



North East Scotland Pension Fund investment manager, Graham Buntain, and Robbins Geller Rudman & Dowd co-founder and partner, Mark Solomon

Winning the battle

✓ **North East Scotland Pension Fund investment manager, Graham Buntain, and Robbins Geller Rudman & Dowd co-founder and partner, Mark Solomon, discuss their recent success in a battle for justice against American sportswear brand Under Armour**

North East Scotland Pension Fund (NESPF) has recently helped secure a \$434 million settlement in a class action against Under Armour, in which it was the lead plaintiff. How did the situation arise?

Mark Solomon: My law firm, Robbins Geller Rudman & Dowd and I have been legal counsel to NESPF with respect to its US securities fraud exposure for a number of years. We monitor for such fraud and perform analyses of the securities transactions of our clients worldwide who invest in listed securities generally, and in the United States in particular. NESPF's fraud-related losses in Under Armour came to light as a result of that monitoring programme. Shares of Under Armour had been purchased for NESPF during the time period we alleged that the company's share price was inflated by the defendant's misrepresentations about the company's true condition.

We alleged that instead of revealing to investors that demand for Under Armour's products was in decline, its CEO, Kevin Plank, masked the decline by pulling in sales from future quarters and engaging in other suspect sales practices. When the jig was up and the practice revealed, Under Armour's share price collapsed. NESPF led a class of investors globally in seeking to recover their losses and, after several years of litigation here in the US, we reached a settlement just three weeks before the trial was set to begin. NESPF won a recovery that is almost 50 times more than the \$9 million Under Armour paid the Securities Exchange Commission to resolve similar charges.

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

Graham Buntain: Simply put, because we felt we had to right the wrong. If we overpay for shares in a company because its leaders have been misleading the

market, that overpayment financially harms the pension fund and its beneficiaries: Every £1 million lost to fraud is more than enough to fund over 100 pensions for a year. Multiply that by all of the losses caused by such fraud that we and other funds suffer across our portfolios and it's clear that if there's a remedy that we can reasonably take advantage of, we want to consider it. Here, after advice from Mark [Solomon], we believed we could help provide some remedy, at no financial risk or out-of-pocket expense, for all investors damaged by the apparent wrongdoing. And, as a member of the Principles of Responsible Investment (PRI), in addition to financial recovery, we want to promote good governance and better functioning financial markets.

What extra work is involved for a pension fund acting as a lead plaintiff in a class action? How involved was NESPF in the legal process?

Solomon: The balance needs to be carefully struck. The cases require responsible leadership, and without such leadership from institutional investors, securities fraud would go without a remedy in many cases and consequently there would be far fewer recoveries for investors. As to their responsibilities, it's important that lead plaintiffs understand that they are expected in the formal 'discovery' stage of the litigation to provide any documents relevant to the litigation; identify any witnesses they may know of; confirm, often in a deposition, the foregoing as well as describe the process they have followed in becoming active in the litigation. Often, it is the lead plaintiff's external manager who will have the bulk of any relevant documentation.

Discovery aside, the lead plaintiff liaises with lead counsel throughout litigation. A large amount of lawyers' time is devoted to purely legal issues, but lead plaintiffs are directly involved in overall case strategy and instruct on case dispositive decisions. If the case

succeeds via settlement or judgment, the lead plaintiff is allowed to apply for reimbursement for time spent pursuing the matter. Graham [Buntain] and his NESPF team liaised with us closely from the inception of their involvement in the case and were a critical factor in securing a precedent-setting resolution.

What are the next steps in this particular case now that an agreement has been reached?

Solomon: The federal jury trial, which had been scheduled to start on 15 July in Baltimore, has been called off; notice of the settlement is being circulated to class members; and the judge has set a final approval hearing for 7 November 2024. If approved, the net settlement proceeds then get distributed to class member claimants via a third-party claims administrator. Also, if approved, the governance reforms, which also are a component of the settlement, will kick in, including the enforced separation of the chair and CEO positions for at least three years and the imposition of enhanced performance metrics as a condition to any stock grants for the CEO, CFO and CLO (chief legal officer).

Are there any other class actions that NESPF is currently involved with or using stewardship to change procedures/strategies at any companies it invests in?

Buntain: There are no other ongoing class actions in which we currently are actively involved at the moment. In terms of overall stewardship, NESPF actively votes in-house on equity holdings and has a strong history of collaboration and engagement to help drive change.

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

Buntain: I think in the same way that you would risk assess anything, it's important to understand the process

involved and work with a trusted partner. The idea of legal action can seem a little daunting, but if a pension fund has done nothing wrong then why should it be penalised? You can make a difference by doing it and the reality is you are an expert in the subject matter, which is your own fund and its investments. Clearly, it's important to pick a specialist external legal adviser to help you navigate a US securities fraud case. As with any service provider, but here with heightened importance, securities fraud lawyers should be carefully assessed

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on their record, their reputation, their financial strength, relevant trial experience, and the data security they provide because, as they proceed to prosecute the case, the good reputation of the fund will be entrusted to them and the ability to secure any kind of recovery and governance reforms for our members.

There is an emerging trend of local government pension schemes (LGPS) taking on important roles in investor lawsuits like this case. What do you think is motivating LGPS funds to take part, compared to private sector schemes in the UK? Or is it the case that private sector schemes are involved but are just not publicising it?

Solomon: This important trend is a direct reflection of the responsible ownership and stewardship ethos of these funds. They recognise that the right to bring a claim to recover assets damaged by fraud is itself an asset that

carries with it the obligation to maximise its potential where the cost of doing so doesn't outweigh the benefit. They have consequently embraced securities fraud monitoring services and have embarked on litigation where appropriate. Securities fraud litigation in the United States, which can be expertly prosecuted to obtain a recovery at no out-of-pocket cost to the claimants, provides injured funds a mechanism to recover compensation not just for themselves but for others similarly injured, too.

The stewards of public-facing funds such as LGPS funds in the UK, and their counterparts in state, local, and union funds in the USA, increasingly lead such actions. UK industry funds, such as the Mineworkers and British Coal Staff Pension Schemes and the Universities Superannuation Scheme, in addition to the LGPS, have also led recent cases. There's no reason in principle why corporate schemes, facing the same duties, many of the same issues and who benefit pro rata when they are members of successful classes, cannot similarly lead efforts to recover losses attributable to fraud – and it is slowly happening. More corporate schemes are seeking the lead plaintiff mantle and I expect that trend to continue across the spectrum of investors who attach value to corporate integrity, transparency, accountability and redress.

Written by Natalie Tuck

