Labaton Keller Sucharow

THE LIAISON

NEW YORK · DELAWARE · LONDON · WASHINGTON, D.C.

2024 MID-YEAR REPORT

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EXECUTIVE SUMMARY

Labaton Keller Sucharow is pleased to present *The Liaison: 2024 Mid-Year Report.* The Firm has been a pioneer in protecting clients' interests in non-U.S. litigation. With more than 20 years of experience abroad and deep relationships with law firms around the world, Labaton Keller Sucharow has a unique perspective on investment-related issues and recovery opportunities outside the United States.

Featured in this edition:

- Prospects for a streamlined securities class action regime in the UK;
- Recent developments regarding investor groups bringing claims in Germany;
- Analysis of Australian securities actions that have gone to trial; and
- Global trends in non-U.S. securities actions.

We would be happy to provide more comprehensive assessments and recommendations with regard to any of the topics discussed or highlighted in *The Liaison.*

By: Mark S. Willis, Hui Chang

Representative Actions: Will the UK Go the Way of the U.S.?

NOTEWORTHY DEVELOPMENTS

Investors joining American securities class actions have the wind at their backs compared to shareholders pursing similar fraud claims in the UK. In each U.S. action, one or more investors are designated as lead plaintiff(s) to oversee the case's progress and act as fiduciaries for the entire class, making key decisions (subject to judicial approval) on counsel fees and settlement terms, including ESG enhancements. This streamlined system creates considerable efficiencies and enables other class members to sit back, let the lead plaintiff steer the ship, and wait for a recovery. Investors joining UK actions have thus far not been as fortunate. However, a local form of representative action is now being tested in UK courts, which would make them closer to their U.S. counterparts. That would be good news for those joining UK actions, but it all depends on several upcoming judicial opinions.

NO PASSIVITY PLEASE, WE'RE BRITISH

U.S. class actions are low effort, passive creatures. Because they are "opt out" proceedings, investors who meet the eligibility criteria are automatically included. Once an action begins, the lead plaintiff takes on its oversight role and other class members can then simply wait for any monies recovered to be distributed. UK investor actions do not currently permit the same level of passivity, although they are not massively taxing on a claimant either.

Most UK actions have been brought under Section 90 or Section 90A of the Financial Services and Markets Act 2000. Section 90 covers prospectus liability (similar to Section 11 of the the U.S. Securities Exchange act of 1934) and has no reliance requirement. *RBS* and *Glencore* are examples of Section 90 cases. Section 90A covers other false statements and after-market representations, such as annual reports, financial statements, and press releases. It is more akin to Section 10(b) of the U.S. Exchange Act of 1934, and most of the UK-based cases launched thus far have been Section 90A proceedings, including *Tesco, G4S, Standard Chartered, RSA, Barclays*, and *Serco.*

Whether a claim in the UK is brought under Section 90 or 90A, there are two steps that investors will then take. First, they must affirmatively register, as these are "opt-in" actions, meaning an investor will not be automatically included as it would in a U.S. action. Second, investors must generally (although not always) provide supporting evidence that they have standing to bring the claim. (Neither of these steps are terribly time-consuming.) In some Section 90A cases, there is a third step whereby investors are asked to provide some form of supporting evidence that they *relied* on the defendant's misrepresentations.

These steps have precluded claimants in UK actions from mimicking the passive role claimants have played in U.S. class actions. However, the utilization of the representative action may partially cure this.

LET ME REPRESENT YOU

In the UK, investors have most frequently used the multi-party action to prosecute fraud claims under both Sections 90 and 90A. After affirmatively opting-in, their cases are prosecuted as a group, but they are not consolidated and there is no representative that acts on their behalf. However, in a number of actions, investors have sought to bring the same claims through a *representative action* pursuant to Rule 19.8 of the Civil Procedure Rules 1998 ("Rule 19.8"), either initially or later in the proceedings.

The key benefit of a representative action is that it operates far more like a U.S.-style class action, permitting one claimant to prosecute key aspects of a claim on behalf of, and for the benefit of, other similarly situated investors. Each claimant is still required to formally register, but only the actual representative is named on the claim form filed with the court. Importantly, adverse costs risk arises only for the representative plaintiff (who would be protected through adverse costs insurance). After registration, and until trial, only the representative plaintiff is involved in the action, and other investors can essentially sit back and let it play out, as there are no standing or disclosure requirements for these investors.

The representative action provides clear benefits for investors wanting a more passive role. However, defendants have aggressively contested its use, and it has yet to be given a clear judicial stamp of approval. Even so, there are signs this may be in the offing. Perhaps the most closely watched case is *Reckitt/Indivior*.[1] There Justice Green (of the High Court, *i.e.*, the trial court) rejected the claimant's proposed representative action. His broader commentary favored other methods of bifurcation already used in securities actions in the UK, and he expressed concern about Rule 19.8 depriving the court of its case management powers. However, part of the motivation behind Rule 19.8's implementation (and its recent use in securities actions) is to benefit retail shareholders whose claims are usually too small to justify joining an active group litigation. *Reckitt/Indivior* was brought on behalf of *institutional* investors, and Justice Green may have felt the representative model was not well suited to that setting (and he was unimpressed by retail claimants being added to the list of represented parties at the eleventh hour).

