



The Changing Landscape of Securities Class Actions and Its Impact on Mutual Funds

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Opting Out: The Data Driving the Trend

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**Securities class actions per year
2011 – 2015***

221

**Data provided by NERA*

A record **300** filings in 2016

32% higher than in 2015

36% higher than the average rate 2011 to 2015.

**According to Lex Machina Data Analytics,
Securities class actions now pending**

724

\$5 Billion

total paid *per year* in class settlements (aggregated)
2007-2016

80%
of class actions settle for
Less than \$50M

Median Class Settlement 2007-2016

\$9M

Median Ratio of Class Settlement to Investor Losses

2007 - 2016

2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
2.3%	2.7%	2.4%	2.4%	1.3%	1.8%	1.9%	1.7%	1.6%	2.1%

2 cents

per dollar lost

Median recovery for class members 2007 – 2016

“Institutional investors are increasingly bringing their own lawsuits when they believe a company’s disclosures were false and harmful.”

– Wall Street Journal

In the Last 20 Years...

**58% of class settlements
over \$500 million
had opt outs.**

*– Harvard Law School Forum
on Governance*

ENRON	\$7.2 Billion
WorldCom	\$6.2 Billion
Cendant	\$3.7 Billion
Tyco	\$3.2 Billion
AOL	\$2.6 Billion

100 opted out of **AOL**

288 opted out of **Tyco**

500+ opted out of **Petrobras**

Petrobras Opt Outs

27

mutual fund families

Petrobras Opt Outs

500

funds

Petrobras: A New Template?

- “... primarily a non-class action.”
- “... the class action is but one, arguably secondary piece.”
- “... the relative subordinate position of the class action.”

– Hon. Jed. S. Rakoff, *In re Petrobras*

Petrobras

**“... the watershed case
for opt-out plaintiffs.”**

- *Financial Times*

Global Investor Recovery in a *Post-Morrison* World

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Securities Fraud Litigation in the United States

- Robust system for identifying and vetting cases
- Sophisticated and well-resourced plaintiffs' bar
- Contingent fee arrangements
- “American Rule” – no fee-shifting
- Passive class participation option for marginal cases or investors with small losses

Pre-Morrison

- For decades, courts used a combination of the “conduct” and “effects” test to determine whether a securities fraud fell within the scope of the U.S. securities laws.
- Courts considered whether any significant fraudulent conduct occurred in the United States and whether the fraud had any significant effect in the United States.

Pre-Morrison (cont.)

- The conduct/effects test was a very flexible analytical framework.
- Aside from so-called “foreign cubed” cases – where a foreign plaintiff asserted claims against a foreign defendant arising from a foreign fraud – courts had great latitude to apply federal securities laws to foreign securities frauds.

Morrison v. National Australia Bank Ltd., **561 U.S. 247 (2010)**

To what extent do the anti-fraud provisions of the federal securities laws (*e.g.*, Section 10(b) of the Exchange Act) reach fraud involving foreign securities?

Section 10(b) of the Exchange Act *only* reaches fraud in connection with *securities transactions in the United States.*

Morrison v. National Australia Bank Ltd., **561 U.S. 247 (2010)**

“[P]urchase-and-sale transactions are the objects of the statute’s solicitude.”

“[I]t is in our view *only* transactions in securities listed on domestic exchanges, and domestic transactions in other securities to which § 10(b) applies.”

Post-*Morrison*

- After *Morrison*, in most cases, investors who sustain losses in foreign securities frauds must either participate in litigation opportunities in non-U.S. jurisdictions or forego recovery.
- Not all jurisdictions are created equal, and investors must carefully consider the benefits and risks of pursuing investor recovery actions in foreign jurisdictions.

Key Risk Areas

- Litigation fees and costs
- Adverse cost exposure
- Discovery requirements (and other demands on the investor's time and resources)
- Publicity
- Undeveloped law in securities fraud context

Risk Mitigation

- Third-party litigation funding
- Indemnification from counsel
- After-the-Event (ATE) Insurance
- Careful due diligence

Cases on the Horizon

- Volkswagen litigation in Germany
- Petrobras arbitration in Brazil
- Mitsubishi and Toshiba litigation in Japan
- Tesco and Petrofac litigation in the UK

Navigating the Decision to Opt Out

Keith Dutill

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Who Decides?

Directors,

On Advisor recommendation,

Subject to policies and procedures.

What Drives the Decision?

- **Duty of Care**
- **Merit**
- **Size of Loss**
- **Reputational Issues**
- **Defendant's Ability to Pay**

What Drives the Decision?

(cont.)

- **Status of Class Action**
- **Regulatory / Criminal Proceedings**
- **Cost / Adverse Cost**
- **Timing**
- **Competitive Issues**

Key Policies & Procedures

- **Gathering Information**
- **Evaluating Cases**
- **Estimating Recoveries**
- **Selecting Counsel**
- **Setting Authority Lines**
- **Exercising Oversight**

Looking Ahead

- **Opt Out Trend Continues**
- **Foreign Cases Increase**
- **Process Paramount**