Summary
- A class action is a legal proceeding from a group of investors seeking compensation for losses suffered, due to misrepresentation from the company in which they were invested.
- Pension schemes are recommended to have systems in place to consider whether to participate in a class action.
- There is a time and cost risk of participating in a class action. In the UK the schemes would have to pay the other party's legal costs if they lose the case.

Time for action?

Class actions can bring significant gains for pension schemes, but they also carry heavy risk, in terms of both time and costs. Sally Ling examines whether UK schemes are looking at these actions, how to participate, and how to minimise the risk

A class action is a legal proceeding brought by a group of investors seeking compensation for losses suffered as a result of misrepresentations made by or about the companies they have invested in. Historically, most class actions have taken place in the US; while billions of dollars are recovered every year, significant amounts remain unclaimed.

There are a number of familiar arguments against class actions – they've been brought over from America or it's a form of ambulance-chasing; some people just find the whole thing rather distasteful. But shareholder litigation – referred to as group action in the UK - is becoming increasingly international and there are currently three high-profile home-grown actions underway - against RBS, Lloyds and Tesco. So should the trustees of UK pension schemes be doing more to seek redress for such losses? Do they in fact have a fiduciary duty to do so?

Should trustees get involved?

Sackers, head of litigation Katherine Dandy believes that trustees should at least have a system in place to consider whether they should participate in class actions. She says: "A claim regarding a loss that a pension scheme has suffered is a contingent asset of the scheme. For that reason I strongly believe that trustees are under a duty to consider it as a potential asset." She adds: "It would be wrong for a trustee board to have a blanket policy not to take part in any class actions regardless of the losses the scheme might have suffered."

The Universities Superannuation Scheme (USS) is one example of a scheme with a securities litigation policy in place. A USS spokesperson said that in accordance with this policy: "USS Investment Management takes reasonable steps on behalf of USS to file claims in respect of existing class securities litigation actions and to evaluate specific active litigation cases."

Help is at hand

So, how can trustees get involved and how do they find out about what actions they might be eligible to join? Custodians might alert their clients to potential losses, but there are other organisations that will provide help and support, often for a share of the proceeds. Bentham Europe, for example, provides funding for commercial disputes on a 'no win no fee' basis. The firm actively seeks out disclosure issues that might lead to a group action, then carries out due diligence to establish if there is a strong enough case against the firm, whether the potential claim is large enough to make action worthwhile and whether the firm has the money to pay damages if the claim succeeds. If it meets all these criteria the company will decide to fund the action and seek to build a book of clients. Bentham Europe investment manager Simon Dluzniak explains: "These are expensive cases to run so you need a potential total loss to

clients in excess of £50 million for it to be worthwhile funding."

Dandy cautions: "The no-win no-fee approach is attractive to trustees but there are still risks attached. The protection offered is only as good as the reputation of the funder and the insurance to cover the risk of losing."

She adds that there are a number of checks that trustees should make. For example has the funder met its minimum threshold for the claim to go ahead? Has it appointed a litigation firm with a track record in group actions? Has 'after the event' insurance been secured to protect against the risk of losing the case?

USS engages a specialist agency to provide settlement monitoring and claims recovery services to identify and file post litigation proofs of claim. Institutional Protection Services (IPS) managing director Caroline Goodman explains how this type of service works. "IPS monitors shareholder actions around the world. We then identify which are relevant to our clients and inform them of the estimated losses in the various actions."

Where there are multiple actions against one firm IPS helps clients decide which, if any, to enter. Goodman cites the example of Tesco, where there are six potential group actions in the UK and the Netherlands. The cases are compared and assessed to see which are far enough advanced to be viable – key considerations include whether the funding is in place, the legal team has been appointed and contracts drawn up and whether after-the-event insurance is in place to cover any losses.

USS takes a case-by-case approach. Each instance is assessed in terms of the size of the losses, likelihood of success, potential costs of the action and reputational consequences. Where relevant, it will consider if it can also push for corporate governance changes.

What are the risks?

There are two major concerns about getting involved in litigation: time and cost. In the US it is only usually the lead representative in a case who is involved in the court proceedings so joining a US class action is comparatively easy.

As Dandy explains: "Over the past 10 years or so trustees have become comfortable with US-style claims where all they had to do was fill in a piece of paper to claim a share of money set aside. This was a very passive way of participating in claims. But in the UK claimants have to actively opt in to a group action and such cases carry a significant financial risk; if you lose a case in the UK you will be liable to pay the other party's legal costs."

A key factor in the RBS case is that trustees have the comfort of knowing that many hundreds of other pension schemes are participating.

Dandy suggests that when deciding whether to get involved, trustees should ask themselves "is there a good reason why we should participate?" To answer this they need to establish if they have suffered a loss, if the loss was incurred during the 'liability period' and the estimated value of that loss. She adds: "Where the loss is significant I believe that trustees are then under a duty to look into the pros and cons of participating in a claim. It's not cost effective to pursue every penny."

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As shareholder group actions are new in the UK the level of involvement required from trustees is, as yet, unknown. Dluzniak explains that once signed up trustees must provide trading data as evidence that they bought the shares and suffered a loss. He adds: "They might also have to be involved in court proceedings – possibly providing a statement about relying on misleading information when buying shares. But this has not been tested as none of these cases have moved to trial. If trustees are unwilling to give evidence then they don't join."

One arguably justifiable concern, where a scheme still holds a company's shares, is that court action might kill off the company. The USS viewpoint on this is that: "Taking legal action against a company in which we have invested is a significant step and one which USS Investment Management (on behalf of the trustee) only takes if it believes it is in the best interests of the scheme and its members to do so." They add that taking legal action against an organisation does not preclude further investment.

What next?

Whether shareholder litigation takes off in a big way in the UK will depend to a large extent on the outcomes of the cases against RBS and Lloyds, which are expected to go to trial in 2016; at that point trustees will discover how much involvement is required from them. Dluzniak observes: "The courts need to find a way to manage evidence – clearly if you have 2,000 claimants it would be extremely time-consuming and an inefficient use of the court's resources for them to all appear to give evidence. I imagine they might use some type of questionnaire or take evidence from representative group members."

If things in the UK pan out as they have in Australia, we may never find out. Dluzniak says that in 15 years of operation in Australia, every shareholder class action case has been settled out of court.

Written by Sally Ling, a freelance journalist