The claimants seeking the representative action in *Reckitt/Indivior* followed protocol and sought Justice Green's permission to appeal his decision to the Court of Appeal, which he denied. The claimants then petitioned the Court of Appeal directly, and that body granted permission. That appeal is expected to be heard in March of 2025. The outcome will directly impact other pending cases that have also sought to proceed as representative actions. For example, in one of the *Glencore* cases, the defendant made a strike out application similar to *Reckitt/Indivior*, but the hearing on that application has been extended until after the *Reckitt/Indivior* appeal. The *British Telecom* case was also launched as a representative proceeding, but the deadline for service of the claim has been postponed until after the resolution of the *Reckitt/Indivior* appeal. Finally, one of the *Petrofac* actions has been brought as a representative proceeding, but that too awaits the outcome of the *Reckitt/Indivior* appeal. Litigation funders and English counsel are contemplating other representative actions, but until the *Reckitt/Indivior* appeal is resolved in 2025, insurance carriers

[1] *Wirral Council v Indivior PLC/Reckitt Benckiser Group PLC* [2023] EWHC 3114 (Comm).

seem unwilling to underwrite the adverse costs risk associated with Rule 19.8 actions. Until then, UK-based investor actions will continue to be launched using the multi-party format, and if *Reckitt/Indivior* goes in favor of claimants, some of these group proceedings will likely be converted to representative actions (thereby bringing Rule 19.8 into play).

While it is difficult to know how the Court of Appeal will rule on *Reckitt/Indivior*, it is perhaps useful to consider a parallel appeal in the *Commission Recovery* action (a non-securities claim regarding secret commissions also brought as a representative proceeding). There, the High Court sanctioned the use of the representative action, even though it acknowledged the claimants had some differences in their circumstances and the potential remedies sought. The court did not regard these differentiating factors to be an obstacle to the Rule 19.8 representative mechanism, particularly given there was no conflict of interest between the group members. The defendant then appealed, but in January 2024, the Court of Appeal unanimously upheld the High Court's decision. Having lost again, the defendant then sought permission to appeal to the UK Supreme Court, which was rejected. In other words, the Court of Appeal in *Commission Recovery* refused to allow the defendant to appeal its decision permitting a representative action, while at same time *granting* claimants' appeal in *Reckitt/Indivior* (and overruling Justice Green, who had refused permission to appeal). The Court of Appeal's actions in both cases can be viewed as a positive signal to how it may decide near year's *Reckitt/Indivior* appeal. If claimants are successful there, other securities claims brought under Rule 19.8 will have a greater chance of moving forward as well.

SPLITTING UP

Once a case goes to trial, it will most likely be bifurcated, with the defendant's liability occupying Phase 1 and issues of reliance (if applicable), causation, and damages punted to Phase 2. It is in Phase 2 where passive investors in a representative proceeding may still be required to take certain active steps.

There is an obvious judicial economy in having issues relating to a defendant's liability tried in Phase 1. If the defendant is found not liable, there would be no need to proceed to Phase 2, where the claimants' reliance (possibly), causation, and damages would have to be proved. This structure also puts pressure on a defendant that is found liable in Phase 1 to settle before the claimants' burden arises in Phase 2.

Unlike representative proceedings, bifurcation has already been embraced by a number of UK courts, drawing it closer to being settled precedent. In the *RSA* action in 2022, Justice Miles bifurcated the trial with only the defendant's liability occupying Phase 1 and claimants' reliance, causation, and damages left for Phase 2. Around the same time, Justice Falk sanctioned this same split-trial approach in *G4S* and then again, a few months later, in *Serco.* In 2024, the same Justice Green overseeing the *Reckitt/Indivior* action ordered that the *Standard Chartered* case be bifurcated along the same lines, while allowing expert evidence regarding price reliance to be included in Phase 1 along with the defendant's liability. Finally, in May of 2024, Justice Bryan ordered a split trial in *Glencore*. The defendant there, perhaps recognizing the increased body of case law favoring the split trial approach, actually signed on to it (albeit not in precisely the same terms as the claimants sought).

In a representative action, if a direct reliance claim is being pursued, claimants may be asked in Phase 2 to provide evidence of what they relied on. Conversely, if there is a parallel dishonest delay claim—which does not focus on a defendant's misrepresentations but instead on its delay in telling the truth—they may have no such burden. Moreover, issues of causation and damages are likely to be expert led and require minimal input from claimants. If the case settles before Phase 2 of the trial, a claimant will have no further obligation. If the trial goes into Phase 2, a claimant's obligation would remain limited, depending on the type of reliance claim asserted and whether the court permits test or sample cases, as opposed to requiring evidence from each claimant (which would be highly unlikely).

DOWN THE ROAD

For investor litigation, the UK is the most active jurisdiction outside the U.S., save Australia. This makes it a critical space to watch. With so many actions proceeding, judges in the UK are being forced to interpret the law to further define shareholder rights. For example, what must a claimant show to substantiate its standing to bring a claim? In a Section 90A action, what is the minimum demonstration of reliance? If a case is bifurcated at trial, which issues should be tried first? Finally, under what circumstances can a representative plaintiff be appointed to act as a fiduciary for similarly situated investors? For now, only the question of bifurcation seems to have reached the point of settled precedent. However, by 2025 there will be additional clarity on the fate of representative actions. This will begin to show whether UK proceedings are drawing closer to the efficiencies available in U.S. class actions. Until then, investors will need to remain patient with a jurisdiction in transition.

By: Mark S. Willis, Hui Chang

Will Disaggregation Make the German KapMuG Proceeding Go Kaput?

