
Alex Younger


Mark Solomon

Leading the class

Norfolk Pension Fund recently acted as the lead plaintiff in a class action against US pharmaceutical company, Puma Biotechnology, which it won. Natalie Tuck speaks to the fund's investment and actuarial manager, Alex Younger, along with its legal representative, Robbins, Gellar, Rudman and Dowd LLP partner Mark Solomon

Norfolk Pension Fund has recently won a class action against a US pharmaceuticals company. Can you tell us how the situation came about?

Robbins, Gellar, Rudman and Dowd LLP partner Mark Solomon (MS) - Like many local government pension schemes, Norfolk Pension Fund invests in, among other things, shares of companies whose securities trade on the world's stock exchanges such as the LSE in the UK, and the NYSE and NASDAQ in the USA. When executives have engaged in fraud in order to artificially boost the price of its company's stock, investors (the true owners) are often severely harmed when the truth eventually emerges and the value of the shares they own collapses. My law firm and I specialise in the USA in identifying such fraudulent misconduct by publicly-traded companies and financial institutions, as well as representing pension funds globally in securities fraud class actions, in order to recover sums lost to fraud and to instill corporate governance enhancements where possible. We monitor the investment portfolios of pension fund clients worldwide, including those of Norfolk Pension Fund. When Norfolk was alerted to its losses suffered in its Puma Biotechnology investments (Puma trades on the NASDAQ) and the apparent wrongdoing that caused them, it decided to seek the role of lead plaintiff in the proceedings, which were in Federal Court in Santa Ana, California. Having done so, we then prosecuted the case together for over three years. That involved document disclosures and depositions, including a representative of the fund being deposed. Unusually, the case did not settle ahead of trial and, instead, was tried before a jury some 43 months after it had first been filed.

The trial lasted three weeks and Norfolk's representative from the fund again testified – this time in front of the Santa Ana jury. Out of the thousands of securities class actions filed in America since 1995, only 15 have been tried to a jury verdict; two of them in Santa Ana where the Puma case was tried – the first, a case against executives of Helionetics, Inc. in 2000, which me and my partners tried and won a $15.4 million verdict; the second, the Puma trial, which was led by Norfolk and which is expected to yield recoveries of up to $100 million.

What was it that motivated the fund to take legal action against the company?

Norfolk Pension Fund investment and actuarial manager, Alex Younger (AY) – The fund has in place securities fraud monitoring by two US law firms so that it is alerted to instances where the fund may have suffered from fraud in the securities markets. Both firms also assist the fund in ensuring that it participates in all recoveries on settled cases where it has had a holding. The purpose is to enable the fund to maximise returns for the benefit of present and future pensioners, reduce the burden on its sponsoring employer, to advance good governance, and to support the deterrent effect for future misconduct in financial markets. If a case succeeds, all of the damaged investors garner a pro rata share of the amount recovered – amounts which vary from tens of thousands of dollars to hundreds of millions of dollars depending on the size of the investor and the amount of damage caused.

The fund's experience in Puma and its recoveries from the work of others on other cases, demonstrates the value of investors standing up for each other and taking their turn to step up where their rights are uniformly violated. Each of the cases prosecuted requires a defrauded investor sufficiently responsible to lead the case to retain and liaise with the lawyers they choose to litigate the case for the benefit of all. When appropriate we recognise that includes the fund taking an active and responsible role.

Can you talk us through the process of taking legal action against a company What is the first step, how long does it go for, what are the different stages? How did the fund end up becoming the lead plaintiff? And what did this involve?

MS - In the USA we have what is known as an 'opt-out' class action mechanism. That means, in the field of securities class actions, that if you are one of a number of investors damaged as a result of buying shares (or other securities) during a time period when the price you all paid for your shares was artificially inflated by fraud, then in any class action to recover compensation, each damaged investor is a member of the 'class' and ordinarily will be entitled to a share in any recovery won in the class action, unless you opt-out of the class. Each securities class action requires a damaged investor to act as lead plaintiff and in the USA there is a competition for that position in which, to put it bluntly, the biggest loser wins. Put less bluntly, there is a presumption written into statute that the investor who steps forward to lead the case with the biggest interest in its outcome compared to all other investors stepping forward is entitled in the ordinary course to the lead plaintiff position.

