

# Pensions Committee

**Tuesday, 18 December 2012**

## Class Actions

Item number	5.5
Report number	
Wards	All

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# Executive summary

## Class Actions

### Summary

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This report summarises activity on class actions.

A class action is when an investor agrees to act as a lead plaintiff in a case against a company. Typically, these actions happen in the US when a group of shareholders get together and sue a company to recover a loss in share value, or to exert influence on the company. A law firm fights the case on behalf of the class with the lead plaintiffs being treated as the representatives of the class. The cases can take several years to be heard by the courts and can be settled out of court. They are typically taken on a no win, no fee basis.

If a class action case is won, the compensation fund, net of legal fees approved by the court, is distributed to eligible shareholders who make a claim within the relevant time limit. Any shareholder that held shares during the class period is entitled to make a claim. The shareholders who lodge a claim share the compensation in proportion to the loss suffered. As shareholder, the Lothian Pension Funds make claims for compensation on all class action settlements.

In addition, the Lothian Pension Fund acts as lead plaintiff on a number of class actions, holding company management to account and aiming to deter future fraud and/or loss of shareholder value. This is consistent with its approach to environment, social and governance issues. Also, by acting as a lead plaintiff, the Fund may be in a position to influence the terms of the settlement. Summaries of the class actions where Lothian Pension Fund is acting as lead plaintiff are provided in the Appendix 1.

A court ruling in the case of Morrison vs. National Australia Bank (NAB) in 2010 appeared to narrow the ability of investors to seek redress under the laws of the US, particularly where shares are purchased out-with the US.

Compensation received by the Fund from class actions is shown in the table below.

Financial Year	US\$ (000's)
Prior to 31/03/10	1,614
2010/11	209
2011/12	317
2012/13 [1]	21
<b>TOTAL [1]</b>	<b>2,161</b>

[1] To 30 September 2012

There have been only three small settlements for the first half of this financial year. These relate to class actions against EADS, Qwest Communications and Royal Dutch Shell.

The Morrison vs. NAB ruling impacts on the Fund's ability to claim for compensation in the US. However there have been different interpretations of the ruling. It remains to be seen exactly how the Morrison vs. NAB ruling will be applied further. As a result investors are increasingly looking to obtain compensation through other jurisdictions where the legal process may require investors to "opt-in" to the case prior to the trial if they wish to participate. Lothian Pension Funds will consider the potential benefits and risks on a case by case basis.

## **Recommendations**

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It is recommended that the Pensions Committee note the content of this report.

## **Measures of success**

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Success will be measured by the number of actions successfully pursued and the compensation received.

## **Financial impact**

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US class actions are conducted on a no win no fee basis. In the event of a case being won, the courts approve the legal costs which are deducted from the compensation fund. The fund has recovered over \$2bn in compensation from class actions.

## **Equalities impact**

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There are no adverse equalities impacts arising from this report.

## **Sustainability impact**

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Class action activity is undertaken as part of the Environmental Social and Governance (ESG) activity of the Fund which is expected to contribute to the sustainability of the Funds' investments.

## **Consultation and engagement**

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Regular updates on class actions have been provided to stakeholders.

## **Background reading / external references**

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Not applicable.

## Links

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### **Coalition pledges**

**Council outcomes** CO26 – The Council engages with stakeholders and works in partnerships to improve services and deliver agreed objectives.

### **Single Outcome Agreement**

**Appendices** Appendix 1 – Class Actions

## APPENDIX 1 – CLASS ACTIONS

Summaries of the cases where Lothian Pension Fund's is currently acting as a lead plaintiff are outlined below:

- A case against Lehman Brothers is being progressed in relation to false financial statements and mismanagement at the company prior to the collapse of the bank. The case consists of separate claims against the directors, underwriters and auditors. The case was filed in 2008 and the estimated loss to the Fund is \$4.7m. Shares were purchased in the US. In August 2011, the case against the company directors agreed a settlement of \$90m. In May 2012 courts gave final approval to settlement of \$90m with Lehman directors and officers and \$426m with the underwriters. Litigation is ongoing with Lehman's accountants, Ernst & Young. The court may want to include this settlement with the others, which could delay settlement of the whole distribution. It is anticipated that settlement will be reached with Ernst & Young in first half 2013.
- A case against BP was lodged in 2008 in relation to the Prudhoe Bay oil spill in 2006 which caused an estimated loss to the Fund's shareholding of \$0.4m. Shares were purchased in the UK. The case was dismissed in March 2012, partly due to the Morrison ruling, and also because of the specifics of the case. Legal advice was not to appeal, and the class action route is considered to be closed.
- The case against the pharmaceutical company Sanofi-Aventis was filed in 2007 and relates to misleading statements made by the company in relation to trials of a new drug, i.e. that the drug was testing successfully when in fact the Company was receiving definitive information to the contrary. The Fund is serving as co-Lead Plaintiff alongside a pension fund from the United States. The Fund's loss is estimated to be \$1.5m. The plaintiffs filed for class certification in February 2012 and the defendant appealed. Plaintiffs have gone back to further support the motion for class certification. The court's ruling is pending.
- The Fund had an estimated loss of \$2.0m due to holdings in the company Wyeth. The case is premised on Wyeth's (now Pfizer, as a result of a merger) misrepresentations of clinical trial results for the investigational Alzheimer's drug, bapineuzumab. The Fund was appointed co-lead plaintiff (along with Italian investment fund, Arca) in September 2010. In the summer of 2011, defendants moved to dismiss the case and were successful. An amended complaint was due to be heard by a magistrate in May 2012 but she cancelled the hearing and will decide the motion without argument. The motion is pending.
- The case against Genzyme was filed in 2009 and the Fund's losses are estimated to be \$3.1m. The case relates to its failure to disclose serious issues at one of its manufacturing facilities that caused the company to halt production of two of its top selling drugs due to contamination. The case was dismissed. However an appeal was lodged, as new information became available. The result of the appeal is pending.