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INTERNATIONAL DEVELOPMENTS

# A Global Concern: The Rise of International Securities Litigation

By William F. Sullivan, John S. Durrant, and Sarah Kelly-Kilgore

While defendants could once expect to face securities litigation only in the United States, legal and regulatory regimes outside the United States now offer some plaintiffs attractive alternative forums in which to bring securities claims.

Recent filings underscore this trend. In 2012, the number of securities fraud class actions filed against non-U.S. issuers in U.S. courts declined. Though this trend is partly attributable to a decline in credit crisis filings, that is only part of the story. The decline in U.S. claims against non-U.S. issuers has accompanied an unprecedented rise of the international securities class action.

Two forces have combined to give international securities class actions increased vitality.

First, the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank, Ltd.*[1] limited the application of American securities fraud laws to disputes either involving securities traded on American exchanges or arising out of transactions occurring within the United States. Since *Morrison*, investors cannot as regularly use U.S. courts to litigate claims concerning fraud outside the United States. Instead, they must find alternative forums in which to bring their claims.

Second, in the wake of major financial scandals across Europe, a number of jurisdictions outside the United States have created or amended corporate governance and securities fraud laws, in the hope of improving regulation and increasing corporate transparency. More significantly, these countries have acknowledged that *Morrison* left many investors without a forum in which to litigate their claims, and have enacted laws enabling private persons to bring securities actions. Such efforts have included the implementation of class or mass actions to incentivize plaintiffs' counsel to bring such claims. In the wake of these changes, corporate entities must be prepared to face increased international securities litigation.

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## The *Morrison v. National Australia Bank, Ltd.* Decision

Before 2010, the United States was widely acknowledged as the premier forum for securities litigation. In large part, this was due to the ability of plaintiffs to proceed as a class, the availability of the fraud-on-the-market presumption of reliance, and, significantly, the courts' liberal application of American securities fraud

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laws to disputes arising out of non-U.S. transactions.[2] As Justice Scalia remarked, the United States was seen as ''the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.''[3]

The *Morrison* decision changed that by limiting the application of Section 10(b) of the Securities Exchange Act of 1934 to transactions of securities traded on American exchanges and transactions taking place within the United States. Although *Morrison* can be read so as to allow Section 10(b) claims arising out of non-U.S. transactions if the security is ''cross-listed'' on an American exchange, lower courts have rejected this reading, requiring that the transaction have occurred domestically.[4] In addition, then, to *Morrison*'s other limitations, investors alleging securities fraud occurring on non-U.S. exchanges are foreclosed from bringing Section 10(b) claims, regardless of whether the security is listed on an American exchange.

As a result of the *Morrison* decision, investors began pursuing their claims by proceeding under the various U.S. states' blue sky laws, in addition to bringing suit under some of the then-new securities regimes in various jurisdictions outside the United States.

However, a recent New York decision seems to have foreclosed even state law actions to some investors trading on non-U.S. markets. In *Viking Global Equities LP v. Porsche Automobil Holdings SE*, a New York appellate court dismissed investors' state law action on *forum non conveniens* grounds, stating: ''We find that these connections failed to create a substantial nexus with New York, given that the events of the underlying transaction otherwise occurred entirely in a non-U.S. jurisdiction.''[5] Although the court's decision would appear to allow class actions brought by a class consisting entirely of state residents, it forecloses New York state jurisdiction in situations where the defendant and a majority of plaintiffs are non-residents.

While it is unclear if other states' courts will follow the New York court's lead, it is fair to say that investors who wish to proceed by class action are increasingly likely to turn to non-U.S. courts.

## The Development of International Securities Class Action Litigation

*Morrison* and its progeny provide only a partial explanation of the trend in securities lawsuits outside the United States. Recent changes in global securities regulation have also opened the door to international securities lawsuits. In the wake of the global financial crisis and widely reported corporate scandals, a number of countries began developing laws designed to regulate corporate governance and prohibit securities fraud.[6]

