

A class act

► Arshad Khan discusses what pension fund trustees need to consider when participating in a class action

Pension fund trustees are increasingly having to grapple with the question of whether to participate in class actions. Given the demands of ongoing scheme management and business as usual administration, this often drops down the agenda. But it is important that trustees focus on the question as part of their fiduciary duty: assets may be out there which could properly be collected and used for the purposes of the scheme.

In opening their minds fully to the possibility of participating in class actions, trustees should, with support from their advisers, take into account a number of factors when reaching a decision whether or not to participate. So, what are the key considerations?

A useful starting point is to obtain sufficient information to establish the size of the loss, the prospects of success, the complexity of the claim and impact on resources, the risks including any reputational risk for the trustees (or indeed the sponsoring employer) and any conflict of interest.

The loss

The amount of the loss is often the most important factor and is likely to influence the rest of the trustees' decision making. It is a matter for the trustee to decide, in the context of the overall assets of the fund, what it regards as a significant loss and makes the claim worth pursuing.

In order to assess this, the scheme's available trading data should be obtained and analysed at an early stage for the net loss to be assessed. This service is frequently offered free of charge by the lawyers or sponsors of the class action.



The prospects of success

Trustees should request a copy of the Counsel's Opinion (if available) or a summary of any legal advice obtained on the merits of the class action to ensure there are reasonable prospects of success. Importantly, it is not necessary for trustees to evaluate the merits of the claim or try and second guess the likely outcome.

Allied to this consideration are the prospects of settlement of the action.

Complexity of the claim

Trustees should try and assess at an early stage the complexity of the claim. This may include how many parties and how many issues are involved.

At the same time, trustees will wish to assess how best to use their finite resources in order to ensure minimal impact on the other exigencies of managing the scheme. For example, the amount of time that may be involved in reviewing the documents, locating evidence and taking advice are relevant factors when weighing up the pros and cons.

Risks involved

Trustees will wish to be satisfied about the financial risk to the scheme of participating in the class action. This

can be mitigated through the funding programme in place through the lawyers or sponsors of the class action but trustees should not leave the position to chance and should look to cap their costs.

As well as financial risk, reputational risk may be a factor to consider. In most cases participation in a class action could be a matter of public record.

Conflict of interests

Trustees may wish to consider whether there is a conflict of interest in pursuing a legal action against a company, particularly if the scheme still has an investor relationship. If the court action and/or its settlement could affect the long-term value of the shareholding, this could be a relevant consideration.

Conclusion

Trustees should not approach any request to consider participating in a class action with trepidation or scepticism. In times of increased activism and shortfalls for schemes, not to mention strains on employers and members, passing up on the potential to convert any claim for loss suffered into real assets could be storing up issues further down the line.

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