

# Securities Litigation

*Contributing editors*

**Antony Ryan and Philippe Z Selendy**



2016

GETTING THE  
DEAL THROUGH 

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# Securities Litigation 2016

*Contributing editors*

**Antony Ryan**

**Cravath, Swaine & Moore LLP**

**Philippe Z Selendy**

**Quinn Emanuel Urquhart & Sullivan LLP**

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



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87 Lancaster Road  
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# Japan

Junichi Ikeda and Masao Ito

Nagashima Ohno & Tsunematsu

## 1 Describe the nature and extent of securities litigation in your jurisdiction.

The Financial Instruments and Exchange Act of Japan (the FIEA) requires issuers of securities to prepare disclosure documents that include information necessary for investors to make informed investment decisions. In order to secure the accuracy of the statements contained in the disclosure documents, the FIEA establishes civil and criminal liability for material misstatements in, or omissions of material information from, the disclosure documents (material misstatements or omissions) and administrative monetary penalties which are prosecuted or imposed by the Financial Services Agency of Japan.

In addition to civil liability under the FIEA, the Companies Act of Japan also establishes civil liability for the material misstatements in, or omissions of material information from, financial statements, annual business reports and audit reports. See question 4.

## 2 What are the types of securities claim available to investors?

An investor may assert a claim for damages against the issuer of securities, the issuer's directors and auditors, sellers of securities and the underwriters for any material misstatements or omissions under the FIEA. See questions 17 to 19. While an investor may assert a tort claim against the issuer of securities under the Civil Code of Japan, the FIEA eases the burden of proof on investors by setting forth special provisions in regard to tort liability under the Civil Code. See question 9.

Moreover, in cases where an investor acquires securities through a brokerage firm, the investor may assert a claim for damages against such brokerage firm for any breach of its accountability and suitability rule (ie, a rule that requires brokerage firms to provide explanations suitable for their customers in view of each such customer's level of knowledge, experience, financial condition and investment purpose) under the Act on Sales, etc, of Financial Instruments (the ASFI). The ASFI provides that brokerage firms are to be held strictly liable in cases involving a breach of the accountability and suitability rule, and establishes a legal presumption in favour of investors when assessing damages.

## 3 How do claims arising out of securities offerings differ from those based on secondary-market purchases of securities?

Claims arising out of the purchase of securities on primary or secondary offerings differ from those based on secondary-market purchases or sales of securities in the following ways:

- the standard for determining liability (strict liability or negligence) (see question 7);
- the burden of proving the damages amount and establishing causation (see question 9); and
- the limitations period for each type of claim (see question 11).

## 4 Are there differences in the claims available for publicly traded securities and for privately issued securities?

Regardless of whether shares are listed or not, a shareholder of a company may assert a claim for damages under the Companies Act against the company's directors and auditors based on any material misstatements in, or omissions of material information from, its financial statements, annual business reports and audit reports.

Furthermore, an investor may assert a claim for damages under the FIEA against the issuer of listed shares, the issuer's directors and auditors,

sellers of listed shares and the underwriters for any material misstatement or omissions. See questions 17 to 19.

The Companies Act, as well as the FIEA, eases the burden of proof on plaintiffs or shareholders who assert claims for damages against directors and auditors of an issuer of listed shares. See questions 17 and 19.

## 5 What are the elements of the main types of securities claim?

To prevail on a claim for damages asserted against an issuer arising out of the purchase of securities on a primary or secondary offering, the plaintiff or investor must only establish (i) the existence of the material misstatements or omissions; and (ii) the investor's purchase of the securities on a primary or secondary offering. The investor is not required to establish (iii) the amount of damages sustained by the investor; or (iv) causation between the material misstatements or omissions and the damages.

On the other hand, in a claim for damages against an issuer based on secondary-market purchases or sales of securities, or against the issuer's directors or auditors, sellers of such securities or underwriters, the plaintiff or investor bears the burden of establishing items (iii) and (iv), as well as items (i) and (ii) stated above. See question 9.

