*July 29, 2019*

# Class & Collective Action Group Newsletter

## Supreme Court

### Denial of Certiorari in *Stoyas v. Toshiba Corp.*

#### *Key Issue*

While all circuits agree that a domestic transaction is necessary for the Exchange Act to apply, there is a split between the Second and Ninth circuits as to whether a domestic transaction is sufficient for its application, without more. Toshiba sought certiorari to resolve this split; in denying certiorari, the Supreme Court has left the question open.

#### *Background & Decision*

In July of 2018, the Ninth Circuit revived a securities class action against Toshiba,[1] a Japanese company whose Japanese disclosures had been exposed as incorporating fraudulent accounting practices, on the theory that U.S. purchasers of Toshiba ADRs could assert claims against Toshiba under the Exchange Act. The Ninth Circuit held that this result was consistent with the Supreme Court's ruling in *Morrison v. National Australia Bank Ltd.*[2] that the Exchange Act does not apply extraterritorially, but only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[3] In so doing, the Ninth Circuit declined to follow the Second Circuit's decision in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, which held that a domestic transaction is necessary, but not sufficient, for the Exchange Act to apply.[4] At the same time, however, the Ninth Circuit suggested a different route to reach perhaps the same destination. It suggested that there might be sufficient distance between the alleged fraud—which was one arguably on Toshiba shareholders—and the purchase and sale of Toshiba ADRs so as to flunk the "in connection with" requirement.

Toshiba petitioned for certiorari, arguing that the split between the Ninth and Second circuits was significant and likely to have the usual pernicious consequences, including forum shopping by plaintiffs interested in the Ninth Circuit's more liberal approach to the *Morrison* inquiry. A few weeks ago, in June, the Supreme Court denied its petition.

#### *Thoughts & Takeaways*

The Supreme Court's denial of certiorari leaves intact a potential split between the Ninth Circuit's holding that a domestic transaction is sufficient for the Exchange Act to apply, and the Second Circuit's holding that a domestic transaction is

[1] *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018). In the Supreme Court, the case was captioned *Toshiba Corp. v. Auto. Industries Pension Trust Fund*, No. 18-459.

[2] *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

[3] *Id.* at 267.

[4] *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014).

necessary, but not sufficient. It will be interesting to see whether there will in fact be an increase in the number of securities fraud class actions filed in the Ninth Circuit, and in particular, whether more such cases are filed against foreign defendants whose relevant conduct occurred abroad and whose sole connection to the United States is the sale of their ADRs.

In addition, *Stoyas* itself will be interesting to follow. In *Stoyas*, the application of the Exchange Act to Toshiba hung on the slender thread of the domestic market in its Level 1 ADRs (which can be generated without any involvement or even consent from the company whose stock is referenced). But the Ninth Circuit emphasized that, to adequately plead a violation of the Exchange Act, plaintiffs must also sufficiently allege that Toshiba's fraudulent conduct in Japan was "in connection with" the ADR transactions that are the sole hook for domestic liability.[5] How plaintiffs do so in the amended complaint that they now have an opportunity to file, and how the courts will evaluate that attempt, will determine the extent to which the result in *Stoyas* will differ from the result in *Parkcentral*.

Read the petition for certiorari here, and read the decision below here.

## Denial of Certiorari in *Mineworkers' Pension Scheme v. First Solar Inc.*

### *Key Issue*

Also in June, the Supreme Court denied a petition for a writ of certiorari from the Ninth Circuit's decision in *Mineworkers' Pension Scheme v. First Solar Inc.*, which held that a private securities fraud plaintiff can establish loss causation based on a decline in the market price of a security even when the event or disclosure that triggered the decline did not reveal the fraud on which the plaintiff's claim is based.[6] The Ninth Circuit permitted plaintiffs to recover based on the drop in the stock's value before the fraud was revealed to the market because "the underlying facts concealed by fraud affect[ed] the stock price."[7] The Ninth Circuit concluded that the revelation of fraud to the market is just one of multiple theories on which a plaintiff may establish proximate cause in the context of a securities fraud claim. The denial of certiorari in this case gives securities plaintiffs in the Ninth Circuit in a stronger position with respect to pleading and proving loss causation.

