

# SECURITIES LITIGATION ISSUES FACING INSTITUTIONAL INVESTORS



JULY 21, 2009

# Agenda

- Introduction
- Presentation
  - Adam Savett, RiskMetrics Group's Securities Class Action Services
  - Salvatore Graziano, Bernstein Litowitz Berger & Grossmann LLP
  - Wayne Schneider, New York State Teachers' Retirement System
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
  - > [www.securitiesdocket.com](http://www.securitiesdocket.com)
- Wrap-up



# Webcast Series

- Series of webcasts — every other week
- [www.securitiesdocket.com/webcasts](http://www.securitiesdocket.com/webcasts)
- NEXT: Credit Default Swaps: Recent Developments, August 5, 2009, 2 pm Eastern



# Panel



Adam Savett



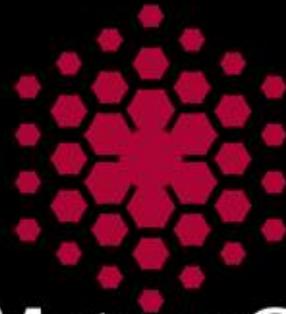
Salvatore Graziano



Bruce Carton



Wayne Schneider



**RiskMetrics Group**  
The Center for the Financial Community

# Securities Litigation Issues Facing Institutional Investors

July 21, 2009



# Agenda

## ● Monitoring the portfolio

*When and why you would want to be a lead plaintiff*

## ● Don't leave money on the table

*Filing claim forms in settled cases to recover losses*

## ● Opting out

*When does it make sense to leave the safety of the class action and pursue an individual case*

## ● Opting in

*Navigating the waters of non-US securities litigation*

## Monitoring – How does it help an institution?

*Institutional investors have 3 choices to recover their assets when securities litigation is filed:*

- Move to be the Lead Plaintiff in the securities class action
- File an individual action to recover their losses (possibly in state court, in the case of a public fund)
- Do nothing, remain a passive class member and, if there is a recovery, file a proof of claim, or as discussed below, opt-out

*But how does an institution even know about the existence of cases and evaluate the options?*

**One word – Monitoring!**



## Monitoring – The Nuts and Bolts

- Some institutions do not monitor newly filed cases, and instead rely on a custodial bank to file claims forms in settled cases.
- An institution may engage one or more outside law firms to review their portfolio and offer suggested courses of action.
- These arrangements have become extremely common, and generally are ostensibly done for free by the law firm.
- Some institutions perform this task in house, or use a non-law firm third party service.



# Monitoring – So What’s the Big Deal?

- In a recent decision appointing a lead plaintiff and examining the various lead plaintiff movants<sup>1</sup>, Judge Rakoff suggested that some arrangements with law firms have a built in conflict of interest.
- The problem with “must hire us” clauses.
- Possible solutions:
  - ◆ Eliminate the “must hire us” clause
  - ◆ Design a dual track arrangement – separate evaluation counsel and litigation counsel
  - ◆ Require institutions to pay for “monitoring” services from law firms
  - ◆ Engage “litigation neutral” third parties or in-house assets to perform loss calculations
- Larger issue of whether an institution is capable of serving as a lead plaintiff

1. *Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing and Securitization, LLC*, 616 F.Supp.2d 461 (S.D.N.Y. 2009)



## Monitoring: A Sample Lead Plaintiff Evaluation Process

- Are the institution's potential damages large enough to warrant the expenditure of staff/counsel time that would be required for active involvement in the case?
- Will the institution's active involvement in the case add value to the potential settlement? One obvious source of added value will be through a reduced fee agreement.
- Are other responsible institutional investors likely to seek lead plaintiff status?
- How many cases are we involved in concurrently? (There is a statutory limit of 5 cases in a 3 year period)
- The number of class action activity fluctuates significantly.



# Monitoring: A Sample Settlement Evaluation Process

- What are the deadlines?
- Is the institution a member of the class?
- What does the settlement provide?
- Is there anything problematic in the allocation of settlement proceeds?
- Are the proposed attorneys' fees fair?



# Leaving money on the table - by not filing claims

“Public and corporate pension plans are losing out on hundreds of millions of dollars in class-action settlements for which they are eligible simply by neglecting to file claims.”

“Investors Fail to Claim \$1.8 Billion From Shareholder Lawsuits.”

“On average roughly 28% of eligible institutional investors file claims in [securities class action] settlements,” resulting in an estimated \$1 billion left on the table each year.”

## **WORLD.COM (CITIGROUP) SETTLEMENT NOTICE**

The Settlement is all cash, and includes interest earned on the Settlement Amount starting forty-five days after the Court granted preliminary approval of the Settlement, and continuing through the date the Settlement Amount is paid, with interest. Further, based on Lead Counsel's experience and survey of claims administrators, it is reasonable to assume that 25-30% of potential claimants will not file claims for a distribution from the Settlement Fund, so the actual distribution may be an even greater percentage of recoverable damages than the figures noted in the Summary section of this Notice.

Source: a. September 4, 2001; The Wall Street Journal

b. December 18, 2003; Bloomberg, Mark Jaffee

c. *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions To Participate in Securities Class Action Settlements*, 2005; 58 Stanford Law Review, 411, 424; Professors James D. Cox and Randall S. Thomas.



