TRENDS IN SHAREHOLDER LITIGATION

IMLA 83rd ANNUAL CONFERENCE
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Houston, TX

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INCREASED INVOLVEMENT BY INVESTORS

- U.S. Securities Class Action and Direct Action/Opt-Out Trends
  - PSLRA (1995)
  - Public Pension Fund Involvement
  - Notable actions
- Non-U.S. Litigation
  - Notable actions
  - Issues to consider
- Importance of Portfolio Monitoring & Filing Claims in Securities Class Action Settlements/Judgments

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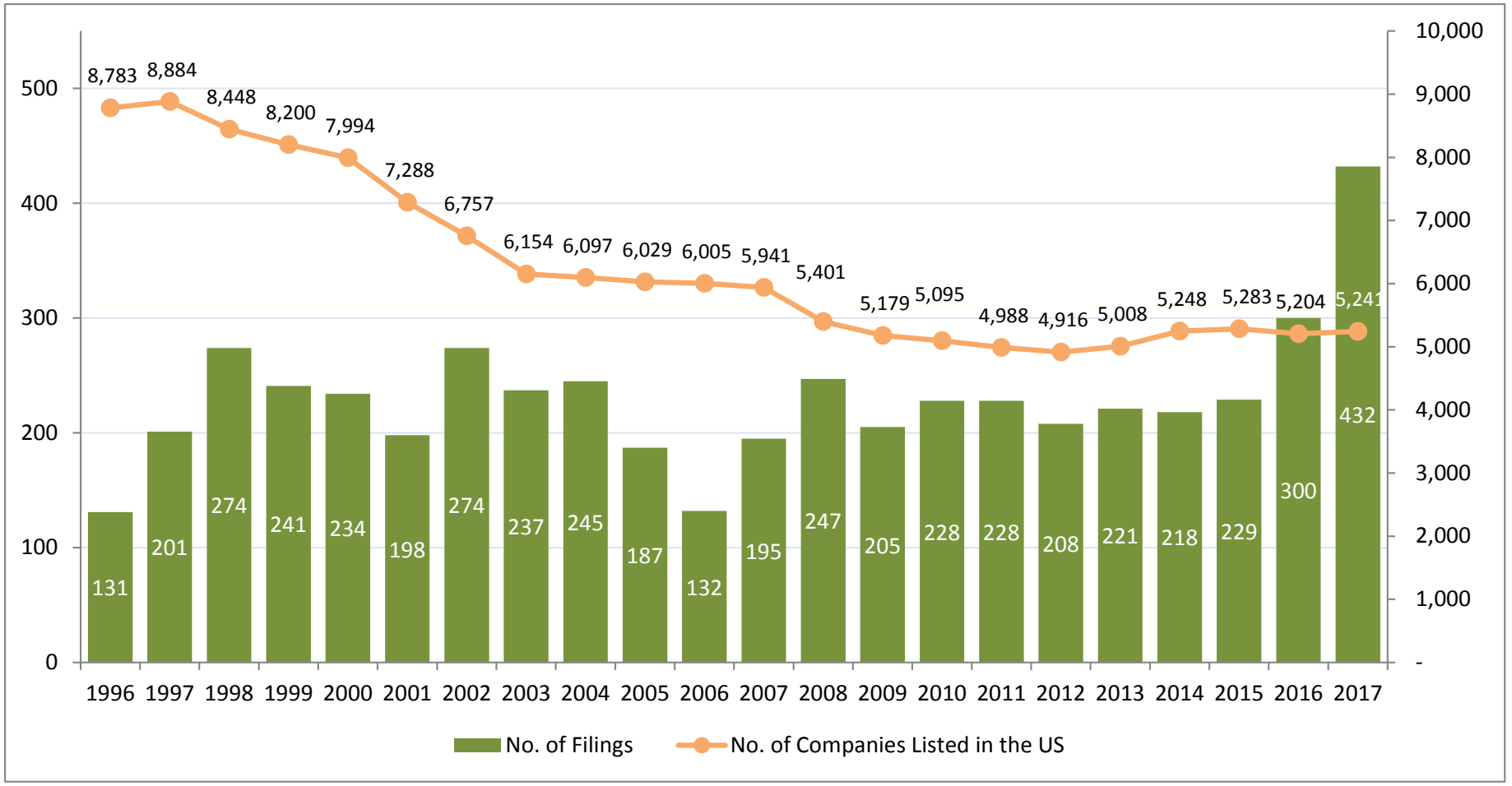
THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 (PSLRA)

