


EVALUATING SERVICE PROVIDERS: *Shareholder Litigation Firms*

PAPERS

Online Program Event

Wednesday, December 17, 2014 – 10:30 a.m.

Darren J. Check, Esquire

Jonathan R. Davidson, Esquire

Kessler Topaz Meltzer & Check, LLP



Introduction

- Shareholder Litigation Counsel
- Portfolio Monitoring
 - Fiduciary Duty
 - Asset Allocation
 - Reporting & Services
- Non-U.S. Jurisdiction Litigation
 - Current Landscape
- Claims Administration
 - Do You Really Have a Handle on This?
- Best Practices for Evaluating Shareholder Litigation Firms



Qualitative Review of Shareholder Litigation Counsel

- What kind of firm have you retained to represent you in a case?
 - Case Selection – Conservative or Aggressive?
 - Case Range – securities class action; shareholder derivative and takeover litigation; opt-outs/direct actions
 - Experience of firm: lead plaintiff appointment process and in-case representation
 - Results – Quick settlement? Trial?
 - Reputation with the courts, defense bar and corporations



Portfolio Monitoring

- According to Cornerstone research, an average of 191 securities class actions are filed each year in the U.S.
 - Figure does not include Derivative, M&A, and non-U.S. cases.
 - Average of cases from 1997-2012 (2013 report)
- A growing number of pension plans in the United States have embraced portfolio monitoring (often retaining multiple firms).
- Fiduciary obligation to take part in a case: NO.
- Fiduciary obligation to monitoring actions/collect pro-rata share of settlement proceeds: YES.
- Critical for public pension funds to have proper systems in place to track and manager cases impacting their portfolios.



Portfolio Monitoring

□ Asset Allocation

■ U.S. Equities

- NCPERS 2013 Study – 35% (Target Allocation: 33%)

■ Non-U.S. Equities

- NCPERS 2013 Study – 17% (Target Allocation: 18%)



Portfolio Monitoring

- What types of reports should you be getting?
- New Case Summaries
 - each time a new securities class action is filed where your fund has a financial interest.
 - provides LP deadline (or registration deadline for non-U.S. cases), class period, jurisdiction/judge, case overview, strengths/weaknesses, your losses, estimated class-wide damages.



Portfolio Monitoring

MEMORANDUM

Privileged Attorney Client Communication

TO: ABC Employees' Retirement System
FROM:
RE: Bank of America Class Action
DATE: February 14, 2011

The following is a case summary regarding the securities class action litigation filed against Bank of America ("BofA" or the "Company") (Ticker: NYSE: BAC):

Date case filed: February 2, 2011
Lead Plaintiff Deadline: April 4, 2011
Class Period: January 20, 2010 – October 19, 2010
Jurisdiction: United States District Court, Southern District of New York
Judge: The Honorable William H. Pauley
Potential Sub-classes: NONE

Losses Suffered by ABC Employees' Retirement System: **(\$92,591.02)**

Initial Estimate of Class Damages: \$3.9 Billion

Recommendation: Remain a passive class member.

The Case against Bank of America:

The Complaint charges BofA and certain of its officers and directors with violations of the Securities Exchange Act of 1934. BofA is a bank holding company and a financial holding company.

The Complaint alleges that during the Class Period, defendants issued materially false and misleading statements regarding the Company's business. Defendants concealed defects in the recording of mortgages and improprieties with respect to the preparation of foreclosure paperwork that harmed BofA's investors when BofA had to temporarily discontinue foreclosures and admit to the problems it was experiencing. For much of the Class Period, defendants also concealed that BofA had previously engaged in a practice known as "dollar rolling," wherein it omitted billions of dollars in debt from its balance sheet reported to the public. As a result of defendants' false statements, BofA's stock traded at artificially inflated prices during the Class Period, reaching a high of \$19.48 per share on April 15, 2010.



Portfolio Monitoring

□ Quarterly Reports

- outlining all settled, dismissed, ongoing and new litigation for the quarter.
- also include details on non-U.S. case monitoring (where applicable).



