

Advising the Board on **Securities Litigation Risk**



Risk, Resilience
and Reputation

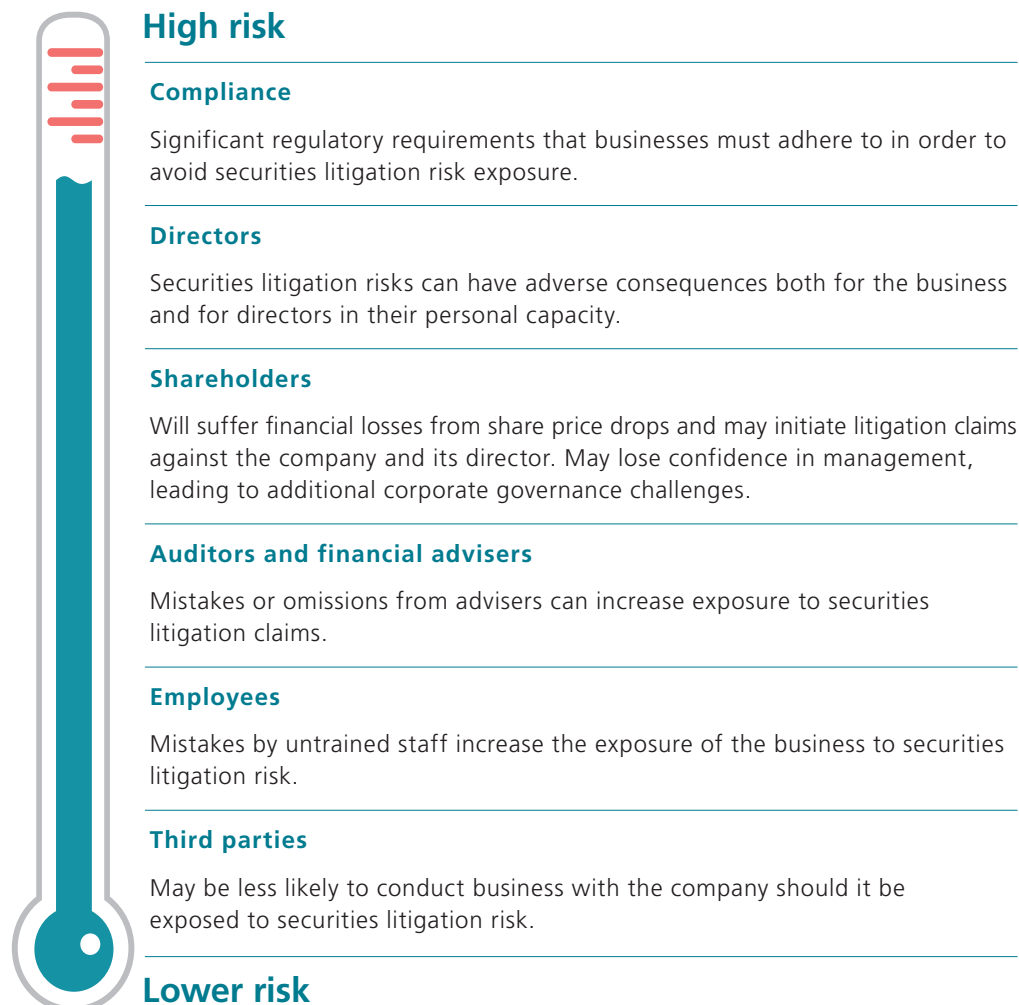
Directors' risk report

Securities litigation claims in the UK are on the rise due to several key factors, including: increased availability of litigation finance, growth of shareholder activism, and the use of litigation as a tool for corporate governance and compliance. Any board that is unable to properly address these issues could face severe penalties, ranging from personal liability for individual directors to significant financial and reputational damage for the company.

Securities litigation is a term commonly used to describe disputes arising from the purchase and sale of shares in publicly listed companies. These disputes are a form of shareholder claim which typically seek to recover alleged investment losses arising from corporate misrepresentation, mis-selling, fraud, or other corporate wrongdoing. Directors have a key role in ensuring that their businesses are aware of and have strategies in place to deal with securities litigation risks. While these claims are relatively uncommon compared to the United States, the development of a strong litigation funding market and increasing popularity of group litigation has created the perfect environment for their growth.