## 6 What is the standard for determining whether the offering documents or other statements by defendants are actionable?

In regard to civil liability, a case against the offender will be actionable if the disclosure documents (i) include an untrue statement of a material fact, (ii) omit to state a material fact required to be stated therein or (iii) omit to state a material fact necessary in order to make a statement included therein not misleading. In regard to administrative monetary penalty, a case will be actionable against the offender if either of the defects mentioned in items (i) and (ii) above applies. For criminal liability, a case will be actionable against the offender only if the defect described in item (i) above applies.

Whether a fact is a 'material fact' will depend on whether it is important for investors to be aware of such fact in order to make an informed investment decisions.

## 7 What is the standard for determining whether a defendant has a culpable state of mind?

An issuer will be strictly liable to purchasers of securities on primary or secondary offerings for material misstatements or omissions. On the other hand, a negligence standard of liability is applied when determining whether an issuer is liable to purchasers or sellers of securities on the secondary-market for damages sustained due to material misstatements or omissions; provided, however, that the issuer, if found to have acted negligently, will be liable to purchasers or sellers of securities on a secondary-market, unless the issuer disproves any such claim of negligence.

Directors and auditors of an issuer, as well as sellers and underwriters of securities, if found to have acted negligently, will also be liable to purchasers of securities on primary or secondary offerings and purchasers or sellers of securities on a secondary-market, unless he or she disproves any such claim of negligence.

## 8 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Upon asserting a claim for damages under the FIEA based on any material misstatements or omissions, an investor is not required to prove that the

investor purchased or sold the securities in reliance upon any statement. However, an investor will be barred from asserting a claim for damages based on a material misstatement or omission if the investor knew of the relevant material misstatement or omission. In regard to this defence, defendants bear the burden of proving the investor's knowledge of such material misstatement or omission under the FIEA.

### 9 Is proof of causation required? How is causation established?

As a general principle of tort liability under the Civil Code of Japan, upon asserting a claim for damages against a tortfeasor, the plaintiff bears the burden of establishing the damages amount allegedly sustained and causation between the damages and the tortfeasor's tortious conduct. Upon asserting a claim for damages based on material misstatements or omissions, however, it is difficult for the plaintiff or investor to establish its sustained damages amount and causation. Therefore, the FIEA eases the burden of proof on the plaintiff or investor by setting forth special provisions in regard to tort liability under the Civil Code of Japan.

More specifically, the FIEA provides that upon asserting a claim for damages against an issuer arising out of the purchase of securities on primary or secondary offerings, the plaintiff or investor is not required to establish (i) the damages amount sustained by such investor; or (ii) causation between the material misstatements or omissions and the damages. For more detail, see question 10.

On the other hand, upon asserting a claim for damages against an issuer based on secondary-market purchases or sales of securities, or against the issuer's directors and auditors, the sellers of the securities or the underwriters, an investor bears the burden of establishing items (i) and (ii) stated above (for more detail, see question 13); provided, however, that, upon asserting a claim for damages against the issuer based on secondary-market purchases of securities, the investor could, under certain circumstances, rely upon a presumption of law under the FIEA to establish the amount of damages sustained by the investor. For more detail, see question 10.

### 10 What elements present special issues in the securities litigation context?

As stated in question 9 above, it would be difficult for a plaintiff or investor to establish the damage amount and causation. Therefore, the FIEA provides the following special provisions in regard to tort liability under the Civil Code of Japan.

Firstly, upon asserting a claim for damages against an issuer in regard to the purchase of securities on primary or secondary offerings, the plaintiff/investor does not bear the burden of establishing the damages amount sustained by such investor and causation between the material misstatement or omission and the damages. More specifically, under the FIEA the compensation amount to be paid by the issuer to the investor is to be calculated by deducting from the purchase price of the securities either: (a) the market price of the securities at the time the claim for damages is asserted, or if no such market price is available, the estimated sales price of such securities at that time; or (b) if the investor sold the securities prior to asserting the claim for damages, the actual sales price of the securities.

