

## Class Actions – are pension schemes missing out?

It has recently been reported that British institutional investors, custodians and pension funds who have direct holdings of US shares are failing to collect settlements from US securities class actions worth a total of £4.7bn<sup>1</sup>. This raises the question – should pension funds and their advisers be doing more to get a slice of the pie?

### US class actions

How do they work?

- In the US, litigation is commonly commenced by investors alleging the fraudulent behaviour of publicly listed companies.
- Should the claim result in a successful judgment or settlement, a pool of money will often become available to **all** shareholders who:
  - have bought that company's shares during the particular period; and
  - have suffered loss in the value of their shares.

### Making a claim

What are the risks?

- In order to claim a share of the pool of money, a shareholder simply needs to:
  - satisfy the above criteria; and
  - lodge a claim within 90 days after the end of the case.
- Remarkably, the process involves minimal costs and no risk of having to pay anyone else's costs.

### What's the catch?

- The main problem for European investors is that they are rarely told of any judgments or settlements following the litigation. The US courts rarely order any particular notification outside of the US.
- For pooled investments, it can also be difficult to demonstrate the purchase of a particular number of the shares and therefore, the amount of the loss and who has suffered that loss.
- And, although the view taken by many in the US is that these actions help to bring about corporate governance reforms, many in the UK do not wish to encourage litigation of this nature.

<sup>1</sup> The Times, 27 July 2005 "Investors fail to claim \$8bn class action cash" by Christine Seib

## Trustees

What duties do they owe?

- It may be overstating the current position to say that trustees have a fiduciary obligation to put in place systems for monitoring the judgments and settlements in US class actions. Some mutual funds in the US have actually been challenged in the courts for failing to take part, but the background is very different in the US.
- But trustees and their advisers should be aware of these developments and consider how best to approach them.

## Trustees

How can they be more proactive?

- It has been suggested that custodians may be well placed to monitor class actions on behalf of the UK pension funds they represent. Despite this, the provision of such services still appears to be in its infancy.
- Some other specialist firms do offer this service.

## UK Group Litigation

- Class actions in the UK are quite different and are even given a different name – group litigation.
- But they are becoming more common now and a number of major pension funds have recently joined forces against the Inland Revenue to pursue claims relating to the UK's foreign income dividend and tax credit regimes.
- Although the procedure in the UK is more complicated and exposes claimants (even non-lead claimants) to a degree of risk for the other party's costs, it is still a method of sharing risk where there is a community of interest.

Where do we go from here?

- With many pension funds continuing to experience funding difficulties, all reasonable avenues for improving funding should be explored.
- At the very least, trustees of larger UK pension funds with direct holdings of US equities should start considering whether it may be in their members' best interests to establish a suitable system for monitoring class actions.

This edition of Sackers Extra News has been produced by our Dispute Resolution Unit to help you keep abreast of developments in pensions litigation. If you are already monitoring class actions we would like to hear from you. Please contact:

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