- Enacted into law by the U.S. Congress over a veto by President Bill Clinton.
  - The U.S. House of Representatives approved the bill by a 319-100 margin, and the U.S. Senate approved it 68-30.
  - Developed as part of Newt Gingrich's Contract With America.
  - Only one other time during Bill Clinton's presidency did Congress successfully override one of his 37 vetoes to enact a bill into law.
- Designed to limit frivolous securities lawsuits and made significant changes to cases brought under federal securities laws.
  - Heightened pleading standard: Plaintiffs need more proof of fraud before they can initiate a suit (forced to present evidence of fraud before any pretrial discovery has taken place).
  - It allows judges to decide the most adequate plaintiff in class actions.
  - Mandates full disclosure to investors of proposed settlements (including the amount of attorneys' fees).

U.S. SECURITIES CLASS ACTIONS (NERA REPORT): FILING RATES



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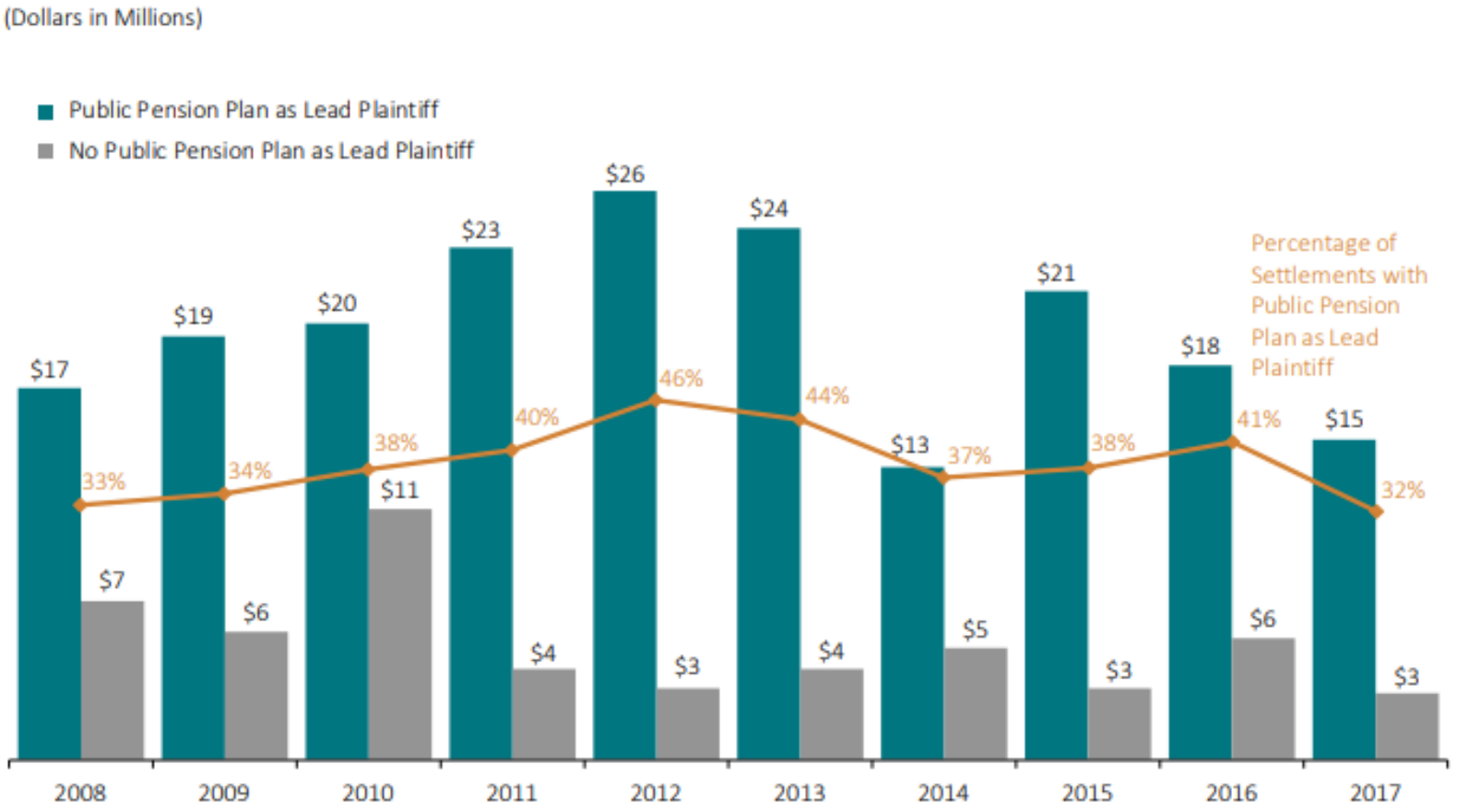
SETTLEMENT VALUE FOR PUBLIC PENSIONS VERSUS OTHERS (CORNERSTONE RESEARCH)