This report highlights the key securities litigation risks that businesses most commonly face and effective measures to mitigate them.

Stakeholder risk thermometer



Operating securities litigation risks

When listed companies suffer a significant financial under-performance, accounting issues or make various public commitments (for example about sustainability), claimant law firms and shareholders will analyse whether any claims can be brought against the company and its directors.

Areas of focus for groups of companies (particularly those operating in multiple jurisdictions and with external financing), include:



Shareholder activism

Shareholder activism is the practice of shareholders using their rights and influence to challenge and/or attempt to change the management, governance, or strategy of a listed company. Shareholder activism can take various forms, such as requisitioning general meetings, making public statements, initiating litigation, or seeking board representation. It can therefore create pressure and uncertainty for listed companies and their senior stakeholders, distracting management, as well as increase the risk of litigation or regulatory scrutiny.



Regulatory / enforcement

Action taken by securities regulators and/or other authorities, such as the Financial Conduct Authority (**FCA**) or the Serious Fraud Office (**SFO**) in the UK, to investigate and sanction violations of securities laws and regulations. Regulatory enforcement can result in civil or criminal penalties, injunctions, disgorgement, public or private censure, or bans from the securities industry. Regulatory enforcement can also trigger or facilitate private litigation by providing evidence or findings of wrongdoing.



Group Litigation Orders (**GLOs**)

GLOs are court orders that allow a group of claimants who have a common or related issue of fact or law to join together in a single proceeding. GLOs can expose listed companies and their senior stakeholders to large-scale liability and costly settlements. In the UK, GLOs are less common and more difficult than class actions in the United States, but they are still a potential threat, especially for cross-border claims.



Notifications and market announcements

Companies must regularly consider their obligation to disclose inside information, including potential securities litigation claims, as soon as possible to the market under the UK Market Abuse Regulation (**MAR**), seeking advice from its brokers and lawyers as necessary. These announcements in themselves can trigger regulatory enquiries and shareholder claims. Similarly, the company will have to consider whether it has any contractual obligations to notify third parties, such as its banks or insurers.



Market volatility

Fluctuations in securities prices can increase the likelihood and severity of securities litigation, as investors may seek to recover their losses or hold the company and its directors accountable for any perceived misstatements or omissions.

Typical claims

The types of claim available to shareholders will vary based on whether the company is publicly listed or not:

Legal Basis	Type of claim	Applicable to public or private companies	Brief description
Direct claims by shareholders			
Financial Services and Markets Act 2000 ("FSMA")	s90 FSMA	Public only	Claims in relation to untrue or misleading statements in prospectuses, including omissions. Defendants include the company, its directors, and potentially advisers who have accepted responsibility for the prospectus/listing particulars.
	s90A FSMA	Public only	<p>Claims in relation to misleading statements in published information, such as annual reports and half-year reports. This extends to omissions and dishonest delays in publishing information.</p> <p>Liability depends on whether a 'person discharging managerial responsibilities' (PDMR) within the issuer had relevant knowledge or acted dishonestly. The potential defendant is limited to the issuer of securities, not individual directors.</p> <p>Recent court judgments have emphasised the importance of demonstrating reliance in securities litigation claims under s90A FSMA. However, this remains a developing area of law with some uncertainty. To date, the courts have taken varying approaches to questions of whether investors must personally read or rely on the specific published information alleged to be misleading, or whether more indirect forms of reliance might suffice. Similarly, questions remain about liability for dishonest delays in publication and whether claims can succeed where information was never subsequently published. Boards should monitor these developments closely as the parameters of liability continue to evolve through the courts.</p>
	Misrepresentation	Public only	An untrue statement that induces someone to enter into a contract. This can be an action in tort or an action under the Misrepresentation Act 1967. May be more relevant to primary market investors due to the contractual relationship requirement. Can be innocent, negligent or fraudulent.

Legal Basis	Type of claim	Applicable to public or private companies	Brief description
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Direct claims by shareholders

Common Law	Breach of common law duty to take reasonable skill and care when making statements to shareholders	Public and Private	Directors may owe a common law duty to shareholders to exercise reasonable skill and care when making statements to shareholders or when recommending a course of action for the company.
	Deceit (fraudulent misrepresentation)	Public and Private	A deliberately false statement made knowing it's untrue or without belief in its truth, intending others to rely on it. Does not require a contract or duty of care, but requires proving fraudulent intent.