NOTEWORTHY DEVELOPMENTS

Germany does not have a U.S.-style class action device for investor lawsuits. Groups of investor claims are instead generally brought under the German Capital Markets Model Case Act (the "KapMuG"), which has been used in many high-profile cases, including *Volkswagen, Porsche, Bayer, Wirecard/EY,* and *Daimler*.

Although many German actions continue to move at a snail's pace—*e.g.*, the *Volkswagen* action has been pending since 2016—the KapMuG has generally worked well by providing a more streamlined litigation vehicle that significantly reduces costs and risk. For example, a litigation funder may only need to pay a single court fee for the perhaps hundreds of investors in a KapMuG proceeding. Moreover, the maximum adverse costs risk for an entire KapMuG group would be capped by statute at approximately €2 to €3 million, depending on when the case resolves. In contrast, the court costs and adverse costs exposure would explode exponentially if levied on a claimant-by-claimant basis. Therefore, where a KapMuG proceeding has commenced, any risk that it might be dismantled and the investors' claims *disaggregated* (meaning they must be litigated *separately*) can quickly make that action financially unsupportable.

Disaggregation is precisely what happened in the recent *Wirecard/EY* case, which quickly impacted the *Bayer* case. Although these are the only two examples out of more than a dozen KapMuG cases brought since the statute's enactment in 2005, their recent prevalence raises the question of whether disaggregation is a trend or an anomaly. If it is a trend, it would be bad news for investors, as some funders may stop backing German actions and the entire KapMuG procedure could be called into question. Fortunately, two factors may prevent it from becoming a trend. First, recent revisions to the KapMuG statute by the German Bundestag will likely dissuade trial courts from disaggregating claims. Second, litigation funders and shareholder rights groups may be inclined to structure claimant groups through a Special Purpose Vehicle ("SPV"), which can help reduce the risk of disaggregation. Time will tell.

DISAGGREGATION ANXIETY

In a KapMuG proceeding, investors first file their individual actions with the trial court (*i.e.*, the District Court), then apply for a model case proceeding. One of the claimants is then selected to serve as a model (or lead) plaintiff, and *that* investor's claim proceeds while, ideally, all the other investors' claims are *stayed*, although the process of staying a claim is often delayed until the claimant can satisfy the high evidentiary bar erected by German courts to prove its standing. When a claimant's action is stayed, it becomes a so-called Beigeladene (a notified third party). This gives its counsel the right to submit pleadings and participate in oral arguments in the KapMuG model proceeding. Once selected, the model plaintiff then litigates the common legal and factual questions and evidence, which are then applied to each claimant whose action has been stayed, although each claimant's damages must ultimately be demonstrated on an individualized basis. If the model plaintiff and defendants enter into a settlement, all claimants in the stayed actions will be bound unless they opt-out.

Section 60 of the German Code of Civil Procedure (the "ZPO") permits the form of "subjective joinder" of claims seen in KapMuG cases. However, Section 145 of the ZPO also permits a court, on its own initiative or at a party's request, to separate or disaggregate actions previously joined. Until 2023, no KapMuG case had been disaggregated. Indeed, in the ongoing actions against Volkswagen and Daimler, for example, those defendants actually supported keeping the claims within the KapMuG, knowing that if they lost at trial, they would be responsible for the expanded costs that come with disaggregation.

Because there had been no history of disaggregation of investor actions, the *Wirecard/EY* decision created alarm bells. There, the claimant group was unusually homogenous, consisting exclusively of German institutional investors. The Munich Regional Court nevertheless accepted defendant EY's disaggregation request. The immediate impact was that the litigation funder was faced with covering court costs and the adverse costs risk for *each* claimant *separately.* In real terms, this meant its costs would rise by more than tenfold, from just a few million dollars to well over $100 million in separate fees for each claimant.

The *Wirecard/EY* decision not only made the case financially untenable for the funder but, by ordering disaggregation of the claims, also destroyed the efficiencies of having the model plaintiff litigate common issues on behalf of the broader claimant group. Notably, the purpose of the KapMuG, when enacted in 2005, was to create a vehicle for collective redress, particularly in light of the chaos that ensued three years earlier, in 2002, when more than 16,000 shareholders represented by nearly 800 different counsel sought to sue Deutsche Telekom individually before the same judge.

Even though disaggregation through Section 145 of the ZPO is extremely rare, its successful use in *Wirecard/EY* has had broader ramifications. In the subsequent *Bayer* action before the Cologne Region Court, the defendant petitioned the court to follow *Wirecard/EY* and disaggregate the 288 claims brought—a request that if successful would have increased the funder's exposure nearly twentyfold, to over $200 million in court fees and adverse costs cover. Faced with this possibility, the *Bayer* funder elected to withdraw the claims before the court ruled and then consider refiling later using an SPV to which investors assigned their claims.

STAYED . . . JUST A LITTLE BIT LONGER

Although it had only been ordered by a court once in an investor action, the threat of disaggregation was serious enough that the funder in *Bayer* preemptively withdrew its clients' claims to avoid that risk. Courts have the power to disaggregate under Section 145 at any time, but its invocation is far less likely the longer a case has been developed, particularly if evidence has been taken and witnesses testimony provided. Moreover, in shareholder actions, the disaggregation threat seems to be most acute when the court has not yet stayed many or all of the investor claims—the necessary predicate to entering the protections of the KapMuG.

In *Bayer*, even though the action was launched in 2021, the court had yet to stay any of the investor claims, or even appoint a model plaintiff. This left the action open to attack by a defendant seeking to create a financial threat to the funder and thus to incentivize it to walk away.