The United Kingdom, for example, enacted legislation in 2000 containing more than 433 individual sections regulating insurance, investment business, and banking.[7] That legislation, the Financial Services and Markets Act (''FSMA''), contains provisions creating liability to private persons for any ''untrue or misleading statement'' appearing in a prospectus.[8] Although the FSMA does not contemplate a private right of action for that particular offense, private litigants may bring claims for damages arising from market abuse, which includes insider trading and behavior ''likely to give a regular user of the market a false or misleading impression'' as to the value of his or her investment.[9] Because Part 19.11 of the English Civil Procedure Rules allows for multiple claims to proceed collectively, some commentators have concluded that the FSMA provides for securities class actions to be litigated, though none has yet been filed.[10]

Like the United Kingdom, Australia, Canada, Germany, South Korea, Mexico, the Netherlands, and Taiwan have all adopted procedures that allow the adjudication of multiple securities fraud claims at one time. Some of these countries specifically provide for the use of class actions in securities litigation.[11] In others, a government authority or designated organization will litigate multiple investors' claims simultaneously on behalf of the group.[12] Still others use ''model proceedings'' in which the adjudication of one investor's claim determines issues of fact and law that are common to the group.[13] While these various procedures differ in some respects from American class action procedures, they nonetheless effectively allow similarly situated plaintiffs to pursue claims simultaneously against defendants. Recent filings in some of the countries listed above suggest they provide welcome forums for investors barred from U.S. suits by *Morrison*.

In Germany, for example, investors have begun implementing the Capital Investors' Model Proceeding Law[14] (''KapMuG''), which was enacted in 2005. Under the KapMuG, plaintiffs with similar claims may seek a model proceeding to determine all common questions of law and fact. If at least 10 petitions for a model proceeding are made by plaintiffs with similar claims, the model proceeding will commence and all other actions will be suspended. A determination on any of the common questions will be binding on all persons, even those not party to one of the petitions.

Recently, a series of securities actions were brought against Porsche SE in the German trial courts.[15] Some of the these suits, which relate to statements made during Porsche's attempted acquisition of Volkswagen AG, were initiated after a New York state court dismissed a similar lawsuit under the doctrine of *forum non conveniens*.[16] The German court has agreed to litigate the cases through a model proceeding.

Similar to the pending actions against Porsche SE, ongoing litigation in the Netherlands began after the Southern District of New York dismissed a securities fraud suit based on its reading of *Morrison*.[17] The Netherlands expanded its jurisdiction over international claims in the 2010 decision, *Scor Holdings AG (f/k/a Converium Holdings AG)*.[18] There, focusing on *Morrison*'s jurisdictional effects, the Amsterdam Court of Appeal approved a settlement amounting to U.S.$58.4 million as binding on all non-U.S. claimants due to concerns that they might otherwise be denied any forum in which to hear their claims.[19]

The current suit, which was filed by the investor group Stichting Investor Claims Against Fortis, makes use of the ''representative group action'' provided for by the Dutch civil code.[20] Although representative group actions can be used only for injunctive or declaratory relief, successful plaintiffs can use the Netherlands' now-expansive class settlement procedure to obtain a binding settlement based on the declaratory judgment.[21] The current suit by former Fortis investors is following just such a procedure, suggesting that securities litigation in the Netherlands — like in other non-U.S. jurisdictions — is only increasing.

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## Canada: The Special Problem of Cross-Border Litigation

There is an additional risk of litigation in one country triggering litigation in another country. At present, Canada is the most common example of such ''cross-border'' litigation.[22] Last year, two-thirds of all securities class actions filed in Canada were accompanied by parallel actions in the United States.[23] Viewing the numbers in reverse, the number of U.S. filings accompanied by parallel Canadian actions is currently 47 percent — a sharp increase from the 18 percent recorded prior to 2006.[24]

The reasons for this dynamic are complex, but plaintiff-friendly laws in Canada provide part of the explanation. Obtaining leave to proceed as a class, for instance, is far easier to achieve in Canada than in other non-U.S. jurisdictions.[25] Similarly, in a number of respects, Part XXIII.1 of the Ontario Securities Act (''OSA'') — and closely analogous provisions in other provincial Canadian securities acts — offers a more plaintiff-friendly securities litigation regime than that available under the U.S. federal securities laws. Under the OSA, there is no scienter requirement and no effective motion-to-dismiss procedure. Loss causation is more readily established; plaintiffs' losses are assumed to have been caused by the defendant, and the burden is on the defendant to prove otherwise. More significantly, while the damages that plaintiffs receive in securities class actions in the United States might be capped by the actual out-of-pocket loss attributable to fraud following a drop in the relevant security's price accompanying a corrective disclosure,[26] the OSA permits plaintiffs to recover the purchase price less the 10-trading-day post-disclosure average (regardless of whether the entire drop in the price of the security can be attributed to fraud or misstatement).