Secondly, upon asserting a claim for damages against the issuer based on secondary-market purchases of securities, an investor can, under certain circumstances, rely upon a presumption of law when establishing the damages amount sustained by the investor. More specifically, if (i) there are material misstatements or omissions and the relevant misstatement or omission has been disclosed, (ii) an investor purchased the securities within the one year prior to the disclosure date, and (iii) the investor holds the securities on the disclosure date, then the damages amount sustained by the investor may be presumed, under the FIEA, to be the amount calculated by deducting the average market price of the relevant securities (or, if no market price is available, the estimated sales price) during the one month after the disclosure date from the average market price during one month prior to the disclosure date. The investor is allowed to establish the fact that the investor sustained damages in an amount exceeding the presumed amount stated above and thus assert a larger damages claim, provided the compensation amount must not exceed the amount calculated by deducting either item (a) or (b) above from the purchase price of the securities.

### 11 What is the relevant limitation period? When does it begin to run? Can it be extended or shortened?

The FIEA provides a different limitation period for each type of claim.

Firstly, under the FIEA a claim for damages against the issuer arising out of the purchase of securities on primary or secondary offering for any material misstatements or omissions extinguishes if the claim is not asserted within three years of the date when the investor comes to know, or by the exercise of reasonable care should have come to know, of the material misstatements or omissions, or within seven years from the date of the primary or secondary offering.

Secondly, under the FIEA a claim for damages against the issuer based on secondary-market purchases or sales of securities for any material misstatements or omissions extinguishes if the claim is not asserted within two years of the date when the investor comes to know, or by the exercise of reasonable care should have come to know, of the material misstatements or omissions, or within five years from the disclosure date of the disclosure document(s) containing the material misstatements or omissions.

Thirdly, under the FIEA a claim for damages against the issuer's directors and auditors, sellers of securities and the underwriters for any material misstatements or omissions extinguishes if the claim is not asserted within three years of the date when the investor comes to know of the material misstatement or omission, or within 20 years from the disclosure date of the disclosure document containing the material misstatements or omissions.

### 12 What defences present special issues in the securities litigation context?

While easing the burden of proof on the plaintiff or investor by setting forth special provisions in regard to tort liability under the Civil Code of Japan as stated in question 10 above, the FIEA also provides for certain defences of the defendant or issuer.

Firstly, upon asserting a claim for damages against the issuer arising out of the purchase of securities on primary or secondary offerings, the amount of compensation to be paid by the issuer to the investor is to be calculated by the formula set forth in the FIEA; provided, however, that if the issuer successfully proves that the whole or part of the damages sustained by the investor is due to circumstances other than the decline in the value of the securities arising from the material misstatements or omissions, the issuer will not be liable for such non-attributable portion of the compensation.

Secondly, as to the presumption of law in regard to the claim for damages asserted against the issuer based on secondary-market purchases of securities under the FIEA, if the issuer successfully proves that the whole or part of the damages sustained by the investor is due to circumstances other than the decline in the value of the securities arising from the material misstatements or omissions, the issuer will not be liable for such non-attributable portion of the compensation. Furthermore, if the court finds that the whole or part of the damages sustained by the investor is due to such circumstances but that it is extremely difficult to prove the damages amount arising from such circumstances, the court may determine an appropriate amount for which the issuer will be deemed not to be liable and reduce the damage award by such amount.

### 13 What remedies are available? What is the measure of damages?

The FIEA only establishes compensatory damages as a remedy once civil liability is established. In other words, punitive damages are not allowed under the FIEA.

With certain exceptions as stated in question 10 above, a plaintiff or investor bears the burden of establishing the damages amount sustained by such plaintiff or investor and causation between the material misstatements or omissions and the incurred damages as stated in question 9.

