

# Fighting for compensati

**UK pension funds have recently spearheaded class actions lawsuits against high profile multi-nationals. Should all schemes follow their lead? asks Matthew Craig**



After suffering substantial investment losses at companies hit hard by the credit crunch, a number of UK pension funds have revealed their involvement in class actions aimed at winning compensation.

The Northern Ireland Local Government Officers' Superannuation Committee and the Lothian Pension Fund are among the lead plaintiffs in a US class action being undertaken against Lehman Brothers. Three separate cases have been brought against Lehman and are being co-ordinated; a debt and equity case, a mortgage based securities case and a case under Employee Retirement Income Security Act (ERISA) legislation.

The Royal Bank of Scotland is also facing a US class action, with the North Yorkshire and Merseyside pension funds named as being among investors seeking redress. In this case, two major US pension funds have been named as lead plaintiffs ahead of UK pension funds, but as US class actions operate on an 'opt-out' basis, all investors meeting the qualifying criteria for holding stock may submit a claim unless they have opted out.

An exception to this is if the US courts dismiss the claims of foreign investors or when

a foreign investor held stock in a foreign company on a foreign exchange. In a class action against Vodafone, the claims of foreign investors were dismissed at trial court level but this decision was later reversed at the court of appeal.

In this regard, a class action against Shell could be relevant for UK pension funds. Here a US court ruled that it did not have jurisdiction over European investors, but the creation of a settlement foundation under Dutch law could be an alternative. Spector

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Roseman Kodroff & Willis partner Robert Roseman said: “We are waiting for the Amsterdam court of appeal. It is an important decision for European investors, as it will allow

them to have their own settlement after they have been excluded from a US class action.”

According to Caroline Goodman, managing director of Institutional Protection Services (IPS), a firm that specialises in helping schemes monitor and participate in class actions, if a UK pension fund with £1bn in assets fails to participate in class actions, it could be missing out on as much as £200,000 in settlements each year.

Stephen Everard, managing director of the GOAL Group, said nearly \$12bn was left on the table by institutional investors who did not take part in class actions between 2000 and 2007 and \$3.6bn of this was attributable to European investors. Everard added: “With the new wave of class actions instigated in the wake of the credit crunch, these losses are likely to soar in 2009 if institutional investors do not claim their slice of the pie.”

For pension funds, a securities class action is a legal mechanism that collectively compensates a group of litigants when they have suffered a loss at a company they hold stock in, due to mismanagement or wrongdoing at the company.

Thomas Dubbs, senior partner at US law firm Labaton & Sucharow, said: “Given that UK pension schemes often have a significant percentage of their equity investments in US stocks, or stocks that are cross-listed in the US, schemes can look at the US courts to take jurisdiction over claims they may have.”

UK pension funds taking part in a US class action may become lead plaintiffs if they are the largest investors in the stock in question. Dubbs said this can be a good thing: “The active involvement of public pension schemes can enhance the size of any settlement dramatically; sometimes by a factor of six.”

In theory, a scheme's global custodian is responsible for monitoring any class actions that a scheme has an interest in, but this is not a core function for custodians and they may not be pro-active in monitoring class actions. As a result, US law firms specialising in class actions are developing relationships with pension funds in the UK and specialist services which monitor and process class action claims for pension funds are also springing up. David Paterson, the head of corporate governance at the National Association of Pension Funds (NAPF) says: “Do not underestimate the time





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## casestudy

The £500m City of Westminster Superannuation Fund is one example of a pension fund which is taking advantage of class actions to bring in extra revenue to the fund.

Its chief investment officer, Ian Woodall, said that the scheme's global custodian, is expected to be pro-active in reclaiming any taxes and other sums, including class action settlements, as part of its service level agreement. Woodall says: "Most custodians do an adequate job but class actions are not a core function for them. I am pushing Westminster to take a more specialised approach and in the last three years we have seen greater receipts coming in from class actions."

Woodall says: "I personally believe there is a fiduciary duty to reclaim every penny the fund is entitled to, whether it is from reclaiming taxes promptly or through class actions. If a judge awards \$1bn in compensation and you don't claim your share, it doesn't go back to the company, it means that everyone else putting in a claim gets more."

Woodall said in the last nine months of 2008, the pension fund reclaimed over £120,000 from current class actions, where it is entitled to take part in a settlement, and by chasing up cheques from older cases. "How many pensions does that pay for in a year? If you look at the size of the average pension, it is a lot," Woodall says.

and effort involved in leading a claim."

In terms of time, Everard said the average class action settlement period was 17 months, from filing the claim to receiving payment, but the odd cases have gone on for over five years.

While a class action may take some time to go through the courts, the nature of the US legal system means that pension funds should not be out of pocket.

Dubbs says: "In the US, the lawyers work on a contingent fee mechanism whereby fees and costs come out of any settlement amounts at the end of the case. There is also no risk of the shifting of adverse legal costs to the other side if the case is unsuccessful."

In contrast, it is possible for all legal costs to be awarded against one side in the UK. In addition, there is a more onerous duty on the plaintiff to demonstrate that it has a case, according to Paterson.

Some UK pension schemes may feel that securities class actions belong in a more

confrontational US legal culture. Nevertheless, more schemes are now taking part in class actions. Picking up extra income for relatively little effort is one reason and some lawyers, like Dubbs, believe taking advantage of class

actions is a fiduciary duty for trustees. "A claim in litigation, whether it is in the US or elsewhere, is an asset like any other and trustees need to take steps to be aware of what claims their scheme may have. The best way to do

that is by monitoring their portfolio." But Paterson is more circumspect on this point: "It is not all clear whether funds have a fiduciary duty to make a claim or participate in a settlement. It certainly makes practical sense, however."

While some may see scheme involvement in class actions as a matter of good governance, there is also an argument that these cases can play a role in improving poorly managed companies. The NAPF's Paterson said that the most effective tool for improving corporate

“ Some feel that class actions belong in a more confrontational US legal culture ”

governance was engagement with management, while class actions could inhibit this dialogue. But he added: "They do have their place, especially in the US, and can and should be used to achieve lasting changes in governance practices."

For UK pension funds, class actions are not quite a free lunch, but they look like being a low cost, low risk source of useful additional income in today's difficult climate. ■