Median Settlement Amounts with and without Public Pension Plans as Lead Plaintiff



Note: Settlement dollars are adjusted for inflation; 2017 dollar equivalent figures are used.

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NOTABLE RECENT CASES



- Plaintiffs alleged that Petrobras issued materially false and misleading statements by misrepresenting facts and failing to disclose a culture of corruption at the company that consisted of a multi-billion dollar money-laundering and bribery scheme embedded in the Company since 2006.

- The Company is alleged to have overstated its property, plant and equipment line item on its balance sheet because overstated amounts paid on contracts were carried as assets on the balance sheet. These amounts were overstated because Petrobras inflated the value of the Company's construction contracts.

- When the truth was finally disclosed, it caused Petrobras to lose billions in market capitalization. This case was filed in December 2014, and on June 25, 2018, settled for $3 billion.

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NOTABLE RECENT CASES



- Plaintiffs allege that Perishing Square Capital Management and Valeant Pharmaceuticals were involved in an illegal insider trading and front-running scheme starting in February 2014.

- The scheme deprived a class of Allergan shareholders billions of dollars of value in violation of the federal securities laws.

- Allergan shareholders filed a lawsuit (USDC CD Cal) in December 2014 and in December of 2017, with trial set to begin, a settlement was reached between the parties (approved by the Court on August 14, 2018).

    - Settlement amount: $290 million
    - Pershing Square to pay $193.75 million
    - Valeant to pay $96.25 million

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INCREASE IN DIRECT ACTION/OPT-OUT ACTIVITY

- While the number of securities class actions has remained consistent, recently we have seen an increase in direct actions/opt-outs. This increase reflects the magnitude of many recent securities class actions.

- Appropriate in limited number of cases
  - Strong facts and significant material losses

- Pros
  - Potential for recovering a premium versus class recovery
  - Tailored litigation strategy
  - Opportunity to influence class action strategy

- Cons
  - Discovery obligations
  - Unlikely to obtain non-monetary benefits
  - Can be reliant on class counsel for certain aspects of the litigation

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PETROBRAS

- More than 20 individual complaints by institutional investors collectively asserting billions in damages.
- Class certified on February 2, 2016; court notes that "it is not uncommon for large institutions to opt-out of class actions simply so that they can improve their bargaining position…."





































INVESTORS ARE FILING DIRECT ACTIONS EARLIER

- *IndyMac* undermines "wait and see" approach which was the norm for investors previously
- 2011 – Two Southern District of New York courts reject application of tolling rules to repose periods in securities class actions
- Second Circuit Appeals Court in *IndyMac* accepts minority view
  - Conflicts with Tenth Circuit authority
- U.S. Supreme Court heard argument on this issue in CalPERS v. ANZ Securities, Inc. on April 17, 2017; Court ruled June 26, 2017 that the filing of a class action does not toll the Securities Act's 3-yr statute of repose = American Pipe Doctrine does not apply

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NON-U.S. LITIGATION

- Class or collective actions outside the United States are causing the most headaches for investors, and in particular, U.S. public plans
- Before 2010 almost all significant shareholder litigation was brought in the U.S. regardless of where the defendant company was domiciled
- Morrison v. National Australia Bank (2010)