If a stay reduces the disaggregation risk, what can be done to motivate judges at the trial court level to issue stay orders more promptly? Historically, German judges' slow pace has, in large part, been because they erected an unusually high bar for demonstrating standing—particularly for investors domiciled outside Germany—before agreeing to stay a claim. This high evidentiary bar can sometimes border on the absurd. For example, in one large shareholder action, a German judge refused to stay a claim until a 111-year-old, globally-known U.S. state pension fund (with well over $300 billion AUM) could document that it actually existed. Furthermore, institutions have often had to show in excruciating detail why they are the proper legal entity to bring a claim—something that has arisen with certain statutory trusts and large investment banks. German courts have also set a high bar for demonstrating that the person signing a power of attorney actually has the authority to bind the claimant, including requiring that documents evidencing a pension fund executive's (or board member's) signing authority be apostilled and notarized.

BERLIN TO THE RESCUE

Fortunately, there appears to be an end in sight for the tendency of some German courts to put institutional investors through needless hoops in order to satisfy standing. On June 13, 2024, the German Bundestag passed the second reform of the Capital Markets Model Case Act (the "Second Reform"). In the lead up to its passage, the German Federal Government heard statements from, among others, lawyers who represent claimants—and thus knew firsthand the inordinate detail some courts had been requesting of investors—and were simply looking for straightforward legal redress. This proved influential in some of the changes to the KapMuG.

As has been noted, before an investor joins a KapMuG proceeding, it must first file its action before a court of first instance (a trial court). It is this court that determines whether and when to stay the claimant's case. This determination is critical because the claimant's case must be stayed before it can join the KapMuG proceeding. In 2019, the Federal Court of Justice applied a very strict standard for when a trial court could issue a stay order. In practice, this meant the trial court had to (and often did) hold off staying a claim until demonstrative proof of the claimant's standing had been shown. One of the changes in the Second Reform of the KapMuG is that this 2019 standard has been modified and lowered. Previously, the trial court could not stay an action unless the issues before the KapMuG court were the only relevant issues left for the trial court to decide. In other words, a trial court had to assure itself that it had adjudicated all of the issues within its purview (such as standing) before it could stay a claim. This ensured that when the claim reached the KapMuG the only decisions for that court would relate to questions and issues common to all the claimants (*e.g.*, whether the defendant made false statements and whether they were made intentionally).

Under the new standard arising out of the Second Reform, a trial court has more discretion to stay a claim. If, based on its evaluation, it believes a claimant *will* be able to prove its standing, even if it has not yet fully done so, the court can proceed to stay the case and permit the claimant to join the KapMuG action. The need to adhere to Germany's strict standing requirements has not changed but the timing for it has. The new standard should make it easier for trial court judges to defer a robust standing examination until after the main KapMuG proceedings have finished and each claimant's damages are assessed.

THE SPV PATCH

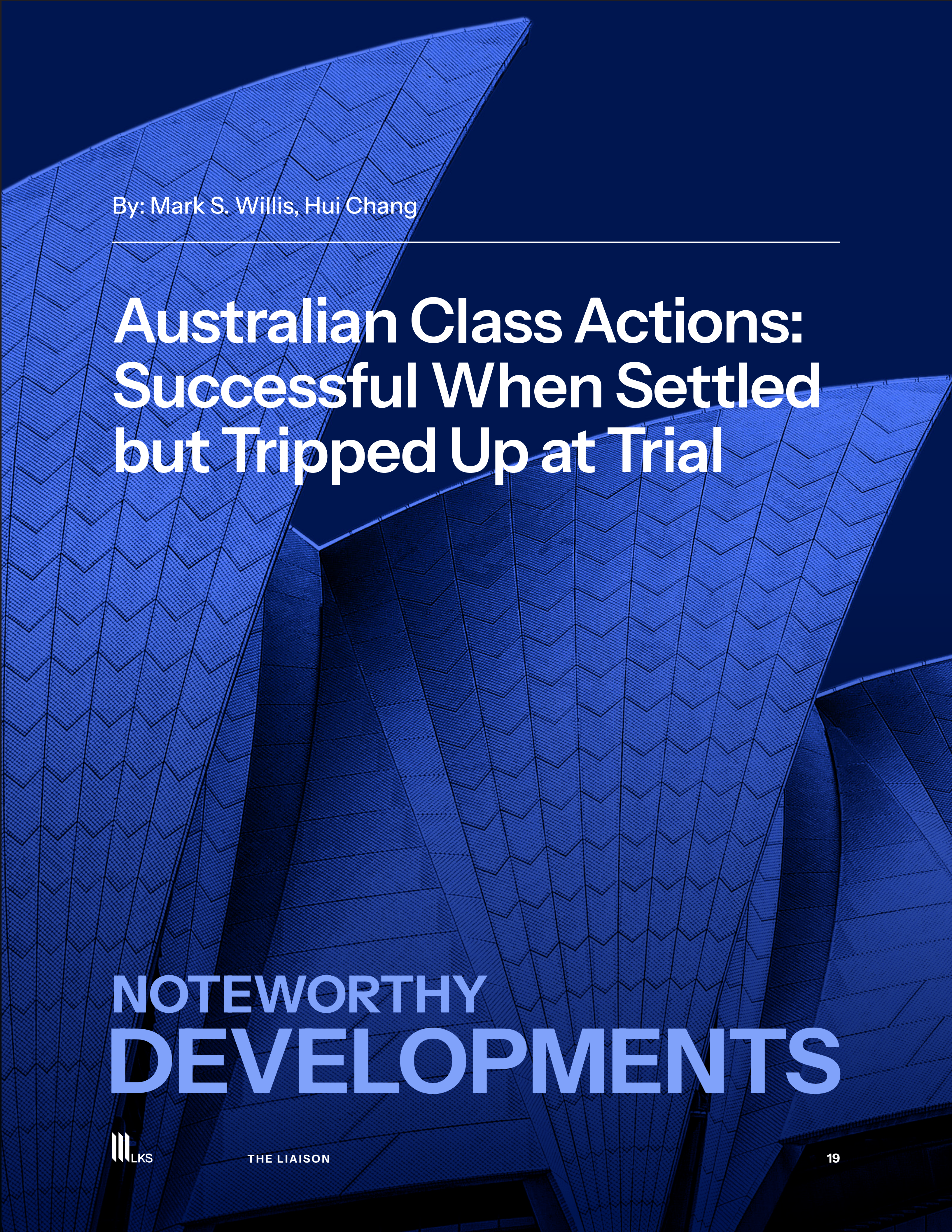
Because the 2024 modifications to the KapMuG are not retroactive, investors with pending cases impacted by disaggregation will still need to find another way of advancing their claims. In *Bayer*, the funder considered using the SPV, or assignment model. Here, each claimant formally assigns the right to its claim over to an SPV, which then becomes the single claimant in the case. The case is then litigated on behalf of the SPV, and any proceeds are distributed to the assigning claimants. Because the German Federal Court of Justice has held several times that the assignment model is generally valid, a funder can expect this structure to be upheld. A landmark decision on the validity of the assignment model by the European Court of Justice ("ECJ") is expected toward the end of 2024 or early 2025. Although it is an antitrust action, the questions before the ECJ in terms of the SPV/assignment structure would still be applicable.