# Why Do Institutions Fail To File Claims?

## Reasons:



### No notification of settlements



### No procedures in place to complete claim forms



### No awareness of substantial recovery



### No access to historical data

Complete and Sign  
Bill Form and  
Return Postmarked  
No Later Than  
August 26, 2005

WorldCom, Inc. Securities Litigation  
c/o The Garden City Group, Inc.  
Claims Administrator  
P.O. Box 9000 #247  
Manhasset, NY 11566-9000

WCM

**PROOF OF CLAIM AND RELEASE**

IDENTITY OF CLAIMANT:  
Client Number: 000001174  
LAWYER: 000000  
MORTGAGE: 00  
TRUSTEE: 00 701210

PROOF OF CLAIM AND RELEASE  
WRITE ANY NAME AND ADDRESS CORRECTIONS  
HERE OR ON A SEPARATE PAGE. RETURN TO THE  
FEE LETTER WITH THIS PROOF OF CLAIM AND  
ADDRESS HERE

NAME:  
ADDRESS:  
CITY:  
STATE/ZIP:  
PHONE:

IF THE ABOVE AREA IS BLANK, YOU MUST ENTER  
YOUR FULL NAME AND ADDRESS HERE

PLEASE COMPLETE THE FOLLOWING:

Client Identification (Please check the appropriate box)  
 Individual  Partnership  Joint Tenants  Corporation  
 IRA, Keogh, or other type of Retirement (Indicate type of plan)  
 Other (specify):

Name of Beneficial Owner (if different than Claimant):

The Social Security (Employer or Employer Identification) number and telephone number of the beneficial owner may be used  
in verifying the claim. Failure to provide any of the foregoing information could delay verification of your claim or result in  
rejection of your claim.

Social Security Number (Employer Identification Number) Employer Identification Number  
( ) ( )  
Office Telephone Number ( )  
Fax Telephone Number ( )  
E-mail Address (if available):

For informational purposes, you must also respond to the following question:  
Was I an officer, director or employee of WorldCom, Inc. at any time from April 29, 1999 through and including June 20, 2002?  
Yes  No

If yes, state position held, date and nature of employment or affiliation

QUESTIONS? CALL TOLL-FREE (866) 808-3556 OR VISIT [www.worldcomlitigation.com](http://www.worldcomlitigation.com)



## What is at stake?

- During the period from 2006 to 2008, more than \$35bn in securities class actions and regulatory settlements were finalized
- Fiduciary duty to file claims in settled actions is fairly clear.
- In January 2005, more than 40 mutual fund managers were sued by shareholders in class action lawsuits alleging that the funds had failed to collect nearly \$2bn in settlement payouts to which the funds (and the funds' shareholders) were entitled
- In 2007, a publicly traded investment advisor took a \$56m charge as a result of having to reimburse certain clients for mistakes they made in filing claims for those clients.



# Class Action vs. "Opt Out"

## ◆ Advantages of "opting out":

- ◆ Possible to achieve a proportionately larger recovery than the class
- ◆ Possible to negotiate better fee arrangement
- ◆ Settlement is not paid through claims administration process
- ◆ May have more control over the legal process and pace
- ◆ Might be able to avoid the PSLRA discovery stay (if in state court)
- ◆ May be able to get to trial faster than class action (if in state court)

## ◆ Disadvantages of "opting out":

- ◆ Defense counsel may refuse to settle on even the same basis afforded to the class
- ◆ Institution and its managers may be subjected to discovery
- ◆ Unless your loss is large, the defendants may be far more worried about the class action than about you
- ◆ No real opportunity to affect corporate governance changes
- ◆ Opt-out litigation can be adversely impacted by class litigation results



# Securities Litigation is not just a US anomaly

- At least 7 countries allow securities class actions (or an analogous procedure) and have had at least one case filed.
  - ◆ Opt-in - Australia, Germany, Israel, and Taiwan
  - ◆ Opt-out: Canada, Netherlands
  - ◆ Uncertain: Nigeria
- At least 5 countries allow securities class actions (or an analogous procedure) but have yet to see any cases filed.
  - ◆ Denmark, Italy, Norway, South Korea, and Sweden all have enacted legislation.
- Neither here, nor there.
  - ◆ Press reports have indicated that securities class actions have been filed in Japan, but upon closer review, they have generally not been true class actions
  - ◆ A current Indian case (Satyam) appears set to become a true securities class action
  - ◆ France is contemplating class action legislation (again)
- The role of litigation funders.

# Developing A Securities Litigation Policy Model

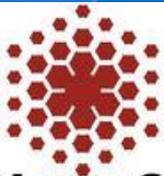
## In House

- **What experience do the members of your team have with class action litigation?**
- **Does your staff have the time, experience, and resources necessary to track the state, federal, and international securities class actions filed each year?**
- **Do they have the time, experience, and resources necessary to track the state, federal, and international securities class action settlements finalized each year?**
- **Do you have relationships with key constituents such as claims administrators, law firms, and federal state and international securities regulators?**
- **Do you have automated procedures to identify and track new securities class actions that may impact your portfolio?**

## Outside Partner / Law Firms

- **Does your outside partner cover and track class actions involving both equity and (debt) securities?**
- **What services does your outside partner provide (e.g. monitoring/loss calculation, claims filing)?**
- **Is your custodial agreement clear on the responsibility and level of claims filing service?**
- **Is your outside partner compensated for providing securities class action services to you on a contingent basis?**
- **Does your outside partner have the technical support and infrastructure needed to properly service your account?**
- **Does your outside partner have the operational staff and resources needed to properly service your account?**
- **Does your outside partner have the client support and management resources needed to properly service your account?**

# Questions?



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# Thank You

Thank you for attending this webcast.

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for information on future webcasts.

