When markets need a courtroom: Litigation as fiduciary governance

With systemic risks reshaping the investment landscape, trustees are recognising litigation not as conflict, but as a necessary element of prudent, long-term fiduciary governance

The disconnect

Many trustees believe their fiduciary duty ends where the courtroom begins. That assumption is misplaced. As systemic risks, from climate change to market manipulation, increasingly threaten diversified portfolios, the question facing UK pension trustees is not whether litigation belongs in the stewardship toolkit, but whether failing to use it may itself constitute a breach of duty.

Trustees frequently describe themselves as universal owners with exposure to the entire market. Yet as Dr Ellen Quigley of Cambridge University observes, diversification brings exposure not only to the market's strengths but also to its failures: climate risk, data risk, accounting failures and governance breakdowns.[1] These are risks that cannot be diversified away.

Quigley's research on universal ownership and fiduciary escalation sets out a clear logic: When engagement and voting cannot resolve market wide externalities, fiduciaries must consider new levers of accountability. Stewardship has raised awareness and expectations, but it also has limits, including inconsistent data, fragmented accountability and the practical reality that dialogue alone cannot correct system level harms.

Why litigation belongs in fiduciary governance

Securities litigation is far more than simply an adversarial act but a disciplined form of fiduciary governance: a structured escalation when voluntary measures prove insufficient. It serves three essential functions:

- **It restores disclosure discipline.** Every securities case reinforces the principle that misrepresentation carries cost. Settlements not only compensate investors but recalibrate behaviour. Boards, auditors and insurers adjust their risk assessments accordingly.
- **It generates public information.** Through court filings, disclosure processes and the evidentiary record created during proceedings, actions produce information that informs future stewardship, regulation and market pricing. The process itself acts as a transparency dividend for the system.
- **It drives governance spillovers.** Governance reforms secured in settlements, such as the separation of Chair and CEO roles in the Under Armour litigation, ripple across sectors as peer companies adjust to mitigate their own exposure.[2]

This dynamic is reflected in emerging scholarship. Legal scholar Maurits Dolmans frames the challenge as a climate prisoner's dilemma: Each fiduciary acts rationally within their mandate, yet the collective outcome is irrational and value destructive.[3] His 2025 paper argues that fiduciary duty already requires trustees to manage system level risks that cannot be diversified away.

Alexander Hastreiter's 2025 working paper goes further, describing fiduciaries as macro prudential actors responsible for safeguarding the functioning of the market itself.[4] When misconduct distorts prices at scale, fiduciaries who fail to act create what he terms 'fiduciary externalities'. Left unaddressed, these compound into systemic harm.

In short: stewardship protects the system's intent; litigation protects its integrity. Both are necessary if fiduciary duty is to mean more than risk management within broken markets.

The evidence: What works

The United States has the deepest disclosure culture in the world, built on nearly a century of securities law precedent.[5] Decades of shareholder actions have made the cost of misrepresentation visible, quantifiable and material to decision makers. This experience demonstrates how credible enforcement sustains market integrity.

For trustees, this is not about importing American litigiousness. It is about upholding market discipline. Credible enforcement reinforces the pricing and governance structures upon which long term value depends.

UK pension funds increasingly demonstrate this approach. When they act as lead plaintiffs, as in the Under Armour, Apple and Puma Biotech cases, they are not pursuing private gain but defending the rules of the market itself.[6] Their actions show that trustees can escalate responsibly when dialogue and disclosure fail.

Far from undermining stewardship, litigation completes it. It signals that governance failure is not a risk to be tolerated but a breach to be corrected. Used effectively, litigation strengthens all the other tools in the stewardship toolbox, reinforcing the credibility of engagement and ensuring that governance standards do not rely on voluntary compliance alone.

The evolving legal and regulatory framework

Dolmans notes that this interpretation remains an emerging perspective rather than settled law. Yet shareholder actions increasingly demonstrate that fiduciary escalation can deliver tangible governance reform.

