Claims Trends

A Review of Claims Activity in the Mutual Fund Industry
(January 2015-March 2016)

ICIMutual
The safest decision you can make.

Table of Contents

Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CFTC	U.S. Commodity Futures Trading Commission
ERISA	Employee Retirement Income Security Act of 1974
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
OCIE	Office of Compliance Inspections and Examinations of the SEC
RICO	Racketeer Influenced and Corrupt Organizations Act
SEC	U.S. Securities and Exchange Commission
SLUSA	Securities Litigation Uniform Standards Act of 1998

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

Introduction

Since 1999, ICI Mutual's annual *Claims Trends* has reported on significant civil lawsuits, regulatory proceedings, and operational errors affecting the fund industry. *Claims Trends* focuses on developments in four traditional risk areas for fund groups—fee-based litigation, disclosure-related litigation, regulatory enforcement activity, and operational errors—and also reports on other noteworthy litigation developments. This publication is designed to assist ICI Mutual's insureds in better assessing and managing the risks associated with such matters, thereby reducing the potential for associated losses and reputational damage.

ICI Mutual measures claims activity by both *frequency* and *severity*. 2015 saw an increase in the overall number of claims submitted to ICI Mutual by fund groups under their directors and officers/errors and omissions (D&O/E&O) policies. Moreover, nearly one quarter of ICI Mutual's insured fund groups submitted at least one claim notice in 2015, and, over the five-year period 2011-2015, approximately half of insured fund groups did so. These figures suggest that claims frequency remains an issue for fund industry insureds.

In contrast to frequency, the *severity* of new claims can be more difficult to assess. Generally speaking, it may take years to establish the magnitude of losses (including defense costs, settlements, and judgments) in civil lawsuits and regulatory proceedings. Nonetheless, the potential for severity, too, remains a concern for the fund industry, as illustrated by the many new shareholder lawsuits initiated over the past several years alleging "excessive fees."

Recent years have also witnessed significant regulatory enforcement activity in the asset management area, chiefly by the SEC. In its 2015 fiscal year, the SEC brought a record number of enforcement actions overall, including a significant number of actions in the asset management area. Statements by SEC representatives suggest continued scrutiny of the asset management area, including in the registered fund sector, in 2016.

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

Fees

In recent years, the plaintiffs' bar has initiated a number of challenges to fees charged to mutual funds by investment advisers and other service providers. Many of these lawsuits have alleged violations of section 36(b) of the ICA, with others alleging violations of ERISA or breach of fiduciary duty under state law.

Section 36(b)

Section 36(b) of the ICA provides that the investment adviser of a registered investment company "shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services," and expressly provides shareholders with the right to bring a lawsuit to enforce this duty.[1]

The *Gartenberg* Standard:

"To be guilty of a violation of §36(b), … the adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."

–Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928 (2d Cir. 1982).

"The *Gartenberg* standard … may lack sharp analytical clarity, but we believe that it accurately reflects the compromise that is embodied in §36(b), and it has provided a workable standard for nearly three decades."

– Jones v. Harris Assocs. L.P., 559 U.S. 335, 353 (2010).

In its landmark 2010 decision in *Jones v. Harris Associates, L.P.*, the U.S. Supreme Court affirmed the use of the longtime "*Gartenberg* standard" for assessing the liability of fund advisers in excessive fee cases brought under section 36(b), and remanded the case to the Seventh Circuit for further proceedings.[2] More than five years later (and over a

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

(Cases in **blue** were active as of March 31, 2016)

2010	• **Santomenno v. John Hancock Life Ins. Co.**, No. 2:10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (May 23, 2011) & 2013 U.S. Dist. LEXIS 103404 (July 24, 2013), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (U.S. Apr. 20, 2015) (No. 14-1054) • **Southworth v. Hartford Inv. Fin. Serv., LLC**, No. 1:10-cv-00878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011)
2011	• **Kasilag v. Hartford Inv. Fin. Servs., LLC**, No. 1:11-cv-01083 (D.N.J. filed Feb. 25, 2011) • **Reso v. Artisan Partners Ltd. P'ship**, No. 1:11-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)
2013	• **Laborer's Local 265 Pension Fund v. iShares Trust**, No. 13-cv-00046 (M.D. Tenn. filed Jan. 18, 2013), *dismissed*, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, No. 13-6486 (6th Cir. Sept. 30, 2014), *cert. denied* (U.S. Mar. 2, 2015) (No. 14-771) • **Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp.**, No. 2:13-cv-01601 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, No. 4:14-cv-00044 (S.D. Iowa Feb. 3, 2016), *appeal docketed*, No. 16-1580 (8th Cir. filed Mar. 8, 2016) • **In re Voya Global Real Estate Fund S'holder Litig.**, No. 1:13-cv-01521 (D. Del. filed Aug. 30, 2013) • **In re Russell Inv. Co. S'holder Litig.**, No. 1:13-cv-12631 (D. Mass. filed Oct. 17, 2013) • **Curd v. SEI Invs. Mgmt. Corp.**, No. 2:13-cv-07219 (E.D. Pa. filed Dec. 11, 2013)
2014	• **Zehrer v. Harbor Capital Advisors, Inc.**, No. 1:14-cv-00789 (N.D. Ill. filed Feb. 4, 2014) • **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 3:14-cv-01165 (D.N.J. filed Feb. 21, 2014) • **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 2:14-cv-414 (S.D. Ohio filed May 5, 2014) • **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 1:14-cv-00585 (D. Del. filed May 7, 2014) • **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014) • **Redus-Tarchis v. N.Y. Life Inv. Mgmt.**, No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014) • **Kenny v. Pac. Inv. Mgmt. Co. LLC**, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014)
2015	• **Chill v. Calamos Advisors, LLC**, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015) • **Ingenhutt v. State Farm Inv. Mgmt. Corp.**, No. 1:15-cv-1303 (C.D. Ill. filed July 22, 2015) • **Wayne County Employees' Ret. System v. Fiduciary Mgmt. Inc.**, No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015), *closed per stipulation* (Jan. 4, 2016) • **Kennis v. Metro. West Asset Mgmt., LLC**, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015) • **North Valley GI Med. Group v. Prudential Invs. LLC**, No. 1:15-cv-3268 (D. Md. filed Oct. 30, 2015) • **Ventura v. Principal Mgmt. Corp.**, No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015)
2016	• **Obeslo v. Great-West Capital Mgmt., LLC**, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016)

decade after *Jones* was first filed), the Seventh Circuit, in August 2015, affirmed the lower court's grant of summary judgment,[3] and subsequently denied the plaintiffs' petition for rehearing *en banc*,[4] thereby finally bringing the high-profile *Jones* lawsuit to a close.

The only remaining pre-*Jones* section 36(b) lawsuit also came to a close in 2015 when, in September 2015, the Ninth Circuit upheld the trial court's dismissal of the lawsuit.[5]

As reported in prior *Claims Trends*, notwithstanding the high bar for liability inherent in the *Gartenberg* standard, the Supreme Court's ruling in *Jones* has not discouraged the plaintiffs' bar from initiating new section 36(b) challenges to fee arrangements involving registered funds. As of the date of publication of this *Claims Trends*, twenty-four section 36(b) lawsuits, involving twenty-one fund groups, have been filed since the Supreme Court's *Jones* decision.[6] In 2015 and early 2016 alone, seven new 36(b) lawsuits were filed.

All but five of the twenty-four post-*Jones* lawsuits remain active.[7] Of the nineteen active lawsuits, fourteen have progressed into or beyond the discovery phase of litigation. Notably, and as discussed below, in early 2016, one of these post-*Jones* lawsuits proceeded to a full trial—a rare occurrence in section 36(b) litigation. This marks the first section 36(b) lawsuit to proceed to trial in over six years.[8]

NEWER POST-*JONES* SECTION 36(B) LAWSUITS (FILED IN 2013-2016)

Nineteen of the twenty-four post-*Jones* section 36(b) lawsuits were first filed in 2013-2016. Seventeen of these more recent lawsuits remain pending in federal district courts.

The active lawsuits can largely be divided into two basic categories, both of which focus on disparities in fees paid to advisers and subadvisers. The first category, sometimes referred to as "**manager-of-managers**" lawsuits, focuses on the alleged disparities between fees paid to advisers and fees paid to unaffiliated subadvisers. The second category, sometimes referred to as "**subadvisory**" lawsuits, focuses on alleged disparities between fees charged by advisers for managing their *affiliated* funds and the lesser fees charged by those advisers in their roles as subadvisers to *unaffiliated funds*. A smaller number of the post-*Jones* cases largely rely on different theories (but may also include allegations based on manager-of-managers or subadvisory theories) in seeking to establish that the fees at issue are excessive, and are discussed in "Other lawsuits" below.

"Manager-of-managers" lawsuits: Of the nineteen post-*Jones* section 36(b) lawsuits filed between 2013 and 2016, eight target "manager-of-managers" arrangements.[9]

Motions to dismiss (i.e., motions in the early stage of litigation in which defendants challenge the adequacy of plaintiffs' allegations on purely legal grounds) are pending in two of these eight lawsuits.[10] To date, no motion to dismiss has been filed in a third (filed in January 2016).[11]

The other five manager-of-managers lawsuits are now in the discovery (fact-finding) stage of the litigation process. In three of these five lawsuits, the district courts denied the defendants' motions to dismiss.[12] In the other two lawsuits, the defendants opted not to file motions to dismiss.[13]

"Subadvisory" lawsuits: Six of the nineteen post-*Jones* lawsuits filed between 2013 and 2016 are "subadvisory" suits.[14]

In four of these, motions to dismiss have been denied in whole or in part, thereby allowing the lawsuits to continue.[15] In a fifth case, a motion to dismiss was filed in December 2015 and remains pending.[16] The most recent of the subadvisory lawsuits was filed at the end of 2015, and, to date, no motion to dismiss has been filed.[17]

Other lawsuits: Of the nineteen post-Jones section 36(b) lawsuits filed between 2013 and 2016, five cannot be characterized exclusively as either "manager-of-managers" or "subadvisory" lawsuits.[18]

One such lawsuit's allegations are similar to those set forth in *Jones* and contemporaneous cases. This lawsuit alleges that the adviser's fees charged to the affiliated fund are higher than those charged by the adviser to its institutional clients and further alleges that the adviser's fees are higher than those charged by other advisers to similarly managed unaffiliated funds. This lawsuit also alleges that the distribution fees charged to the fund are excessive.[19] The defendant's motion to dismiss, filed in June 2015, was denied in March 2016.[20]

A second of these lawsuits also alleges that the adviser's fees charged to the affiliated fund are higher than those charged by the adviser to its institutional clients, but adds an allegation that the adviser's fees are higher than those it charged to its similarly managed exchange-traded fund (ETF). The federal district court denied the defendant's motion to dismiss in August 2015.[21]

A third lawsuit involves fees charged by an adviser managing "funds-of-funds" (i.e., those mutual funds that invest solely in underlying mutual funds).[22] In this lawsuit, the plaintiff is not challenging the advisory fees charged by the adviser to the funds-of-funds (in which plaintiff is a shareholder), but rather focuses on fees charged by the underlying funds in which the funds-of-funds invest. In September 2014, the defendants' motion to dismiss was granted in part and denied in part (which had the effect of permitting the lawsuit to proceed). In February 2016, the district court granted the defendants' sealed motion for summary judgment, finding the plaintiff did not have standing to challenge the fees at issue because it was not a shareholder of the underlying funds.[23] In March 2016, the plaintiff filed an appeal with the Eighth Circuit.[24]

The remaining two lawsuits have concluded. One of the two lawsuits challenged the "split" between securities lending revenue paid to an ETF's adviser and its affiliate (which provided the securities lending services), a theory not shared by any other section 36(b) lawsuit. In September 2014, the Sixth Circuit upheld the district court's dismissal of the lawsuit, and the plaintiffs' petition for a writ of certiorari was denied by the U.S. Supreme Court in March 2015.[25] The second of these lawsuits was dismissed by stipulation of the parties in January 2016, a mere three months after it was filed.[26]

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

Five of the twenty-four post-*Jones* lawsuits were first filed in 2010-2011. Of these five lawsuits, two remain open.[27] Both can be characterized as "manager-of-managers" lawsuits.