### *Background & Decision*

*First Solar*, a 2012 securities fraud class action filed against a major producer of solar panels, alleged that the company had concealed certain defects in its solar panels and understated their financial impact; as disappointing financial results trickled out and the company's stock took a hit, plaintiffs alleged that investors were suffering an injury proximately caused by the defendant company's fraud—despite the fact that that fraud had not yet been revealed to the market.

The district court, and then the Ninth Circuit, agreed with plaintiffs that they did not need to show that their losses were caused by the revelation of a fraud, as long as the loss could be traced back to the facts which the defendant had misstated. In other words, when the negative impact of a fraud is revealed to the market before the fraud itself is revealed, loss causation can be satisfied by showing its connection to that impact.

### *Thoughts & Takeaways*

The Supreme Court's denial of certiorari leaves intact a decision that could be highly consequential for securities fraud defendants, because it enables plaintiffs to establish loss causation in a broader set of circumstances.

Read the petition for certiorari here, and read the decision below here.

[5] *Stoyas*, 896 F.3d at 32.

[6] *Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750 (9th Cir. 2018). In the Supreme Court, the case was captioned *First Solar Inc. v. Mineworkers' Pension Scheme*, No. 18-164.

[7] *Id.* at 754.

## Denial of Certiorari in *Perryman v. Romero*

### *Key Issue*

In March of this year, in *Frank v. Gaos*,[8] the Supreme Court avoided directly addressing an objection to the cy pres settlement mechanism despite an invitation to do so. More recently, on June 24, the Supreme Court declined even to take up a challenge to cy pres relief, denying certiorari in *Perryman v. Romero*.[9] Some commentators have interpreted this as a signal that, at least for the time being, cy pres is here to stay. However, the tea leaves are not so clear, and if a better vehicle for challenging a cy pres settlement comes along, it is possible that the Supreme Court will take it up.

### *Background & Decision*

*Perryman* concerned the settlement of a class action in which plaintiffs alleged that the defendants had fraudulently enrolled all 1.3 million class members into a membership program without their consent, and then charged them a monthly membership fee, reaping tens of millions of dollars thereby. The case settled for $12.5 million, with class counsel requesting $8.65 million in fees and $200,000 in costs, a special payment of $80,000 to the class representatives, and the $3.65 million remainder available to class members who submitted refund claims. Class members were also to receive a $20 coupon that could be redeemed at the website of one of the defendants, which defendants valued at around $26 million (a valuation that was disputed). After administrative costs were satisfied and refunds paid, any remaining unclaimed money was to go to cy pres awards to three San Diego universities, including one from which several of the attorneys on the case graduated. The awards were to be coordinated with the main defendant and directed to be used in relation to issues of internet privacy or data security.

Ted Frank, for the Center for Class Action Fairness, which also objected to the settlement in *Frank v. Gaos*, represented Perryman, a member of the class, in his objection to this settlement. Perryman objected on a number of grounds, among them, the distribution of any money to cy pres recipients when all class members were known and would receive a distribution.

The district court was not persuaded and approved the settlement, despite the fact that only about 3,000 class members claimed refunds, with the result that about $225,000 was refunded to class members, leaving about $3 million to go to cy pres recipients. And, on appeal, the Ninth Circuit too rejected the cy pres argument (despite taking issue with other aspects of the settlement, including vacating the award of fees). The Ninth Circuit noted that due to the large size of the class, a distribution of any remaining amounts would be "de minimis." Nor was the court persuaded by the argument that an award to universities to which certain of the litigating attorneys had relationships was improper or that it was improper for the cy pres award to be geographically concentrated despite a nationwide class.

### *Thoughts & Takeaways*

Unlike *Frank v. Gaos*, *Perryman* did not involve a cy pres-only settlement. In *Perryman*, the cy pres mechanism was used to distribute unclaimed funds, with other funds being paid directly or indirectly to class members. It therefore raised a somewhat different question about the cy pres mechanism. To the extent that the grant of certiorari in *Frank v. Gaos* suggested that the Supreme Court was open to weighing in against the use of cy pres, the denial of the petition in *Perryman* does not necessarily signal a shift in its views.

Ted Frank, counsel to *Perryman* and also "Frank" in *Frank v. Gaos*, has assured the press that he has

[8] *Frank v. Gaos*,—S. Ct.—, No. 17-961, 2019 WL 1264582 (Mar. 20, 2019) (per curiam).

