proceedings arise from Puerto Rico's difficulties in meeting its bond debt and unfunded pension obligations. Following the enactment of PROMESA in 2016, which allowed Puerto Rico to avail itself of federal bankruptcy-like proceedings, Puerto Rico filed to restructure its debt in 2017.[153]

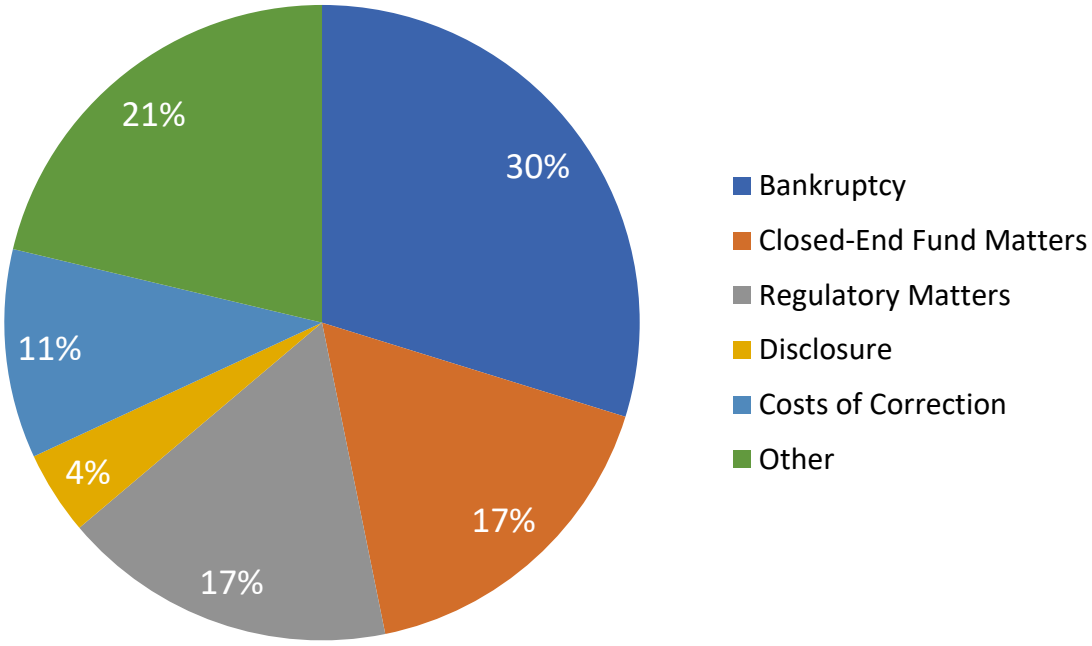
Various entities (including mutual funds) held municipal debt issued by Puerto Rico, and a number of

funds and/or fund advisers appear to have been named in related adversary proceedings.[154] In December 2019, the district court stayed these adversary proceedings until March 2020.[155] In a February 2020 court filing, Puerto Rico's federal oversight board advised that it had reached a deal with a subset of bondholders on a bankruptcy plan that, if approved, would assist Puerto Rico in emerging from bankruptcy.[156] In March 2020, the district court extended the stay of the related adversary proceedings until the court had the opportunity to decide whether the plan can be confirmed.[157] In March 2021, the oversight board filed an amended bankruptcy plan.[158] A hearing on the amended plan is expected to be scheduled later in 2021. It appears likely that the adversary proceedings will remain stayed until the court has ruled on whether the amended plan can be confirmed.

D&O/E&O Claims Data

D&O/E&O Notices by Subject (2020)

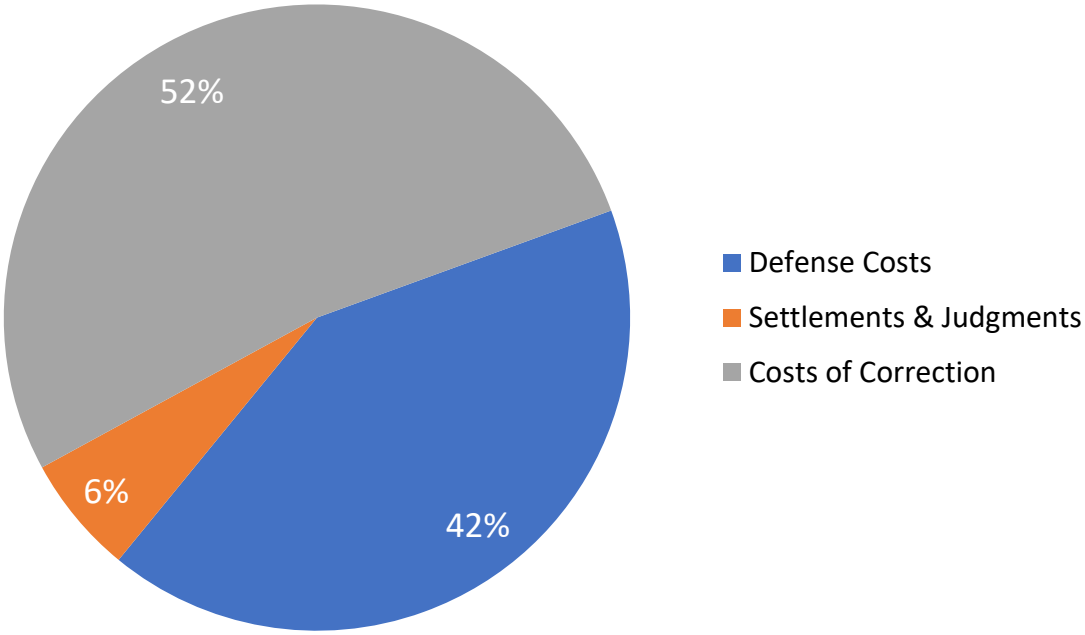
Bankruptcy, closed-end fund, and regulatory matters constituted the most common subjects of claims notices submitted under ICI Mutual D&O/E&O policies in 2020. As shown in the chart below, a substantial percentage of notices received (the "Other" category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2011–2020)

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 under ICI Mutual D&O/E&O policies over the ten-year period January 1, 2011 through December 31, 2020.