In one of these lawsuits, the federal district court denied the parties' motions for summary judgment in August 2015. The parties proceeded to a "bench" trial (i.e., a trial held before a judge, and not a jury) in early January 2016,[28] which marked the first section 36(b) lawsuit to proceed to trial since 2009. After nearly two months, the parties concluded their cases in February 2016, with closing arguments scheduled to be delivered in late May 2016.[29] A decision by the

district court is not expected before the summer of 2016, at the earliest.

In the second of these older lawsuits, plaintiffs filed a motion for partial summary judgment, and defendants filed a motion for summary judgment, in June 2015. In March 2016, the district court granted in part and denied in part these motions.[30]

The other three post-*Jones* section 36(b) lawsuits filed in 2010-2011 have concluded. As reported in prior *Claims Trends*, two of these were closed by stipulation of the parties.[31] A third lawsuit—in which the plaintiffs had initially combined section 36(b) claims and another ICA claim with ERISA claims, and in which the lower court's dismissal of the ICA claims was affirmed by the Third Circuit in April 2012—came to a close in April 2015. At that time, the Supreme Court denied the plaintiffs' petition for a writ of certiorari with respect to the Third Circuit's September 2014 decision that affirmed the lower court's dismissal of the remaining ERISA claims.[32]

Other Developments in Fee Litigation

Over the years, fees in the fund industry have also been challenged under ERISA. Recent fee litigation arising under ERISA is described in more detail in the "ERISA" section below. As discussed in past *Claims Trends,* the fund industry has also seen fee challenges in derivative claims brought under state law for breach of fiduciary duty.

Disclosure

"Prospectus liability" lawsuits—i.e., shareholder class action lawsuits brought under the '33 Act—have periodically been a major source of potential liability for funds and their directors, officers, advisers, and principal underwriters. In some instances, these lawsuits have coincided with disruptions affecting industry sectors or the broader market. A number of such lawsuits were filed, for example, in the wake of the "dot-com" collapse in 2000 and then again (as discussed below) during the 2007-2009 subprime/credit crisis period.[33]

During the period 2010-2014, no noteworthy new prospectus liability lawsuits were filed under the '33 Act against fund industry defendants. In 2015 and early 2016, however, several new prospectus liability lawsuits were filed. These new lawsuits have arisen from discrete issues at a small number of fund complexes.

Plaintiffs have also filed a small number of new lawsuits challenging fund disclosure under the '34 Act (as opposed to under the '33 Act). As discussed below, plaintiffs have historically had limited success in bringing these types of lawsuits against fund industry defendants.

Prospectus Liability Lawsuits

2015-2016 PROSPECTUS LIABILITY LAWSUITS

Following a five-year lull, several new prospectus liability lawsuits involving the fund industry have been filed in past year. In May 2015, a lawsuit was filed in federal district court in connection with an adviser's use of allegedly improper performance data in the public filings and marketing materials for a registered investment company. This lawsuit, brought against the fund, its directors (including independent directors) and officers, and its investment adviser, subadviser, and distributor, alleges '33 Act violations (as well as '34 Act

violations).[34] A motion to dismiss is pending in this case.[35]

In early 2016, in the wake of the suspension of redemptions by a high-yield bond fund in December 2015, prospectus liability lawsuits were filed that generally name the fund, its directors (including independent directors) and officers, and its investment adviser and distributor as defendants. These lawsuits, which allege '33 Act violations with respect to misrepresentations and omissions in offering documents, remain in their early stages.[36] Motions to transfer the various lawsuits to the same federal district court are pending.[37]

SUBPRIME/CREDIT CRISIS-RELATED LAWSUITS

As discussed in prior *Claims Trends,* in 2007-2009, a number of fund groups were involved in lawsuits that challenged the adequacy of disclosure provided by certain fixed-income funds that had significantly underperformed their peers during the subprime/credit crisis period. Most of these prospectus liability lawsuits have now effectively concluded, with a number having involved multi-million dollar settlements. In one of the longest-running of these lawsuits, the district court preliminarily approved a $125 million settlement in November 2015; a motion for final approval remains pending.[38] To date, settlement amounts approved or preliminarily approved by the courts in these prospectus liability lawsuits from the subprime/credit crisis period collectively total over $650 million.[39]

Other Disclosure-Based Litigation ('34 Act)

Fund shareholders have also challenged disclosure in class action "securities fraud" lawsuits brought under section 10(b) of the '34 Act and rule 10b-5 thereunder. Because these lawsuits are subject to various legal requirements that can be difficult for shareholders to satisfy in the mutual fund context,[40] plaintiffs have historically had limited success in pursuing these lawsuits against fund industry defendants.

In a class action lawsuit originally filed in January 2015 in federal district court in California, the plaintiffs alleged that an investment adviser to a registered fund violated section 10(b) and rule 10b-5 thereunder by investing in excess of an investment restriction set forth in the fund's prospectus.[41] The plaintiffs filed an amended complaint in July 2015. The amended complaint dropped the section 10(b) and rule 10b-5 claim, and was restyled as a state law action in an apparent effort to capitalize on the Ninth Circuit's controversial decision (discussed below under "Litigation under State Law") in a long-running credit crisis-related lawsuit. The district court granted the defendants' motion to dismiss the amended complaint in November 2015. An appeal to the Ninth Circuit remains pending.[42]

As noted above, '34 Act violations (in addition to '33 Act violations) were alleged in a class action lawsuit filed in May 2015 against a fund, its directors (including independent directors) and officers, and its investment adviser, subadviser, and distributor, in connection with the adviser's use of allegedly improper performance data in the public filings and marketing materials for a registered investment company.[43] A motion to dismiss is pending in this case.[44]

Litigation under State Law

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

2015-2016 State Law Actions

A derivative lawsuit filed in New York state court in January 2016 alleges that, by permitting a mutual fund to exceed its stated concentration limits in certain securities, the fund's directors (including independent directors) and investment adviser breached their fiduciary duties, and the investment adviser breached its contractual obligations to the fund.[45] The lawsuit remains pending.

A second derivative lawsuit, originally filed in New York state court in February 2016, follows the suspension of redemptions by a high-yield bond fund in December 2015.[46] (This event also gave rise to recent prospectus liability litigation, as discussed under "Prospectus Liability Lawsuits" above.) This derivative lawsuit alleges that a fund's investment adviser and certain officers (one of whom is also an interested director) committed breaches of fiduciary duty and breach of contract by failing to ensure that the fund had sufficient liquidity in its portfolio to meet redemption requests from fund shareholders. The proceeding has since been removed to federal court and remains in its early stages.[47]

In a third derivative lawsuit, filed in federal district court in February 2016, shareholders allege that the investment advisers to two mutual funds, as well as fund officers and directors (including independent

Recent Ninth Circuit Activity of Interest

2015 witnessed developments in a long-running credit crisis-related lawsuit (originally filed in 2008) that may have significant potential implications for mutual funds and their advisers. In its latest form, the lawsuit alleged, among other things, that, in causing a fund to deviate from a fundamental investment objective, the fund, its directors (including independent directors), and its investment adviser committed breaches of fiduciary duty, contract, and the covenant of good faith and fair dealing. In March 2015, in reversing the district court's dismissal of state law claims, the Ninth Circuit made three significant findings—(1) that fund shareholders could bring direct class action claims against advisers and directors for breach of fiduciary duty; (2) that fund shareholders could seek to enforce a fund prospectus' terms through state law claims for breach of contract; and (3) that fund shareholders could sue the adviser directly in their capacity as third-party beneficiaries to the management contract between the fund and the adviser. The Ninth Circuit denied the defendants' petition for rehearing and rehearing *en banc* in April 2015.[48]

At that time, some industry observers criticized the decision as departing from well-established law governing mutual funds, and voiced concerns that the decision's reasoning, if adopted more widely, could introduce new legal avenues (i.e., new state law-based avenues) for use by the plaintiffs' bar in pursuing fund industry defendants.[49]

In the year since the Ninth Circuit's decision, there have been developments in the lawsuit that may help to blunt its potential longer-term impact. In October 2015, the U.S. Supreme Court denied the defendants' petition for a writ of certiorari.[50] On the same day, the district court dismissed with prejudice the breach of contract and third-party beneficiary claims in the lawsuit on the grounds that they were barred by SLUSA. At that time, the district court did not dismiss the breach of fiduciary duty claims, citing procedural flaws. In February 2016, however, the district court granted the defendants' motion for judgment on the pleadings, finding that the fiduciary duty claims were also barred by SLUSA. The plaintiffs have since appealed the district court's decision to the Ninth Circuit, where the appeal remains pending.[51]

directors) committed breaches of fiduciary duty and contract with respect to the funds' alleged investments in a start-up boxing promotion company.[52] This lawsuit remains pending.

In other state law actions, a business development company (BDC) was targeted in late 2015 in two lawsuits filed in the same federal district court. These lawsuits alleged common law claims in connection with a proxy contest relating to the proposed sale of the BDC's investment adviser to a third party. In the first lawsuit, an adviser competing for the advisory contract alleged that misrepresentations in the BDC's proxy statement and other public communications regarding the proposed sale constituted violations of federal and common law.[53] The second lawsuit was a purported class action brought on behalf of the BDC's shareholders, asserting similar allegations under federal and common law to those asserted in the competing adviser's lawsuit.[54] Both of these lawsuits were voluntarily dismissed in February 2016.[55]

Fund Investments in Gambling Industry Securities

Since 2008, *Claims Trends* has been following a number of federal lawsuits against several fund groups, which originally alleged that fund investments in online gambling companies constituted illegal racketeering under RICO. Most of these federal lawsuits were dismissed,[56] but certain plaintiffs refiled the suits in state courts or other federal courts, alleging that the investments violated state or common law.

One such refiled lawsuit had concluded in state court in January 2012,[57] and was subsequently filed yet again in federal court in June 2013. Upon the federal district court's dismissal of the lawsuit in January 2015, the dismissal was appealed to the Third Circuit in March 2015, where the appeal remains pending.[58]

In two other related gambling securities lawsuits involving another fund group, the Eighth Circuit affirmed a lower court's dismissal of one of the lawsuits in March 2013. The plaintiff then refiled his complaint in a federal district court in March 2014, and in December 2015, the district court issued a final approval of the parties' settlement.[59] In the second lawsuit, a federal district court granted summary judgment in April 2014,[60] and in August 2015, the Eighth Circuit affirmed the district court's ruling.[61]

A similar gambling securities lawsuit involving a third fund group was refiled in state court and dismissed in November 2013. The dismissal was appealed in March 2014,[62] and in December 2015, a state appellate court affirmed the dismissal.[63]

Regulatory Enforcement

In its 2015 fiscal year, the SEC continued to pursue an aggressive enforcement agenda, bringing a record 807 enforcement actions overall.[64] Although the SEC did not specify, as it has in the past, the number of enforcement actions brought in the asset management space, it has described fiscal year 2015 as "an active year" in matters involving advisers and funds.[65] A review of the enforcement actions over the past year indicates that the SEC's Division of Enforcement continues to focus substantial attention on the activities of both investment advisers and registered investment companies.