The SPV model would not face the same standing scrutiny as an individual claimant, but that does not make it completely immune to disaggregation from a KapMuG proceeding. A funder would still need to satisfy certain compliance regulations. For example, a court might carefully look at the structure of the SPV to ensure it is free from conflicts. German courts have already voided SPVs as conflicted where the funder's remuneration is based solely on a multiple of the funding amount, on the basis that this would incentivize the funder to spend as much as possible. A funder can also expect a defendant to aggressively challenge the validity of investors' assignments to the SPV, including whether the person making the assignment had the power to do so and whether the SPV was sufficiently capitalized at the time of the assignment to cover any potential adverse costs. Notwithstanding these challenges, an SPV is still far less likely to face a disaggregation threat.

Where a KapMuG action has been successfully disaggregated, the SPV route seems to be the safest alternative, and perhaps the only one absent a claimant launching its own action individually. However, in light of *Wirecard/EY* and *Bayer*, and even with the streamlining of standing requirements made possible by the revised KapMuG legislation, funders may be tempted to use the SPV model from the beginning, in order to dissuade a court from disaggregating claims later on. However, and notwithstanding its advantages when it comes to the disaggregation threat, an SVP is not fullproof. Indeed, the funder in *Bayer* ultimately felt the SPV model did not sufficiently eliminate this threat and elected not to continuing funding.

CONCLUSION

The disaggregation threat recently seen in *Wirecard/EY* and *Bayer* will hopefully become an historical relic. First, it was always an outlier position, as disaggregation did not occur—or was even requested—in most other German investor actions. Volkswagen and Daimler, for example, could have urged the court to disaggregate investors' claims in the cases against them but elected not to. Second, the ability to seek disaggregation arose where courts had yet to stay the claims of large groups of claimants. This was exacerbated by the tendency of German courts to take a hard line on claimants' standing. Under the recent KapMuG reforms, trial courts are permitted to defer the excruciatingly detailed standing analysis they have sometimes undertaken, so that an investor's claim can be stayed. Finally, where disaggregation has arisen, claimants may still be able to get around it by repleading their claims using the SPV model. In sum, the KapMuG is not kaput. With the 2024 reforms, it actually appears to be strengthened. One thing that does look likely to continue to haunt investors, however, is the snail's pace at which KapMuG proceedings move. Some of the current actions have been pending now for nearly ten years. The jury remains out as to whether the recent KapMuG reforms will change that.



By: Mark S. Willis, Hui Chang

Australian Class Actions: Successful When Settled but Tripped Up at Trial

NOTEWORTHY DEVELOPMENTS

Over the past 20 years, there have been many Australian shareholder class actions that have recovered millions of dollars for injured investors. These actions have provided one of the most reliable avenues for investor recoveries outside the U.S.—but only when they have resolved *before* trial. Of the five shareholder actions that have actually gone to trial in Australia—*Commonwealth Bank of Australia* ("*CBA*"),[1] *Myer,*[2] *Iluka Resources,*[3] *Worley* (f/k/a *WorleyParsons*),[4] and *Insignia Financial* (f/k/a *IOOF*)[5]—none have resulted in a favorable judgment for investors. *CBA* is the latest in this string of disappointments, with the presiding federal judge dismissing the action in May 2024. With five straight losses, the obvious question is why have dozens of Australian securities class actions successfully settled and distributed monies to investors but none have been victorious at trial? The jury remains out, so to speak, on this issue—with no clear reasons for the trend. But for investors, this continues to be a question of interest, rather than risk. Indeed, even though shareholders lost at trial in these five actions, they were never liable for any out-of-pocket costs or even adverse costs, as such risks were all covered by the entities funding these actions.