According to the basic principle for assessing damages under the FIEA, as well as the Civil Code of Japan, the damage amount sustained by an investor is assessed by comparing the investor's hypothetical financial condition if there had been no material misstatements or omissions and the investor's actual financial condition. However, courts have presented various calculation methods for assessing the amount of damages under the FIEA, which can be classified as follows:

- the difference between the actual acquisition cost and a hypothetical market value at the time of the acquisition if there had not been the material misstatements or omissions;
- the whole or part of the decline in the market price caused by the disclosure of the material misstatements or omissions; and
- the difference between the actual acquisition cost and the actual sale price of the securities.

**14 What is required to plead the claim adequately and proceed past the initial pleading?**

In order for a plaintiff to properly assert a claim arising from material misstatements or omissions under the FIEA, all relevant elements set out in question 5 must be pleaded in the complaint. If the complaint fails to adequately and properly plead all required elements of the claim and the plaintiff fails to make appropriate corrections despite receiving an order to do so by the court within the time allotted by it, the court must dismiss the complaint.

**15 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?**

There are no such procedural mechanisms available to defendants. However, in practice an issue-clarification process presided over by the court is conducted through a series of the meetings between the court and the parties. Through such process, the court is expected to narrow down the issues and clarify the parties' assertions. If a claim asserted by the plaintiff is viewed by the judge to be extremely weak, it is likely that the judge may instruct the plaintiff to drop such claim.

**16 Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?**

The principles of secondary, vicarious or 'controlling person' liability are not recognised under the FIEA. However, a sales representative who is a director or an employee of a brokerage firm is deemed, under the FIEA, to have the authority to perform any and all acts out of court concerning certain brokerage activities on behalf of the brokerage firm.

Also, as for the civil liabilities of underwriters and auditors, see questions 18 and 19.

**17 What are the special issues in your jurisdiction with respect to securities claims against directors?**

Under the FIEA, an investor may assert a claim for damages against the issuer's directors for any material misstatements or omissions. The directors will be liable based on their negligence; provided, however, that a director will not incur liability if he or she can establish that such director did not know, and by the exercise of reasonable care could not have known, of the material misstatements or omissions.

In addition to the civil liability under the FIEA, under the Companies Act of Japan a shareholder of a company may assert a claim for damages against the company's director for any material misstatement in, or omissions of material information from, any financial statement or annual business report. See questions 1 and 4

**18 What are the special issues in your jurisdiction with respect to securities claims against underwriters?**

Under the FIEA, an investor may assert a claim for damages against an underwriter for any material misstatements or omissions. The underwriter will be liable based on its negligence; provided, however, that the underwriter will not incur liability if it can establish that it did not know, and, with respect to parts other than information contained in the financial statements, by the exercise of reasonable care it could not have known, of the material misstatements or omissions.

**19 What are the special issues in your jurisdiction with respect to securities claims against auditors?**

Under the FIEA, an investor may assert a claim for damages against an auditor that, in its audit report, certifies financial statements which contain any material misstatements or omits to include material information, as being without any material misstatements or omissions. The auditor will be liable based on its negligence; provided, however, that the auditor will not incur liability if it can establish that it did not intentionally or negligently provide such inappropriate certification.

In addition to the civil liability under the FIEA, under the Companies Act of Japan a shareholder of a company may assert a claim for damages against the company's auditor that, in its audit reports, made any misstatement. See questions 1 and 4.

**20 In what circumstances does your jurisdiction allow collective proceedings?**

Under the Act on Special Provisions of Civil Procedure for Collective Recovery of Property Damage of Consumers (the ASPCP) only certified consumer organisations can bring collective actions, and an individual consumer has no standing to bring such an action. The collective actions to be brought under the ASPCP must relate to monetary payment obligations (owed by a business operator to consumers) which pertain to the following claims concerning consumer contracts:

- claims for performance of a contractual obligation;
- claims pertaining to unjust enrichment;
- claims for damages based on non-performance of contractual obligations;
- claims for damages based on a warranty against defects; and
- claims for damages based on a tort under the Civil Code.