SEC Enforcement Actions

Over the past fifteen months, the SEC has brought enforcement actions against advisers and others, including fund officers and affiliated service providers, with respect to both registered fund activities and non-registered fund activities.

A number of the recent SEC administrative proceedings in the asset management area illustrate certain broader SEC themes:

- ***Compliance:*** Several SEC administrative proceedings in 2015 focused on compliance issues (including on the role of chief compliance officers (CCOs)). These actions involved: (1) the adoption and implementation of compliance policies and procedures;[66] (2) annual compliance reviews;[67] and (3) the implementation and enforcement of provisions of adviser's compliance policies and procedures and code of ethics.[68]

- ***Distribution:*** In September 2015, following a long-running sweep examination on fund distribution payments (often referred to as "distribution in guise") by OCIE, the SEC brought its first administrative proceeding against an adviser and its affiliated distributor for improper use of fund assets in distributing mutual fund shares.[69] A recent public filing by another fund group suggests that there may be ongoing enforcement interest by the SEC in this area.[70]

- ***Cybersecurity:*** In its first cyber-related administrative proceeding, which arose out of an examination conducted by OCIE, the SEC found in September 2015 that an adviser violated the ICA and IAA by failing to adopt written policies and procedures reasonably designed to protect customer records and information.[71]

- ***Conflicts of Interest:*** Over the past fifteen months, the SEC has brought administrative proceedings for failure to disclose conflicts of interest with respect to (1) preferential investments in a firm's proprietary products;[72] (2) a portfolio manager's senior loan to funds;[73] (3) outside business interests of a fund's portfolio manager;[74] (4) failure to disclose compensation arrangements;[75] and (5) preferential treatment of certain clients through pre-arranged trades.[76]

Administrative proceedings initiated or resolved by the SEC in 2015 and early 2016 against advisers of registered funds, advisory personnel, and/or fund officers also involved a variety of other issues, including: custody rule violations;[77] failure to disclose changes in investment strategy;[78] the use of hypothetical performance in fund advertising;[79] the advisory and distribution agreement renewal process;[80] and improper processing of purchase and redemption orders.[81]

SEC administrative proceedings were also initiated or resolved against fund advisers and/or advisory

SEC Proceedings and Private Civil Litigation

Regulatory proceedings may be linked with private civil litigation. During the 2003-2004 market timing scandal period, for example, numerous private civil lawsuits were brought against fund groups in the aftermath of regulatory actions by the SEC and other authorities.

A recent series of SEC proceedings and civil lawsuits illustrates the sometimes complex interrelationships between the two. In 2014, the SEC settled proceedings against a subadviser to certain mutual funds with respect to the performance track record for an ETF sector rotation strategy.[82] In May 2015, shareholders of the subadvised funds brought a prospectus liability lawsuit against the funds' adviser and subadviser.[83] In June 2015, a former employee of the subadviser filed a lawsuit against the adviser alleging violations of section 10(b) of the '34 Act and rule 10b-5 thereunder.[84] Thereafter, in November 2015, the SEC settled proceedings against the funds' adviser.[85]

personnel with respect to their *non*-registered fund activities. These proceedings likewise involved a variety of issues, including: custody rule violations;[86] failure to provide investors with audited financial statements;[87] and valuation.[88]

SEC Examination Priorities

Insight into potential future enforcement risks may also be gained through a review of the SEC's examination priorities and other communications from the SEC and its staff. On an annual basis, the SEC staff formally communicates its examination priorities through OCIE's National Exam Program Examination Priorities.[89] In its 2016 examination priorities, OCIE identified its three overarching themes: protecting retail investors, assessing market-wide risks, and using data analytics. In particular, OCIE indicated a focus on ETFs, liquidity controls, and retirement investing.[90]

In addition to its annual list of examination priorities, OCIE issues periodic risk alerts that provide insight into its examination findings and priorities. In November 2015, OCIE described the results of examinations conducted in response to the "growing trend in the investment management industry" of outsourcing compliance activities, including the roles of CCOs themselves.[91]

OCIE also initiates targeted "sweep" examinations from time to time in response to market and/or industry developments, and these examinations may result in referrals to the Division of Enforcement. For example, the recent collapse of a bond fund reportedly spurred OCIE to conduct unscheduled examinations of high-yield bond funds.[92] OCIE's "distribution in guise" sweep examinations also informed the Division of Investment Management's January 2016 guidance on distribution/sub-accounting fee payments.[93]

Other Regulators

The SEC is not the only regulator that may institute enforcement actions involving registered funds or their affiliated service providers. Others include FINRA, the CFTC, state securities regulators, and foreign regulators.

FINRA, which conducts exams of broker-dealers, has indicated that its annual priorities for 2016 include management of conflicts of interest, technology (e.g., cybersecurity and technology management), outsourcing, liquidity, and ETFs.[94]

The CFTC, which regulates the trading of commodities (including many futures and derivatives), has disclosed its 2016 priorities through public statements. Among the CFTC's 2016 focus areas are cybersecurity, stress testing, recovery

Cybersecurity Remains a Top SEC Priority

A prior *Claims Trends* reported on OCIE's 2014 "Cybersecurity Initiative," and described OCIE's proposed examinations to assess the cybersecurity preparedness of broker-dealers and registered investment advisers. In February 2015, OCIE discussed the preliminary results of its examinations.[95] In September 2015, OCIE announced that it would be conducting a second round of examinations focusing on "cyber preparedness," including an adviser's ability to protect client information.[96] OCIE has stated that the second round of examinations will focus on six areas: governance and risk assessment; access rights and controls; data loss prevention; vendor management; training; and incident response. To assist registrants, OCIE has provided a sample list of information and documents that might be requested.

The Division of Investment Management issued separate guidance in April 2015 with respect to actions that funds and advisers might wish to take to address cybersecurity risks. These actions include conducting periodic cybersecurity assessments; creating strategies designed to prevent, detect, and respond to cybersecurity threats; and implementing these strategies through written policies and procedures and training.[97] In a recent interview, the Director of the Division of Enforcement also identified cybersecurity (particularly with respect to safeguarding customer information) as an enforcement priority for 2016.[98]

planning, automated trading, and improved data reporting.[99]

Portfolio Management Errors

Since ICI Mutual's formation in 1987, approximately 10% of all claim amounts paid by ICI Mutual have been for "costs of correction" claims—i.e., insurance claims by advisers for payments made by them, outside the litigation context, to remedy operational errors that have resulted in losses to funds or private accounts. Generally, "costs of correction" insurance coverage permits an insured entity to be reimbursed for costs incurred to correct an operational error, provided that the insured entity has actual legal liability for the resulting loss.[100]

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

- Several mutual funds followed a certain asset allocation model. After multiple changes to the asset allocation model had been made, the investment adviser inadvertently sent a stale version of conforming trade estimates to the subadvisers for the funds. As a result, securities were oversold for one fund, and undersold for the others. *Total Loss: $3.4 million.*

- An investment adviser erroneously treated a particular security included in the model investment strategy as an investment prohibited under a client account's investment restrictions. *Total Loss: $1.7 million.*

- The portfolio manager at an adviser for a mutual fund sought to establish a short position in one security. To avoid causing the fund to exceed its limit on short positions, the portfolio manager instructed that the fund's short position in another security be reduced. Due to a misunderstanding by the trading group of the portfolio manager's instructions, the short position in the second security was reduced by a larger-than-intended amount. *Total Loss: $2.8 million.*

- The portfolio manager for two accounts (a registered fund and a private account), which followed the same investment mandate, sought to enter a trading instruction (involving several securities) for the two accounts. Instead of entering the trading instruction for both accounts, the portfolio manager entered the instruction for only one account. *Total Loss: $1.5 million.*

This loss history demonstrates the continued importance to fund groups of close attention to policies, procedures, and the use of technology designed to prevent and detect operational mistakes and oversights.

Other Litigation Developments

In addition to the fee and disclosure lawsuits already discussed, 2015-2016 also saw several other noteworthy litigation developments.

ERISA

As is the case with excessive fee lawsuits under section 36(b) of the ICA, recent years have witnessed an increase in the frequency of ERISA-based class action lawsuits involving fund advisers

and affiliates. A number of these lawsuits fall into one of two categories: (1) "fee-based lawsuits" challenging fees and compensation received directly or indirectly by fund advisers and affiliates that act as plan service providers, and (2) "mismanagement" lawsuits against fund advisers and affiliates that act as plan "fiduciaries."

FEE-BASED LAWSUITS

2015 saw significant developments in a number of fee-based ERISA lawsuits discussed in prior *Claims Trends*, as well as the filing of new lawsuits of this type. One long-running lawsuit in which plaintiffs alleged excessive fees under both section 36(b) and ERISA finally came to a conclusion when the Supreme Court denied the plaintiffs' petition for certiorari in April 2015.[101] In two other older fee-based ERISA lawsuits, the defendant's renewed motion to dismiss remains pending in one;[102] and the Eighth Circuit affirmed the district court's dismissal in a second.[103]

New fee-based lawsuits involving fund advisers and/or affiliates were also filed in 2015-2016, alleging that the defendants breached their fiduciary duties with respect to sponsoring and/or administering their own retirement plans. Several of these lawsuits allege that a plan fiduciary invested plan assets in high-cost proprietary mutual funds, without providing lower-cost options. Motions to dismiss are pending in most of these lawsuits, and a motion to dismiss was granted in another of these lawsuits.[104] (In a similar lawsuit filed in 2011, a federal district court granted final approval of a settlement in July 2015.[105]) Another lawsuit challenges the excessive "layers of fees" charged by the unregistered funds offered as plan investment options. The defendants' motion for judgment on the pleadings remains pending in this lawsuit.[106]

Two additional fee-based ERISA lawsuits involving fund advisers and/or affiliates filed in late 2015 and early 2016 allege that the plan sponsors/administrators breached their fiduciary duties to the retirement plans through their negotiation of revenue sharing fees, which plaintiffs argue had the effect of increasing the overall management fees of the mutual funds in which the plans invested.[107] Each of these lawsuits is in its early stages of litigation.

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 notable ERISA decision from outside of the mutual fund industry, the U.S. Supreme Court vacated and remanded a Ninth Circuit decision in July 2015. The Supreme Court held that an ERISA fiduciary's duty of prudence includes—"separate and apart from [a] duty to exercise prudence in selecting investments at the outset"—a "continuing duty to monitor plan investments and eliminate those that are no longer prudent."[108] The remanded lawsuit remains pending before the Ninth Circuit.