[9] *Brian Perryman v. Josue Romero, et al.*, No. 18-1074. In the Supreme Court, the case was captioned *Brian Perryman v. Josue Romero, et al.*, No. 18-1074.

other cy pres cases pending,[10] and will certainly continue his scrutiny of class action settlements. Consequently, cy pres only settlements, or settlements where the cy pres portion is more significant in comparison to direct relief than it was in *Perryman*, should still be considered carefully by counsel, and the potential (depending on the circuit, perhaps remote, but not nonexistent) for a successful appeal of cy pres relief should be taken seriously in structuring and negotiating classwide relief.

Read the petition for certiorari here, and read the decision below here.

# Federal Appellate Courts

## Decision in *Andrews v. Plains All American Pipeline, L.P.*

### *Key Issue*

In *Andrews v. Plains All American Pipeline, L.P.*, the Ninth Circuit reversed in an unpublished decision a district court's certification of a subclass seeking relief for economic injury arising from an oil spill and pipeline shutdown, which allegedly depressed economic activity in Santa Barbara's local oil and gas industry.[11] The Ninth Circuit held that individual issues—such as causation and injury—would predominate, and that the district court abused its discretion by failing to resolve factual disputes necessary to determine whether plaintiffs' damages model provided common proof.

### *Background & Decision*

The case arises from a 2015 oil spill from a pipeline owned and operated by defendant Plains. After an investigation concluded that the pipeline was corroded, Plains ceased operations of the pipeline, thereby purportedly depressing the local economy and causing businesses dependent on the pipeline to terminate employees and to lose revenue.[12] Within weeks, plaintiffs—individuals and businesses allegedly harmed by the spill and shutdown—brought an action against Plains in the Central District of California. Plaintiffs' California claims for negligence and negligent interference with prospective economic advantage survived defendant's motions to dismiss and for summary judgment.

At the class certification stage, the disctrict court first denied plaintiffs' motion for certification of a class that included any persons or entities "whose jobs or businesses were dependent, in whole or in part, upon the functionality of Plains' Pipeline."[13] But the district court subsequently certified a (purportedly narrower) class comprised of individuals and entities who "were employed, or contracted, to work on or to provide supplies, personnel, or services for the operations of facilities" reliant on the shutdown pipeline.[14] The district court reasoned that the revised class definition satisfied Rule 23(b)(3)'s predominance and superiority requirements because, though at least some class members were not injured—e.g., their employment had not been terminated—all class members were "at the very least *exposed* to the shutdown," and, moreover, "had a contract that was impacted in one way or another" by the shutdown.[15] In reaching its conclusion, the district court relied on plaintiffs' damages model, which

[10] Bem Kochman, *High Court Won't Hear Challenge to Cy Pres Mechanism*, Law360 (June 24, 2019), https://www.law360.com/articles/1172218/high-court-won-t-hear-challenge-to-cy-pres-mechanism.

[11] —F. App'x—, No. 18-55850, 2019 WL 2880970 (9th Cir. July 3, 2019).

[12] Plaintiffs-Appellees' Answering Br. at 5-8, *Andrews*, No. 18-55850 (9th Cir. Jan. 18, 2019), ECF No. 34.

[13] Pls.' Mem. In Supp. of Pls.' Mot. for Class Certification at 6:14-16, *Andrews*, No. 2:15-cv-04113-PSG-JEM (C.D. Cal. Aug. 22, 2016), ECF No. 123.

[14] *Andrews*, *supra* note 11, at *1.

[15] Civil Minutes at 13-14, *Andrews*, No. 2:15-cv-04113-PSG-JEM (C.D. Cal. Feb. 9, 2018), ECF No. 419.

purported to demonstrate a 34 percent decrease in employment in the local oil and gas industry due to the shutdown.

In reversing the class certification order, the Ninth Circuit rejected the district court's "exposure" theory of common causation and injury because the class members were subject to varying economic factors that could have caused their economic injury, to the extent they suffered any injury at all.[16] Furthermore, the Ninth Circuit scrutinized plaintiffs' damages model, which demonstrated only a "general impact" of a 34 percent decrease in employment in the local oil and gas industry, and therefore confirmed that many employees within the class likely were not injured. Finally, plaintiffs' varying relationships with Plains also undermined predominance because California's economic loss doctrine would require each plaintiff to show that a special relationship existed between it and Plains such that Plains had a duty of care to prevent economic harm. Plaintiffs could not make that showing merely by alleging that they all had contracts with Plains.