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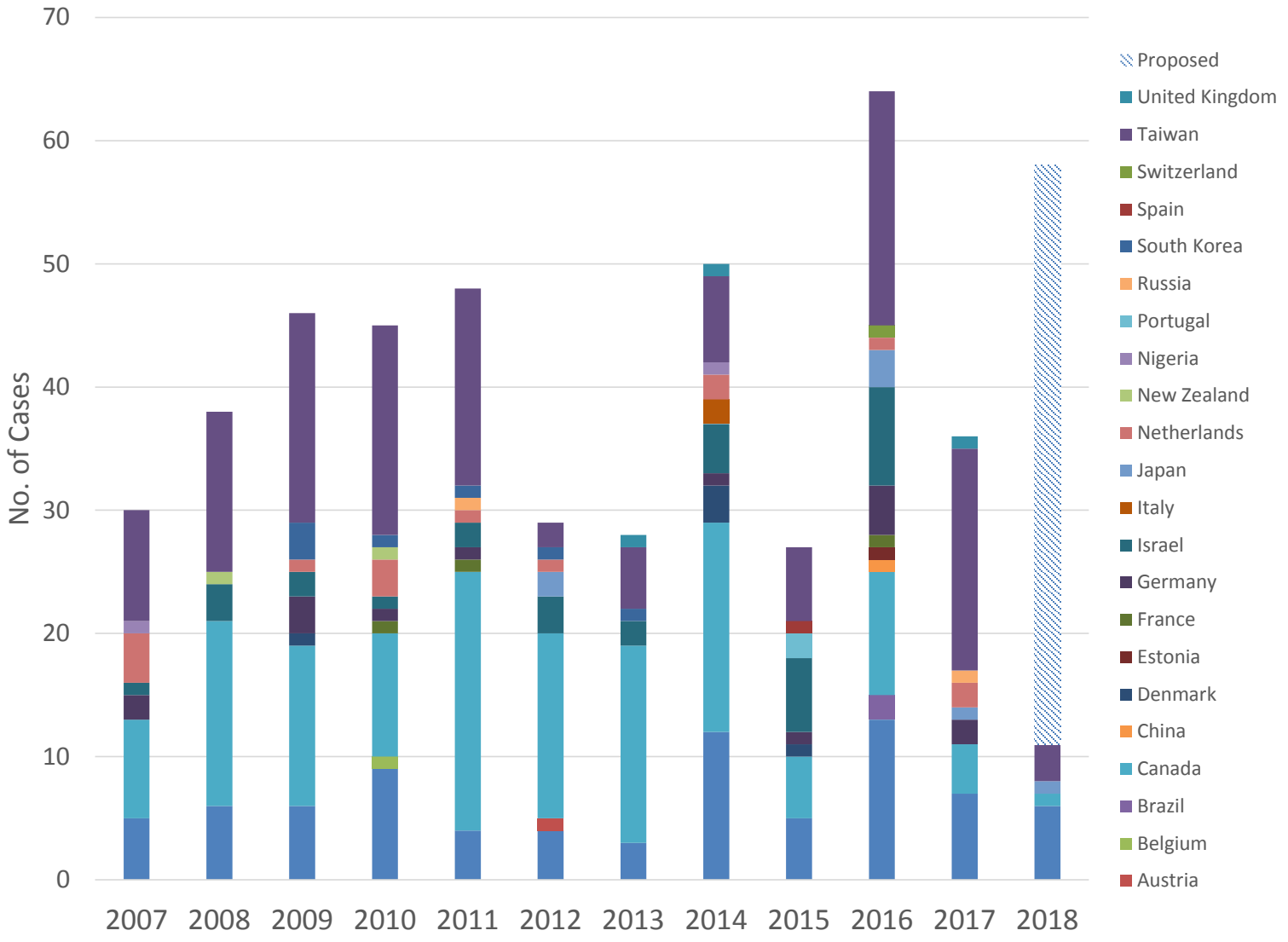
INTERNATIONAL SHAREHOLDER LITIGATION



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NON-U.S. LITIGATION

- Shareholder litigation outside the U.S. has become more high profile as huge multinationals like Royal Bank of Scotland, Volkswagen, Mitsubishi, Petrobras, and Toshiba have committed major frauds resulting in billions of dollars in lost market cap

