

The Time is Right for Mid-Size Public or Union Pension Funds to be Lead Plaintiffs in Securities Class Actions

By Stephen L. Brodsky, Esq., *Zwerling, Schachter & Zwerling, LLP*

Mid-size public and union pension funds have become serious contenders for the role of lead plaintiff in securities class actions. Whenever large pension funds opt to pursue individual securities actions instead of class actions, a mid-size fund may be positioned as the investor with the largest financial interest in the relief sought by the class, and thereby, the presumptive lead plaintiff. Mid-size funds should seize their chance to lead shareholder recovery efforts on behalf of their own beneficiaries and other investors.

Since the passage of the Private Securities Litigation Reform Act ("PSLRA") in 1995, institutional investors have increasingly been appointed by courts to serve as lead plaintiffs in securities class actions.¹ The increased number of institutional investors serving as lead plaintiffs comports with Congress's purpose in enacting the PSLRA: that the plaintiff with the greatest financial interest in the relief sought be the presumptive lead plaintiff in the litigation.² With their sizable portfolios, pension funds often have the largest holdings in publicly held companies and, therefore, the greatest financial interest in securities class actions involving those companies.

Pension funds have recognized the benefits of serving as the lead plaintiff in a securities class action, including their selection of class counsel and involvement in case strategy. A 2006 *Cornerstone Research* report identified five funds that have served as lead plaintiff in four or more³ post-PSLRA cases.⁴ The two most active institutions, the Teachers' Retirement System of Louisiana and Local 144 Nursing Home Pension Fund, have served as

lead plaintiff in nine and six cases respectively.⁵

A study by *PricewaterhouseCoopers LLC* (PwC) estimates that institutional investors served as lead plaintiffs in over 50% of all class actions that settled in 2006.⁶ Public pension funds, in particular, have become more involved. According to the PwC study, approximately 70% of institutional investors serving as lead plaintiffs in class actions that settled in 2006 were public pension funds.⁷



Stephen L. Brodsky

By taking leadership roles in securities class actions, pension and union funds may ensure that they are best satisfying their fiduciary obligations to their beneficiaries.

Undeniably, the presence of a sizable institutional investor in the role of lead plaintiff lends a certain distinction to a class action. A study by *National Economic Research Associates* ("NERA") concludes that class actions with institutional investors serving as lead plaintiff settle for an average of one-third more.⁸ The NERA study also reports that some settlements include changes in corporate governance procedures,⁹ an issue of importance to institutional investors.

Despite the increased involvement of institutional investors (and particularly, pension funds) in class actions, large public pension funds have, from time-to-time, opted to pursue individual actions.¹⁰ One example of this is the California State Teachers' Retirement System ("CalSTRS"). With its \$157.8 billion investment portfolio, CalSTRS is the second largest public

pension fund in the United States.¹¹ In January 2007, CalSTRS's announced that it had reached a settlement in its individual securities action against *Qwest Communications*.¹²

The selective decisions by large institutional investors to pursue individual cases is not a new phenomenon. In September 2002, the state of Ohio joined at least four other states (Illinois, Alabama, West Virginia and California) in electing not to be part of a federal class action against *Enron* and, instead to pursue individual state court actions.¹³

Certainly, the decision of large institutions to "opt out" (whether in the early or later stages) of class actions has been most notable in recent, highly publicized "mega" cases. At least 93 investors, including institutions, chose to pursue separate lawsuits against *Time Warner*, rather than participate in a securities class action that settled for \$2.65 billion.¹⁴ Among the institutional investors that brought their own cases against *Time Warner* were the *Ohio State Pension Funds*, *California Public Employee Retirement System* ("CalPERS"), *CalSTRS*, the State of Alaska, and the *University of California*.¹⁵ Similarly, at least 65 investors, including institutions, brought individual actions against *WorldCom*, rather than participate in a class action that later settled for \$6.1 billion.¹⁶

When larger pension funds forgo lead plaintiff status in favor of individual actions, mid-size pension funds may possess the largest financial interest in cases in which they otherwise would have been overshadowed.