### *Thoughts & Takeaways*

In overturning the district court's class certification order, the Ninth Circuit rejected the district court's conclusion that Rule 23(b)(3)'s predominance requirement was satisfied because the putative class members had a contractual relationship with the facilities and were "exposed" to the Pipeline shutdown. The Ninth Circuit distinguished cases in which "exposure to the alleged misconduct was itself the injury or was the sole cause of the injury,"[17] observing that, in the matter at hand, individual class members would need to present varying evidence to demonstrate both causation and injury—meaning that common issues of fact did not predominate.[18] Notably, though, even where "exposure" is the injury, a defendant can still challenge the propriety of class certification under Rule 23(b)(3) where the nature of the exposure poses ascertainability issues. For a memorable example, consider the District of New Jersey's decision in *Fenwick v. Ranbaxy Pharmaceuticals, Inc.*, a case arising from consumers' purchase of prescription pills that originated from an allegedly tainted inventory pool that may have included glass particles.[19] There, in a sense, consumers' "exposure" to the tainted pool was itself the injury (the court's conclusion that plaintiffs had standing meant that they suffered an injury-in-fact by purchasing a sub-standard product that may or may not have contained glass particles), but that exposure was ultimately not enough to support class certification because plaintiffs could not meet their burden of proving that the class is ascertainable. Specifically, the court held that plaintiffs' method for class certification did not show that class members could actually be identified: distribution processes complicated plaintiffs' efforts to identify which consumers actually purchased pills from inventory pools containing recalled pills, and plaintiffs could not exclude consumers who did not purchase any recalled pills.[20] "Exposure" theories of class certification, therefore, expose class action plaintiffs to attacks on numerous fronts.

Read the Ninth Circuit's opinion here.

[16] *Andrews*, *supra* note 11, at *1.

[17] *Id.*

[18] In the Ninth Circuit, the need for individualized calculations to demonstrate the amount of damages generally does not defeat class certification, but individualized questions regarding whether class members were injured at all present a substantial hurdle. *See Andrews*, *supra* note 11, at *2; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013).

[19] No. 3:12-cv-07354, 2018 WL 5994472 (D.N.J. Nov. 13, 2018).

[20] *Id.* at *6-8.

# Federal District Courts

## Motion for Certification of a "Negotiation Class" in *In re National Prescription Opiate Litigation*

### *Key Issue*

The ongoing opioid multidistrict litigation in the Northern District of Ohio consists of approximately 2,000 similar lawsuits, the majority of which are brought by states, cities, or counties seeking to recoup past and future expenses for governmental services that the nation's opioid epidemic necessitated. Though the multi-district litigation is not itself a class-action lawsuit, 51 city and county plaintiffs recently submitted a novel motion for certification of a Rule 23(b)(3) "Negotiation Class" comprised of all cities and counties (but not states) in the United States for the sole purpose of negotiating and potentially settling with defendants that conducted nationwide opioids manufacturing, sales, or distribution.[21] To our knowledge, no court has previously certified a "negotiation class."

### *Background & Briefing*

On June 17, 2019, a group of city and county plaintiffs filed the first iteration of their motion seeking certification of a so-called "Negotiation Class."[22] In their motion, plaintiffs proposed the creation of a novel arrangement by which all cities and counties in the United States would be able to participate collectively in settlement negotiations with defendants who wish to settle on a classwide basis, and to vote to accept or reject any proposed resolution.[23] Plaintiffs offered a forceful defense of their proposal, emphasizing the need for a swift and comprehensive resolution of the opioids epidemic. Plaintiffs criticized the constraints of existing processes for approval of settlement classes, which render the settlement process "passive" because class members begin participating at the preliminary approval stage, after class counsel has submitted a proposed settlement to the court for consideration. Plaintiffs argued that a Negotiation Class would invite participation upfront by giving members a binding voting process by which they could approve settlements as they are proposed; that same process would also give credibility to plaintiffs in their settlement negotiations because their unified front could offer something akin to global peace for settling defendants.[24] The first iteration of plaintiffs' motion addressed Rule 23's requirements in less detail, characterizing their application as a "new application that is faithful to the animating principles" of Rule 23.[25] The motion also emphasized that the Negotiation Class would not be precedential and could not be used for purposes of forming a litigation class.