- With increasing visibility of these cases there is a need for pension funds and all institutional investors to evaluate and participate in these cases under the right circumstances

- Aside from Australia and Canada, in all other jurisdictions outside the U.S. investors need to take some proactive step, and in many cases actually opt-in, to be able to participate in any recovery

- Potential plaintiffs are faced with a number of significant issues and questions in these cases:
  - **Adverse costs considerations**
  - **Fiduciary obligations**
  - **Developing law**
  - **Reliance on local counsel you may not be familiar with**
  - **Uncertainty as to real damages and what can actually be recovered**
  - **Internal resistance**

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NOTABLE NON-U.S. ACTIONS

SETTLED CASES

- Ageas, N.V. (formerly Fortis Bank): Dutch Foundation in the Netherlands
  - €1.3 billion settlement; approved by Dutch Court July 2018; largest shareholder recovery in Europe to date.
- Royal Bank of Scotland: Litigation in the United Kingdom
  - £900 million settlement on behalf of shareholders
- Olympus Corp.: Litigation in Japan
  - $100M settlement for 86 investors filing actions
- Agnico-Eagle Mines Ltd.: Litigation in Canada and U.S.
  - U.S. class action dismissed while Canadian action led by AFA settled for C$17M

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NOTABLE NON-U.S. ACTIONS

PENDING CASES

- Volkswagen: Litigation in Germany.
  - Stemming from "Diesel-gate" Emissions Scandal
- Petrobras: arbitration in Brazil in connection with BOVESPA-traded securities
- Vivendi: litigation in France on behalf of large group of institutional investors
- Toshiba & Mitsubishi: litigation Japan on behalf of large groups of institutional investors
- Banco Espirito Santo: Litigation in Portugal

RBS LITIGATION – UNITED KINGDOM

- Royal Bank of Scotland ("RBS"): Litigation in the U.K.
  - Investors, in four distinct groups, brought action against RBS for £44 billion loss in market value stemming from allegations RBS materially mislead investors with respect to its true exposure to subprime assets and CDOs and that it inflated the value of its assets including those acquired from the Dutch bank ABN Amro
  - Hundreds of institutional investors from around the world joined this litigation which was filed in 2013 and recently settled for more than £900 million.
  - Litigation in the UK is the most expensive of any current jurisdiction
    - This litigation and litigation in the U.K. in general are a microcosm of the issues investors face in non-U.S. litigation
      - **Multiple actions to choose from with different financial structures**
      - **ATE Insurance (Unique to the U.K.)**
      - **Adverse costs**
      - **Case of first impression**

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VW – SHAREHOLDER LITIGATION LANDSCAPE

- Investors in Volkswagen ADRs pursuing claims in federal court in California - $48 million settlement announced Aug. 28, 2018
- 500+ investors in VW common stock, VW preferred stock, and Porsche preferred stock pursuing claims in Germany
  - Claims asserted under KapMug – opt-in model case system
  - Investors claim damages of approximately €5 billion
  - Court appointed Deka Investments to serve as model plaintiff
  - Some investors filling claims in the Netherlands – seeking opt-out settlements under WCAM
  - Oral hearings scheduled to begin in November 2019

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PORTFOLIO MONITORING

- According to NERA Economic Consulting research, an average of 209 securities class actions are filed each year in the U.S.
  - Average of cases from 1997-2015 (excluding outliers of 2016, 2017)
- A growing number of public pension plans in the United States have embraced portfolio monitoring (often retaining multiple firms).
- Fiduciary obligation to take part in a case: NO.
- Fiduciary obligation to monitoring actions/collect pro-rata share of settlement proceeds: YES.
- Critical for public pension funds to have proper systems in place to track and manage cases impacting their portfolios.

MONITORING ACTIONS OUTSIDE THE U.S.