Some observers have suggested that this decision might lead to more cases being initiated against plan fiduciaries for failure to monitor plan investments.[109] While the ultimate impact of the Supreme Court's decision remains to be seen, one such lawsuit was filed in late 2015. Citing the Supreme Court's recent decision, plaintiffs allege that the trustee (a fund group entity) intentionally mismanaged plan assets by allowing the assets to remain in a high-cost, low-performing collective investment trust.[110]

OTHER ERISA LAWSUITS

Fund groups have also been involved in other lawsuits brought under ERISA. As reported in prior *Claims Trends*, two fund group defendants—one, the directed trustee and recordkeeper for ERISA plans, and the other, an investment adviser for the mutual funds offered as investment options—were involved in an ERISA lawsuit in which the plaintiffs challenged both fees and the handling of "float income" (i.e., the short-term income earned on plan assets cashed out by participants). In March 2012, the district court found, among other things, that the fund group defendants were ERISA "fiduciaries" (but not with respect to excessive fees) and that they breached their fiduciary duties to the plan with respect to the handling of float income.[111] In March 2014, the Eighth Circuit vacated the federal district court's decision, ruling that, because the plaintiffs failed to demonstrate that the float income was a plan asset, the district court had erred in finding that the fund group defendants had breached their fiduciary duties.[112] On remand, in July 2015, the district court ruled in favor of the defendants.[113] Plaintiffs' appeal of the district court's 2015 decision remains pending before the Eighth Circuit.[114]

In early 2013, a number of plaintiffs brought similar allegations in another federal district court against entities in the same fund group for the treatment of float income. In December 2013, four of the cases were consolidated, and an amended complaint was filed in October 2014. In March 2015, the district court granted the defendants' motion to dismiss the amended complaint.[115] An appeal of the district court's decision remains pending before the First Circuit.[116]

Bankruptcy Claims Involving Portfolio Securities

Mutual funds have occasionally been ensnared in proceedings arising from corporate bankruptcies, typically for no reason other than the funds' status as passive holders or former holders of securities of the bankrupt issuers. In these proceedings, sometimes referred to as "clawback" suits, bankrupt issuers and/or their creditors often seek a return of pre-bankruptcy payments made to security holders or other creditors, including funds.

A number of bankruptcy proceedings (including proceedings arising out of the bankruptcies of the Tribune Company, the Lyondell Chemical Company, and General Motors) have named numerous funds as parties.[117] These proceedings raise a number of legal issues, including issues regarding the legal right (or "standing") of the plaintiffs to prosecute their claims, the timeliness of the plaintiffs' claims, and the applicability to the plaintiffs' claims of a "safe harbor" defense in the federal bankruptcy code for "settlement payments."

Both the Tribune and Lyondell proceedings involve state law "constructive fraudulent conveyance" and "intentional fraudulent conveyance" claims. In September 2013, a federal district court in Tribune granted the defendants' motions to dismiss the constructive fraudulent conveyance claims, but left open the possibility that plaintiffs could re-file the claims at a later date.[118] In March 2016, in affirming the district court's dismissal (but on different grounds), the Second Circuit ruled that federal bankruptcy law does not permit individual creditors to bring constructive fraudulent transfer claims to unwind securities "settlement payments."[119]

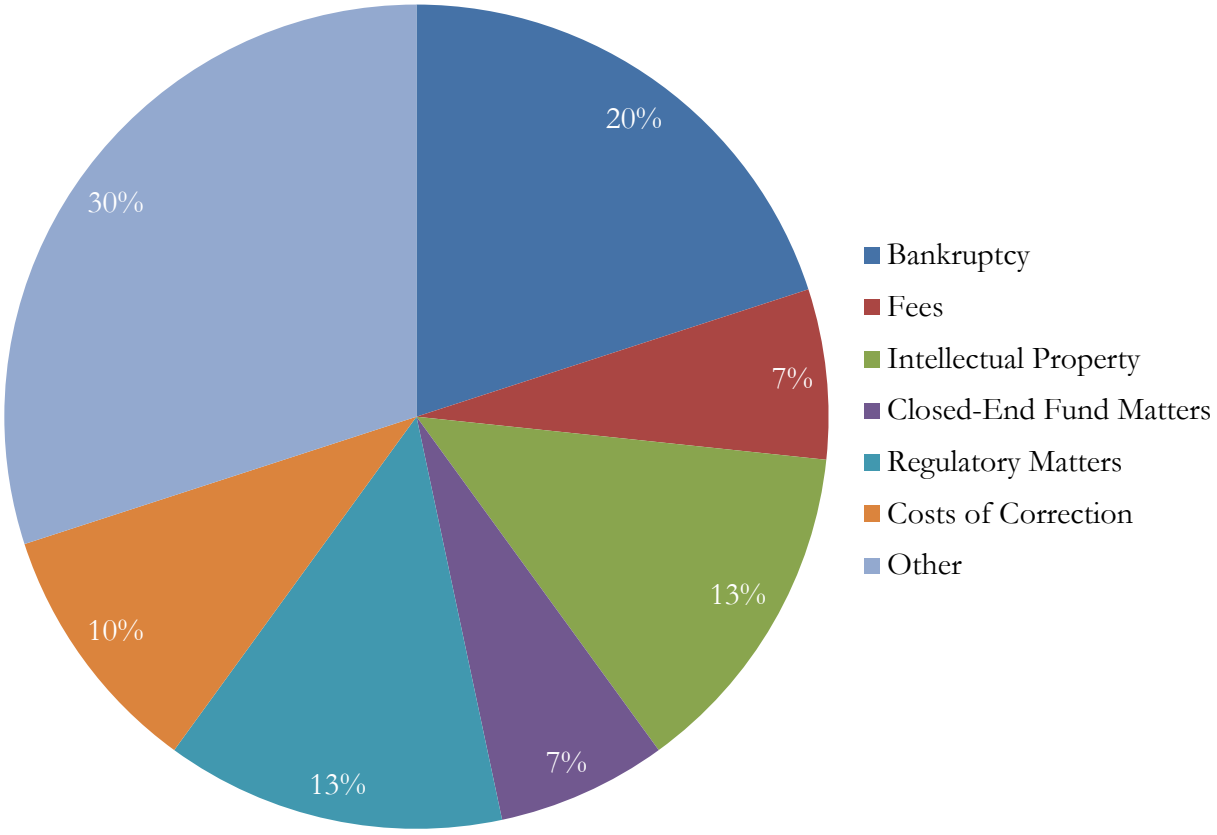
In Lyondell, the bankruptcy court in January 2014 denied the defendants' motion to dismiss the state law constructive fraudulent conveyance claims. The court granted the defendants' motion to dismiss the state law intentional fraudulent conveyance claims, but gave the plaintiffs permission to replead these claims to correct their deficiencies. An amended complaint was filed in April 2014 followed by motions to dismiss in August 2014.[120] In November 2015, the court dismissed the claims for intentional fraudulent transfer, but once again declined to dismiss the claims for constructive fraudulent transfer.[121]

In the General Motors bankruptcy, various lenders (including a number of mutual funds) held interests in a term loan secured by collateral subject to a security interest. Due to an apparent clerical error, the security interest in certain collateral for the term loan was inadvertently released by the administrator for the term loan.[122] The committee of unsecured creditors of General Motors initiated an action, in effect, seeking a determination that the lenders should be treated as unsecured creditors. Concluding that the release of the security interest was unauthorized, the bankruptcy court granted summary judgment in favor of the defendants in March 2013.[123] On appeal, the Second Circuit reversed the bankruptcy court's decision in January 2015, and remanded the proceeding to the bankruptcy court.[124] An amended complaint, which names a number of mutual funds as defendants, was filed in May 2015. The matter remains pending.[125]

D&O/E&O Claims Data

D&O/E&O Notices by Subject (2015)

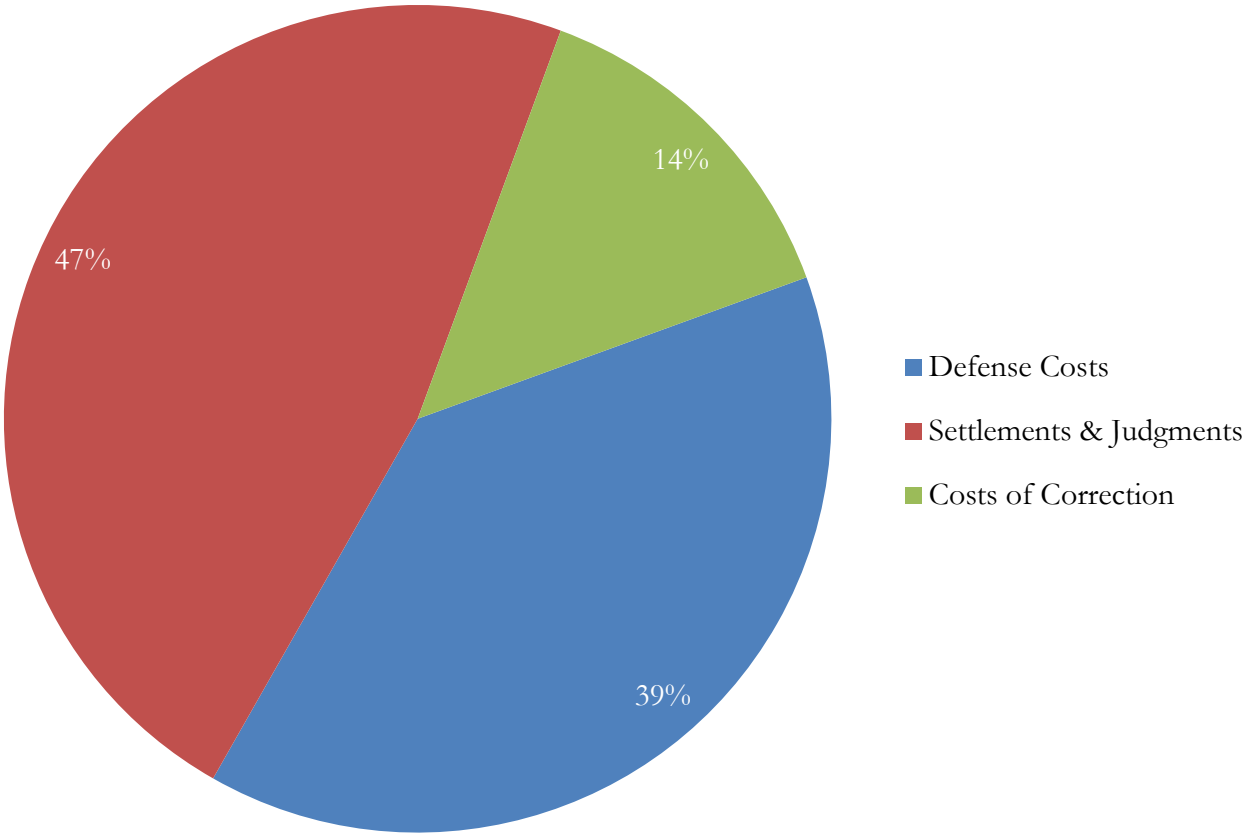
Bankruptcy matters, followed by intellectual property and regulatory matters, constituted the most common subject of claims notices provided under ICI Mutual D&O/E&O policies in 2015. As shown in the chart below, a substantial percentage of notices received (the "Other" category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2006-2015)

The chart below shows the breakdown of payments (i.e., defense costs, settlements and judgments, and costs of correction) made by ICI Mutual on claims submitted over the ten-year period from January 1, 2006 through December 31, 2015 under ICI Mutual D&O/E&O policies.



Endnotes

1 15 U.S.C. § 80a-35(b) (2007).

