CSFI

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Credit crunch litigation: A round-table on the litigation that the current financial and economic crisis is generating, with David Greene and Alexandra Carn (Edwin Coe), Matthew Collings (QC), and Nick Carn (Odey Asset Management). To be held on Thursday, February 26, 2009, at Edwin Coe, 2 Stone Buildings, Lincoln's Inn, London WC2A 3TH from 12:30-2:15pm.

With support from Edwin Coe LLP

The first speaker began by addressing the idea of class actions lawsuits and stated that, compared with the US model, no such thing truly exists in Europe. In the US, everyone in the determined class is automatically included in the lawsuit unless they actively "opt out". In the UK, by contrast, a claimant must actively "opt in" in order to take part in the case. The UK system resulted in large numbers of victims going unrepresented in court. For example, in a case involving the sale of football shirts, only 100 claimants appeared, despite the thousands of sales of such shirts.

He then commented that litigation must be asset based. Thus, if the assets have no value, there is no point in pursuing the bankrupt organisation through the courts. In particular, with fraud cases, such as the Madoff and Stanford cases, the money is generally already gone. Unfortunately, fraud had been relatively common throughout history and was similarly seen after the dotcom bubble burst.

The speaker then proceeded to address the Madoff incident in detail. He began by explaining that Madoff did not run a hedge fund, rather he was a manager of funds that were entrusted to him by various feeder funds. He ran through nearly 10 red flags that had signalled the likely fraudulent nature of Madoff's business. These included his lack of staff, issues with the accounting firm employed, the unusual fee structure, and his overly consistent returns.

Madoff had used a regulatory loophole to avoid SEC registration. This was accomplished by using the SEC rule that a fund manager only has to register if it has more than 15 clients. The various feeder funds were his clients as opposed to the final investors.

The speaker concluded by expressing his conviction that there would be numerous lawsuits against financial advisers as a result of the crisis.

The second speaker began by discussing the rising level of insolvencies resulting from the crisis and the numerous lawsuits that would dispute who would get what was left. There would probably be a large volume of legislation dealing with the Icelandic banks, which would be further complicated by the differences between UK and Icelandic insolvency laws.

The speaker then addressed the possibility of litigation against financial advisers. He began by briefly discussing a few cases against Merrill Lynch, Goldman Sachs and JP Morgan

Chase. However, he believed that class action lawsuits against financial advisers would be difficult to mount, due to the personal and complex relationships between the adviser and the investor that often spanned years.

The third speaker began by stating that Fannie Mae and Freddie Mac were two of the most significant problems in the current crisis. However, these two entities had run into trouble despite being in a heavily regulated environment, particularly as a result of their government charter. This brought into question the possible effectiveness of increased regulation in preventing future crises.

He likened the Madoff case to the Richard Whitney case in the 1930s. Many people knew that something was not quite right with Madoff's business and even thought he was running a scam. However, despite this, many feeder funds continued to entrust him with their money, believing that he was scamming other clients in a way that benefited them – they did not realise they and their clients were victims.

The fourth speaker focused on a different aspect of the crisis: litigation likely to occur as a result of the numerous redundancy dismissals in recent months. This would lead to a large number of unfair dismissal claims. In addition, businesses might see claims over unpaid contractual or seemingly contractual bonuses as a result historical pay structures. Where the litigant was able to link the claim to discrimination, he or she would do so because the potential damages paid were not capped. Thus, businesses could be facing considerable risk as a result of all of these potential claims against them.