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 Obeslo v. Great-West Capital Mgmt., LLC, No. 20-1310 (10th Cir. filed Sept. 2, 2020) (notice of appeal).

5 Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230, 2020 U.S. Dist. LEXIS 141198 (D. Colo. Aug. 7, 2020) (findings of fact and conclusions of law). Of particular note, in late September 2020, the district court sanctioned the plaintiffs' attorneys—"undeterred by the signs that their case was fatally flawed" due to their reliance on a discredited witness—for "recklessly proceed[ing] to trial in violation of their duty to objectively analyze their case." The district court held the plaintiffs' attorneys liable for defendants' excess costs, expenses, and attorney fees from the commencement of the trial. Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230, at 8 (D. Colo. Sept. 28, 2020) (order granting defendants' motion for sanctions).

6 Obeslo v. Great-West Capital Mgmt., LLC, No. 20-1310 (10th Cir. filed Sept. 2, 2020) (notice of appeal).

7 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. Grp. 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); 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); 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); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 14-cv-44, 2016 U.S. Dist. LEXIS 188713 (S.D. Iowa Feb. 3, 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).

8 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).

9 Chill v. Calamos Advisors, LLC, 417 F. Supp. 3d 208 (S.D.N.Y. Sept. 27, 2019) (order of dismissal) (stipulation of non-appeal filed on October 25, 2019).

10 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), *aff'd*, 2020 U.S. App. LEXIS 9868 (6th Cir. Mar. 30, 2020).

[11] 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).

[12] 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), *aff'd*, 816 Fed. Appx. 637 (3d Cir. May 28, 2020).

[13] In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014), *dismissed*, 2019 U.S. Dist. LEXIS 111521 (S.D.N.Y. Jul. 2, 2019), *aff'd*, 805 Fed. Appx. 79 (2d Cir. May 22, 2020).

[14] Kennis v. Metropolitan West Asset Mgmt., LLC, No. 15-cv-8162, 2019 U.S. Dist. LEXIS 162598 (C.D. Cal. Aug. 5, 2019) (district court adopted findings of fact and conclusions of law in favor of defendants following trial).

[15] Kennis v. Metropolitan West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015), *dismissed*, 2019 U.S. Dist. LEXIS 162598 (C.D. Cal. Aug. 5, 2019), *aff'd*, No. 19-55934, 2020 U.S. App. LEXIS 29662 (9th Cir. Sept. 17, 2020).

[16] Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2786 (D. Md. Jan. 4, 2021) (closed by stipulation); 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).

[17] Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2786 (D. Md. Jan. 4, 2021) (closed by stipulation); Kennis v. First Eagle Inv. Mgmt., LLC, No. 14-cv-585 (D. Del. Aug. 9, 2017) (closed by stipulation).

[18] One of these lawsuits (filed in 2011) involved a traditional challenge to advisory fees charged to certain mutual funds. The lawsuit was closed by stipulation of the parties in August 2012. Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. Aug. 23, 2012).

In a second lawsuit (filed in 2013, 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 post-*Jones* section 36(b) lawsuit. The August 2013 dismissal of the lawsuit by the district court was affirmed by the Sixth Circuit in September 2014, thus bringing the lawsuit to a close. 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).

A third lawsuit (filed in 2014), 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. The lawsuit was closed by stipulation of the parties in August 2018. Kenny v. PIMCO, No. 14-cv-1987 (W.D. Wash. Aug. 9, 2018).

A fourth lawsuit (filed in 2016) 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, which decision was appealed to the Second Circuit in February 2017. Paskowitz v. Prospect Capital Mgmt., L.P., 232 F. Supp. 3d 498 (S.D.N.Y. 2017), *appeal docketed*, No. 17-510 (2d Cir. Feb. 21, 2017). In May 2017, the Second Circuit approved the parties' stipulation to withdraw the appeal, thus bringing the lawsuit to a close. Paskowitz v. Prospect Capital Mgmt., L.P., No. 17-510 (2d Cir. May 15, 2017).

The last lawsuit in this category (filed in 2018) was styled as a manager-of-managers lawsuit, but was unusual in that it involved two relatively small closed-end funds and two unrelated investment advisers as defendants. The lawsuit appeared to stem from prior efforts by the plaintiff to attempt to force a conversion of the funds to open-end funds. The lawsuit was closed by stipulation of the parties in May 2019. Winston v. Western Asset Mgmt. Co., No. 18-cv-3523 (C.D. Cal. May 7, 2019).

[19] 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), *aff'd*, 2020 U.S. App. LEXIS 9868 (6th Cir. Mar. 30, 2020).

[20] In re Davis N.Y. Venture Fund Fee Litig., 805 Fed. Appx. 79 (2d. Cir. May 22, 2020).

[21] In re BlackRock Mutual Funds Advisory Fee Litig., 816 Fed. Appx. 637 (3d Cir. May 28, 2020).

[22] Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. Aug. 7, 2020) (findings of fact and conclusions of law), *appeal docketed*, No. 20-1310 (10th Cir. Sept. 2, 2020).