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

3 Jones v. Harris Assocs. L.P., 611 Fed. Appx. 359 (7th Cir. Aug. 6, 2015). In its opinion, the Seventh Circuit apologized for the delay, explaining, "The court's internal system for tracking cases under advisement does not include remands from the Supreme Court, so the normal process of alerts and ticklers failed. We will see to it that this is fixed. That may be small comfort to these litigants and their lawyers, but at least some good will come from the delay." *Id.* at 362.

4 Jones v. Harris Assocs. L.P., No. 07-1624 (7th Cir. Oct. 13, 2015) (order denying petition for rehearing *en banc*).

5 In this lawsuit, the district court in March 2013 refused to reconsider its earlier dismissal of the plaintiff's complaint. Turner v. Davis Selected Advisers, L.P., No. 4:08-cv-421 (D. Ariz. Mar. 19, 2013) (order denying motion to alter or amend the judgment). In September 2015, the Ninth Circuit affirmed the district court's dismissal, 626 Fed. Appx. 713 (9th Cir. Sept. 29, 2015).

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

7 Five of these post-*Jones* lawsuits have concluded. *See* Laborers' Local 265 Pension Fund v. iShares Trust, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied* (U.S. Mar. 2, 2015) (No. 14-771); Santomenno v. John Hancock Life Ins. Co., 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011) (dismissed as to section 36(b)) & No. 2:10-cv-1655 (D.N.J. Aug. 24, 2013) (dismissed as to ERISA), *aff'd*, 677 F.3d 178 (3d Cir. 2012) (as to section 36(b)) & 768 F.3d 284 (3d Cir. 2014) (as to ERISA), *reh'g denied*, No. 13-3467 (3d Cir. Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (U.S. Apr. 20, 2015) (No. 14-1054); Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. Aug. 23, 2012) (order dismissing lawsuit with prejudice pursuant to a stipulation of the parties); Southworth v. Hartford Inv. Fin. Servs. LLC, No. 10-cv-878 (D. Del. filed Oct. 14, 2010) (voluntarily dismissed by the plaintiffs in November 2011); Wayne County Employees' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (order dismissing lawsuit with prejudice pursuant to a stipulation of the parties).

8 *See* Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. filed Mar. 31, 2010) (trial commenced in January 2016). The last section 36(b) lawsuit to proceed to trial was In re Am. Mut. Funds Fee Litig., U.S. Dist. LEXIS 120597 (C.D. Cal. Dec. 28, 2009) (trial held in 2009), *aff'd sub nom.*, Jelinek v. Capital Research & Mgmt. Co., 448 Fed. Appx. 716, 2011 U.S. App. LEXIS 17821 (9th Cir. 2011).

9 *See* In re Voya Global Real Estate Fund S'holder Litig., No. 1:13-cv-01521 (D. Del. filed Aug. 30, 2013); In re Russell Inv. Co. S'holder Litig., No. 1:13-cv-12631 (D. Mass. filed Oct. 17, 2013); Curd v. SEI Invs. Mgmt. Corp., No. 2:13-cv-7219 (E.D. Pa. filed Dec. 11, 2013); Zehrer v. Harbor Capital Advisors, Inc., No. 1:14-cv-789 (N.D. Ill. filed Feb. 4, 2014); Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014); Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 1:15-cv-1303 (C.D. Ill. filed July 22, 2015); North Valley GI Med. Group v. Prudential Invs. LLC, No. 1:15-cv-3268 (D. Md. filed Oct. 16, 2015); Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016).

[10] Ingenhutt v. State Farm Inv. Mgmt. Corp., No. 1:15-cv-1303 (C.D. Ill. Dec. 15, 2015) (motion to dismiss filed); North Valley GI Med. Group v. Prudential Invs. LLC, No. 1:15-cv-3268 (D. Md. Jan. 29, 2016) (motion to dismiss filed).

[11] Obeslo v. Great-West Capital Mgmt., LLC, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016). In this case, plaintiffs' complaint not only alleges manager-of-managers fee disparities, but also includes fund-of-funds allegations regarding defendants' investments in proprietary underlying funds.

[12] Curd v. SEI Invs. Mgmt. Corp., No. 2:13-cv-7219, 2015 U.S. Dist. LEXIS 90940 (E.D. Pa. July 14, 2015) (order denying motion to dismiss); Zehrer v. Harbor Capital Advisors, Inc., No. 1:14-cv-789, 2014 U.S. Dist. LEXIS 162060 (N.D. Ill. Nov. 18, 2014) (order denying motion to dismiss); Redus-Tarchis v. N.Y. Life Inv. Mgmt., No. 14-cv-7991, 2015 U.S. Dist. LEXIS 146007 (D.N.J. Oct. 28, 2015) (order denying motion to dismiss). An analogous case, filed in November 2013, similarly focuses on the comparative level of fees paid to advisers and to subadvisers, but does so in the ERISA context rather than under section 36(b). Gordan v. Mass. Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. filed Nov. 5, 2013) (motion to dismiss filed on Mar. 14, 2014 was denied without prejudice on Mar. 30, 2015; plaintiffs filed a renewed motion to dismiss on July 2, 2015, which remains pending).

[13] In re Voya Global Real Estate Fund S'holder Litig., No. 1:13-cv-01521 (D. Del. filed Aug. 30, 2013); In re Russell Inv. Co. S'holder Litig., No. 1:13-cv-12631 (D. Mass. filed Oct. 17, 2013).

[14] *See* In re BlackRock Mut. Funds Advisory Fee Litig., No. 3:14-cv-01165 (D.N.J. filed Feb. 21, 2014); Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 2:14-cv-414 (S.D. Ohio filed May 5, 2014); Kennis v. First Eagle Inv. Mgmt., LLC, No. 1:14-cv-00585 (D. Del. filed May 7, 2014); In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014); Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015); Ventura v. Principal Mgmt. Corp., No. 4:15-cv-00481 (S.D. Iowa filed Dec. 30, 2015).

[15] Kennis v. First Eagle Inv. Mgmt., LLC, No. 1:14-cv-00585, 2015 U.S. Dist. LEXIS 167849 (D. Del. Dec. 8, 2015) (order denying motion to dismiss); In re Davis N.Y. Venture Fund Fee Litig., No. 14-cv-4318, 2015 U.S. Dist. LEXIS 155821 (S.D.N.Y. Nov. 18, 2015) (order denying motion to dismiss); In re BlackRock Mut. Funds Advisory Fee Litig., No. 3:14-cv-01165, 2015 U.S. Dist. LEXIS 39514 (D.N.J. Mar. 27, 2015) (order denying motion to dismiss); Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 2:14-cv-414, 2015 U.S. Dist. LEXIS 26361 (S.D. Ohio Mar. 4, 2015) (order denying motion to dismiss).

In October 2015, a second complaint similar to *Goodman* was filed and named the same investment adviser as in *Goodman*, but also named the funds' administrator and sub-administrator as defendants. Campbell Family Trust v. J.P. Morgan Inv. Mgmt., Inc., No. 2:15-cv-02923 (S.D. Ohio filed Oct 16, 2015). *Campbell* was consolidated into *Goodman* in February 2016. In February 2016, the district court granted in part and denied in part a motion to dismiss filed in *Campbell* prior to its consolidation. The district court dismissed the action against the sub-administrator, but not the administrator. Goodman v. J.P. Morgan Inv. Mgmt., Inc., No. 2:14-cv-414, 2016 U.S. Dist. LEXIS 23815 (S.D. Ohio Feb. 26, 2016) (order granting in part and denying in part motion to dismiss).

[16] Kennis v. Metro. West Asset Mgmt., LLC, No. 15-cv-8162 (C.D. Cal. Dec. 18, 2015) (motion to dismiss filed).

[17] Ventura v. Principal Mgmt. Corp., No. 4:15-cv-00481 (S.D. Iowa filed Dec. 30, 2015).

[18] *See* Wayne County Employees' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015); Chill v. Calamos Advisors, LLC, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015); Kenny v. Pac. Inv. Mgmt. Co., No. 2:14-cv-1987 (W.D. Wash. filed Dec. 21, 2014); Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 4:14-cv-00044 (N.D. Ala. filed Aug. 28, 2013); Laborer's Local 265 Pension Fund v. iShares Trust, No. 13-cv-00046 (M.D. Tenn. filed Jan. 18, 2013).

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

[20] Chill v. Calamos Advisors, LLC, No. 15-cv-1014, 2016 U.S. Dist. LEXIS 39954 (S.D.N.Y. Mar. 28, 2016) (order denying motion to dismiss).

[21] Kenny v. Pac. Inv. Mgmt. Co. LLC, No. 2:14-cv-1987 (W.D. Wash. Aug. 26, 2015) (order denying motion to dismiss).

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

[23] Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 4:14-cv-00044 (S.D. Iowa Feb. 3, 2016) (order granting motion for summary judgment).

[24] Am. Chems. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp., No. 16-1580 (8th Cir. filed Mar. 8, 2016).

[25] Laborer's Local 265 Pension Fund v. iShares Tr., No. 13-cv-00046, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, (U.S. Mar. 2, 2015) (No. 14-771).

[26] Wayne County Employees' Ret. Sys. v. Fiduciary Mgmt. Inc., No. 15-cv-1170 (E.D. Wis. Jan. 4, 2016) (order dismissing lawsuit with prejudice pursuant to a stipulation of the parties). On the same day that the case was dismissed, the adviser named in the lawsuit announced a reduction in its advisory fee and added breakpoints for the fund at issue. *See* Emile Hallez, *FMI Lowers Fund Fees, Lawsuit Dismissed*, IGNITES (Jan. 6, 2016), http://ignites.com/c/1266783/142053/lowers_fund_fees_lawsuit_dismissed.

[27] Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Aug. 6, 2015) (order denying motions for summary judgment); Kasilag v. Hartford Inv. Fin. Servs. LLC, No. 1:11-cv-1083, 2016 U.S. Dist. LEXIS 47063 (D.N.J. Mar. 24, 2016) (order granting in part and denying in part the defendants' motion for summary judgment and the plaintiffs' motion for partial summary judgment). The lawsuits that have closed are Reso v. Artisan Partners Ltd. P'ship, No. 11-cv-873 (E.D. Wis. filed Sept. 16, 2011), *closed per stipulation* (Aug. 23, 2012); Santomenno v. John Hancock Life Ins. Co., 677 F.3d 178 (3d Cir. 2012), *cert. denied* (U.S. Apr. 20, 2015) (No. 14-1054); Southworth v. Hartford Inv. Fin. Serv., LLC, No. 1:10-cv-00878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011).

[28] Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Aug. 6, 2015) (order denying motions for summary judgment). In early 2013, a similar section 36(b) complaint was filed against the same fund group and was subsequently consolidated into Sivolella. Sanford v. AXA Equitable Funds Mgmt. Group, LLC, No. 3:13-cv-312 (D.N.J. filed Jan. 15, 2013). On April 15, 2013, the plaintiffs filed a second amended complaint, in which they also challenged, under section 36(b), the administrative fees paid.

[29] Sivolella v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (D.N.J. Mar. 2, 2016) (order regarding scheduling and post-trial filings).

[30] Kasilag v. Hartford Inv. Fin. Servs. LLC, No. 1:11-cv-1083, 2016 U.S. Dist. LEXIS 47063 (D.N.J. Mar. 24, 2016) (order granting in part and denying in part the defendants' motion for summary judgment and the plaintiffs' motion for partial summary judgment). In partially granting the defendants' motion for summary judgment, the court found that the independent directors' approval of the advisory fees is entitled to "substantial weight." *Id.* at *43-*65.