Portfolio Monitoring

SETTLED LITIGATION

Quarterly Report

The following is an update of the portfolio monitoring services provided by _____ for ABC Employees' Retirement System. The cases listed below include both settled and ongoing securities class actions in which ABC Employees' Retirement System had transactions during the relevant class period. If you have any questions regarding this report please contact _____.

SETTLED LITIGATION

The custodian for ABC Employees' Retirement System has confirmed that it is responsible for submitting proof of claim forms for all settlements in which ABC Employees' Retirement System is eligible. _____ has conducted an audit of the claims filed for ABC Employees' Retirement System with filing deadlines that occurred this Quarter.

Based on a review of ABC Employees' Retirement System's transaction history, _____ has confirmed that this list is inclusive of all settlements for which ABC Employees' Retirement System is eligible to file. This list also contains eligible settlements for which new claims did not need to be submitted because ABC Employees' Retirement System previously filed overlapping transactions in a related settlement.

SETTLEMENT	CLAIMS DEADLINE	CLASS PERIOD	TOTAL SETTLEMENT
American International Group, Inc. (2004)	1/23/2012	10/28/99 - 4/1/05	\$725,000,000
MBIA, Inc.	2/9/2012	7/02/07 - 4/7/08	\$68,000,000
Medicis Pharmaceutical Co.	2/18/2012	10/30/03 - 9/23/08	\$18,000,000
Nortel Networks Corporation (SEC)	3/16/2012	10/24/00 - 4/27/04	\$35,500,000



Portfolio Monitoring/Case Evaluation

□ Research Memoranda

- when considering active involvement in a case.
- in-depth memorandum to allow the Board to make an informed decision about how best to proceed.



Portfolio Monitoring/Case Evaluation

MEMORANDUM

PRIVILEGED ATTORNEY CLIENT COMMUNICATION AND ATTORNEY WORK PRODUCT

TO: ABC Employees' Retirement System

FROM: _____

DATE: January 26, 2012

RE: BNY Mellon Corp. Securities Litigation Research Memorandum

EXECUTIVE SUMMARY

Losses Suffered by ABC Employees' Retirement System: \$11,283,344.83

We are writing to advise you of a potential securities fraud class action lawsuit we have been investigating against The Bank of New York Mellon Corp. ("BNY Mellon" or the "Company") and its executives for issuing false and misleading statements and omitting material information regarding the Company's use of fraudulent practices to artificially increase foreign currency exchange ("FX") revenue between February 28, 2008 and August 11, 2011 (the "Class Period").

Details about the Company's deceptive practices began surfacing in January of this year after two whistleblower (or *qui tam*) lawsuits against BNY Mellon were unsealed.¹ The lawsuits were filed on behalf of state pension funds located in Virginia and Florida who retained the Company as a trustee to manage fund accounts. Since the actions were unsealed, three state attorneys general (Virginia, Florida and New York) have filed their own actions against BNY Mellon. On August 11, 2011, the Virginia Attorney General filed a complaint in intervention that cited to internal BNY Mellon emails where employees discussed the impact to the Bank's profitability if clients were provided with greater transparency when trading FX. The emails generally concluded that profitability diminished as transparency increased. A few weeks later, after the markets closed on October 4, 2011, the New York AG Action,² filed an action seeking



Portfolio Monitoring

□ Online Access

- Make sure all trustees, administrator, counsel, etc. have access to reporting in one centralized location.
- Trustees receive email notifications when new material is added to fund's account.
- No client transaction data kept online.

Portfolio Monitoring

Welcome, ABC Employees' Retirement System | [Home](#) | [Change Username](#) | [Change Password](#) | [Logout](#)
 Institution: ABC Employees' Retirement System

(Use dropdown box on the right to change institution)

Newly Posted	Posted	
Filed Claims Status Chart	11-16-2012	
Sample Audit Report	11-16-2012	
Fortis (Belgium) Client Research Memorandum	11-01-2012	
Agnico Eagle-Mines (Canada) Client Research Memorandum	11-01-2012	
Weatherford - Amended Complaint	09-13-2012	
More...		