[23] Kennis v. Metropolitan West Asset Mgmt., LLC, No. 19-55934, 2020 U.S. App. LEXIS 29662 (9th Cir. Sept. 17, 2020).

[24] Zoidis v. T. Rowe Price Assocs., Inc., No. 16-cv-2786 (D. Md. Jan. 4, 2021) (filing of order approving joint stipulation of dismissal with prejudice).

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

[26] Hunter v. Infinity Q Diversified Alpha Fund, No. 651295-2021 (N.Y. Sup. Ct. filed Feb. 24, 2021); Rosenstein v. Trust for Advised Portfolios, No. 651302-2021 (N.Y. Sup. Ct. filed Feb. 25, 2021).

[27] Hunter v. Infinity Q Diversified Alpha Fund, No. 651295-2021 (N.Y. Sup. Ct. Mar. 17, 2021) & Rosenstein v. Trust for Advised Portfolios, No. 651302-2021 (N.Y. Sup. Ct. Mar. 17, 2021) (filing of motion for consolidation).

[28] Yang v. Trust for Advised Portfolios, No. 21-cv-1047 (E.D.N.Y. filed Feb. 26, 2021).

[29] Drapeau v. ProShares 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).

[30] Ford v. ProShares Tr. II, No. 19-cv-886 (S.D.N.Y. Apr. 29, 2019) (order of consolidation).

[31] In re ProShares Tr. II Secs. Litig., No. 19-cv-886 (S.D.N.Y. June 21, 2019) (filing of consolidated amended complaint); In re ProShares Tr. II Secs. Litig., No. 19-cv-886 (S.D.N.Y. Sept. 6, 2019) (filing of second consolidated amended complaint).

[32] In re ProShares Tr. II Secs. Litig., No. 19-cv-886, 2020 U.S. Dist. LEXIS 1533 (S.D.N.Y. Jan. 3, 2020) (order granting motion to dismiss), *aff'd*, No. 20-419, 2021 U.S. App. LEXIS 7369 (2d Cir. Mar. 15, 2021).

[33] Drapeau v. ProShares Tr., No. 18-cv-107 (D. Vt. Mar. 5, 2020) (order granting motion to dismiss).

[34] Lucas v. U.S. Oil Fund, LP, No. 20-cv-4740 (S.D.N.Y. filed June 19, 2020) (complaint).

[35] Ephrati v. U.S. Oil Fund, LP, No. 20-cv-6010 (S.D.N.Y. filed July 31, 2020) (complaint); Palacios v. U.S. Oil Fund, LP, No. 20-cv-6442 (S.D.N.Y. filed Aug. 13, 2020) (complaint).

[36] In re U.S. Oil Fund, LP Secs. Litig., No. 20-cv-4740 (S.D.N.Y. Sept. 16, 2020) (order consolidating the lawsuits).

[37] Di Scala v. ProShares Ultra Bloomberg Crude Oil, No. 20-cv-5865 (S.D.N.Y. filed July 28, 2020) (complaint).

[38] Di Scala v. ProShares Ultra Bloomberg Crude Oil, No. 20-cv-5865 (S.D.N.Y. Feb. 22, 2021) (filing of stipulation of voluntary dismissal).

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

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

[41] Sokolow v. LJM Funds Mgmt., Ltd., No. 18-cv-1039 (N.D. Ill. Mar. 28, 2018) (order consolidating *Bennett* and *Nosewicz* into *Sokolow*).

[42] Sokolow v. LJM Funds Mgmt., Ltd., No. 18-cv-1039 (N.D. Ill. July 13, 2020) (stipulation of dismissal).

[43] Sokolow v. LJM Funds Mgmt., Ltd., No. 18-ch-11880 (Cir. Ct. Cook Cty., Ill. June 5, 2020) (order and final judgment).

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

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

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

[47] Jensen v. iShares Tr., 44 Cal. App. 5th 618 (Cal. Ct. App. Jan. 23, 2020) (decision).

[48] 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, https://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).

[49] As reported in prior *Claims Trends*, a noteworthy development in the rule 10b-5 area came in 2011 with the U.S. 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.

[50] Yang v. Trust for Advised Portfolios, No. 21-cv-1047 (E.D.N.Y. filed Feb. 26, 2021).

[51] Salzberg v. Sciabacucchi, 227 A.3d 102 (2020).

[52] A California state court, in September 2020, dismissed '33 Act claims because the issuer's corporate charter contained a federal forum selection provision. *Wong v. Restoration Robotics, Inc.*, No. 18-civ-2609 (Cal. Super. Ct., San Mateo Cty. Sept. 1, 2020) (order on motion to dismiss). Another California state court reached a similar conclusion in *In re Uber Technologies, Inc. Securities Litigation*, finding the federal forum selection provision "[wa]s consistent with Plaintiffs' reasonable expectations at the time they chose to purchase … stock." *In re Uber Technologies, Inc. Secs. Litig.*, No. 19-civ-579544 (Cal. Super. Ct., San Francisco Cty. Nov. 16, 2020). In *In re Dropbox Securities Litigation*, a California state court found that shareholders assented to the issuer's federal forum selection provision by purchasing shares in the company's IPO. *In re Dropbox Inc. Secs. Litig.*, No. 19-civ-5089 (Cal. Super. Ct., San Mateo Cty. Dec. 4, 2020) (order on motion to dismiss). *See Dropbox Becomes Third California Superior Court Decision To Enforce Delaware Corporations' Federal Forum Provision For Securities Act Lawsuits*, Seyfarth Shaw (Dec. 8, 2020), https://www.seyfarth.com/news-insights/dropbox-becomes-third-california-superior-court-decision-to-enforce-delaware-corporations-federal-forum-provision-for-securities-act-lawsuits.html.