As a result, pension funds, quintessentially large investors that also sometimes are large losers in particular investments owing to fraud, often compete for the lead plaintiff position. The path to the position is prescribed by statute. The investor responsible for filing the first class action in any particular case must publish a notice inviting other class members to seek appointment as lead plaintiff within 60 days. Investors, often public pension funds, with their chosen lawyers, regularly compete to be appointed lead plaintiff for the good of the class in the hundreds of securities class actions filed in the USA each year. After leadership of the case is decided, the lead plaintiff and the lawyers retained by the lead plaintiff prosecute the case in one, consolidated proceeding. Cases that proceed into the discovery phase of litigation typically settle in a two to four year timeframe, although the duration can vary wildly. Exceptionally, as with Puma, the case may go to trial by jury. In Puma, it was apparent that Norfolk had sustained a significant loss and the facts, if

Case overview

Norfolk Pension Fund won a class action against US pharmaceutical company, Puma, in which it was found liable for securities fraud. The jury in the United States District Court for the Central District of California, in Santa Ana, California found that Puma, which is listed on the NASDAQ, and its CEO and chairman, Alan H. Auerbach, committed securities fraud and are liable to compensate a class of investors who purchased Puma shares between 22 July 2014 and 13 May 2015 at prices inflated by the defendants' misconduct.

The jury found that Puma and Auerbach knowingly misled investors about the effectiveness of a breast-cancer drug called neratinib, sold commercially under the name Nerlynx. The jury determined that the fraud inflated Puma's share price by $4.50, which is over 15 per cent of the price at which Puma's shares currently trade and which may cost defendants, when all claims are counted, up to $100 million.

The case against Puma and Auerbach featured forensic evidence showing that Auerbach had created counterfeit official meeting minutes of the US Food and Drug Administration to advance the defendants' fraudulent scheme. Auerbach sent these forged minutes to underwriters of a $218 million public stock offering in 2015.

challenging, appeared highly persuasive. Accordingly, my firm and I were retained by the fund and, having been appointed lead plaintiff and lead counsel respectively, together we prosecuted the case to its successful conclusion.

Why is it important that pension schemes take action against companies they are unhappy with, rather than just divest? How important is it to Norfolk Pension Fund on a personal level?

AY - If a fraud is discovered, disinvestment from the company may ultimately be an appropriate course of action. However, this action is unlikely to address the issues of losses in asset values that the discovery of the fraud by the market normally brings about. It may also not be an appropriate course of action for a long-term investor. Divestment can be highly disruptive and at odds with the aims and processes surrounding long-term investment. Rather than turning a blind eye when a fraud has been perpetrated by executives of publicly-traded companies in which the fund has ownership stakes, the fund adheres to the belief that when securities fraud is committed it is important that responsible investors call it out and seek compensation for themselves and others similarly harmed. The ultimate aim of action, either indirectly as the result of the settlement payment and related publicity, or directly via negotiated governance reforms, will be governance improvements at companies where fraud may have occurred.

Are there any other companies that Norfolk Pension Fund is taking legal action against/or using stewardship to change procedures/strategies at any companies it invests in?

AY - Monitoring of our investments is ongoing and we regularly consider the impact of different events or disclosures within the portfolios. We have not initiated any similar litigation since the favourable jury verdict in the Puma case but do not rule out doing so in appropriate circumstances. Litigation remains a last resort and the fund requires all its investment managers to actively engage with the companies where it has a shareholding. We also have a well-developed voting policy to ensure that our ownership rights are exercised to support good governance. As part of the wider Local Government Pension Scheme we support the Local Authority Pension Fund Forum in its engagement activities with UK and overseas companies. We also support initiatives on carbon disclosure and The UK Living Wage Campaign. We genuinely believe that institutions should be responsible stewards of the assets they own and recognise their wider responsibilities as part of a much larger investor base.

What advice would you give to other schemes that could find themselves in a similar situation and considering legal action?

AY - Pension funds could consider introducing portfolio monitoring by a suitably qualified firm or firms. This will allow them to be confident that they are collecting the proceeds of settled actions and to be made aware and consider if it is appropriate for them to become involved in litigation in a case. Internally you will need to consider your own governance capacity and resource to review monitoring, interact with your advisers and ultimately take a case forward if required.

It is important that the choice of firm is made carefully and with eyes wide open. The criteria for selection may include the history and track record of the firm, the depth and experience of its client base, the financial capacity of the firm to take on corporations with large budgets and teams of corporate lawyers (important given the contingent basis of most plaintiff funding) and a record of persevering with cases, with a demonstrable willingness to take go to trial where it is in the optimum interest of the class to do so. As a client you will need to be able to work openly and honestly with your lawyers and to trust and depend on the advice they give you as class representative. It would strike a note of caution if a firm being considered showed a propensity to early settlement.

Written by Natalie Tuck