Recent legal scholarship suggests that prudence now encompasses the willingness to act collectively and, where necessary, legally to prevent foreseeable harm. Failing to address system level risk may itself amount to imprudence.

Analysis from the Net Zero Lawyers Alliance reinforces that climate risk is a foreseeable and financially material factor within fiduciary duty, requiring trustees and directors to integrate it into their duties of care, loyalty and prudence.[7]

This evolution aligns with broader regulatory thinking. The Financial Conduct Authority's disclosure requirements, the Pensions Regulator's climate governance guidance and international precedents such as the *Urgenda and Milieudefensie* rulings all point towards a more active interpretation of fiduciary duty.[8 9]

Urgenda (2019) established that governments must do their part to mitigate climate harm. *Milieudefensie* (2021, appeal 2024) confirmed that corporations owe a duty of care to reduce climate impacts. Each illustrates how courts can define accountability where voluntary measures fail.

Together, they highlight the principle underpinning systemic stewardship: when voluntary mechanisms reach their limits, accountability must move from persuasion to enforcement.

Addressing trustee concerns

Some trustees hesitate to embrace litigation, citing concerns about cost, time and relationships. These concerns deserve consideration, but none should prevent appropriate action.

- **Cost:** Securities class actions typically operate on a contingency basis, requiring no upfront capital and capping downside exposure.
- **Relationships:** Litigation targets specific misconduct, not the broader engagement relationship. Stewardship continues through investment manager dialogue.
- **Time:** Specialist counsel manage proceedings. Trustees participate only at key strategic milestones.

"When markets fail to police themselves, the courtroom becomes the custodian of fiduciary duty"

The real question is not whether litigation is comfortable, but whether inaction is prudent. When material misrepresentation threatens beneficiaries' capital and voluntary measures fail, trustees must ask: is doing nothing truly defensible?

Turning principles into practice

Trustees wishing to integrate this thinking can take several practical steps:

- Review litigation policies to ensure alignment with fiduciary duty.
- Engage legal advisers early to understand options for fiduciary escalation.
- Monitor emerging cases, particularly those related to transition plan misrepresentation or climate risk disclosure failures.
- Embed system level risk oversight into governance and reporting frameworks.

Each step aligns with UK regulatory expectations for proactive risk management.

A call to trustees

Fiduciary duty has always adapted to its time. In the 20th century, it meant prudence, diversification and independence. In the 21st, it also means vigilance, escalation and enforcement.

For long term investors, litigation is often characterised as backward looking. In reality, it is forward looking risk management. Class actions correct pricing distortions, deter misconduct and establish governance precedents that stabilise markets.

This is especially relevant to universal owners such as UK pension schemes. Unable to divest from the market as a whole, they carry exposure to the system's integrity itself. Litigation becomes a form of market maintenance, not a departure from stewardship but its logical extension.

When trustees use every lever available, from engagement to enforcement, they affirm that fiduciary duty is not passive guardianship but active governance. True fiduciary governance is measured not by how often trustees litigate, but by how fully they use every lever to protect the integrity of beneficiaries' capital.

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Footnotes

1. Quigley, E. (2020). *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors.* Cambridge University; and subsequent research on systemic stewardship.
2. *In re Under Armour Securities Litigation* (2021), U.S. District Court for the District of Maryland.
3. Dolmans, M. (2025). *Sustainable Fiduciary Duties.* Produced in collaboration with the Net Zero Lawyers Alliance.
4. Hastreiter, A. (2025). *Fiduciary Duties in a Systemic Context*. Working Paper.
5. SEC (2020). *The Investor's Advocate: How the SEC Protects Investors.*
6. Robbins Geller Rudman & Dowd LLP (2024). *Institutional Investor Recoveries.*
7. Net Zero Lawyers Alliance (2024). *Fiduciary Duty and Climate Risk.*
8. The Pensions Regulator (2021). *Climate Change Governance and Reporting.*
9. *Urgenda Foundation v. State of the Netherlands (2019); Milieudefensie et al. v. Shell* (2021, appeal 2024).