MID-SIZE, *cont. on page 11*

owed. No one, of course, can predict which investors may seek lead plaintiff status or the financial interest of other investors. Yet, the fact remains that mid-size public and union pension funds have an opportunity to serve as a lead plaintiff in a class action and to champion the cause of investor rights while fulfilling their fiduciary duties to their own beneficiaries. It is an opportunity they should not let pass by. *Stephen L. Brodsky is a senior counsel with Zwerling, Schachter & Zwerling, LLP, a securities litigation law firm which represents pension funds and other institutional investors. He graduated from Columbia Law School, where he was a Stone Scholar.*

¹ PWC ADVISORY, CRISIS MANAGEMENT, 2006 SECURITIES LITIGATION STUDY 36-40 (2006) ("2006 PWC STUDY"); SEE ALSO LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS, 2006 REVIEW AND ANALYSIS 10 (2007).

² See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

³ The PSLRA provides that unless a court grants an exception, "a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period." 15 U.S.C. § 78u-4(a)(3)(B)(vi).

⁴ SIMMONS, supra note 1, at 11.

AT PRESS TIME, cont. from page 1

Quantitative Management Associates

as possible managers for the portfolio. Kehler noted that the board is trying to schedule interviews for its meeting in April. The search is being conducted to replace **State Street Global Advisors (SSgA)**, which was terminated following the resignation of CEO **Bill Hunt**.

The plan's consultant, **Summit Strategies Group**, is assisting with the search. ■

⁵Id.

⁶ Given that final 2006 data was not available at the time of the report's publication, a full year projection was based upon the first 50 percent of 106 case filings for 2006. 2006 PWC STUDY, supra note 1, at 36. In its study, Cornerstone Research similarly reports that institutions served as lead plaintiff in over 50 percent of all settlements in 2006. SIMMONS, supra note 1, at 10.

⁷ 2006 PWC STUDY, supra note 1, at 36.

⁸ ELAINE BUCKBERG ET AL., NERA ECONOMIC CONSULTING, RECENT TRENDS IN SHAREHOLDER CLASS ACTION LITIGATION: BEAR MARKET CASES BRING BIG SETTLEMENTS 7 (Feb. 2005).

⁹Id. at 10-11.

¹⁰ As noted herein, this situation has been most observable in the largest of class action litigations. It need not be limited to such cases, however. As long as a fund's losses are sufficiently large, the prospect of pursuing an individual action remains.

¹¹ Press Release, California State Teachers' Retirement System, CalSTRS Announces \$46.5 Million in a Settlement Against Qwest Communications and Former CEO (Jan. 31, 2007).

¹²Id.

¹³ Bruce Carton, Puncturing the Myths of Opting Out, RiskMetrics Group, Dec. 2, 2003, <http://slw.issproxy.com/2003/12/000313print.html> ("Carton").

¹⁴ Kevin M. LaCroix, Opt-Outs: A Worrisome Trend in Securities Class Action Litigation, InSights (OakBridge Insurance Services), Vol. II Issue Three, Apr. 2007, at 1-2 ("LaCroix"); Carton.

¹⁵ LaCroix at 2.

¹⁶ LaCroix at 1.

WORCESTER, cont. from page 1

Shah, senior associate with **Meketa Investment Group**, is assisting with the search. The RFI is available at meketa-group.com/mgrCenter.php. ■

Odds & Ends

■ **Peter Martin** has been appointed as president of a new institutional services division at **Natixis Global Asset Management**, which will focus entirely on pension funds, endowments and foundations. Also, **Spiro Christopoulos** was named chief operating officer of the new division.

■ **Chartwell Investment Partners** has hired **Daken Vanderburg** as a portfolio manager and director of quantitative research. He will head up the firm's first quantitative research team. He joins from **Gamma Capital Advisors** where he was a partner and portfolio manager.

■ **Coast Asset Management** has named **Roger Hartley** as chief operating officer. Prior to joining Coast, Hartley was a managing director at **Putnam Lovell**.

Odds & Ends is a compilation of reported news from a variety of sources. The information in this section is assumed to be reliable, but all information should be confirmed, as IMW does not guarantee its accuracy.

IMWeekly.com Poll

Concerns about sovereign wealth funds are attracting more and more attention in the market these days. Do you think it's warranted?