[53] *See* Alison Frankel, *The Sciabacucchi effect: Delaware ruling on forum provisions is 'stabilizing' D&O insurance market*, REUTERS (Mar. 16, 2021), https://www.reuters.com/article/instant-article/idUSKBN2B82S8.

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

[55] Lanotte v. Highland Capital Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. May 26, 2020) (order granting motion to dismiss), *appeal docketed*, No. 20-10649 (5th Cir. June 25, 2020); Lanotte v. Highland Capital Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. Mar. 25, 2019) (filing of motion to dismiss).

[56] Saba Capital Master Fund v. BlackRock Credit Allocation Income Tr., C.A., No. 2019-416 (Del. Ch. filed June 4, 2019) (filing of complaint).

[57] Saba Capital Master Fund v. BlackRock Credit Allocation Income Tr., C.A., No. 2019-416, 2019 Del. Ch. LEXIS 243 (Del. Ch. June 27, 2019) (issuance of memorandum opinion).

[58] *See* Saba Capital CEF Opportunities 1 Ltd v. Voya Prime Rate Tr., No. CV2020-5293 (Ariz. Sup. Ct. Maricopa Cty. filed May 1, 2020) (challenging bylaws provisions establishing voting standards for board elections). *See also* Tim LeeMaster, *Bulldog Investors targeting CEF complexes at larger firms for activism*, FUND DIRECTIONS (Aug. 20, 2020), https://funddirections.com/analysis/77521/bulldog-targeting-cef-complexes-at-larger-firms-for-activism/; Tim LeeMaster, *Saba Director Slate Takes Over Voya CEF Board*, FUND DIRECTIONS (Aug. 27, 2020), https://funddirections.com/news/77507/saba-director-slate-takes-over-voya-cef-board/; Tim LeeMaster, *The Funds and Firms Pursuing Closed-End Fund Activism*, FUND DIRECTIONS (Feb. 13, 2020), https://funddirections.com/news/76965/the-funds-and-firms-pursuing-closed-end-fund-activism-2/; Tim LeeMaster, *Western Asset Closed-End Funds Attract New Activist Fund*, FUND DIRECTIONS (Feb. 10, 2020), https://funddirections.com/news/76953/

western-asset-closed-end-funds-attract-new-activist-fund/; Naimish Keswani, Saba Goes After Franklin Templeton CEF in Latest Activist Campaign, FUND DIRECTIONS (Apr. 1, 2021), https://funddirections.com/news/77706/saba-goes-after-franklin-templeton-cef-in-latest-activist-campaign/.

[59] Under laws of certain states, a company may be permitted to prevent or restrict changes in control of the company by restricting the voting power of certain voting shares, unless a majority of the company's disinterested shareholders vote to permit the person to vote the shares. A recent SEC staff statement, issued in May 2020, indicated that the staff would not recommend enforcement action against a closed-end fund that availed itself of an applicable control share statute, subject to certain conditions. *See Control Share Acquisition Statutes*, SEC Staff Statement, Div. of Inv. Mgmt. (May 27, 2020), https://www.sec.gov/investment/control-share-acquisition-statutes. The staff's recent statement withdrew a 2010 no-action letter in which the staff articulated its view that it would be inconsistent with section 18(i) of the ICA if a closed-end fund availed itself of Maryland's control share statute. *See* Boulder Total Return Fund, SEC No-Action Letter (Nov. 15, 2010), https://www.sec.gov/divisions/investment/noaction/2010/bouldertotalreturn111510.htm.

[60] Closed-end fund matters often involve a so-called "demand" made on the fund's board of directors. In the demand, the shareholder typically requests that the fund board itself authorize and pursue litigation on behalf of the fund. The fund board, in order to make an informed decision as to how to respond to the demand—i.e., whether (1) to take over and assert the claims at issue (thereby displacing the shareholder), (2) to pursue an alternative remedy, or (3) to reject the shareholder's demand—will often appoint a special committee to conduct a shareholder derivative demand investigation (which is often conducted by an outside law firm retained by the special committee).

[61] BlackRock Credit Allocation Income Tr. v. Saba Capital Master Fund, Ltd., 220 Del. LEXIS 14 (Del. Super. Ct. Jan. 13, 2020).

[62] Saba Capital Master Fund v. BlackRock Credit Allocation Income Tr., C.A., No. 2019-0416 (Del. Ch. No. filed Feb. 25, 2020) (approval of stipulation of dismissal).

[63] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc., Case No. 24-C-19-3168 (Md. Cir. Ct. filed June 4, 2019).

[64] *See U.S. Listed Closed-End Funds and BDCs Activist and Key Corporate Actions*, AST FUND SOLUTIONS, LLC (July 2019), https://www.astfinancial.com/media/444040/c-users-dcampagnone-documents-ast-cef-monthly-july-2019.pdf; Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc., Case No. 24-C-19-3168 (Md. Cir. Ct. filed June 4, 2019).

[65] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc., Case No. 24-C-19-3168 (Md. Cir. Ct. Sept. 13, 2019) (filing of motion to dismiss).

[66] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc., Case No. 24-C-19-0168 (Md. Cir. Ct. Nov. 15, 2019) (order granting motion to dismiss).

[67] Saba Capital Master Fund, Ltd. v. BlackRock Muni New York Intermediate Duration Fund, Inc., Case No. 2068-2019 (Md. Ct. Spec. Apps. Feb. 27, 2020) (notice of voluntary dismissal).