A second lawsuit against the same defendant, based on the same basic claims and underlying facts, was filed and consolidated into the 2011 case in 2014. Kasilag v. Hartford Funds Mgmt Co. LLC, No. 1:14-cv-1611 (D.N.J. filed Mar. 12, 2014) (consolidated with original *Kasilag* lawsuit on April 4, 2014).

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

[32] Santomenno v. John Hancock Life Ins. Co., No. 2:10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (May 23, 2011) (as to section 36(b)) & 2013 U.S. Dist. LEXIS 103404 (July 24, 2013) (as to ERISA), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (U.S. Apr. 20, 2015) (No. 14-1054).

A similar case was filed in early 2011 by the same plaintiffs' lawyers against another insurance company and certain affiliated investment advisers. Santomenno v. Transamerica Life Ins. Co., No. 11-cv-736 (D.N.J. filed Feb. 8, 2011). That lawsuit also challenged fees under ERISA and sought to recover advisory fees, but, rather than alleging violation of section 36(b), the lawsuit sought to recover certain fees based on the allegation that one defendant acted as an unregistered investment adviser in violation of IAA section 203. The lawsuit was transferred to a federal district court in California, and in February 2013, the court granted a motion to dismiss with respect to the IAA claim, but denied the motion with respect to the ERISA claims. Santomenno v. Transamerica Life Ins. Co., 2013 U.S. Dist. LEXIS 22354 (C.D. Cal. Feb. 19, 2013). In March 2016, the district court granted the plaintiffs' motion for class certification. Santomenno v. Transamerica Life Ins. Co., 2016 U.S. Dist. LEXIS 40468, No. 2:12-cv-2782 (C.D. Cal. Mar. 14, 2016) (order granting motion for class certification).

[33] *See* note 39, *infra*. *See generally* ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY, http://www.icimutual.com.

[34] Youngers v. Virtus Inv. Partners, Inc., No. 1:15-cv-08262 (S.D.N.Y. filed May 8, 2015).

[35] Youngers v. Virtus Inv. Partners, Inc., No. 1:15-cv-08262 (S.D.N.Y. Feb. 2, 2016) (motion to dismiss filed).

[36] Tran v. Third Ave. Mgmt, LLC, No. 2:16-cv-00602 (C.D. Cal. filed Jan. 27, 2016); Inter-Marketing Group USA, Inc. v. Third Ave. Trust, No. 2:16-cv-00736 (C.D. Cal. filed Feb. 2, 2016); Matthews v. Third Ave. Mgmt. LLC, No. 2:16-cv-00770 (C.D. Cal. filed Feb. 3, 2016); Bhat v. Third Ave. Mgmt. LLC, No. 2:16-cv-00904 (C.D. Cal. filed Feb. 9, 2016). While not a prospectus liability suit, a state court derivative action (since removed to federal court) was filed based on the same facts and circumstances. *See* Engel v. Third Ave. Mgmt. Co., LLC, No. 1:16-cv-01118 (S.D.N.Y. filed Feb. 12, 2016) (originally filed as Engel v. Third Ave. Mgmt. Co., LLC, No. 650196-2016 (N.Y. Sup. Ct. filed Jan. 15, 2016)).

[37] *See* Bhat v. Third Ave. Mgmt. Co., LLC, No. 2:16-cv-00904 (C.D. Cal. Mar. 9, 2016) (defendants' motion to transfer case to S.D.N.Y. filed); Inter-Marketing Group USA, Inc. v. Third Ave. Mgmt. Co., LLC, No. 2:16-cv-00736 (C.D. Cal. Mar. 14, 2016) (defendants' motion to transfer case to S.D.N.Y. filed); Matthews v. Third Ave. Mgmt. Co., LLC, No. 2:16-cv-00770 (C.D. Cal. Mar. 9, 2016) (defendants' motion to transfer case to S.D.N.Y. filed); Tran v. Third Ave. Mgmt. Co., LLC, No. 2:16-cv-00602 (C.D. Cal. Mar. 9, 2016) (defendants' motion to transfer case to S.D.N.Y. filed).

[38] In re Morgan Keegan Open-End Mut. Fund Litig., No. 2:07-cv-2784 (W.D. Tenn. Nov. 30, 2015) (order granting preliminary approval of settlement).

[39] *Id.* (order granting preliminary approval of settlement); In re Oppenheimer Rochester Funds Group Secs. Litig., No. 1:09-md-2063 (D. Colo. July 28, 2014) (final settlement); In re Reserve Primary Fund Secs. & Derivative Class Action Litig., No. 1:08-cv-8060 (S.D.N.Y. Jan. 13, 2014) (final settlement); In re Morgan Keegan Closed-End Fund Litig., No. 2:07-cv-2830 (W.D. Tenn. Aug. 5, 2013) (final settlement); In re Evergreen Ultra Short Opportunities Fund Secs. Litig., No. 08-cv-11064, 2012 U.S. Dist. LEXIS 174711 (D. Mass. Dec. 10, 2012) (final settlement); Yu v. State St. Corp., No. 1:08-cv-8235 (S.D.N.Y. Sept. 6, 2012) (final settlement); Zametkin v. Fidelity Mgmt. & Research Co., No. 1:08-cv-10960 (D. Mass. May 11, 2012) (final settlement); In re Oppenheimer Champion Fund Secs. Fraud Class Actions, No. 1:09-cv-386 (D. Colo. Sept. 30, 2011) & Ferguson v. OppenheimerFunds, Inc., No. 1:09-cv-1186 (D. Colo. Sept. 30, 2011) (final settlement of both lawsuits); In re Charles Schwab Corp. Secs. Litig., No. 08-cv-01510, 2011 U.S. Dist. LEXIS 44547 (N.D. Cal. Apr. 19, 2011) (final settlement); Gosselin v. First Trust Advisors L.P., No. 08-cv-5213, 2009 U.S. Dist. LEXIS 117737 (N.D. Ill. Dec. 17, 2009) (final settlement).

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

[41] Hampton v. Pac. Inv. Mgmt. Co. LLC, No. 8:15-cv-00131 (C.D. Cal. filed Jan. 28, 2015).

[42] Hampton v. Pac. Inv. Mgmt. Co. LLC, No. 8:15-cv-00131 (C.D. Cal. Nov. 2, 2015) (order granting motion to dismiss), *appeal docketed*, No. 15-56841 (9th Cir. filed Nov. 30, 2015).

[43] Youngers v. Virtus Inv. Partners, Inc., No. 1:15-cv-08262 (S.D.N.Y. filed May 8, 2015).

[44] Youngers v. Virtus Inv. Partners, Inc., No. 1:15-cv-08262 (S.D.N.Y. Feb. 2, 2016) (motion to dismiss filed).

[45] Epstein v. Ruane, No. 650100-2016 (N.Y. Sup. Ct. filed Jan. 8, 2016). As a prerequisite to a plaintiff's filing a derivative action, the plaintiff must typically make a "demand" on the board, seeking authorization to litigate on behalf of the fund. However, in this case, the plaintiffs allege that such a demand would be futile due to conflicts of interest on the part of certain directors.

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

[47] Engel v. Third Ave. Mgmt. Co., LLC, No. 1:16-cv-01118 (S.D.N.Y. filed Feb. 12, 2016). An amended complaint was filed on March 8, 2016.

[48] Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036 (9th Cir. 2015), *reh'g & reh'g en banc denied*, 2015 U.S. App. LEXIS 7030 (9th Cir. Apr. 28, 2015).

[49] Indeed, as discussed in the text accompanying notes 41-42, an apparent effort was made in another lawsuit to capitalize on the Ninth Circuit's decision. In that lawsuit, the plaintiff filed an amended complaint in July 2015 that dropped the original section 10(b) and rule 10b-5 claim and was restyled as a state law action. The lawsuit was dismissed by the district court in November 2015 and is now on appeal before the Ninth Circuit. Hampton v. Pacific Inv. Mgmt. Co. LLC, No. 8:15-cv-00131 (C.D. Cal. Nov. 2, 2015) (order granting motion to dismiss), *appeal docketed*, No. 15-56841 (9th Cir. filed Nov. 30, 2015).

[50] Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036 (9th Cir. Mar. 9, 2015), *cert. denied*, 136 S. Ct. 240 (U.S. Oct. 5, 2015) (No. 15-134).

[51] Northstar Fin. Advisors, Inc. v. Schwab Invs., No. 08-cv-4119, 2015 U.S. Dist. LEXIS 135847 (C.D. Cal. Oct. 5, 2015) (order granting in part and denying in part motion to dismiss) & 2016 U.S. Dist. LEXIS 22660 (C.D. Cal. Feb. 23, 2016) (order granting motion for judgment on the pleadings), *appeal docketed*, No. 16-15303 (9th Cir. filed Feb. 26, 2016).

[52] Kapor v. Ivy Inv. Mgmt. Co., No. 2:16-cv-02106 (D. Kan. filed Feb. 18, 2016). Two similar lawsuits were filed in federal district court in May and July 2015 against multiple defendants, including many of the same fund group defendants; the fund group defendants were later dismissed from the lawsuits. *See* Golden Boy Promotions v. Alan Haymon, No. 2:15-cv-3378 (C.D. Cal. June 29, 2015) (notice of dismissal); Top Rank, Inc. v. Alan Haymon, No. 2:15-cv-04961, 2015 U.S. Dist. LEXIS 164676 (C.D. Cal. Oct. 16, 2015) (order of dismissal with prejudice).

[53] NexPoint Advisors, L.P. v. TICC Capital Corp., No. 3:15-cv-01465 (D. Conn. filed Oct 8, 2015).

[54] Barnes v. TICC Capital Corp., No. 3:15-cv-01564 (D. Conn. filed Oct. 27, 2015).

[55] NexPoint Advisors, L.P. v. TICC Capital Corp., No. 3:15-cv-01465 (D. Conn. Feb. 2, 2016) (notice of voluntary dismissal without prejudice); Barnes v. TICC Capital Corp., No. 3:15-cv-01564 (D. Conn. Feb. 1, 2016) (notice of voluntary dismissal without prejudice).

[56] These dismissals came in 2009 and 2010, with the Second Circuit affirming the dismissals of two of these lawsuits in November 2009 and June 2011, respectively, and with the Ninth Circuit affirming the dismissal of another lawsuit in May 2011. See McBrearty v. Vanguard Group, Inc., 353 Fed. Appx. 640 (2d Cir. 2009); Seidl v. Am. Century Cos., 427 Fed. Appx. 35 (2d Cir. 2011); Wodka v. Causeway Capital Mgmt. LLC, 433 Fed. Appx. 563 (9th Cir. 2011). One lawsuit was voluntarily dismissed by the plaintiff. *See* Gamoran v. Neuberger Berman Mgmt. LLC, No. 1:08-cv-10807 (S.D.N.Y. May 19, 2009) (order of dismissal without prejudice).

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

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

[59] Gomes v. Am. Century Cos., 2012 U.S. Dist. LEXIS 187426 (W.D. Mo. Feb. 16, 2012), *aff'd*, 710 F.3d 811 (8th Cir. 2013); Gomes v. Am. Century Cos., No. 14-cv-283 (W.D. Mo. Dec. 17, 2015) (final order approving settlement).

