

**Duties on UK pension fund trustees to pursue claims in the US**  
**Ed Anderson and Lianne Shing, March 2009**

Two local authority pension schemes have launched legal action in the US against the Royal Bank of Scotland (RBS) and others are considering joining them.

The Merseyside and North Yorkshire council pension funds have commenced a US securities class action and are accusing RBS of withholding information about the extent of the bank's problems. In June 2008, RBS gained £12 billion from shareholders after a successful share issue but just five months later the bank had to accept a huge government rescue package, following which the government now owns a 68% shareholding.

The action is good evidence of the fact that the trustees of UK pension schemes are becoming increasingly aware of their ability to participate in US litigation to recover money. A recent survey by the National Association of Pension Funds showed increased active participation by larger pension schemes (those with assets worth over £1 billion) in US class actions, from 10% in 2007 to 23% in 2008. Some 75% in total had played at least a minor role in collecting settlement monies. Traditionally local authority schemes have been less willing to pursue action and some past estimates have suggested they have lost the opportunity to recover \$365 million of damages.

As monies recovered in US securities class litigation are not solely limited to US shareholders, European investors have increasingly been joined as plaintiffs. However, trustees should be aware of some potential practical difficulties to litigation in the US. European investors can often be excluded if the lead plaintiff is a US company and this has seen increasing numbers of European investors commencing their own actions. Often there are also strict time limits for collecting settlement monies. If not claimed, the monies are distributed to other investors, given to charity or to the US Treasury.

Other practical problems include the fact that US settlements are not usually advertised outside the country, so trustees need to carefully monitor litigation in the US and there are specialist US law firms and other service providers who can assist with this process. Keeping abreast of these issues may be complicated but trustees need to be conscious of the fact that they themselves may be exposed to actions for breach of fiduciary duty if they fail to collect monies available to them.

Trustees have duties to act in members' best interests, to ensure assets are held securely and to ensure that there are processes in place to protect those assets. Despite most trustees delegating daily investment decisions to an authorised investment manager, it is the trustees who remain responsible for investment strategy, who must monitor the fund manager's performance and put into place a Statement of Investment Principles covering their policy on the investments and risks. The varied portfolios that many schemes invest in and the fact that they sometimes switch managers or investments regularly can pose problems. However it is very important that trustees not only ensure that the investment managers have proper procedures in place to assist in monitoring potential recoveries but that they themselves regularly review the opportunities to make recoveries.

The increased awareness of the ability to pursue actions and the fact that the US system of no win no fee can present little risk to members means that in the current turbulent markets, trustees can have little excuse for failing to give serious consideration to actively pursuing the recovery of their losses. Pension trustee liability insurers will also wish to ensure that they appreciate the potential exposures.

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