[68] Saba Capital CEF Opportunities 1 Ltd v. Voya Prime Rate Tr., No. CV2020-5293 (Ariz. Sup. Ct. Maricopa Cty. filed May 1, 2020)

[69] *See Investment Management Retrospective: 2020's Second Half*, Client Alert, Skadden, Arps, Slate, Meagher & Flom LLP (Dec. 21, 2020), https://www.skadden.com/insights/publications/2020/12/investment-management-retrospective (discussing, among other things, Saba's litigation in Arizona state court against Voya Prime Rate Trust).

[70] *See* Saba Capital CEF Opportunities 1 Ltd v. Voya Prime Rate Tr., No. CV2020-5293 (Ariz. Sup. Ct. Maricopa Cty. Sept. 20, 2020) (order granting dismissal with prejudice).

[71] Saba Capital CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-cv-327 (S.D.N.Y. filed Jan. 14, 2021) (filing of complaint).

[72] *See* discussion of control share acquisition statutes at note 59 *supra*. The argument that "control share acquisition" bylaw amendments violate the ICA is also at issue in counterclaims filed by the same activist shareholder in another

lawsuit. *See* Eaton Vance Senior Income Tr. v. Saba Capital Master Fund, Ltd., No. 2084-cv-1533 (Mass. Suffolk Cty. Sup. Ct. Aug. 27, 2020) (filing of counterclaims by defendant). On March 31, 2021, the court granted in part and denied in part the plaintiff's motion to dismiss the defendant's counterclaims in that lawsuit, thereby permitting the defendant's counterclaim relating to the alleged ICA violation to proceed. Eaton Vance Senior Income Tr. v. Saba Capital Master Fund, Ltd., No. 2084-cv-1533 (Mass. Suffolk Cty. Sup. Ct. Mar. 31, 2021) (order granting in part and denying in part plaintiff's motion to dismiss defendant's counterclaims).

[73] *See* Oxford Univ. Bank v. Lansuppe Feeder, Inc., 933 F.3d 99 (2d Cir. Aug. 5, 2019) (holding that section 47(b) of the ICA provides an implied private right of action for rescission of contracts that violate the ICA). Prior to the Second Circuit's decision, a number of courts had declined to find an implied private right of action under section 47(b), and courts had generally found that the only private right of action under the ICA was expressly set forth in section 36(b).

[74] Saba Capital CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-cv-327 (S.D.N.Y. Mar. 30, 2021) (filing of joint motion to dismiss).

[75] *See* SEC, Div. of Enforcement, Annual Report 2020 (Nov. 2, 2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf.

[76] *See id.* at 16 (indicating that 57, or approximately 21%, of its stand-alone actions in fiscal year 2020 were against investment companies/investment advisers).

[77] *See* In re Catalyst Capital Advisors, LLC, File No. 3-19674, IAA Rel. No. 5436 (SEC Jan. 27, 2020), https://www.sec.gov/litigation/admin/2020/ia-5436.pdf (finding that a registered investment adviser made material misstatements concerning its risk management procedures for a mutual fund under its management).

[78] *See* In re Transamerica Asset Mgmt. Inc., File No. 3-20105, ICA Rel. No. 34035 (SEC Sept. 30, 2020), https://www.sec.gov/litigation/admin/2020/ia-5599.pdf (finding that an adviser improperly recaptured waived fees on registered money market funds, causing the investors to overpay for fund shares, and further finding that each fund's prospectus had not disclosed the adviser's recaptured amount).

[79] In re Franklin Advisers, Inc., No. 3-19854, ICA Rel. No. 33919 (SEC July 2, 2020), https://www.sec.gov/litigation/admin/2020/ia-5531.pdf (finding that a registered investment adviser caused mutual funds to invest in other mutual funds in excess of regulatory investment restrictions).

[80] SEC, EXAMS, 2021 Nat'l Exam Program Examination Priorities, 19–27 (Mar. 3, 2021), https://www.sec.gov/files/2021-exam-priorities.pdf.

[81] *Id.* at 32.

[82] *Id.* at 28.

[83] *Id.* at 29.

[84] SEC, OCIE, Nat'l Exam Program Risk Alert, Examination Initiative: LIBOR Transition Preparedness (June 18, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20OCIE%20LIBOR%20Initiative_1.pdf.

[85] SEC, OCIE, Nat'l Exam Program Risk Alert: Observations from Examinations of Investment Advisers Managing Private Funds (June 23, 2020), https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf.

[86] SEC, EXAMS, Nat'l Exam Program Risk Alert, Cybersecurity: Ransomware Alert (July 10, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20Ransomware.pdf.

[87] 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 *Kokesh* 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).

[88] Liu v. SEC, 140 S. Ct. 1936 (2020).

[89] *See* SEC, Div. of Enforcement, Annual Report 2020, 7 (Nov. 2, 2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf.

[90] SEC, OCIE, Nat'l Exam Program Risk Alert: Select COVID-19 Compliance Risks and Considerations for Broker-Dealers and Investment Advisers (Aug. 12, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20COVID-19%20Compliance.pdf.

[91] SEC, OCIE, Nat'l Exam Program Risk Alert: Cybersecurity: Safeguarding Client Accounts against Credential Compromise (Sept. 15, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20Credential%20Compromise.pdf.

[92] SEC, OCIE, Nat'l Exam Program Risk Alert: OCIE Observations: Investment Adviser Compliance Programs (Nov. 19, 2020), https://www.sec.gov/files/Risk%20Alert%20IA%20Compliance%20Programs_0.pdf.