[60] Seidl v. Am. Century Cos., No. 4:10-cv-4152, 2014 U.S. Dist. LEXIS 155522 (W.D. Mo. July 2, 2014) (order granting motion for summary judgment).

[61] Seidl v. Am. Century Cos., 799 F.3d 983 (8th Cir. 2015) (order affirming district court's grant of summary judgment).

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

[63] Wodka v. Causeway Capital Mgmt. LLC, No. B255454 (Cal. Ct. App. Dec. 14, 2015) (final judgment).

[64] SEC Press Release, SEC Announces Enforcement Results for 2015 (Oct. 22, 2015), https://www.sec.gov/news/pressrelease/2015-245.html.

[65] SEC, *Agency Financial Report, Fiscal Year 2015*, 154 (Nov. 13, 2015), https://www.sec.gov/about/secpar/secafr2015.pdf.

[66] *See* In re BlackRock Advisors, LLC, ICA Rel. No. 31558, File No. 3-16501 (SEC Apr. 20, 2015), http://www.sec.gov/litigation/admin/2015/ia-4065.pdf (SEC finding that the investment adviser failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations; additional SEC finding that the adviser and CCO caused the registered funds' failure to have the funds' CCO report to the funds' boards of directors regarding the employee's violations of the adviser's private investment policy). *See also* SEC Press Release, SEC Charges BlackRock Advisors With Failing to Disclose Conflict of Interest to Clients and Fund Boards, SEC Rel. No. 2015-71 (Apr. 20, 2015), http://www.sec.gov/news/pressrelease/2015-71.html; Peter Ortiz, *SEC Fines BlackRock, Ex-CCO in Conflict of Interest Case*, IGNITES (Apr. 21, 2015), http://ignites.com/c/1104223/116773/.

[67] *See* In re SFX Fin. Advisory Mgmt. Enters., Inc., IAA Rel. No. 4116, File No. 3-16591 (SEC Jun. 15, 2015), https://www.sec.gov/litigation/admin/2015/ia-4116.pdf (SEC finding that a private adviser's CCO caused the adviser's failures to implement its compliance policies and to conduct an annual compliance review, and that the CCO was responsible for a material misstatement in a Form ADV filing). *See also* SEC Press Release, Investment Advisory Firm's Former President Charged With Stealing Client Funds, SEC Rel. No. 2015-120 (June 15, 2015), http://www.sec.gov/news/pressrelease/2015-120.html.

[68] *See* In re Pekin Singer Strauss Asset Mgmt., Inc., ICA Rel. No. 31688, File No. 3-16646 (SEC June 23, 2015), http://www.sec.gov/litigation/admin/2015/ia-4126.pdf (SEC finding that the president at the time failed to dedicate sufficient resources to the compliance function, which contributed substantially to the private adviser's compliance failures); In re Parallax Invs. LLC, ICA Rel. No. 31741, File No. 3-15626 (SEC Aug. 6, 2015), https://www.sec.gov/litigation/admin/2015/34-75625.pdf (SEC finding that the adviser engaged in principal trades without appropriate disclosure to clients, violated the custody rule, failed to design and implement compliance policies and procedures, and failed to establish and maintain a written code of ethics).

[69] *See* In re First Eagle Inv. Mgmt., LLC, ICA Rel. No. 31832, File No. 3-16823 (SEC Sept. 21, 2015), https://www.sec.gov/litigation/admin/2015/ia-4199.pdf (SEC finding that adviser and distributor made payments to intermediaries for distribution of fund shares that were outside of the funds' board-approved rule 12b-1 plan). *See also* SEC Press Release, SEC Charges Investment Adviser With Improperly Using Mutual Fund Assets to Pay Distribution Fees, SEC Rel. No. 2015-198 (Sep. 21, 2015), https://www.sec.gov/news/pressrelease/2015-198.html.

[70] *See* Beagan Wilcox Volz, *William Blair Hit With Wells Notice in Distribution Sweep*, IGNITES (Mar. 1, 2016), http://ignites.com/c/1305083/148013. *See also* Peter Ortiz, *Oppenheimer, Others Snared in Sales-Fee Probe: Report*,

IGNITES (May 20, 2015), http://ignites.com/c/1122313/119213 (reporting that distribution-related proceedings against two fund groups had been referred to the SEC's Division of Enforcement); Peter Ortiz, '*Distribution in Guise' Enforcement Actions in Works: SEC*, IGNITES (Mar. 5, 2015), http://ignites.com/c/1076263/112443.

[71] *See* R.T. Jones Capital Equities Mgmt., Inc., IAA Rel. No. 4204, File No. 3-16827 (SEC Sept. 22, 2015), https://www.sec.gov/litigation/admin/2015/ia-4204.pdf (SEC finding that the adviser stored personally identifiable information ("PII") of clients on third-party servers without modification or encryption, and failed to adopt procedures to protect and monitor the stored information; the servers were compromised and exposed the PII of over 100,000 clients). *See also* Beagan Wilcox Volz, *SEC Prepping to Whack Firms With Weak Cyber Defenses*, IGNITES (Mar. 17, 2016), http://ignites.com/c/1316343/149343.

[72] *See* In re JPMorgan Chase Bank, N.A., IAA Rel. No. 4295, File No. 3-17008 (SEC Dec. 18, 2015), https://www.sec.gov/litigation/admin/2015/33-9992.pdf (SEC finding that the adviser failed to adequately disclose its preference for investing its clients' assets in the firm's proprietary products).

[73] *See* In re JH Partners, LLC, IAA Rel. No. 4276, File No. 3-16968 (SEC Nov. 23, 2015), https://www.sec.gov/litigation/admin/2015/ia-4276.pdf (SEC finding that the private fund manager had loaned $62 million to the firm's managed funds' portfolios, thereby creating senior interests to other interests held by the funds).

[74] *See* In re BlackRock Advisors, LLC, ICA Rel. No. 31558, File No. 3-16501 (SEC Apr. 20, 2015), https://www.sec.gov/litigation/admin/2015/ia-4065.pdf (SEC finding that the adviser knew of a portfolio manager's involvement with a company, but failed to disclose the portfolio manager's conflict of interest to the fund's board and shareholders).

[75] *See* In re Dion Money Mgmt., LLC, IAA Rel. No. 4146, File No. 16702 (SEC Jul. 24, 2015), https://www.sec.gov/litigation/admin/2015/ia-4146.pdf (SEC finding that a registered investment adviser failed to disclose to clients the terms of certain compensation arrangements whereby the adviser received payments from third parties that were calculated based on client assets invested in particular mutual funds). *See also* In re Everhart Fin. Group, Inc., IAA Rel. No. 4314, File No. 3-17051 (SEC Jan. 14, 2016), https://www.sec.gov/litigation/admin/2016/34-76897.pdf (SEC finding that the investment adviser invested client assets in higher-cost class of shares from which the investment adviser received rule 12b-1 fees).

[76] *See* In re Morgan Stanley Inv. Mgmt., '33 Act Rel. No. 9998, File No. 3-17016 (SEC Dec. 22, 2015), http://www.sec.gov/litigation/admin/2015/33-9998.pdf (SEC finding that a portfolio manager engaged in a series of unlawful prearranged trades, which resulted in the undisclosed favorable treatment of certain of the firm's advisory clients over others).

[77] *See* In re Water Island Capital LLC, ICA Rel. No. 31455, File No. 3-16385 (SEC Feb. 12, 2015), https://www.sec.gov/litigation/admin/2015/ic-31455.pdf (SEC finding that the investment adviser did not custody certain securities at a qualified bank, but instead permitted broker-dealers to hold the securities).

[78] *See* In re UBS Willow Asset Mgmt., ICA Rel. No. 31869, File No. 3-16909 (SEC Oct. 16, 2015), https://www.sec.gov/litigation/admin/2015/33-9964.pdf (SEC finding that the fund's disclosure misrepresented the investment strategy followed by its portfolio managers).

[79] *See* In re Virtus Inv. Advisers, Inc., ICA Rel. No. 31901, File No. 3-16959 (SEC Nov. 16, 2015), http://www.sec.gov/litigation/admin/2015/ia-4266.pdf (SEC finding that the adviser failed to test/question the accuracy of the subadviser's performance track record, which was found to be materially inflated and hypothetical). A related class action lawsuit was filed against the adviser in federal court, alleging rule 10b-5 violations in connection with the improper historical performance provided by the subadviser. Youngers v. Virtus Inv. Partners, Inc., No. 1:15-cv-08262 (S.D.N.Y. filed May 8, 2015). In an unrelated but similar administrative proceeding, the SEC found that a registered adviser to private clients created and distributed misleading performance information. In re Alpha Fiduciary Inc., IAA Rel. No. 4283, File No 3-16974 (SEC Nov. 30, 2015), http://www.sec.gov/litigation/admin/2015/ia-4283.pdf.

[80] *See* In re Commonwealth Capital Mgmt., LLC, ICA Rel. No. 31678, File No. 3-16599 (SEC June 17, 2015), https://www.sec.gov/litigation/admin/2015/ic-31678.pdf (SEC finding that a principal caused the adviser to present incomplete and inaccurate information to the boards during the annual management contract approval process and furthermore did not disclose in its shareholder reports the material factors and conclusions that formed the basis for the board's approval or renewal of that contract); In re Kornitzer Capital Mgmt., Inc., ICA Rel. No. 31560, File No. 3-16503 (SEC Apr. 21, 2015), https://www.sec.gov/litigation/admin/2015/ic-31560.pdf (SEC finding that the adviser provided certain inaccurate and incomplete information to the board in the funds' annual management agreement approval process).

[81] *See* In re Nationwide Life Ins. Co., ICA Rel. No. 31601, File No. 3-16537 (SEC May 14, 2015), https://www.sec.gov/litigation/admin/2015/ic-31601.pdf (SEC finding that the insurance company priced mutual fund share transaction requests that arrived by mail using the next day's price, in violation of the ICA).

[82] *See* In re F-Squared Invs., Inc., ICA Rel. No. 31393, File No. 3-16325 (SEC Dec. 22, 2014), https://www.sec.gov/litigation/admin/2014/ia-3988.pdf.

[83] Youngers v. Virtus Inv. Partners, Inc., No. 1:15-cv-08262 (S.D.N.Y. filed May 8, 2015).

[84] Celico v. F-Squared Invs., Inc., No. 1:15-cv-12365 (D. Mass. filed June 18, 2015).

[85] In re Virtus Inv. Advisors, Inc., ICA Rel. No. 31901, File No. 3-16959 (SEC Nov. 16, 2015), https://www.sec.gov/litigation/admin/2015/ia-4266.pdf.

[86] *See* In re Sands Bros. Asset Mgmt., LLC, IAA Rel. No. 4273, File No. 3-16223 (SEC Nov. 19, 2015), http://www.sec.gov/litigation/admin/2015/ia-4273.pdf (SEC finding that respondents made inadequate efforts to ensure that the adviser met its custody rule obligations).

[87] *See* In re Parallax Invs. LLC, ICA Rel. No. 31741, File No. 3-15626 (SEC Aug. 6, 2015), https://www.sec.gov/litigation/admin/2015/34-75625.pdf (SEC finding that the adviser engaged in principal trades without appropriate disclosure to clients, violated the custody rule, failed to design and implement compliance policies and procedures, and failed to establish and maintain a written code of ethics).

