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US CLASS ACTIONS

1 INTRODUCTION

News that Cherie Booth QC is to help represent two local authority pension funds seeking to bring a US class action against the Royal Bank of Scotland has dominated the media over the last day or so.

US securities class actions are big business on the other side of the pond. Although it is not entirely new territory for UK and European investors¹, it is still very much in its infancy. So just what is involved for UK pension funds looking to get their slice of the American pie and is there any obligation to do so?

2 KEY POINTS

- Litigation is often commenced in the US by investors alleging breaches of securities legislation, false and misleading public statements, and even fraud on the part of publicly listed companies.
- Should the claim result in a successful judgment or settlement, a pool of money will often become available for distribution to all shareholders who have bought that company's shares during the particular period, and register their circumstances with the claims administrator.
- Minimal costs are involved, with no risk of having to pay anyone else's costs.
- Proponents of US class actions believe that, approached selectively, they not only provide compensation for past wrongs, but can also help to bring about corporate governance reforms and to maintain investor confidence.

¹ See our Sackers Extra News, August 2005:
http://www.sackers.com/extra/news/documents/News_0805.pdf

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3 WHY NOT THE UK?

Class actions in the UK are quite different and are even given a different name – group litigation. But they have recently become more common, for example, a number of major pension funds are currently pursuing claims against HM Revenue & Customs relating to the UK's foreign income dividend and tax credit regimes.

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. However, it is still a method of sharing risk where there is a community of interest.

4 PRACTICAL ISSUES

Involvement in US securities class actions is only available to trustees of UK pension funds who have (or had) at least some direct investment in US equities. Investing in pooled funds does not provide the necessary link between the company and the pension fund. (However, the pooled fund itself should have the right nexus, so it may be worth checking that it takes such opportunities in the interests of investors.)

Two distinct options are then available to those trustees:

1. Active approach – seek to become a lead plaintiff and have control of the litigation, just as the two local authority pension funds have done.
2. Passive approach – establish a monitoring process (with the assistance of a custodian or other specialist provider) and claim your share of any applicable pool of money that may arise from a successful claim or settlement.

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5 SHOULD TRUSTEES TAKE ACTION?

The publicity attracted by the actions of North Yorkshire and Merseyside Pensions Funds will no doubt lead to further debate about the pros and cons of participating in US securities class actions. It may be overstating the current position to say that trustees have a fiduciary obligation to adopt either the active or passive approach. There is certainly no directly applicable case law to that effect.

For our part, we think this is not a “one size fits all” issue. But given the current turbulence in the markets and with many UK pension funds continuing to experience funding difficulties, all reasonable avenues for improving funding should be considered. Where US securities class actions might provide an additional source of funds for a UK pension fund, trustees of those schemes should ensure that, whatever approach is adopted, a properly informed decision is reached.