[93] SEC, OCIE, Nat'l Exam Program Risk Alert: OCIE Observations from Examinations of Broker-Dealers and Investment Advisers: Large Trader Obligations (Dec. 16, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20Large%20Trader%2013h.pdf.

[94] SEC, EXAMS, 2021 Nat'l Exam Program Examination Priorities, at 10, 18 (Mar. 3, 2021), https://www.sec.gov/files/2021-exam-priorities.pdf.

[95] *See* SEC Press Release, SEC Announces Creation of the Event and Emerging Risk Examination Team in the Office of Compliance Inspections and Examinations and the Appointment of Adam D. Storch as Associate Director (July 28, 2020), https://www.sec.gov/news/press-release/2020-165.

[96] *See* SEC Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[97] *See, e.g.*, *SEC Sharpens Focus on ESG*, Client Alert, Willkie Farr & Gallagher LLP (Mar. 17, 2021) https://www.willkie.com/-/media/files/publications/2021/03/sec_sharpens_focus_on_esg.pdf; SEC Focuses on ESG and Climate Disclosure, Client Alert, White & Case LLP (Mar. 18, 2021), https://www.whitecase.com/publications/alert/sec-focuses-esg-and-climate-disclosure.

[98] FINRA, 2021 Report on FINRA's Examination and Risk Monitoring Program (Feb. 1, 2021), https://www.finra.org/sites/default/files/2021-02/2021-report-finras-examination-risk-monitoring-program.pdf.

[99] *See, e.g.*, Remarks of CFTC Chairman Heath P. Tarbert to the 36th Annual FIA Expo 2020 (Nov. 10, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetstatement111020.

[100] *See, e.g.*, Opening Statement of Acting Chairman Rostin Behnam before the Market Risk Advisory Committee, Rostin Behnam, Acting Chair, CFTC (Feb. 23, 2021), https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement022321.

[101] *See, e.g.*, *id.*

[102] *See, e.g.*, Remarks of CFTC Chairman Heath P. Tarbert to the 36th Annual FIA Expo 2020 (Nov. 10, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetstatement111020 ("I recognized the difficulty faced by many market operators about where the CFTC's jurisdiction stops and the SEC's jurisdiction begins, so I made it a point during my tenure for the two agencies to work hand-in-hand to resolve these issues.").

[103] In re Catalyst Capital Advisors, LLC, CFTC Docket No. 20-13 (CFTC Jan. 27, 2020), https://www.cftc.gov/media/3351/enfcatalystcapitaladvisorsllcorder012720/download; In re Catalyst Capital Advisors, LLC, File No. 3-19674, IAA No. 5436 (SEC Jan. 27, 2020), https://www.sec.gov/litigation/admin/2020/ia-5436.pdf (findings by the CFTC and the SEC that a registered investment adviser made material misstatements concerning its risk management procedures for a mutual fund under its management).

[104] *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* notes 112–136 and

accompanying text; Nicole Piper, *Fidelity Faces State Investigation over Fund Fees*, CITYWIRE (Mar. 5, 2019), https://citywireusa.com/professional-buyer/news/fidelity-faces-state-investigation-over-fund-fees/a1206756.

[105] Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. filed Feb. 14, 2020) (order granting motion to dismiss).

[106] *See U.S. markets regulator raises bar for waivers for sanctioned companies*, REUTERS (Feb. 11, 2021), https://www.reuters.com/article/us-usa-sec-waivers/u-s-markets-regulator-raises-bar-for-waivers-for-sanctioned-companies-idUSKBN2AB2I3.

[107] *See SEC Commissioners Square Off Over Enforcement Settlement Process*, Michael Rivera, Securities Law Exchange Blog, Bass Berry & Sims PLC (Feb. 17, 2021), https://www.bassberrysecuritieslawexchange.com/sec-contingent-settlement-offers/.

[108] Public Statement, Allison Herren Lee, Statement of Acting Chair Allison Herren Lee on Empowering Enforcement to Better Protect Investors (Feb. 9, 2021), https://www.sec.gov/news/public-statement/lee-statement-empowering-enforcement-better-protect-investors.

[109] *See A Shot Across the Bow: Acting SEC Chair Lee Reinstitutes Delegated Authority for Senior Enforcement Leadership and Rescinds Clayton's Waiver Policy*, Client Alert, Debevoise & Plimpton (Feb. 16, 2021), https://www.debevoise.com/insights/publications/2021/02/a-shot-across-the-bow-acting-sec.

[110] 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, https://www.icimutual.com (discussing insurance for the costs of correcting operations-based errors).

[111] *See, e.g.*, ICI MUTUAL, *D&O/E&O Insurance Coverage For Network Security Events: Frequently Asked Questions*, Question 8 (Jan. 2017), https://www.icimutual.com.

[112] *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.

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

[114] The preliminary settlement is as follows: Baird v. BlackRock Inst'l Tr. Co., N.A., No. 17-cv-1892 (N.D. Cal. Mar. 23, 2021) (motion for preliminary approval of $9.65 million settlement).