On June 24, 2019, a group of distributor defendants opposed the motion, primarily on the basis that plaintiffs' proposed voting structure would make settlement impracticable or impossible to achieve, and that any settlement that might result could be reversed on the basis that certification of a Negotiation Class exceeds the court's jurisdiction—thereby undermining the very purpose of the class to facilitate settlement.[26] Defendants also faulted plaintiffs for failing to establish a record from which the court could assess Rule 23's requirements—in particular, typicality, commonality, and

[21] Pls.' Renewed and Amended Notice of Mot. And Mot. for Certification, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio July 9, 2019), ECF No. 1820.

[22] Pls.' Corrected Notice of Mot. and Mot. for Certification, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio June 17, 2019), ECF No. 1690.

[23] *Id.* at 2.

[24] *Id.* at 4-6, 55-59.

[25] Pls.' Mem. in Supp. of Certification at 56, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio June 14, 2019), ECF 1683-1.

[26] Mem. of Certain Defs. in Opp'n to Pls.' Mot. for Certification, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio June 24, 2019), ECF No. 1720.

predominance. Defendants emphasized the difficulty of establishing a nationwide class whose claims are based primarily on state law, and disputed plaintiffs' argument that they were typical of the class because they alleged civil RICO and public nuisance claims, which plaintiffs asserted to be the most common causes of action in the multidistrict litigation. Finally, defendants noted that the proposed Negotiation Class mechanism would be under-inclusive and could not truly offer "global peace" because it could not facilitate participation by states,[27] state agencies, Indian Tribes, or other persons or entities with pending suits in the multidistrict litigation, such as hospitals and labor unions.[28]

On July 9, 2019, plaintiffs filed their Renewed and Amended Notice, which addressed defendants' criticisms of the proposal. To address defendants' attack on typicality, commonality, and predominance, plaintiffs reviewed a randomized sample of class member complaints to find which causes of action were most common in the multidistrict litigation.[29] The survey revealed that civil RICO and public nuisance claims recur in virtually all complaints—as well as in virtually all complaints brought by putative class representatives. Plaintiffs argued that this overlap in common claims was an "empirical demonstration" of typicality, commonality, and predominance.

### *Thoughts & Takeaways*

The briefing so far presents an interesting look at how a novel approach to resolution of mass torts on a nationwide scale could be applied in practice, as well as its potential practical and legal pitfalls. The briefing—with its references to input from the various political stakeholders—also provides insight into the difficulties of creating leadership structures among plaintiff classes and in multidistrict litigations generally, and how those processes could contribute to or undermine efforts by all sides to achieve "global peace" through settlement. Briefing on the revised motion will conclude by July 30, and a hearing is set for August 6, 2019. Look for updates on this case in a future newsletter.

Read the motion here.

## Decision in *Kubilius v. Barilla America Inc.*

### *Key Issue*

In *Kubilius v. Barilla America Inc.*, a case about a New York consumer plaintiff's challenge to Barilla's allegedly deceptive "no preservatives" pasta sauce labeling, the Northern District of Illinois granted Barilla's motion to strike allegations brought on behalf of a nationwide class of consumers claiming relief under the Illinois Consumer Fraud and Deceptive Practices Act and the "substantively similar consumer protection laws" of the remaining forty-nine states and the District of Columbia.[30] The court held that differences among the various states' consumer protection laws would render the claims unmanageable as a nationwide class action.[31] Nonetheless, the court preserved (pun intended) plaintiff's New York fraud and common-law fraud claims on behalf of a class of New York consumers, holding that plaintiff had standing to sue on behalf of those consumers who purchased "similar" products that plaintiff himself did not actually purchase.

### *Background & Decision*

In its decision, the court readily struck allegations that Kubilius brought on behalf of a putative

[27] Currently, all cases brought by states are being litigated outside of the multidistrict litigation.

