Securities Litigation & Class Action Trends — 2016 Year in Review

By Financial Recovery Technologies

Antitrust Class Action Litigation & Settlements
INTRODUCTION

In recent years, institutional investors have moved beyond securities suits to recover damages from losses on investments covered by U.S. federal antitrust laws and the Commodity Exchange Act (CEA), or more simply, Antitrust Class Actions. Investor attention has focused on these matters in the wake of seemingly endless financial scandals affecting benchmark rates and their related instruments. Last year, nearly $2B was disbursed in settlement funds from the Credit Default Swap (CDS) Antitrust Litigation alone. This report discusses trends that emerged in 2016 and will likely continue throughout this year.

ANTITRUST TRENDS

1. **Increase in the number of antitrust cases in the U.S. and globally**

   Antitrust litigation involves alleged misconduct affecting markets for non-securities instruments. In the U.S., there are currently more than 40 active cases in various stages of litigation. In eight settled ones, the administration process has been established and claim forms are available. The increased pace of domestic filings and settlements will likely continue in 2017. Most notably, the Foreign Exchange Rate (FOREX) Litigation has already recovered roughly $2B for damaged investors (claim forms expected mid-year), a figure that could grow significantly and rival the largest securities class action settlements if more defendants settle.

   Additionally, institutions are beginning to consider antitrust matters in other countries, and as in the U.S., there is no shortage of opportunities. Like overseas securities actions, it seems most antitrust matters will be pursued either through Dutch Foundations or as “opt-in” litigation in particular countries. In many instances, cases are being organized by the same lawyers, investment recovery firms and funding organizations who are themselves actively seeking to diversify their scope as the securities area becomes more crowded and competitive.

2. **Complexity of antitrust cases leading to longer administrations**

   **Complex settlement administrations**: Relative to securities class actions, antitrust cases tend to involve more complex settlement administrations. Case counsel and administrators rely heavily on experts to assess damages and formulate distribution plans. These involve complex modeling to estimate artificial inflation of an instrument’s price or spread. Investors, organizers and administrators also have difficulty identifying and obtaining data for antitrust matters, which require more granular trading details, such as proof the trading counterparty was one of the defendants and details on spreads for covered instruments.

   **Identification of claimants’ domicile**: Another factor leading to longer administrations is the process to determine if claimants are domiciled in the U.S and, if not, whether their transactions have a sufficient ‘nexus’ or connection to the U.S., in accordance with the Supreme Court’s *Morrison* decision. This complexity results in longer administration cycles for partial settlements. This is evident in the FOREX case for which recovery money (currently $2B) has been in escrow for more than a year-and-a-half while counsel and the administrator prepare for the distribution process.

**FOREX CASE SPOTLIGHT**

Click here to read FRT’s case spotlight on current partial settlements in the Foreign Exchange Benchmark Rate Litigation.

**CURRENT ANTITRUST SETTLEMENTS**

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<thead>
<tr>
<th>Case</th>
<th>Settlement Amounts</th>
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<tbody>
<tr>
<td>Euroyen-Based Derivatives</td>
<td>$58 m</td>
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<tr>
<td>BARX/Last Look</td>
<td>$50 m</td>
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<td>Forex</td>
<td>$2 b</td>
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<tr>
<td>Silver Fixing</td>
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<td>LIBOR</td>
<td>$120 m</td>
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There are more than 40 active antitrust cases in various stages of litigation. The eight cases listed above have settlement pools available for recovery by investors.
Departure from simple proof of claim forms: In a departure from traditional blank proof of claim forms like those used in securities class actions, administrators in antitrust actions often develop an online claimant portal in which investors can access their trade history as constructed by the administrator. As an example, in the CDS case, the administrator relied on data acquired from the DTCC and from the settling defendants to extrapolate eligible claimant data. Investors can supplement information on the portal if they feel it’s inaccurate or incomplete. However, identifying trades in antitrust matters tends to be more difficult since there usually is no distinct security identifier and claim forms may only include a general description of affected instruments.

Going forward, length of administration may shorten a bit as antitrust matters become more prevalent and administration methods more predictable. On the back end, disbursement of settlement funds may be faster than in securities cases, likely months as opposed to years, like in the CDS case. The speed of disbursement will depend on how many claimants accept the administrator’s constructed transactions as accurate, requiring less processing effort by administrators.

3. Rise of Dutch Foundations and increased direct litigation overseas

As in foreign securities cases, Dutch Foundations are emerging as a mechanism to resolve overseas antitrust matters. In 2016, we saw Dutch Foundations for FOREX and other rate manipulation matters. These settlement vehicles are particularly popular with U.S. law firms seeking involvement in overseas matters. Such firms typically aren’t licensed overseas and can’t directly prosecute cases in the countries where the defendants reside. This trend will likely accelerate in 2017.

Also outside of the U.S., financial scandals and resulting losses are driving many institutions to consider pursuing direct group actions, particularly where there is no class action mechanism available. By contrast, we have not witnessed investors in the U.S. opting-out of antitrust actions. This is presumably due to the lack of an accepted damages methodologies and associated challenges of gathering data and quantifying losses in amounts that make individual suits attractive to the claimants and cost effective for the lawyers to undertake on a contingent basis.

4. U.S. Attorneys General are competing with the plaintiff bar

Regulatory enforcement proceedings by state Attorneys General against defendants could put a dent in antitrust class action recoveries. These out-of-court settlements differ from class action settlements in that they are not subject to preliminary or final court approval, fairness hearings or objection proceedings, and they do not involve a process for submitting proof-of-claim forms.

In the Barclays LIBOR case, for example, the state Attorneys General settled for $93.4 million and then notified claimants that in return for signing a release of their claims against Barclays, they would receive a certain amount from the recovery fund. In doing so, claimants forfeit their right to recover against Barclays in several pending class actions and in future cases not yet filed, and are precluded from bringing their own direct lawsuits against the firm. Stay tuned to see how this plays out in 2017.
CONCLUSION

Antitrust litigation is becoming more prevalent in the U.S. and internationally, and we expect this trend to continue through 2017. While not all antitrust cases receive significant publicity, there is a large pool of opportunities across the globe from which investors can attempt to recover their losses. But antitrust matters tend to be complex, which makes identifying and addressing antitrust litigation more challenging for investors than securities claim filings. As a matter of corporate governance, investors should evaluate the optimal approach for them to participate in antitrust actions, both in the U.S. and across the globe.

ABOUT FINANCIAL RECOVERY TECHNOLOGIES

Financial Recovery Technologies (FRT) is a leading technology-based services firm that helps institutional investors identify eligibility, file claims and collect funds made available in securities class action settlements and litigations impacting global investors. Offering the most comprehensive range of services, we provide best-in-class eligibility analysis, disbursement auditing and client reporting.

We deliver the highest level of accuracy, accountability and transparency available to a wide range of institutional investors including hedge funds, investment managers, custodians, public and private pension funds, and wealth managers. Financial Recovery Technologies is a Cross Country Group company (www.crosscountrygroup.com). For more information, go to www.frtservices.com or email info@frtservices.com.

ABOUT FRT ANTITRUST

FRT Antitrust is a comprehensive monitoring and claim filing service that addresses litigation and settlements involving investments covered by U.S. federal antitrust laws and the Commodity Exchange Act. FRT’s knowledgeable team analyzes losses and assesses damages to help clients maximize recoveries from antitrust class actions and related settlements. Clients are notified when new cases are identified and significant case milestones are reached. FRT partners with deep domain experts and works closely with administrators to facilitate claim submission and the subsequent recovery, verification and remittance of settlement funds on behalf of clients.