Canada does limit a defendant's liability by law, but such provisions do little to minimize a cross-border defendant's damages exposure. For example, Canadian law caps a defendant corporation's liability at the *greater* of C$1 million or 5 percent of its *total* market capitalization.[27] This rule fails to account for potential damages both within and outside Canada. Accordingly, defendants will often find Canada's limited liability provisions unavailing in meaningfully limiting their liability. It should come as no surprise that the number of Canadian securities class actions is currently at an all-time high.[28]

## Conclusion

As the class action bar in Canada continues to gain experience, claims under the OSA and its analogues could make Canada a popular forum for securities litigation. However, recent changes in class action procedure also make a number of other non-U.S. jurisdictions appealing to securities plaintiffs.

It should be noted that, although *Morrison* has spurred international securities litigation by limiting U.S. courts' jurisdiction over such disputes, *Morrison* has not resulted in the overall decrease of U.S. securities class actions that commentators expected. The number of U.S. securities class actions filed in 2012 was 207[29] — only a slight decrease from the 2007-2011 average of 221, and one that many have attributed to a decline in litigation stemming from the 2008-2009 financial crisis.[30]

Nor has *Morrison* resulted in a greater net percentage of dismissals under Rule 12(b) of the Federal Rules of Civil Procedure. While the number of securities class actions filed has remained roughly constant, the number of dismissals has decreased steadily: The 60 cases dismissed in 2012 represent the lowest number of dismissals since 1998, and a 50 percent decrease from the dismissals recorded in 2011.[31]

These figures suggest that U.S. securities litigation remains active, and that plaintiffs' counsel are tailoring their efforts to changing case law. Accordingly, defendants now must be prepared to fight securities fraud allegations both in the United States and beyond.

### NOTES

[1] 130 S. Ct. 2869 (2010).

[2] *See* William F. Sullivan & John J. O'Kane IV, *Morrison and Foreign Securities Class Actions*, INT'L LITIG. Q., Fall 2010, at 20 (''For decades, courts across jurisdictions enforced these rules, even where the alleged fraud or its effects occurred outside the territorial jurisdiction of the United States.'').

[3] *Id.* at 2886.

[4] *See, e.g.*, *In re BP P.L.C. Sec. Litig.*, 843 F. Supp. 2d 712, 794-95 (S.D. Tex. 2012); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 530, 532 (S.D.N.Y. 2011).

[5] Nos. 8895, M-5519 (N.Y. App. Div. December 27, 2012). Porsche recently announced that the plaintiffs had agreed to waive any appeal of the New York ruling and instead bring suit in Germany. *See* Chris Dolmetsch, *Porsche Says Funds Decide Against Appealing N.Y. VW Case*, BLOOMBERG BUSINESSWEEK, http://www.businessweek.com/news/2013-01-31/porsche-says-funds-agree-to-end-new-york-court-suit (February 1, 2013).

[6] *See* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL. 281, 290 (2006) (listing the corporate scandals that occurred around 2000).

[7] Financial Services and Markets Act, 2000, c. 8 (United Kingdom).

[8] *See id.* § 90.

[9] *See id.* §§ 118 (defining market abuse), 150 (providing private right of action for market abuse).

[10] *See, e.g.*, Noam Noked, *A New Playbook for Global Securities Litigation and Regulation*, HARVARD L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG., http://blogs.law.harvard.edu/corpgov/2012/02/02/a-new-playbook-for-global-securities-litigation-and-regulation/ (February 2, 2012, 9:53 a.m.).

[11] Australia, Canada, and Mexico all provide for the use of class actions in securities litigation. *See, e.g.*, Federal Court of Australia Act, 1976, pt. IVA, *as amended*, 4 March 1992 (Australia); Ontario Securities Act, R.S.O., ch. S.5 (1990), amended by Budget Measures Act, R.S.O., ch. 22 (2002) (Ontario) [hereinafter ''OSA'']; Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Code of Civil Procedure], *as amended*, Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011 578, 581 (Mexico). South Korea also allows securities class actions under its 2003 Securities Class-Action Suit Law. *See Fin. Supervisory Serv., A*

*Primer on Korea's New Securities Class-Action Suit Law*, http://www.acga-asia.org/public/files/Korea_Class_Action_Law_summary.pdf (last visited February 14, 2013).

