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A legal update from Dechert's Financial Services and
Financial Services & Securities Litigation Groups

Plaintiffs' Firms Have Launched a Litigation Offensive Alleging that Funds Have Failed to File Proofs of Claim in Securities Class Actions

Commencing Monday of this week, a Texas plaintiffs' class action firm began filing virtually identical securities class action complaints against 50 fund families, their boards and advisers, alleging that over the past four years, they breached their fiduciary duties, and the Investment Company Act, by failing to participate in securities class action settlements involving mostly small and mid-cap issuers. The complaints seek damages and rescission of the investment advisory agreement. Thus far, complaints have been filed in the United States District Courts in the Northern and Central Districts of California, the Northern District of Illinois, the District of Massachusetts, and the Eastern District of Pennsylvania, among other venues.

The complaints reviewed thus far allege that from January 10, 2001 to the present, the funds failed to participate in approximately 136 securities class action settlements for which the funds were eligible. Each complaint appears to repeat exactly the same list of settlements, without regard to the fund's individual portfolio during the period. In each case, the plaintiff alleges that he or she owns shares in one of a family of funds, and that the net asset value of the funds would have been increased had defendants filed timely proofs of claim.

The complaints allege four counts. Count I alleges that defendants breached their common-law fiduciary duties to the shareholders by failing to

file timely proofs of claim. It seeks compensatory damages and the forfeiture of all fees and commissions received from class members. Count II alleges that defendants acted negligently in failing to file proofs of claim and seeks damages of "millions of dollars." Count III alleges defendants' alleged breach of fiduciary duty violated section 36(a) of the Investment Company Act and seeks "substantial damages." Count IV alleges that the advisers and the fund parents' alleged breach of fiduciary duty violated section 36(b) of the Investment Company Act by failing to submit proofs of claim that would have resulted in a recalculated NAV. Count V alleges that the contracts between the funds on the one hand, and the advisers and the fund parents on the other, were performed "in violation of the Investment Company Act and are therefore unenforceable." It seeks to void these agreements under section 47(b) of the Investment Company Act and the return of all fees and consideration "of any kind paid to them during the time period that the violations occurred."

These claims need to be approached with care. As an initial matter, they may be factually incorrect. One of our clients has determined that it actually invested in only one of the securities involved in the 136 class actions, and that it had filed a timely claim with regard to that issuer. In addition, the fund not only had in-house people dedicated to tracking these settlements and making appropriate claims, but it also received notice of these claims through its transfer agent.

We have asked the plaintiffs in that case to dismiss the action before they serve it or issue a press release announcing it.

We have been retained to assist certain clients with these matters and intend to continue to update our clients as these matters progress. We are developing a strategy for dealing with those instances where a fund or its adviser failed to make a timely claim.

As the cases proceed, we expect that our clients will develop common lines of defense and that a coordinated response will help litigate these matters efficiently and effectively, while still allowing each fund to litigate the issues raised in its case on terms most advantageous to it.

Practice group contacts

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