Quarterly Reports	Posted	Quarter End Date
First Quarter 2012 Quarterly Report	06-06-2012	03-31-2012

Case Summaries	Posted	Lead Plaintiff Deadline
Sino-Forest Corporation (Canada) Case Summary	04-30-2012	04-30-2012
BNY Mellon Client Research Memorandum	06-06-2011	02-13-2012
Agnico Eagle-Mines (Canada) Client Research Memorandum	11-01-2012	02-07-2012
Fortis (Belgium) Client Research Memorandum	11-01-2012	03-31-2011
Johnson & Johnson Case Summary	06-06-2011	11-22-2010
More...		

Lead Plaintiff	Posted
Weatherford - Amended Complaint	09-13-2012
Lead Plaintiff Deadlines for Newly Filed Securities Class Actions	09-13-2012
Sunpower - Consolidating Related Actions, Appointing Lead Plaintiff & Approving Selection of Lead Counsel	06-06-2011
Sunpower - Scheduling Order	06-06-2011

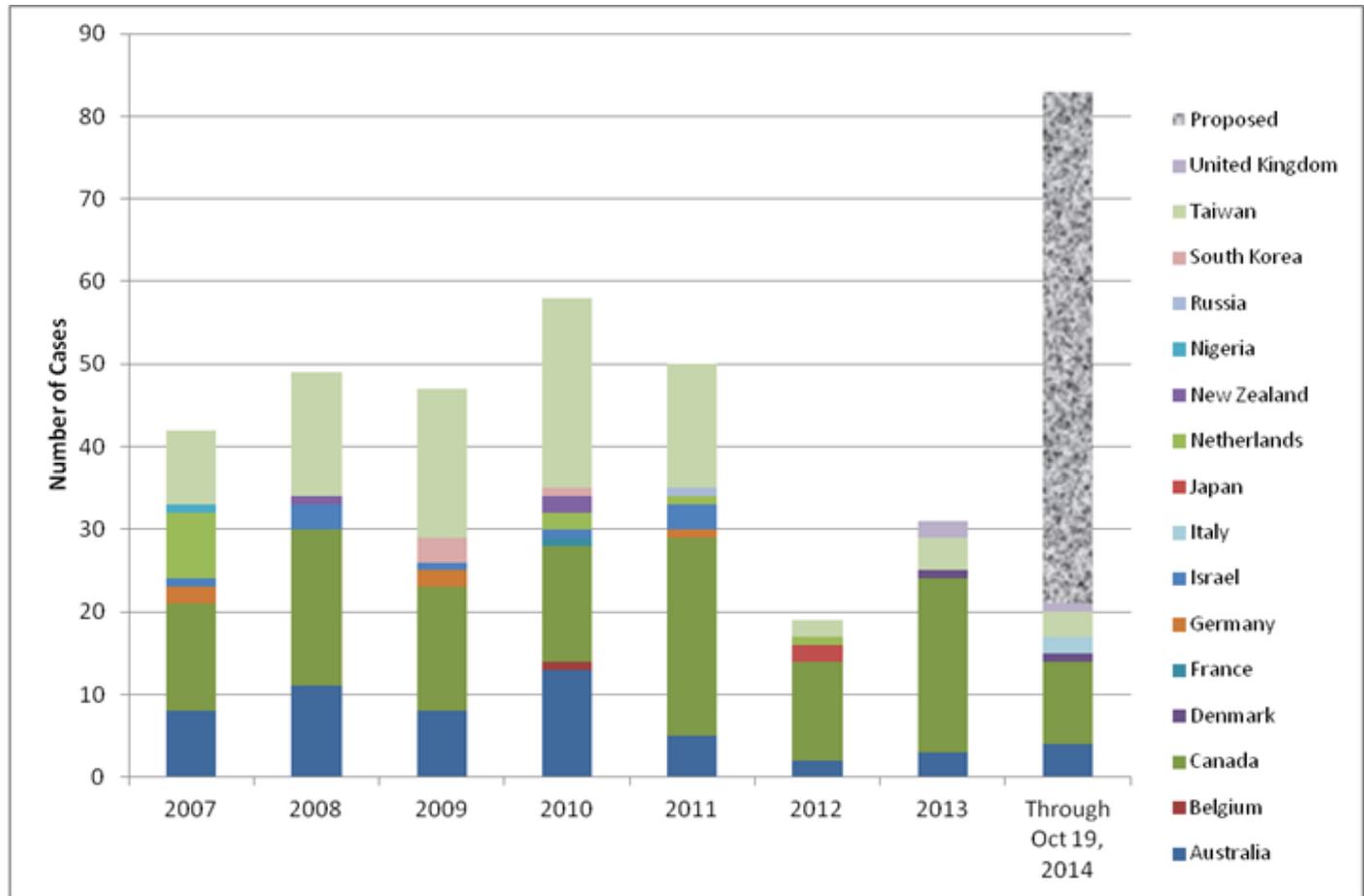
Settlements	Date Posted	
Filed Claims Status Chart	11-16-2012	11-16-2012
Sample Audit Report	11-16-2012	11-16-2012