The 2020 and early 2021 final settlements are as follows: Karpik v. Huntington Bancshares Inc., No. 17-cv-1153 (S.D. Ohio Feb. 18, 2021) ($10.5 million); Moitoso v. Fidelity, No. 18-cv-12122 (D. Mass. Jan. 21, 2021) ($28.5 million); Bekker v. Neuberger Berman Grp., LLC, No. 16-cv-6123 (S.D.N.Y. Dec. 1, 2020) ($17 million); Beach v. JPMorgan Chase Bank, N.A., No. 17-cv-563 (S.D.N.Y. Oct. 7, 2020) ($9 million); Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. Sept. 9, 2020) ($12.5 million); In re M&T Bank Corp. ERISA Litig., No. 16-cv-375 (W.D.N.Y. Sept. 3, 2020) ($20.85 million); Cervantes v. Invesco Holding Co. (U.S.), Inc., No. 18-cv-2551 (N.D. Ga. Aug. 13, 2020) ($3.47 million); In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., No. 11-cv-784 (N.D. Ga. filed Mar. 24, 2020) ($29 million); Stevens v. SEI Invs. Co., No. 18-cv-4205 (E.D. Pa. Feb. 28, 2020) ($6.8 million).

The pre-2020 final settlements are as follows: Velazquez v. Mass. Fin. Servs. Co., No. 17-cv-1124 (D. Mass. Dec. 5, 2019) ($6.875); Cryer v. Franklin Resources, Inc., No. 16-cv-4265 (N.D. Cal. Oct. 4, 2019) ($26.75 million); Price v. Eaton Vance Corp., No. 18-cv-12098 (D. Mass. Sept. 24, 2019) ($3.45 million); Bowers v. BB&T Corp., No. 15-cv-732 (M.D.N.C. May 10, 2019) ($24 million); Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich. Apr. 23, 2019) ($4.5 million); Schapker v. Waddell & Reed Fin., Inc., No. 17-cv-2365 (D. Kan. Apr. 8, 2019) ($4.875 million); Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. Mar. 1, 2019) ($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).

[115] Waldner v. Natixis Inv. Mgrs., N.P., No. 21-cv-10273 (D. Mass. filed Feb. 18, 2021) (filing of complaint).

[116] Cho v. Prudential Ins. Co. of Am., No. 19-cv-19886 (D.N.J. filed Dec. 8, 2020) (filing of motion to dismiss).

[117] Baker v. John Hancock Life Ins. Co., No. 20-cv-10397 (D. Mass. July 23, 2020) (order denying motion to dismiss); Falberg v. The Goldman Sachs Grp., Inc., No. 19-cv-9910 (S.D.N.Y. July 9, 2020) (order denying motion to dismiss); Karg v. Transamerica Corp., No. 18-cv-134, 2019 U.S. Dist. LEXIS 140567 (N.D. Iowa Aug. 20, 2019) (order denying motion to dismiss); In re G.E. ERISA Litig., No. 17-cv-12123 (D. Mass. March 31, 2020) (order granting in part and denying in part motion to dismiss).

[118] Baird v. BlackRock Inst'l Tr. Co., N.A., No. 17-cv-1892 (N.D. Cal. Jan. 12, 2021) (order denying defendants' motion to dismiss); Baird v. BlackRock Inst'l Tr. Co., N.A., No. 17-cv-1892 (N.D. Cal. Feb. 18, 2021) (filing of notice of agreement in principle); Baird v. BlackRock Inst'l Tr. Co., N.A., No. 17-cv-1892 (N.D. Cal. Mar. 23, 2021) (filing of motion for preliminary approval of settlement).

[119] Feinberg v. T. Rowe Price Grp., Inc., No. 17-cv-427 (D. Md. Feb. 10, 2021) (order denying plaintiffs' motion for partial summary judgment and granting in part and denying in part defendants' cross-motion for summary judgment).

[120] *See* note 114, *supra*.

[121] 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).

[122] Patterson v. Morgan Stanley, No. 16-cv-6568, 2019 U.S. Dist. LEXIS 174832 (S.D.N.Y. Oct. 7, 2019) (order granting motion to dismiss).

[123] Meiners v. Wells Fargo & Co., 2017 U.S. Dist. LEXIS 80606 (D. Minn. May 26, 2017) (order granting motion to dismiss), *aff'd*, 898 F.3d 820 (8th Cir. Aug. 3, 2018).

[124] Wayman v. Wells Fargo & Co., No. 17-cv-5153 (D. Minn. Feb. 13, 2018) (notice of voluntary dismissal); Patterson v. Capital Grp. Cos., Inc., No. 17-cv-4399 (C.D. Cal. Feb. 14, 2018) (notice of voluntary dismissal, following court's granting of motion to dismiss plaintiff's first amended complaint on January 23, 2018).

[125] Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Nov. 20, 2019) (order staying the lawsuit pending arbitration and administratively closing the lawsuit, subject to re-opening if a petition to enforce any arbitration award is filed).

In *Severson*, the defendants filed an interlocutory appeal with the Ninth Circuit of the district court's January 2018 decision denying the defendants' motion to compel arbitration, dismiss, and stay claims. 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). The district court granted in part and denied in part a motion to dismiss the second amended complaint. Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Feb. 8, 2019). In August 2019, the Ninth Circuit reversed the district court's order denying the defendants' motion to compel arbitration and remanded the suit to the lower court. Severson v. Charles Schwab & Co. Inc., No. 18-15281 (9th Cir. Aug. 20, 2019). The action is stayed pending arbitration.

[126] Becker v. Wells Fargo & Co., No. 20-cv-1803 (N.D. Cal. filed Mar. 13, 2020) (filing of complaint). The lawsuit was subsequently transferred to another district court. Becker v. Wells Fargo & Co., No. 20-cv-2016 (D. Minn. filed Sept. 22, 2020).

[127] Becker v. Wells Fargo & Co., No. 20-cv-2016 (D. Minn. Feb. 4, 2021) (filing of motion to dismiss).

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

[129] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. Feb. 4, 2020) (order granting in part and denying in part motion to dismiss).