- **Does the *Morrison* Decision Really Affect My Municipality?**

- Claims filing is not enough.
  - Not covered in non-U.S. actions.
    - **Opt-Out Litigation:** Investor (or other party) who is not seeking to serve as the lead plaintiff, does not need to take any affirmative steps at the commencement of an action in order to be included and can share in either a settlement or a favorable judgment simply by filing a claim form after the case is resolved.
      - Examples: The United States, Canada
    - **Opt-In Litigation:** An Investor must take affirmative steps to join an action at the beginning (or "opt-in") and failure to do so precludes the investor from sharing in any recovery.
      - Examples: The UK, France, Germany, Japan, and most other countries in the world.
- Fiduciary duty **now** to monitor (and pursue under certain circumstances) actions **everywhere** (currently over 100 cases pending in 20 different jurisdictions abroad)

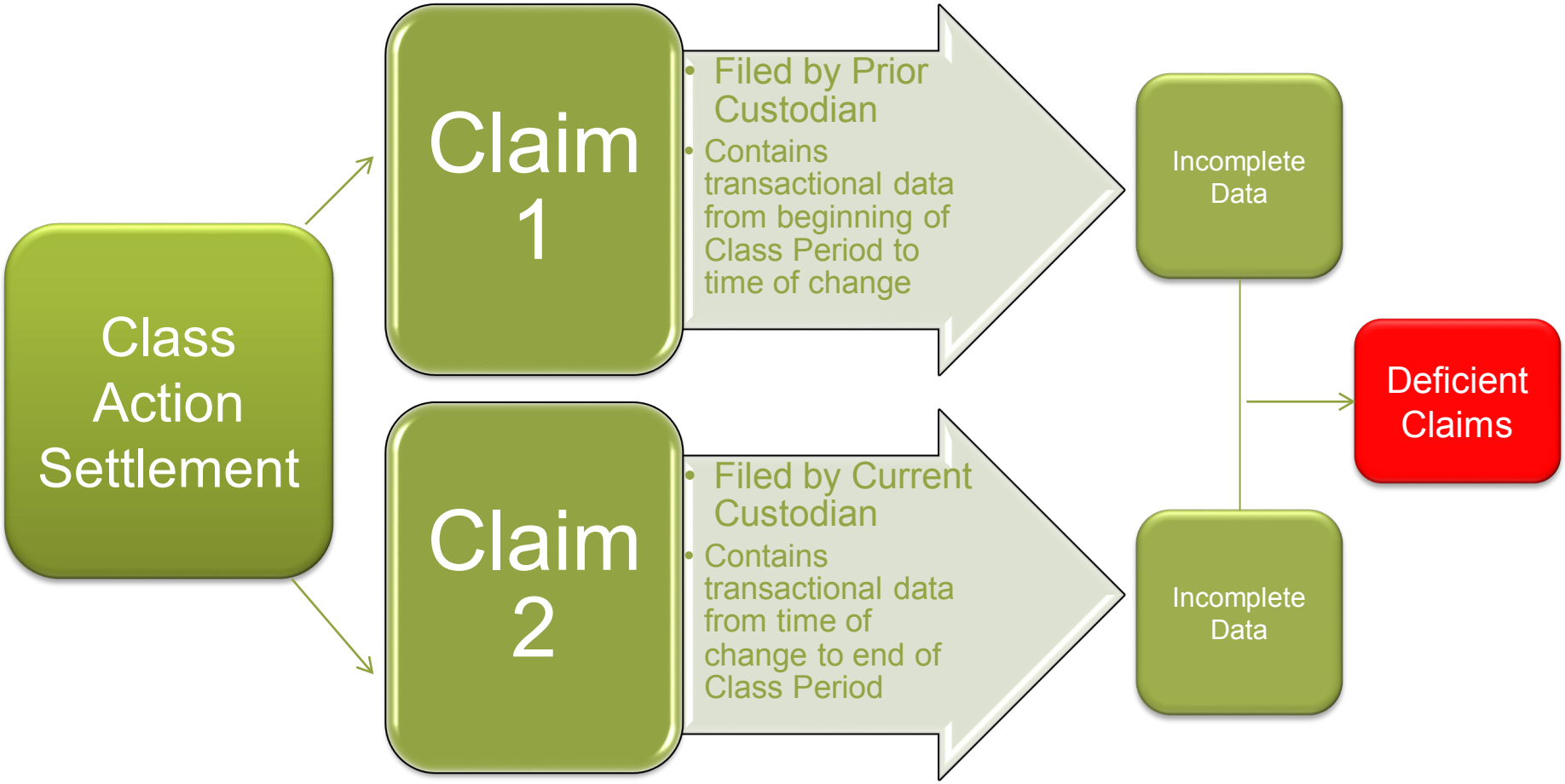
CLAIMS ADMINISTRATION

- Public pension funds must fulfill their fiduciary duty by working to retrieve money rightly owed to their pensioners from securities class action settlements.
- Statistical Data: 2005 independent academic study found that only 28% of institutional investors filed claim forms.
- From 2005-2017 there were over 1300 securities class action settlements totaling nearly $70 billion in proceeds.
- Institutional investors' failure to file produces a windfall for those that do.

CLAIMS ADMINISTRATION

- **Some Reasons Public Pension Funds Fail to File**:
  - Assuming someone is already taking care of it.
  - Not receiving the settlement notice.
  - The perception that the cost associated with filing the proof of claim is greater than any potential recovery.
  - The difficulty institutions have in securing and maintaining access to historical data needed to file claims (long class periods, **changes in custodian**).
  - General confusion with the forms and the securities.

DEFICIENT CLAIMS DUE TO CUSTODIAL CHANGES



EXAMPLE CLAIM:
CITIGROUP, INC. (SETTLED Q2 – 2013)
(CP: 2/26/07 – 7/17/08)

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Separate Claim Recovery Custodian A & Custodian B

Custodian A delivered all shares to Custodian B; Potentially ineligible for a recovery as a separate claim

CUSTODIAN	TRANS CODE	TRADE DATE	QUANT.	PRICE PER SHARE