Increasing Non-U.S. Litigation/ Importance of Monitoring

- The Supreme Court ruled in *Morrison v. National Australia Bank* (2010) that the Securities Exchange Act of 1934 only applies to transactions on domestic exchanges and domestic transactions in other securities.
- More and more countries are adding class action mechanisms and private causes of action for securities fraud violations.
- Currently more than 100 actions are pending in 13 countries around the world.
- The number and size of the cases have increased.
- We are not aware of any custodians that provide advice on non-U.S. cases or that will ever file claims in cases that settle outside the U.S. This is very important considering the size of many of these cases.

Non-U.S. Securities Fraud Actions On The Rise





Global Settlement Estimates

- According to the GOAL Group, settlements in securities class actions outside the U.S. are estimated to reach USD \$8.3 Billion annually by 2020.
- If the rates of non-participation are the same as in the U.S., the GOAL Group estimates that \$2.02 billion will be left on the table each year.

Company Domiciled/Quoted	Predicted Annual Class Action Settlements 2020
	U.S. \$ billions
South & Central America	USD \$ 0.620 bn
Includes: Argentina, Brazil, Chile, Colombia, Mexico and Peru	
Canada	USD \$ 0.542 bn
Asia - Pacific (minus China)	USD \$ 3.435 bn
Includes: Australia, India, Indonesia, Japan, Korea, Malaysia, Philippines, Singapore, Sri Lanka, Taiwan and Thailand	
Europe	USD \$ 3.288 bn
Includes: Austria, Belgium, Cyprus, Eire, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Russia, Scandinavia, Slovenia, Spain, Switzerland, Turkey and UK	
Africa	USD \$ 0.258 bn
Includes: Egypt, Morocco and South Africa	
Middle East	USD \$ 0.150 bn
Includes: Israel, Jordan and Saudi Arabia	
Total World (minus China)	USD \$ 8.293 bn



Challenges with Non-U.S. Cases

1. Need to register by a prescribed deadline - often before the case has been filed and before all information is available.
2. Risk involved in participating in the litigation.
 - Loser pay models.
 - Limited or lack of contingency fee arrangements in most jurisdictions.
 - Necessity of litigation funders or insurance.
3. Other challenges: Hiring foreign counsel; Travel/staff time; Difficulty in enforcing a judgment; Less developed securities laws; Unknown variables (judges, general operation of the legal system, etc.)
4. Prudent to have a law firm actively involved in litigating and monitoring non-U.S. cases to help public funds deal with these complex issues



Claims Administration

- Public pension funds must fulfill their fiduciary duty by working to retrieve money rightly owed to their pensioners from securities class action settlements.
- In past 8 years both mutual fund managers and brokerage houses have been sued by shareholders for breach of fiduciary duty for alleged failure to file proof of claim forms.
- Courts have not addressed issue of whether an institutional investor has a fiduciary duty to file claim forms, though many have opined there is a legal duty to do so.