As such, with respect to securities litigations, only claims based upon tort liability under the Civil Code may be able to be brought as consumer collective actions under the ASPCP and claims under the FIEA cannot be brought as such.

**21 In collective proceedings, are claims opt-in or opt-out?**

The ASPCP has introduced 'opt-in' consumer collective actions. In order for consumers to be compensated in the collective actions, each consumer must submit its claim to the certified consumer organisation which has pursued the first phase of collective actions.

**22 Can damages be determined on a class-wide basis, or must damages be assessed individually?**

Under the ASPCP, the amount of damages sustained by each of the consumers must be assessed individually.

**23 What is the involvement of the court in collective proceedings?**

The involvement of the court in consumer collective actions under the ASPCP is twofold. In the first phase of collective actions, a certified consumer organisation requests the court to issue a declaration that the business operator must compensate many consumers for damages they sustained in respect of their consumer contracts. Second, once such obligation on the part of business operator has been established, in the second phase of collective actions, the existence and amount of the claim asserted by each individual consumer will be determined. Unless the business operator objects to a consumer's claim, such claim will be confirmed without the court's involvement. In cases where the business operator has made an objection and the certified consumer organisation challenges such objection, the court is required to determine the existence and amount of the subject claim.

**24 What role do regulators, professional bodies, and other third parties play in collective proceedings?**

While there is no process similar to class certification in the US, only consumer organisations certified by the prime minister have standing to bring consumer collective actions under the ASPCP.

**25 What options are available for plaintiffs to obtain funding for their claims?**

The civil legal aid provides supports for people having financial difficulties. Such support consists of provision of legal consultation for free and making payment for legal services for people that cannot otherwise afford such services. The civil legal aid is available for any and all civil cases. Contingency fee arrangements are also available.

**26 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?**

In general, the party against whom a judgment has been entered is required to pay all costs incurred in securities litigation, such as court fees paid in the form of revenue stamps, fees paid to witnesses and travel expenses. Attorneys' fees are excluded from such litigation expenses charged to the losing party. Under the Code of Civil Procedure, the court must, upon the

### Update and trends

In the reform of the FIEA in 2014, which is applicable to the disclosure documents filed on or after 29 May, 2015, the following amendments regarding claims for damages based on secondary-market purchases or sales of securities were made.

Firstly, an amendment was made to claims for damages asserted against issuers based on secondary-market purchases of securities. The FIEA previously established a strict liability standard for issuers in cases of Material Misstatements or Omissions, and thus held them liable to purchasers of securities of the issuer on the secondary-market. In the recent reform of the FIEA, the standard of liability in regard to issuers was changed from strict liability to negligence in accordance with a general principle of tort liability under the Civil Code of Japan; provided, however, that the FIEA eases the burden of proof on purchasers by providing that the issuer, if found to have acted negligently, will be liable to purchasers or sellers of securities on a secondary market, unless the issuer disproves any such claim of negligence. See question 7.

Secondly, an amendment was made regarding investors on the secondary market who can assert claims for damages under the FIEA. The FIEA previously provided for claims for damages based on secondary-market purchases of securities, but did not expressly provide those based on secondary-market sales securities. However, in management buyout cases which have increased markedly in recent years, management could have an incentive to depress stock market prices by deflating their earnings reports. To address these circumstances, the FIEA has expressly provided for, in its recent reform, claims for damages based on secondary-market sales of securities.

motion by a defendant, order the plaintiff to provide security for the court's costs if the plaintiff lacks a residence or business office in Japan.

### 27 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

Upon organising an investment fund, various entity forms are used for collecting funds under Japanese law including: voluntary partnerships, anonymous or silent partnership, investment business limited partnerships and investment trusts or investment corporations.

Interests in a Japan real estate investment trust (J-REIT), which is an investment fund for investments in real estate, or an exchange traded fund, which is an investment fund the net asset value of which is linked to a certain stock index or commodity index, are listed and traded on a financial instruments exchange.