[12] The Netherlands permits ''representative group actions'' by which an organization may bring suit on behalf of its members. *See* Burgerlijk Wetboek (Civil Code) 3:305a-c CC (Netherlands) (allowing a designated organization to bring an action on behalf of a group). Taiwan and the United Kingdom allow the ''competent [government] authority'' to bring suit on behalf of multiple investors. *See* Touzi Ren Baohu Fa [Investors Protection Act] Art. 7 (2002) (Taiwan) (providing that the Securities and Futures Investors Protection Center will bring actions on behalf of investors for securities violations); FSMA, § 90-91 (providing that the UK Financial Services Authority will bring actions on behalf of investors for false or misleading statements made in prospectuses). Damages awarded to the government authority will be dispersed to the individual investors.

[13] *See, e.g.*, Kapitalanleger-Musterverfahrensgesetz [Capital Investors' Model Proceeding Act], July 8, 2005 BRDrucks 15/5093 (Germany).

[14] *Id*.

[15] *See* LG Braunschweig, [LG] [Braunschweig Trial Court] No. 5 O 1110/11, 5 O 2894/11, 5 O 3086/11, 5 O 2077/11, & 5 O 552/12.

[16] *See* Noked, *supra* note 10. Additional suits are expected to be brought by the hedge fund plaintiffs whose suit was dismissed by a New York appellate court last year. *See* Dolmetsch, *supra* note 5.

[17] *See Copeland v. Fortis*, 685 F. Supp. 2d 498 (S.D.N.Y. 2010); Noked, *supra* note 10.

[18] Gerechtshof Amsterdam [HoF] [Amsterdam Court of Appeal], Amsterdam, 12 November 2010 NJ __ (Netherlands).

[19] *See id.* ¶ ¶ 2.6-.7.

[20] *See* Burgerlijk Wetboek (Civil Code) 3:305a-c CC.

[21] *See* Wet Collectieve Awkikkeling Massaschade [Act on the Collective Settlement of Mass Claims], codified at Burgerlijk Weboek (Civil Code) 9:907.

[22] *See* Robert Patton, Trends in US/Canada Cross-Border Securities Class Actions at the Knowledge Congress Live Webcast: Legal Series: International Securities Litigation (January 16, 2013).

[23] *See* Bradley A. Heys & Mark L. Berenblut, TRENDS IN CANADIAN SECURITIES CLASS ACTIONS: 2012 UPDATE 5 (2013).

[24] *Id.* at 6.

[25] Under the OSA, leave to proceed as a class shall be granted when the action is brought in good faith and there is a reasonable possibility that the action will be resolved in favor of the plaintiff. This test creates ''a relatively low threshold.'' *Accord Zaniewicz v. Zungui Haixi Corp.*, [2012] ONSC 6061. But *see Gould v. W. Coal Corp.*, [2012] ONSC 5184, ¶ 239 (denying leave to proceed because ''the plaintiff's claim has no reasonable possibility of success at trial and . . . there is no reasonable possibility that a trial judge would accept [the evidence of the plaintiff's accounting expert] in preference to the defendant's expert evidence'').

[26] *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 366 (2005).

[27] OSA, § 138.1 (defining ''liability limit''); *see* Quebec Securities Act, R.S.Q, ch. V-1.1 (2010) (Quebec) (containing identical liability cap). Similar liability limitations apply to individual defendants. *See, e.g.*, OSA, § 138.1.

[28] *See* Heys & Berenblut, *supra* note 23, at 1 (setting the current number of active securities class actions in Canada at 51, and stating that these actions represent a total of more than C$23 billion in claims).

[29] Dr. Renzo Comolli *et al.*, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2012 FULL-YEAR REVIEW 3 (2013).

[30] Kevin M. LaCroix, *NERA: Securities Suit Filings Stable, But Settlements and Dismissals Are Down*, D&O DIARY, http://www.dandodiary.com/2012/12/articles/securities-litigation/nera-securities-suit-filings-stable-but-settlements-and-dismissals-are-down/ (December 11, 2012).

[31] *Id.*

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