Claims Administration

- Statistical Data: 2005 independent academic study found that only 28% of institutional investors filed claim forms.
- From 2005-2014 there were 1121 securities class action settlements totaling over \$69 billion in proceeds.
- Institutional investors' failure to file produces a windfall for those that do.
- NYCERS recovered almost \$20 million from 2007-2008 in class action settlement money; LACERA recovered over \$40 million since formalizing securities litigation monitoring policy/procedure.



Claims Administration

□ Some Reasons Institutions Fail to File:

- Assuming someone is already taking care of it.
- Not receiving the settlement notice.
- The perception that the cost associated with filing the proof of claim is greater than any potential recovery.
- The difficulty institutions have in securing and maintaining access to historical data needed to file claims (long class periods, **changes in custodian**).
- General confusion with the forms and the securities.



Claims Administration

- What Can be Done?: Put a system in place to make sure all claims are identified and filed. Options include:
 - utilize internal staff.
 - negotiate with a custodian to perform this service.
 - hire a third-party claims advisory service.
 - engage external securities litigation counsel.



Claims Administration

- What types of reports should you be getting (no matter who is filing for you)?
- Claims Settlement Chart
 - Periodically updated to provide your fund with a proper accounting of all claims filed, and all proceeds recovered from securities class action settlements.
 - Be able to tell your members how much money you have gotten back.

Claims Administration

ABC Employees' Retirement System

FILED CLAIMS

Settlement	Class Period / Transaction Period	Claims Deadline	Settlement Check #	Distribution Date	Settlement Check \$\$
Merrill Lynch & Co., Inc. Com Stk (2007)	10/17/06 - 12/31/08	9/9/2009	064509	6/9/2010	\$24,145.97
Occam Networks, Inc.	4/29/04 - 10/15/07	3/8/2010	100097	12/23/2010	\$5,359.44
Chicago Board of Trade (PIMCO)	5/9/05-6/30/05 (6/30/05)	6/7/2011	12485	7/11/2012	\$21,533.16
Conseco, Inc.	4/23/01-8/9/02	3/23/2011	1112	8/9/2012	\$385.67
TOTAL RECOVERED					\$51,424.24

INELIGIBLE CLAIMS

Settlement	Class Period / Transaction Period	Claims Deadline	Comments
Sara Lee Corp.	8/1/02 - 4/24/03	2/25/2010	Ineligible
Force Protection, Inc	1/18/07-3/14/08	3/11/2011	No Loss
Nortel Networks Corporation (SEC)	10/24/00 - 4/27/04	3/16/2012	Ineligible
Beckman Coulter, Inc. (2010) (C.D. Cal.)	7/31/09 - 7/22/10	4/12/2012	No Loss

PENDING CLAIMS

Settlement	Class Period / Transaction Period	Claims Deadline
MBNA Corp (2005)	1/20/05 - 4/20/05	9/22/2009
Hartford Financial Services Group, Inc.	8/6/03 - 10/13/04	1/4/2010
Marsh & McLennan Companies, Inc. (2004)	10/14/99 - 10/13/04	2/22/2010
Apple Computer, Inc.	8/23/01-9/27/06	3/15/2011
Cadence Design Systems, Inc. (2008)	4/23/08 - 12/10/08	3/1/2012
International Game Technology	11/01/07 - 10/30/08	8/6/2012



Claims Auditing

- Audit of Custodian Bank or other Third- Party filer.
- Historical Audit (2 year).
- Quarterly Audit going forward.
- Make sure nothing missed; hold custodian or other third party accountable.
- Work with claims administrator to get in a late filing if needed.