[88] *See* In re AlphaBridge Capital Mgmt., LLC, ICA Rel. No. 31700, File No. 3-16670 (SEC Jul. 1, 2015), http://www.sec.gov/litigation/admin/2015/ia-4135.pdf (SEC finding that the private adviser inflated values of mortgage-backed securities). *See also* SEC, Division of Investment Management, Valuation Guidance Frequently Asked Questions (Apr. 22, 2015), https://www.sec.gov/divisions/investment/guidance/valuation-guidance-frequently-asked-questions.shtml. The start-up and ongoing valuations of privately-held companies have been of particular interest to the SEC since late 2015. *See, e.g.*, Kirsten Grind, *Mutual Funds Flail at Valuing Hot Startups Like Uber*, WALL ST. J. (Oct. 29, 2015), http://www.wsj.com/articles/mutual-funds-flail-at-valuing-hot-startups-like-uber-1446174018; Kirsten Grind, *Regulators Look Into Mutual Funds' Procedures for Valuing Startups*, WALL ST. J. (Nov. 17, 2015), http://www.wsj.com/articles/regulators-look-into-mutual-funds-procedures-for-valuing-startups-1447796553 (stating that "[e]xaminers, who are questioning fund managers as well as independent board members of fund companies, are asking about the procedures and tools funds are using to land at the prices they are placing on the startups").

[89] SEC, OCIE, National Exam Program: Examination Priorities for 2016 (Jan. 11, 2016), http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf.

[90] *Id.*; s*ee also* SEC, OCIE, National Exam Program Risk Alert: Retirement-Targeted Industry Reviews and Examinations Initiative, vol. IV, issue 6 (June 22, 2015), http://www.sec.gov/about/offices/ocie/retirement-targeted-industry-reviews-and-examinations-initiative.pdf (describing a multi-year examination initiative focused on retirement-based savings).

[91] SEC, OCIE, National Exam Program Risk Alert: Examinations of Advisers and Funds that Outsource Their Chief Compliance Officers, vol. V, issue 1 (Nov. 9, 2015), http://www.sec.gov/ocie/announcement/ocie-2015-risk-alert-cco-outsourcing.pdf.

[92] *See* Peter Ortiz, *High-Yield Managers Scramble to Respond to SEC Sweep*, IGNITES (Dec. 23, 2015), http://ignites.com/c/1261883/141273 (reporting that the SEC performed a surprise exam of high-yield bond funds in mid-December 2015, following the closure of a bond fund in early December for lack of liquidity).

[93] *See* SEC, Div. of Inv. Mgmt., IM Guidance Update: Mutual Fund Distribution and Sub-Accounting Fees, No. 2016-01 (Jan. 2016), https://www.sec.gov/investment/im-guidance-2016-01.pdf.

[94] *See* FINRA, 2016 Regulatory and Examination Priorities Letter (Jan. 5, 2016), http://www.finra.org/sites/default/files/2016-regulatory-and-examination-priorities-letter.pdf.

[95] SEC, OCIE, National Exam Program Risk Alert: Cybersecurity Examination Sweep Summary (Feb. 3, 2015), http://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf (stating that a goal of the sweep was to identify cybersecurity risks and assess cybersecurity preparedness in the securities industry).

[96] SEC, OCIE, National Exam Program Risk Alert: OCIE's 2015 Cybersecurity Examination Initiative, vol. IV, issue 8 (Sept. 15, 2015), http://www.sec.gov/ocie/announcement/ocie-2015-cybersecurity-examination-initiative.pdf.

[97] SEC, Div. of Inv. Mgmt., IM Guidance Update: Cybersecurity Guidance, No. 2015-02 (Apr. 2015), https://www.sec.gov/investment/im-guidance-2015-02.pdf (providing measures for fund groups' consideration when developing cybersecurity programs, including how to assess vulnerabilities, protect sensitive information, and develop policies and procedures for responding to a cyber incident).

[98] Interview with Andrew Ceresney, Director, Division of Enforcement, SEC (2016), http://www.bna.com/sec-enforcement-priorities-m57982066397/, last viewed on March 18, 2016.

[99] *See* Timothy Assad, Chairman, CFTC, Remarks of Chairman Timothy Massad Before the ABA Derivatives and Futures Law Committee, 2016 Winter Meeting (Jan. 22, 2016), http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-37.

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

[101] Santomenno v. John Hancock Life Ins. Co., No. 2:10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (May 23, 2011 (as to section 36(b)) & 2013 U.S. Dist. LEXIS 103404 (July 24, 2013 (as to ERISA)), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (U.S. Apr. 20, 2015) (No. 14-1054).

[102] Gordan v. Mass. Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. filed Nov. 5, 2013) (renewed motion to dismiss filed on Jul. 2, 2015).

[103] McCaffree Fin. Corp. v. Principal Life Ins. Co., 65 F. Supp. 3d 653 (S.D. Iowa Dec. 10, 2014) (order granting motion to dismiss), *aff'd*, 811 F.3d 998 (8th Cir. 2016).

[104] *See* Bowers v. BB&T Corp., No. 1:15-cv-732 (M.D.N.C. Dec. 23, 2015) (motion to dismiss filed); Smith v. BB&T Corp., No. 1:15-cv-00841 (C.D.N.C. filed Oct. 8, 2015); Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. filed Dec. 21, 2015); Urakhchin v. Allianz Asset Mgmt. of Am., L.P., No. 8:15-cv-01614 (C.D. Cal. Feb. 5, 2016) (motion to dismiss amended complaint filed); Brotherston v. Putnam Invs., LLC, No. 1:15-cv-13825 (D. Mass. Feb. 5, 2015) (motion to dismiss filed); Walker v. Merrill Lynch & Co. Inc., No. 15-cv-01959 (S.D.N.Y. Mar. 24, 2016) (order granting motion to dismiss).

[105] Krueger v. Ameriprise Fin., Inc., No. 11-cv-2781, 2015 U.S. Dist. LEXIS 91385 (D. Minn. Jul. 13, 2015) (final judgment approving settlement).

[106] Dennard v. Aegon USA LLC, No. 2:15-cv-896 (C.D. Cal. Nov. 23, 2015) (motion for judgment on the pleadings filed). This lawsuit alleges that a profit sharing plan sponsor (also the plan's administrator and record keeper), affiliated entities, and plan trustees breached their fiduciary duties under ERISA with respect to the

excessive "layers of fees" charged by the unregistered funds offered as plan investment options. Noting that the unregistered funds simply invest in mutual funds, which are, in turn, managed by subadvisers, the plaintiff argues the defendants could have reduced expenses by contracting with the subadvisers directly.

[107] Krikorian v. Great-West Life & Annuity Ins. Co., No. 1:16-cv-00094 (D. Colo. filed Jan. 14, 2016); Rosen v. Prudential Ret. Ins & Annuity Co, No. 3:15-cv-01839 (D. Conn. filed Dec. 18, 2015).

[108] Tibble v. Edison Int'l, 135 S. Ct. 1823 (May 18, 2015), *vacating and remanding*, 729 F.3d 1110 (9th Cir. 2013).

[109] *See, e.g.*, Deborah S. Davidson and Kimberly M. Melvin, *Tibble v. Edison International: What Does It Mean for Fiduciaries and Their Insurers?*, PLUS J., Aug. 2015, at 2, *available at* http://www.wileyrein.com/media/publication/150_tibble-v-edison-international-what-does-it-mean-for-fiduciaries-and-their-insurers.pdf&usg=afqjcnfe7celucjpxogrpic9asifprrreg.

[110] Ellis v. Fidelity Mgmt. Trust Co., No. 1:15-cv-14128 (D. Mass. filed Dec. 11, 2015).

[111] Tussey v. ABB Inc., No. 06-cv-4305, 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012).

[112] Tussey v. ABB Inc., 746 F.3d 327 (8th Cir. 2014).

[113] Tussey v. ABB Inc., No. 06-cv-04305, 2015 U.S. Dist. LEXIS 89068 (W.D. Mo. July 9, 2015).

[114] Tussey v. ABB Inc., No. 15-2792 (8th Cir. filed Aug. 17, 2015).

[115] Brown v. Fidelity Mgmt. & Research Co., No. 1:13-cv-11011 (D. Mass. filed Apr. 25, 2013); Columbia Air Servs. Inc. v. Fidelity Mgmt. Trust Co., No. 1:13-cv-10570 (D. Mass. filed Mar. 11, 2013); Boudreau v. Fidelity Mgmt. & Trust Co., No. 1:13-cv-10524 (D. Mass. filed Mar. 7, 2013); Kelley v. Fidelity Mgmt. & Trust Co., No. 1:13-cv-10222 (D. Mass. filed Feb. 5, 2013). The cases were consolidated as In re Fidelity ERISA Float Litig., No. 1:13-cv-10222 (D. Mass. Mar. 11, 2015) (order granting motion to dismiss).

[116] In re Fidelity ERISA Float Litig., No. 15-1445 (1st Cir. filed Apr. 15, 2015).

[117] *See, e.g.*, Official Comm. of Unsecured Creditors of Tribune Co. v. JPMorgan Chase Bank, N.A., No. 1:10-ap-55841 (Bankr. D. Del. Mar. 26, 2013) (dismissed) & Kirschner v. FitzSimons, No. 1:10-ap-54010 (Bankr. D. Del. filed Nov. 1, 2010) (both adversarial proceedings in In re Tribune Co., No. 1:08-bk-13141 (Bankr. D. Del. filed Dec. 8. 2008)); In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. filed Dec. 20, 2011); Weisfelner v. Fund 1, No. 10-ap-4609 (Bankr. S.D.N.Y. filed Dec. 1, 2010) & Weisfelner v. Holmes, No. 10-ap-05525 (Bankr. S.D.N.Y. filed Dec. 23, 2010) (both adversarial proceedings in In re Lyondell Chem. Co., No. 1:09-bk-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009)); Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., No. 09-00504 (Bankr. S.D.N.Y. filed July 31, 2009).

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

[119] In re Tribune Co. Fraudulent Conveyance Litig., Nos. 13-3992, 13-3875, 13-4178, & 13-4196, 2016 U.S. App. LEXIS 5787 (2d Cir. Mar. 29, 2016) (affirming district court's decision, but on different grounds—i.e., that the appellants' claims are preempted by section 546(e) of the Bankruptcy Code, rather than, as the district court ruled, on standing grounds).

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

[121] Weisfelner v. Fund 1, No. 10-ap-4609 (Bankr. S.D.N.Y. Nov. 18, 2015) (decision on motions to dismiss amended intentional fraudulent transfer claims).

[122] *See* Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., No. 09-00504 (Bankr. S.D.N.Y. filed July 31, 2009).

[123] Official Comm. of Unsecured Creditors v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 486 B.R. 596 (Bankr. S.D.N.Y. 2013) (order granting motion for summary judgment).

[124] Official Comm. of Unsecured Creditors v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), 777 F.3d 100 (2d Cir. 2015) (reversing bankruptcy court decision), *reh'g & reh'g en banc denied*, 2015 U.S. App. LEXIS 6380 (2d Cir. Apr. 13, 2015).

[125] Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., No. 09-00504 (Bankr. S.D.N.Y filed July 31, 2009) (amended complaint filed May 20, 2015).

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

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

ICIMutual
The safest decision you can make.

1401 H Street NW, Suite 1000
Washington, DC 20005

800.643.4246
info@icimutual.com

www.icimutual.com