An investor may assert a claim for damages against the executive partners of any voluntary partnerships or investment business limited partnerships, or the business operators of any anonymous or silent partnership and the settlor companies and trustee companies of any investment trusts for any breach of their duty of due care, as well as against

officers and auditors of any investment corporations for any material misstatements in, or omissions of material information from, any financial statement and audit report.

In a cases where an investor invests in an investment fund through a brokerage firm, the investor may also assert a claim for damages against such brokerage firm for any breach of its accountability and suitability rule under the ASFI. See question 2.

### 28 Are there special issues in your country in the structured finance context?

In regard to securitising assets in Japan, various structured investment vehicles are used, as well as special purpose companies incorporated under the laws of the Cayman Islands, including limited liability companies, general incorporated corporations, specific purpose companies and trusts.

Lease receivables, consumer loans, credit card loans, home mortgages, notes and account receivables and real estate have been typically securitised in Japan.

An investor may assert a claim for damages against business operators of anonymous or silent partnership and trustee companies of trusts for any breach of their duty of due care, as well as against directors and auditors of specific purpose companies for any material misstatements in, or omissions of material information from, financial statements and audit reports.

In cases where an investor invests in a structured investment vehicle through a brokerage firm, the investor may also assert a claim for damages against such brokerage firm for any breach of its accountability and suitability rule under the ASFI. See question 2.

### 29 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

Any claimant, regardless of such claimant's domicile, may commence a securities litigation with a Japanese court so long as the principal office or business office of the issuer of the securities (in regard to which a material misstatement or omission is claimed to exist) is located in Japan. In addition, even if the defendant issuer's principal office is located outside Japan, a claimant can bring such litigation in Japan against such issuer if the relevant tortious act occurred in Japan.

### 30 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

See question 29.

### 31 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

Unlike the US, there is no system similar to multidistrict litigation. In the event of multiple filings of securities claims arising from the same material misstatement or omission in different district courts in Japan, in principle, each court tries the case separately and in parallel with the other district courts handling similar claims. If the said multiple filings of securities

## NAGASHIMA OHNO & TSUNEMATSU

Junichi Ikeda  
Masao Ito

junichi\_ikeda@noandt.com  
masao\_ito@noandt.com

JP Tower, 2-7-2 Marunouchi  
Chiyoda-ku  
Tokyo 100-7036  
Japan

Tel: +81 3 6889 7000  
Fax: +81 3 6889 8000  
www.noandt.com

claims have been made with the different divisions in the same district court, then, depending on discretion of a judge, the procedures may be consolidated.

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**32 What are the requirements in your jurisdiction to enforce foreign-court judgments relating to securities transactions?**

The requirements for recognition and enforcement by a Japanese court of a final and binding foreign judgment are as follows: (i) the jurisdiction of the foreign court must be recognised under Japanese laws and regulations or treaties; (ii) the defendant against whom the foreign judgment was entered must have been properly served the summons, or must have appeared before the court that rendered such foreign judgment even if the defendant was not properly served the summons; (iii) the contents of the foreign judgment and the relevant court proceedings must not be contrary to the public policy in Japan; and (iv) there exists reciprocity between Japan and the foreign country rendering the foreign judgment by which country Japanese judgments are treated similarly. There are no special rules for the

recognition and enforcement of a foreign judgment relating to securities transactions.

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**33 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?**

In addition to litigation, disputes arising from material misstatement or omission may be resolved through (i) a civil conciliation procedure, which is a mediation type proceeding conducted in camera by a conciliation committee composed of one judge and two or more civil conciliation commissioners; and (ii) arbitration, if agreed by the parties. Arbitration is normally not an option to resolve disputes relating to a securities claim under the FIEA or a tort claim under the Civil Code arising from material misstatement or omission as there would not be an arbitration agreement between the relevant parties.



## Getting the Deal Through

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