DON'T TRY ME

In the *CBA* case—the fifth straight loss for investors at trial—Federal Court judge David Yates dismissed a 2017 claim against the Australian multinational bank over disclosure failures concerning its compliance with Australia's anti-money laundering and counter-terrorism financing laws. The *CBA* claims had looked quite promising to both litigating counsel and the third-party funders backing the claim (with one unnamed investor even paying A$7.5 million for a 1/5 stake in the claim). Not only were the claims a follow-on to a A$700 million civil fine issued by AUSTRAC (Australia's anti-money laundering and counter-terrorism financing regulator), but CBA actually admitted that its compliance with such laws was deficient. In the end, however, the court dismissed *CBA*, finding that plaintiffs had not precisely stated what information the company should have disclosed and that the allegations were too vague. For these and several other reasons, investors in the *Myer, Iluka Resources, Worley*, and *Insignia Financial* actions similarly ran into

[1] *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd* (VID1085 of 2017).

[2] *TPT Patrol Pty Ltd as Trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.

[3] *Bonham as Trustee for the Aucham Super Fund v Iluka Resources Ltd* [2022] FCA 71.

[4] *Crowley v Worley Limited* [2022] FCAFC 33.

[5] *John Mcfarlane as Trustee for S Mcfarlane Superannuation Fund v Insignia Financial Limited* NSD206/2020.

roadblocks at trial. It is difficult to accurately pinpoint why these five cases failed at trial. It cannot all be blamed on the lawyering. *Iluka Resources*, *Worley,* and *Insignia Financial* were litigated by the same law firm, while *Myer* was run by another firm, and *CBA* was co-led by yet two others. Each of these firms has considerable experience prosecuting investor fraud in Australia. Moreover, each of the five actions was adjudicated in federal court by a different judge. Four were filed in New South Wales, while *Myer* was filed in the State of Victoria. (Shareholder actions can be filed either in federal or state court, although in recent years the bulk have been filed in, or transferred to, the Supreme Court of Victoria, which is viewed as more friendly to plaintiffs.) The failure of these actions also cannot be blamed on a change in the pleading standard in 2021. Before this, Australian actions had a strict liability standard for continuous disclosure obligations, which meant plaintiffs were not required to prove a defendant's state of mind. However, in 2021, a statutory change meant that companies could only be liable where a plaintiff could show that a defendant knew or was reckless or negligent about whether the information was price-sensitive. Yet, none of the five failed actions fell on the basis of this new standard.

The judges in the five dismissed actions applied various reasons for their decisions. For example, in *Myer*, the court ruled that the department store Myer had breached its continuous disclosure obligations when it failed to correct remarks related to inflated profit forecasts but, nonetheless, awarded no damages as it found no losses resulted from the disclosures. The same was true in *Worley*, where the court found that this professional services company had breached its continuous obligations when it slashed its profit forecast soon after giving market guidance but still dismissed the claim because it found plaintiffs had failed to show a loss. (The plaintiff in *Worley* lost on retrial and is currently pursuing a second appeal.) One day after the *Worley* judgment, the *Insignia Financial* court dismissed that action, finding that while investors had met their burden in substantiating allegations involving insider trading and breaches of company trading policies, these charges were not material to a shareholder's investment decision, nor did they impact the share price. In *Iluka Resources*, the issue was falsity, with the court dismissing all claims after concluding that Iluka had reasonable grounds for the guidance it gave to investors and did not fail to disclose material information to the market. Finally, in *CBA*, the court found the claims lacked sufficient specificity, among other issues. In sum, it is difficult to find any concrete trends or otherwise draw any helpful conclusions from the dismissals of the five actions.

APPEALING TO A HIGHER POWER

In late June 2024, the plaintiffs in *CBA* appealed the trial judge's decision. Of the five trial court losses for plaintiffs—each of them brought in federal court—this is the second to have been appealed. Unlike the U.S., Australia has no separate appeals court within its federal system (whereas Australian state courts do have separate appellate courts). Instead, an appeal from a federal court decision is heard by a panel typically composed of three judges selected from within the federal court system of roughly 50 or so available justices. This panel will then "re-hear" the trial, with briefs exchanged between the parties, an oral hearing, and a review of the judgment to address any errors. If an appeal is unsuccessful, plaintiffs can file a special leave of appeal to the High Court of Australia, but this would only be granted under very narrow circumstances (*e.g.*, if the case raised a novel issue, was of great public importance, or would settle doctrinal issues that arise due to different Australian courts adopting diverging views).

The *CBA* appeal is not expected to be heard until next year. Whatever its outcome, that decision will undoubtedly have an impact on future cases. Australian counsel representing plaintiffs in other actions have noted that some defendants have already begun referencing it at mediations. But importantly, a federal judge's decision is not binding on another federal or state court judge, but instead is simply considered persuasive and relevant. Therefore, neither *CBA* nor the other four trial losses are binding judgments to other courts. For example, although Justice Yates allowed submissions by CBA on the relevance of the *Worley* and *Insignia Financial* decisions, he noted that nothing in them influenced or impacted his decision. That said, a federal court judge would not, in practice, depart from the decision of a state appellate court, unless she feels it is plainly wrong. The High Court of Australia is at the top of all hierarchies and its decisions are binding on all federal and state judges. With two high profile appeals in process (*CBA* and *Worley*), appellate court guidance on issues of loss evidence and materiality are expected in the next year or so.