A	HOLDINGS	2/26/2007	42,700	0.0000
A	BUY	4/13/2007	10,500	50.3611
A	SELL	5/17/2007	(1,700)	49.8580
A	**DELIVERED**	**7/2/2007**	**(51,500)**	**0.0000**
A	HOLDINGS	7/17/2008	0	0.0000

Potential Total Recovery: $0.00

Custodian A Files for first half of CP and deliver's shares out to Custodian B, who files for remainder of CP

Custodian B received shares from Custodian A; Potentially ineligible for a recovery as a separate claim

CUSTODIAN	TRANS CODE	TRADE DATE	QUANT.	PRICE PER SHARE
B	HOLDINGS	2/26/2007	0	0.0000
B	**RECEIVED**	**7/2/2007**	**51,500**	**0.0000**
B	SELL	7/24/2007	51,500	35.5068
B	HOLDINGS	7/17/2008	0	0.0000

Potential Total Recovery: $0.00

Combined Claim Recovery

Claim including all Class Period data will result in eligibility for a recovery:

CUSTODIAN	TRANS CODE	TRADE DATE	QUANTITY	PRICE PER SHARE
A	HOLDINGS	2/26/2007	42,700	0.0000
A	BUY	4/13/2007	10,500	50.3611
A	SELL	5/17/2007	(1,700)	49.8580
A	DELIVERED	7/2/2007	(51,500)	0.0000
B	RECEIVED	7/2/2007	51,500	0.0000
B	SELL	7/24/2007	(51,500)	35.5068
B	HOLDINGS	7/17/2008	0	0.0000

Total Recovery based on the Plan of Allocation

Potential Total Recovery: $11,914.00

CLAIMS ADMINISTRATION

- What Can be Done?: Put a system in place to make sure all claims are identified and filed. Options include:
  - Utilize internal staff.
  - Negotiate with a custodian to perform this service.
  - Hire a third-party claims advisory service.
  - Engage external securities litigation counsel.

CONCLUSION

- U.S. public pension funds and other institutional investors have had tremendous impact on global shareholder litigation
- Non-U.S. cases are here to stay, and the number of jurisdictions where claims are being brought is increasing
- Increasingly plan participants are aware of these actions and are asking those that oversee their investments to pursue recoveries
- Having a proper system in place to track and manage global shareholder litigation is important from a fiduciary standpoint
- It behooves all investors to have some formal policy on litigation and recovering assets that is shared with constituents
- This can mean financial thresholds, only getting involved in cases where there are strong allegations of frauds, etc.
- Retaining a law firm with significant experience in these areas can add a great deal of value.

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