

Developing a Securities Litigation Claims Recovery Strategy



Colin Holmes of Financial Recovery Technologies explains how to create and implement a comprehensive and effective claims recovery policy

Securities litigation has undergone a significant transformation in recent years, evolving into a complex landscape that institutional investors must navigate with precision and foresight. Svetlana Tabagari, Relationship Executive with Relationship Management at CIBC Mellon and Colin Holmes, Esq., Associate Counsel at Financial Recovery Technologies (FRT), offer a blueprint for asset managers and owners to optimize their approach to securities litigation and claims recovery.

The investment market is no stranger to pressures involving data, technology, and ever-important ESG considerations. As Tabagari highlighted, institutional investors must adapt swiftly to these demands, integrating new data generation and risk mitigation strategies and accommodating the evolving microenvironment. These challenges are reflected in the realm of securities litigation, where an increase in the volume and intricacy of class action lawsuits necessitates a robust recovery program.

With over \$2.4 trillion Canadian dollars in assets under administration as of September 30, 2023, CIBC Mellon is dedicated to helping Canadian institutional investors and international institutional investors into Canada service their financial assets throughout the investment lifecycle. Clients ranging from pension plans to global financial institutions face a common predicament: how to manage the growing complexity of class actions and secure rightful recoveries efficiently and effectively.

In an increasingly litigious society, the rise of global securities litigation presents both challenges and opportunities, Holmes notes that a comprehensive recovery program can help investors identify their exposure and eligibility in litigations worldwide, pinpoint potential recovery opportunities, and maintain necessary transparency and audit trails for internal reporting.

Policy creation

Holmes emphasizes that investors have a fiduciary obligation to proactively monitor and evaluate litigation participation. A well-crafted policy not only aligns with financial responsibilities but also ensures that asset owners maximize recoveries while minimizing associated risks. A policy can streamline the decision-making process by automating participation in passive cases and setting minimum loss thresholds for active opt-in cases, thus reducing the volume of

cases requiring active decision-making.

The landscape of global actions can be divided into passive and active jurisdictions, with passive cases such as U.S. class actions offering straightforward participation with minimal risk, since claimants join immediately before settlement or after a case has already settled. In 2022, U.S. class action settlements reached \$5.6 billion, with disbursements in 2023 already surpassing previous years.

Active jurisdictions, conversely, as Holmes points out, require claimants to be active litigants in ongoing litigation, frequently joining from a case's inception and often exposing them to additional risks, such as adverse costs and the need to provide substantial documentation. These cases require a more deliberate analysis by investors as to whether to join, weighing the potential recovery against the risks of participation. Nonetheless, with informed decision-making and strategic thresholds, the number of active cases requiring attention can be significantly reduced.

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- Colin Holmes

For passive cases, automation can be a game-changer, allowing investors to join whenever eligible without incurring risk. And with the help of third-party vendors, even the most demanding active opt-in cases can be managed more effectively.

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Investors should create standardized procedures for deciding when and how to opt into cases. This should start with identifying relevant cases that a company might be eligible to participate in by regularly monitoring for new class actions or legal claims that may impact the company. This could involve subscribing to legal news

feeds, using third-party services, or actively searching court databases.

Once investors identify cases for which they are potentially eligible, Holmes recommends that they “work with third-party vendors or directly with the organizers to calculate estimated losses based on methodologies likely to be used in the governing jurisdiction. This will help in assessing the financial impact and relevance of the case to the company.”

By setting thresholds for participation, companies then only invest time and resources in cases with potential recoveries that justify the effort, particularly in high-risk jurisdictions.

Policies should also be tailored to identify and assess ‘low-hanging fruit’ cases—those with a greater likelihood of settlement due to case developments or pressures on the defendant. Defendants may be more willing to settle in cases where there is negative publicity surrounding the underlying fraud, they have spoken publicly of a desire to move past a scandal, or there are financial pressures from an insolvency or impending merger that may urge them to resolve outstanding legal claims.

Investors should incorporate strategies into their policies that pinpoint, scrutinize, and engage with such cases to optimize recovery chances.

The ESG factor

With Environmental, Social, and Governance (ESG) factors becoming more critical, Holmes points to FRT’s proprietary litigation ESG (LESG™) scoring system to evaluate the potential impact of recovery actions. The system rates legal efforts on a 100-point scale, guiding investors on whether to join action.

The LESG™ score breaks down into E, S, and G components that allow investors to tailor their litigation involvement based on specific concerns. For example, an investor might focus on participating in actions against companies with poor environmental practices, indicated by a low ‘E’ score. By targeting companies with poor ESG performance, investors can use litigation as a tool to drive improvements. Organizations can align their legal strategies with their ESG commitments and contribute to broader goals of sustainable and ethical business practices.

Policies should be documented and regularly reviewed to ensure they remain relevant in the ever-changing legal and economic landscape.

BPM

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