[130] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. Mar. 10, 2020) (order referring case to mediation).

[131] Bailis v. FMR LLC, No. 19-cv-10654 (D. Mass. filed Apr. 5, 2019) (complaint); Sills v. FMR LLC, No. 19-cv-11595 (D. Mass. filed July 23, 2019) (complaint), 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).

[132] All four have been consolidated under Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. Aug. 5, 2019) (stipulation to consolidate lawsuits).

[133] Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. Feb. 14, 2020) (order granting motion to dismiss).

[134] Wong v. FMR LLC, No. 20-1286 (1st Cir. filed Mar. 6, 2020) (filing of an appeal).

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

[136] Nelsen v. Principal Glob. Investors Tr. Co., No. 18-cv-115 (S.D. Iowa Oct. 5, 2020) (filing of joint stipulation of dismissal with prejudice).

[137] Financial Factors in Selecting Plan Investments, Final Rule, DOL, 85 F.R. 72846 (Nov. 13, 2020), https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments. As described in the rule's adopting release, a fiduciary may use a non-pecuniary factor as a tiebreaker "in circumstances where the fiduciary could not distinguish such investment option from an alternative on the basis of pecuniary factors alone," but the rule does not permit a fiduciary to make a selection "solely on the basis of a fiduciary's personal policy preferences." *Id.* at 72862–63.

[138] U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plan (Mar. 10, 2021), https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf.

[139] *See, e.g.*, Department of Labor Announces Non-Enforcement Policy for Trump-Era ESG and Proxy Voting Rules, Client Alert, Ropes & Gray LLP (Mar. 11, 2021), https://www.ropesgray.com/en/newsroom/alerts/2021/March/Department-of-Labor-Announces-Non-Enforcement-Policy-for-Trump-Era-ESG-and-Proxy-Voting-Rules; DOL to Revisit Trump ESG-Related Rule, Client Alert, Stradley Ronon Stevens & Young, LLP (Mar. 16, 2021), https://www.stradley.com/insights/publications/2021/03/risk-and-reward-march-16-2021.

[140] *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 adversary 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); PR Adversary Proceedings, *infra* note 154.

In addition, a number of recent bankruptcy cases (e.g., involving Nine West Holdings, Inc. and Sears Holdings) have named funds as defendants by virtue of their status as passive holders or former holders of securities of the bankrupt issuers. *See* Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. filed Oct. 15, 2020) (adversary proceeding in In re Sears Holdings Corp., No. 18-bk-23538 (Bankr. S.D.N.Y. filed Oct. 15, 2018)); In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. filed June 3, 2020).

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

[142] 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), *cert. denied* (May 17, 2019) (No. 16-317).

[143] Niese v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 946 F.3d 66 (2d Cir. 2019) (order amending earlier decision in light of Supreme Court's decision in *Merit Mgmt. Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018)), *petition for cert. filed*, No. 20-8 (U.S. July 9, 2020).

[144] Deutsche Bank Tr. Co. Americas v. Robert R. McCormick Foundation, Brief for the U.S. as Amicus Curiae, No. 20-8 (U.S. Mar. 12, 2021).

[145] In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296, 2019 U.S. Dist. LEXIS 69081 (S.D.N.Y. Apr. 23, 2019). The district court had earlier denied the request to add a federal constructive fraudulent transfer claims in August 2017, but had suggested at that time that such an amendment might be appropriate based on the outcome of a then-pending Supreme Court case (*Merit*). 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).

[146] In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. June 13, 2019). The issuance of the judgment had the effect of making an earlier decision—*In re Tribune Co. Fraudulent Conveyance Litig.*, 2017 U.S. Dist. LEXIS 3039 (S.D.N.Y. Jan. 6, 2017)—final and appealable.

[147] Kirschner v. Large S'holders, No. 19-3049 (2d Cir. filed July 15, 2019).

[148] In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. filed June 3, 2020) (filing of complaint).

[149] In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. Aug. 27, 2020) (order on motion to dismiss).

[150] In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. Nov. 19, 2020) (partial final judgment), *appeal docketed*, No. 20-3941 (2d. Cir. Nov. 23, 2020).

[151] Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. filed Oct. 15, 2020) (adversary proceeding in In re Sears Holdings Corp., No. 18-bk-23538 (Bankr. S.D.N.Y. filed Oct. 15, 2018)).

[152] Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. filed Mar. 15, 2021) (consolidation and scheduling order).

[153] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. filed May 3, 2017).

[154] *See, e.g.*, Special Claims Comm. of the Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Jefferies LLC, No. 19-ap-281 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Barclays Cap/Fixed, No. 19-ap-282 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Interactive Brokers Retail Equity Clearing, No. 19-ap-283 (D.P.R. filed May 2, 2019); Official Comm. of Unsecured Creditors v. Defendant 1E, No. 19-ap-284 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1A, No. 19-ap-285 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1B, No. 19-ap-286 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1C, No. 19-ap-287 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1D, No. 19-ap-288 (D.P.R. filed May 2, 2019) (collectively, "PR Adversary Proceedings").

[155] PR Adversary Proceedings (D.P.R. Dec. 27, 2019) (orders extending stays to March 11, 2020).

[156] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Feb. 10, 2020) (filing of the amended report and recommendation of the mediation team).

[157] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Mar. 10, 2020) (extending the stay period pending the court's decision regarding confirmation).

[158] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Mar. 9, 2021) (filing of amended plan).

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1401 H Street NW, Suite 1000
Washington, DC 20005

800.643.4246
info@icimutual.com
www.icimutual.com