LOOKING AHEAD

The number of Australian shareholder actions that have successfully settled dwarf the number lost at trial. Even so, this string of five straight trial losses—including the recent *CBA* decision—may make some companies more emboldened to roll the dice rather than settle early. But doing so carries with it both reputational and financial risk. If a company loses, it will be found to have breached its disclosure obligations or committed other wrongdoings, when a settlement would typically involve no admission of liability. Taking a case to trial is also far more expensive, and if a company loses, its payout to investors will be much higher than if it settled earlier. Furthermore, even though some recent cases have gone favorably for defendants, a different judge in another case could quickly reverse this trend. Australian actions are decided by judges, not juries, and a different judge adjudicating different facts might draw a plaintiff-friendly conclusion. In any event, shareholders will want to closely watch the outcome of the *CBA* and *Worley* appeals as they should provide more clarity and guidance on issues involving disclosure obligations, the evidentiary threshold for proving misleading or deceptive conduct, and shareholder losses. Until then, trying to decipher a meaningful pattern for the trend in trial losses will remain a quixotic effort.

NEW MATTERS

By: Mark S. Willis and Hui Chang

Boohoo Group PLC (England And Wales)

TICKER: LSE: BOO

ISIN: JE00BG6L7297

SEDOL: BG6L729

RELEVANT PERIOD: March 14, 2014 through June 30, 2023

ACTION TYPE: Opt-in Group Action

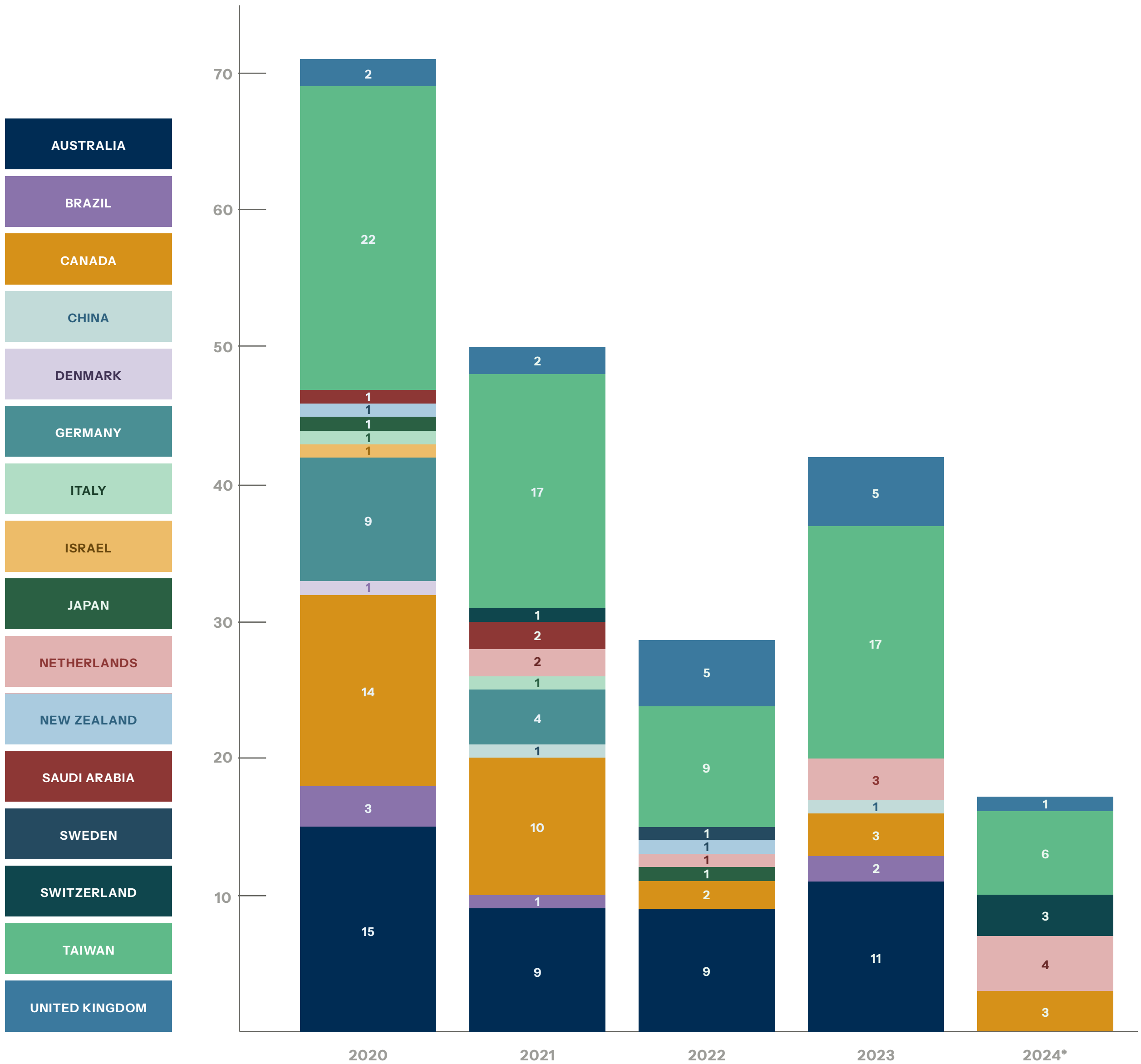
STATUS: Active

A group action has been filed against the UK online fast fashion retailer **Boohoo Group plc** ("Boohoo") in the High Court of London over the company's failure to disclose labor rights violations at its suppliers' factories in Leicester. In July 2020, British newspaper *The Sunday Times* exposed the mistreatment and abuse of workers who were paid well below the legal minimum wage (£3.50 an hour) and forced to work in unsafe and unsanitary conditions during the COVID-19 pandemic. Additional media reports followed in November 2022 and November 2023 by the BBC's *Panorama*. Following these revelations, Boohoo's share price fell substantially, damaging investors.