[28] Indeed, plaintiffs admitted as much. *See* Pls.' Renewed & Amended Mem. in Supp. of Certification at 11, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio June 14, 2019), ECF 1820-1 ("While it is true that the Negotiation Class alone cannot deliver true 'global peace'—it does not seek to interfere with the rights and claims of the States, nor those of hospitals, tribes, third party payors and others who may have claims against the national opioid defendants, it does offer a way to get closer to such peace.").

[29] *Id.* at 76-77.

[30] Mem. Op. & Order at 1, *Kubilius v. Barilla Am., Inc.*, No. 1:18-cv-06656 (N.D. Ill. July 2, 2019), ECF No. 35.

[31] The court also dismissed plaintiff's claim under the Illinois Consumer Fraud and Deceptive Practices Act because the statute does not apply extraterritorially to a course of events that occurred in New York. *Id.* at 2-3.

nationwide class because "the claims of the absent class members [would] be governed by the laws of all fifty states and the District of Columbia,"[32] and, under the Seventh Circuit's decision in *In re Bridgestone/Firestone, Inc.*, class actions are disfavored where all litigants cannot be governed by the same legal rules.[33] The court was also unpersuaded that it could sidestep the differences between states' laws by certifying subclasses, since there is a "multitude of dimensions on which state consumer protection laws differ substantively and procedurally," and accordingly the nationwide class could not meaningfully be divided into a reasonable number of subclasses.[34]

Kubilius fared better against Barilla's challenge to his standing to assert claims on behalf of absent class members who purchased other similar products with "no preservatives" labeling that he himself did not purchase. The court noted that district courts in the Northern District of Illinois, and indeed district courts across the country, are split on this question, but that the majority have held that class representatives may represent class members who purchased "substantially similar products." The court reasoned that there is no material difference between, for example, a consumer who is deceived by a "no preservatives" label on a "Traditional" pasta sauce as compared to a "Chunky Traditional" sauce.

### *Thoughts & Takeaways*

The court's analysis is notable in that it arguably conflates Article III's standing prerequisites with Rule 23(a)(3)'s typicality requirement. The court concluded that Kubilius' alleged injury is not distinct from any injury that absent class members might experience by purchasing "substantially similar products," but it did not address how a plaintiff could demonstrate an *actual*—not hypothetical—injury arising to him from a product he did not purchase.[35] To date, several courts have reached the same conclusion in the context of deceptive labeling claims and with respect to products with little variation, as the court determined was the case here between different pasta sauces. We will continue to watch this issue, including to see whether putative classes expand to include less-similar products, and whether appellate courts will weigh in decisively or add to the split.

Read the opinion here.

[32] *Id.* at 4.

[33] 288 F.3d 1012, 1015 (7th Cir. 2002).

[34] Mem. Op. & Order, *supra* note 30, at 8.

[35] *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (stating that Article III requires plaintiff to establish she has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that it is likely to be redressed by a favorable judicial decision").

# Other Noteworthy Developments

## Rise in Australian Class Actions

Law.com reports a sharp rise in the number of class action lawsuits filed in Australia, attributing the rise to increased litigation funding activity, and to a major government inquiry into the financial sector. Since Australia began allowing class actions in 1992, the average number filed per year has hovered around 22. In 2018, 64 class actions were filed. And this year, 18 have been filed, with half of the year left to go.

But a pending decision from Australia's High Court could throw a wrench in the works. The decision, due later this year, concerns common fund orders, a mechanism that makes it easier for litigation funders to bring cases. If the High Court's examination of their legality results in a limitation on their use, or eliminates them, then the costs of bringing Australian class actions could rise, and the rate of such filings could decline.

By comparison, in the United States, the pace of class action filings shows no sign of slackening. 199 federal securities class actions were filed in the first half of 2019, and at least 20 state securities class actions lawsuits have been filed in the same period.[36] According to a report recently issued by Chubb, the total cost of U.S. securities litigation over the last five years (including defense costs) was $23 billion.

[36] Kevin M. LaCroix, *Securities Suit Filings Remain at Heightened Pace in Year's First Half*, D&O Diary (June 20, 2019), https://www.dandodiary.com/2019/06/articles/securities-litigation/securities-suit-filings-remain-at-heightened-pace-in-years-first-half/.

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