

Why Investors Are Suing Under Antitrust, Futures Laws

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Having diversified their portfolios beyond U.S. stocks and bonds, today's institutional investors are now diversifying the legal tools they use to protect those investments. In cases where markets were manipulated, some pension funds are suing under antitrust laws and the Commodity Exchange Act to recover losses and make rigged markets more efficient.

While many of these alternative investment cases are still in their nascent stages, early results offer investors hope. An antitrust case involving the market for credit default swaps recently settled for \$1.9 billion and injunctive relief that should make it easier for credit default swaps to be traded on exchanges. Another case, focused on manipulation of the foreign exchange markets, has yielded \$2 billion in partial settlements thus far.

So what caused this increase in claims under the antitrust laws and the Commodity Exchange Act? And what should pension funds and other institutional investors do to make sure they are identifying and managing potential claims that are, after all, assets of their trust?

The rise in private lawsuits by investors alleging antitrust and Commodity Exchange Act violations is primarily linked to two factors. First, the courts and Congress have whittled away at U.S. securities laws, narrowing the circumstances under which investors can sue and making it tougher for them to prevail when they do. Second, institutional investors have expanded their portfolios to include a variety of alternative investments.

The Private Securities Litigation Reform Act of 1995 added "procedural and substantive limitations upon the scope of the private right of action" available under the main federal securities laws. A second law, passed in 1998, forced most securities class actions alleging state law claims to transfer to federal court. The U.S. Supreme Court has also narrowed the reach of the securities laws. In 2010, to cite just one prominent example, the court held in *Morrison v. National Australia Bank* that, a half-century of precedent notwithstanding, U.S. securities laws only cover transactions made within the United States.

Meanwhile, institutional investors have diversified their portfolios way beyond traditional securities. Unfortunately, some of these asset classes — notably hedge funds and private equity — are made through limited partnerships that offer limited legal recourse when a general partner's deception comes to light. In contrast, commodity investments, swaps and futures have proved an area where investors still possess the right to sue in court.



Carol V. Gilden



Michael B. Eisenkraft

Commodities make up a growing segment of retirement plan assets, despite plummeting valuations, according to this year's P&I 1000. The survey found that defined-benefit pension funds held \$22.5 billion in commodity assets as of Sept. 30, 2015, up from \$4.1 billion in 2006, with 55 U.S. pension funds holding commodities, more than triple the number a decade ago. The long-term increase comes despite a 50 percent decline in commodities prices over the last five years, as measured by the Bloomberg Commodity Index.

The Commodity Exchange Act, or CEA, protects investors in futures contracts much like the federal securities laws shield investors in securities. The CEA allows investors to sue under four specific circumstances, including market manipulation in connection with a contract for sale of a commodity. It is this circumstance that most often directly concerns institutional investors, who can be damaged by artificially low or high prices created by a manipulated market.

While the CEA primarily protects commodities futures contracts, it can offer critical protection to funds invested in that space. Recently, investors have sued over alleged manipulation of the market for gold futures and silver futures. Our firm represents investors in eurodollar futures who have brought claims based on the manipulation of the Libor rate. In another case, we represent investors suing some of the world's largest banks for allegedly manipulating the market for U.S. treasury futures. More than a dozen pension funds filed claims in that case.

The antitrust laws, in turn, offer much broader remedies. In its 1958 Northern Pacific Railway decision, the Supreme Court said antitrust laws were designed to preserve "free and unfettered competition as the rule of trade" by prohibiting contracts, combinations or conspiracies that "unreasonably" restrain competition. Since the behavior they bar can touch arguably any good or service, the antitrust laws can provide protection from price fixing, market manipulation and other conspiracies for a broad range of investments by other institutional investors.

In addition to the gold, silver, Treasuries and eurodollar futures cases mentioned previously, pension funds are using antitrust laws to recover their losses in credit default swaps and foreign exchange benchmark rates. In another case, where we represent the Public School Teachers' Pension and Retirement Fund of Chicago, the plaintiffs are pursuing major banks under the antitrust laws for manipulating the market for interest rate swaps.

The interest rate swaps case, like the credit default swaps action mentioned above, highlights an important benefit of suing under these laws. In addition to monetary damages, plaintiffs are seeking injunctive relief — court orders aimed at fixing the problem in the manipulated market going forward.

Many institutional investors have developed policies and procedures to effectively manage their securities litigation claims: identifying new lawsuits in which they should consider active involvement and making sure they collect all proceeds due from class action settlements. Motivated by the Supreme Court's 2010 Morrison decision, some funds have broadened their portfolio monitoring program to include foreign securities lawsuits, which present different sets of potential risks and rewards. Now they should review their procedures once again to make sure their monitoring law firms can identify and prosecute antitrust, CEA and other nonsecurities claims.

—By Carol V. Gilden and Michael B. Eisenkraft, Cohen Milstein Sellers & Toll PLLC

Carol Gilden is a partner in Cohen Milstein's Chicago office. Michael Eisenkraft is a partner in the firm's New York office.

DISCLOSURE: The authors currently represent pension fund investors as plaintiffs in several Commodity Exchange Act and antitrust cases.

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