Derivative claims by shareholders on behalf of a company

Companies Act 2006 ("CA 2006")	Breach of common law duty to take reasonable skill and care when making statements to shareholders	Public and Private	Directors may owe a common law duty to shareholders to exercise reasonable skill and care when making statements to shareholders or when recommending a course of action for the company.
	Directors' liability under s463 CA 2006	Public and Private	Directors can be liable to a company in relation to an untrue or misleading statement made in (or an omission from) any of the following: <ul style="list-style-type: none"> 1. the directors' report; 2. the strategic report; 3. the directors' remuneration report; and 4. any separate corporate governance statement.



Risk mitigation and controls



For the Board:

1. Verification procedures

Implement rigorous verification procedures for all financial reports, market announcements and prospectuses to ensure accuracy and completeness of published information.

2. Disclosure controls

Establish robust processes for identifying and disclosing price-sensitive information.

3. Reliance-sensitive disclosures

Recent court judgments have placed a renewed focus on the need for investors to have actively relied on the published information. This reinforces the importance of ensuring that all disclosures are clear, complete, and appropriately framed for the audience.

4. Documentation

Maintain comprehensive records of the basis for significant judgments in financial reporting and the verification steps taken for market announcements, creating an audit trail that demonstrates reasonable care.

5. Forward-looking statements

Include appropriate cautionary language for any forward-looking statements, clearly identifying assumptions and risks that could cause actual results to differ materially.

6. Training

Ensure all directors understand their obligations regarding disclosure of information to the market.



For Risk Managers:

1. Risk register

Review your risk register to ensure it takes into account securities litigation risk and appropriately values potential claims.

2. Insurance coverage

Review D&O insurance policies to ensure adequate coverage specifically for securities claims, including appropriate limits and scope of coverage for both the company and individual directors.

3. Information gathering

Consider whether there is a need to carry out investigations or obtain expert evidence on key issues, particularly where vulnerabilities are identified.

4. Board reporting

Ensure regular reporting to the board on securities litigation risk, including updates on regulatory developments and significant case law that may affect the company's disclosure obligations.

5. Incident response planning

Develop a clear protocol for responding to potential disclosure issues, including:

- i. systems for detecting problems with published information;
- ii. a team responsible for quickly assessing materiality;
- iii. defined decision-making authority for corrective disclosures;
- iv. procedures for coordinated communications with stakeholders; and
- v. documentation practices that demonstrate the company acted promptly and responsibly.

6. Timing of disclosures

Courts have scrutinised the timing and content of market disclosures, particularly in relation to whether companies acted promptly or knowingly delayed the release of material information. Robust documentation of internal discussions and materiality assessments can help protect the company and its directors if questions later arise.

Summary: practical risk management for directors

UK publicly-listed businesses face significant securities litigation risk. From dealing with group litigation orders to navigating complex regulatory requirements, difficulties can arise at any given point and, if these risks are not dealt with, can lead to serious consequences. Effective management of the risks will help to minimise and mitigate against securities litigation risk.

The board has a key role to play in the mitigation of securities litigation risk. The board has responsibility to ensure that strategies dealing with securities litigation risk are put in place, that the right advisors are selected to cover any areas that the board lacks expertise in and that their shareholders and the directors themselves are properly protected.



Awareness – Always consider whether any contemplated actions expose the business, directors or shareholders to securities litigation risk.



Advice – Make sure that the advice of relevant experts is sought early in the process to mitigate against any risk to the extent possible.



Documentation – Properly document board decisions, verification procedures, and contractual arrangements to demonstrate that appropriate care was taken.



Learning – Securities litigation risks are constantly evolving, and it is the responsibility of the board to keep up-to-date with these changing risks.



Planning – Seek assistance to put in place strategies to help deal with and reduce securities litigation risks, including robust verification procedures for all market announcements and financial reports.



Governance – Regularly review board and committee structures to ensure effective oversight of disclosure obligations and market announcements.



Disclosure – Ensure disclosures are accurate, clearly presented, and properly documented. Recent court judgments have reinforced that claimants must prove they actually relied on published information.



Timeliness – Avoid delays in releasing material information and maintain clear records of how and when disclosure decisions are made, particularly as courts have closely monitored the timing of disclosures.

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