Published on *The National Law Review* https://natlawreview.com

Australia – A New Frontier for Plaintiffs?

Article By:

Peter M. Saparoff

Joel D. Rothman

With the increasing barriers to successfully prosecuting a securities fraud case in the United States, including the jurisdictional limitations caused by the Morrison decision, institutional investors are sometimes now looking to other jurisdictions to sometime recover their losses. One such jurisdiction is Australia.

While we are not Australian attorneys, our observations from dealing with many Australian cases are as follows:

- Plaintiffs' attorneys in Australia frequently announce new investigations and/or "class actions" relating to what they see as fraudulent conduct. "Class Actions" or "Representative Proceedings" in Australia differ from U.S. class actions in that one usually has to "opt in" to be assured of participating in the settlement. (There are exceptions – a few actions are filed as "open" class actions which cover all investors. Others – initially filed as "closed" class actions sometimes are opened to all investors during the settlement process, presumably because of the defendants' insistence for complete protection.)

- With respect to the "closed" class actions – ones requiring an investor to "opt in" – while the "opt ins" do technically become "plaintiffs," we understand that they need not be the "representative" plaintiff. Typically the "representative" plaintiff takes the lead and the other plaintiffs are not typically exposed to discovery or required to testify. In unusual situations, the Court may require active participation of group members in the first phase under Section 33ZF of the Federal Court of Australia Act of 1976, which allows the Court to make "any order the Court thinks appropriate or necessary to ensure justice is done in the proceeding." As Justice Beach of the Federal Court in Victoria noted in a recent decision, "provision of discovery has been compelled in at least four cases." See *Earglow PTY Limited v. Newcrest Mining Ltd.*, [2015] FCA 328 at ¶ 47(a). Justice Beach, however, declined to allow discovery of group members in the Newcrest case.

- It should be noted that the net recovery of class members in Australia is affected not only by plaintiffs' attorneys' fees but also by the fees of a litigation funder. If an investor retains

Australian counsel, such investor typically has to sign a funding agreement as well. It is not unusual for half of the plaintiff's recovery to go to these fees.

- However, there are advantages to having a funding agreement – especially in a foreign country. For instance, the litigation funder typically indemnifies group members against any adverse cost awards ordered by the court. This is particularly important in jurisdictions that follow the English rule. Also, in jurisdictions that do not allow lawyers to work on a contingent fee basis, litigation funding agreements allow investors to participate in proceedings for no upfront cost, with legal fees being paid only if the representative plaintiff obtains a recovery.

- Close scrutiny of Australian investor opportunities is recommended. An investor may become aware of some "open" class actions. An investor may become aware of a "closed" class action that has allowed all investors to participate in the settlement. And because institutions increasingly invest in Australian companies, there may well be situations where an investor will decide to become a plaintiff and "opt in" to a "closed" class action.

- Finally, there are certain other advantages in Australia versus other foreign jurisdictions, including (1) a seasoned and responsive plaintiffs' bar, and (2) favorable legal doctrines, such as the "Continuous Disclosure" requirement for companies listed on the Australian Stock Exchange.

National Law Review, Volume V, Number 204

Source URL:https://natlawreview.com/article/australia-new-frontier-plaintiffs