Claims Auditing

ABC EMPLOYEES' RETIREMENT SYSTEM SECURITIES CLASS ACTION CLAIMS AUDIT

Below is a listing of all securities class action claims that the Custodian for the ABC Employees' Retirement System ("ABC Employees") filed on its behalf between January 1, 2011 and June 30, 2012. Based on a review of ABC Employees' transaction history, _____ has confirmed that this list is inclusive of all settlements for which ABC Employees was eligible to file a claim. No proceeds have been distributed for these claims as of August 30, 2012.

ACTION NAME	CLASS PERIOD	CLAIMS DEADLINE
GOLDMAN SACHS GROUP, INC.	7/1/1999-5/7/2002	1/14/2011
SPECTRANETICS CORPORATION	3/18/2007-9/4/2008	2/21/2011
FORCE PROTECTION, INC.	1/18/2007-3/14/2008	3/11/2011
APPLE COMPUTER, INC.	8/24/2001-8/29/2006	3/15/2011
VERITAS SOFTWARE SEC FAIR FUND	1/3/2001-01/16/2003	4/19/2011
HURON CONSULTING GROUP, INC.	4/27/2006-7/31/2009	5/5/2011
TYCO INTERNATIONAL LTD (2) FAIR FUND	12/1/1997-3/13/2003	5/6/2011
HOUSEHOLD INTERNATIONAL, INC.	10/23/1997-10/11/2002	5/24/2011
XYBERNAUT CORPORATION (2)	1/1/1900-5/13/2005	5/31/2011
NAVISTAR INTERNATIONAL CORP. (2007)	2/14/2003-7/17/2006	6/14/2011
ACCURAY, INC.	2/7/2007-8/19/2008	9/12/2011
FLEETBOSTON FINANCIAL CORP. (2008)*	1/25/2001-11/6/2003	11/29/2011
WASHINGTON MUTUAL, INC. (2007)	10/19/2005-7/23/2008	12/8/2011
GALLUCI FUND (SEC)	VARIOUS DATES BETWEEN 1/16/1998 - 8/13/1999	1/31/2012
MBIA, INC.	7/2/2007-1/9/2008	2/9/2012
BECKMAN COULTER, INC.*	7/31/2009-7/22/2010	4/12/2012
CARDIONET, INC.*	10/18/2008-9/12/2008	4/27/2012
LEHMAN BROTHERS HOLDINGS, INC.	6/12/2007-9/15/2008	5/17/2012
MOTOROLA, INC. (3)*	7/19/2006-1/4/2007	5/28/2012
CARTER'S, INC.	3/16/2005-11/10/2009	6/1/2012
WACHOVIA EQUITY	5/8/2006-09/29/2008	6/27/2012

*Based on a review of ABC Employees' transaction history, _____ has determined that ABC Employees did not purchase shares during the Class Period or receive shares in a merger to meet the eligibility requirements to file a claim for this settlement.



Best Practices for Evaluating Shareholder Litigation Firms

- From shareholder litigation firms:
 - Require detailed reporting (case summaries, quarterly reports).
 - Require periodic attendance at Board meetings.
 - When in a case, stay involved and keep firm accountable
- As with any service provider to your fund, periodic review of them, and the marketplace, is prudent
 - Issue a Request for Proposal (RFP)
 - Spend time crafting RFP so you get the answers you want -- not what a firm wants to tell you
 - Require in-person interviews



Summary

- It is essential to ensure that a proper system is in place to actively track and manage securities class action claims **EVERYWHERE**.
 - If your fund has retained a firm or firms, make sure they provide comprehensive service
- Get a better handle on the claims administration process and audit the filings of whomever is doing the work for your fund.
- If change custodian: **MAKE SURE** to insert language related to old transaction data for claims filing purposes in new agreement.
- Keep your shareholder litigation firms accountable.
- The goal, as with each area of your fund's affairs, is to have the best people working for you.



Questions & Thank You!

Darren J. Check, Esquire

Kessler Topaz Meltzer & Check, LLP

(610) 822-2235

dcheck@ktmc.com

Jonathan R. Davidson, Esquire

Kessler Topaz Meltzer & Check, LLP

(484) 270-1419

jrdavidson@ktmc.com