Labaton Keller Sucharow would be happy to discuss the specifics of the filed action and investors' options for recovery abroad.

TRENDS IN NON-U.S. SECURITIES LITIGATION

NON-U.S. SECURITIES LITIGATION FILINGS 2020-2024

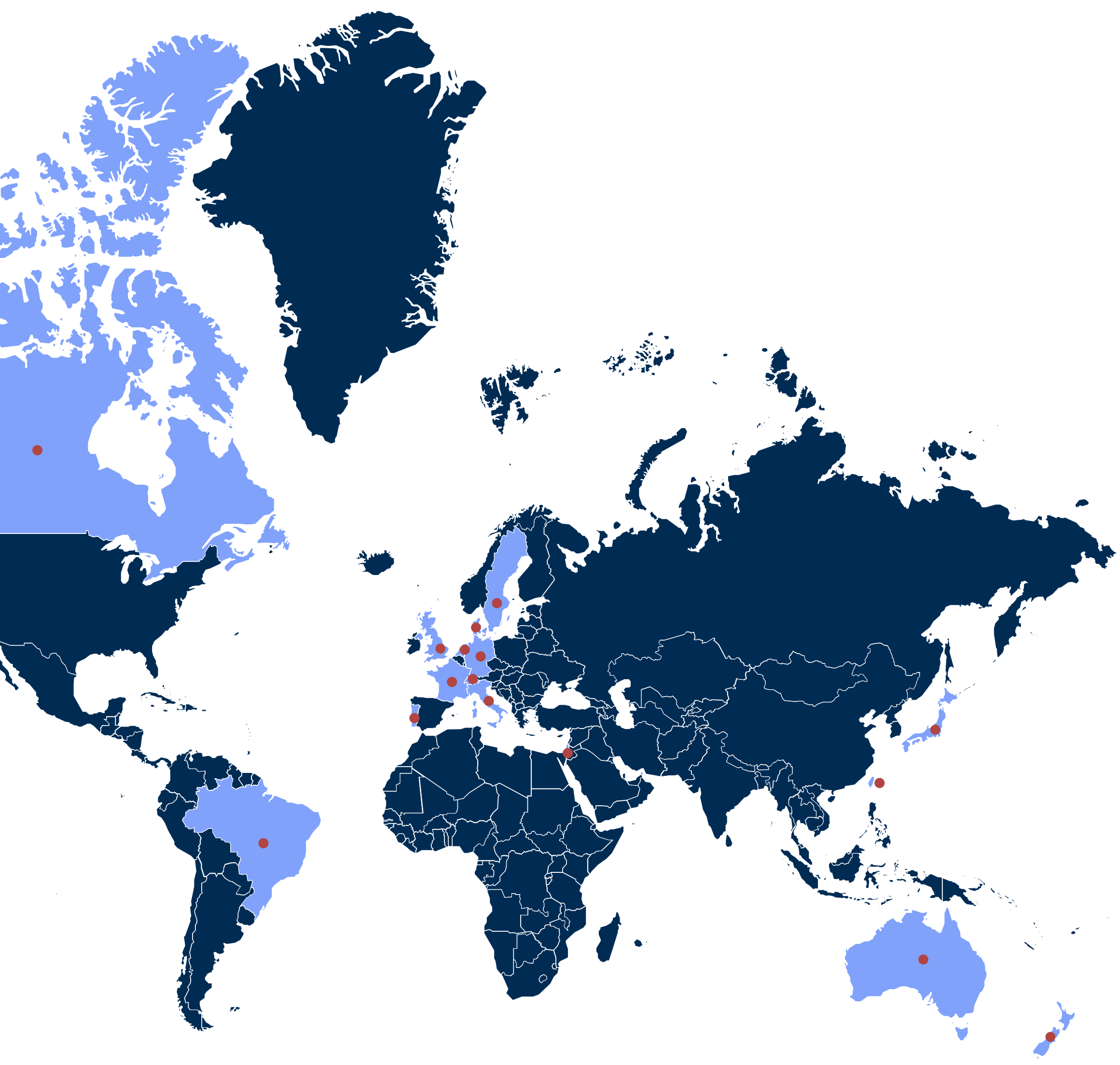


*ACCURATE AS OF JULY 23, 2024

GLOBAL LITIGATION SNAPSHOT

SECURITIES ACTIONS ARE PENDING IN THE FOLLOWING NON-U.S. JURISDICTIONS

- AUSTRALIA
- BRAZIL
- CANADA
- DENMARK
- FRANCE
- GERMANY
- ISRAEL
- ITALY
- JAPAN
- NETHERLANDS
- NEW ZEALAND
- PORTUGAL
- SWEDEN
- SWITZERLAND
- TAIWAN
- UNITED KINGDOM



CONTACT US

Labaton Keller Sucharow's Non-U.S. Securities Litigation Practice is dedicated to analyzing potential claims in international jurisdictions and offering advice on the risks and benefits of proceeding with litigation in non-U.S. forums. Our attorneys are available to address any questions you may have regarding non-U.S. securities litigation. Please contact the Labaton Keller Sucharow lawyer with whom you usually work or a member of our non-U.S. litigation team.

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