Each year, billions of dollars are recovered in legal proceedings brought by investors who have been the victims of securities fraud. These cases secure compensation for investment losses suffered as a result of misrepresentations made by issuers, their agents and third parties in connection with the issuers’ publicly traded securities. The recoveries result from the fact that hundreds of millions – if not billions – of dollars are lost by investors each time a publicly traded company materially misleads financial markets about its true condition or performance, only for the truth to ultimately emerge.

Cases to recover such losses are pursued in just a small number of jurisdictions – predominantly in the United States, which also happens to be the world’s deepest capital market. Cases are increasingly being brought in other jurisdictions as well, and recoveries won are divided in varying degrees amongst the participating investors. In some jurisdictions, so long as some proactive investors are willing to initiate lawsuits to recover their losses, other similarly situated investors can sit back passively and, if there is a recovery, claim a pro-rata share. In other jurisdictions, rather than rely upon the initiative of others, it may be necessary for any investor who wants compensation to actively bring proceedings and, in some cases, to present evidence of reliance upon the misrepresentations in issue.

Investors who suffer losses due to securities fraud possess valuable rights. When they buy publicly traded securities at fraudulently inflated prices and then either sell them at a loss or continue to hold the devalued assets after the truth has emerged, investors often have both statutory and non-statutory rights to recover compensation for their damage. In some circumstances, even those who purchased and sold before the truth emerged may have viable claims on the basis that defrauded investors should be allowed to recover the amounts of artificial inflation they were tricked into paying. Many investors whose portfolios are managed
externally are entirely unaware of these rights.

This article provides an overview of the various opportunities available to investors to pursue legal claims against publicly traded companies acting in breach of anti-fraud laws. It briefly explores the class action opportunities available in the United States as well as the mechanisms available to seek recoveries in other jurisdictions, specifically Canada, Australia, the Netherlands, the United Kingdom, Germany, and Japan.

I. The Road to Multiple Jurisdictions

Securities fraud class actions – actions that can include the claims of all investors similarly damaged by the same misconduct – yield the vast majority of aggregate returns that are the product of securities litigation. The United States remains the most significant forum in the world for securities class actions, recovering an average of $4 billion annually.

But interest in remedies that can be achieved outside of the United States has increased in the past few years. That upswing in interest is largely attributable to the U.S. Supreme Court’s 2010 decision in Morrison v National Australia Bank. The Morrison decision limited federal securities law protection to investors who engage in domestic U.S. transactions, prompting investors who engaged in non-U.S. transactions to look to the laws of the jurisdiction where the transactions occurred for their remedies.

At the same time Morrison limited the jurisdiction of U.S. federal courts to domestic U.S. transactions, the securities class action regimes enacted in Canada and Australia have matured to the point where litigation is generating significant recoveries in those jurisdictions. Consequently, Canada and Australia are becoming increasingly attractive venues for securities class actions after Morrison. Simultaneously, there is an ongoing debate within the European Union as to the merits of extending the scope for collective redress. While in the field of competition law the appetite for such redress appears high, there generally remains a lack of coordination or urgency that leaves collective redress efforts for securities fraud in their infancy.
II. Primary Jurisdictions

United States: Regardless of their nationality or domicile, investors who purchase securities on U.S. exchanges or in U.S. transactions are entitled to the protection of the U.S. anti-fraud provisions. That is the law of the land after *Morrison*. It is for those investors (or their trustees or other fiduciaries) to choose whether to initiate or participate in litigation to enforce U.S. anti-fraud provisions.

From a cost perspective, investors typically incur no out-of-pocket expenses to litigate securities class actions in the United States because most U.S. securities firms offer representation on a contingent fee (i.e., no-win/no-fee) basis, and will also advance all expenses associated with the litigation. Nor, as is the case in most jurisdictions, do litigants assume the risk of paying their opponents’ legal fees should their claims not be successful. Under the “American Rule,” each party bears its own legal fees, win or lose.

Given the permissibility of contingent fee arrangements and the absence of fee-shifting risk, pension funds, with little appetite to spend large sums in legal fees to bring difficult cases, are able to regularly serve as lead plaintiffs in U.S. securities litigation. As global investors vital to the sustainability of the world and national economies, the participation of such investors in securities cases is highly valued and respected. Consequently, recoveries in U.S. securities fraud class actions are significantly higher when pension funds or institutional investors lead the charge.

Canada: Securities litigation in Canadian provinces has increased significantly over the last decade. There were 11 securities class actions filed in Canada in 2014, 11 in 2013, and 10 in 2012. Most of the cases were filed in Ontario, pursuant to Ontario’s 2005 Bill 198, widely seen as a “pro-investor” piece of legislation.

By the end of 2014, there were 60 active securities cases pending in Canada — more than double the number in 2007 and more than four times the number in 2000. These active cases represent more than
CAD$35 billion in total claims. The adoption of opt-out procedures, the jettisoning of reliance, and the fact that the courts are showing some willingness to certify worldwide classes (so long as the defendant has a sufficient connection to the jurisdiction) have helped spur interest in Canadian venues for securities class actions.

However, Canada’s potential for securities fraud recoveries is limited. First, some Canadian provinces have caps on damages, which are determined by the level of misconduct a plaintiff is able to prove. In Ontario, for example, if the plaintiff is unable to prove intentional wrongdoing, damages are capped at the greater of 5 percent of the company’s market capitalization (before the fraud was revealed) or CAD$1 million. Also, most Canadian provinces, like the United Kingdom, operate a “loser-pays” system, with fee-shifting. In such systems, the party that loses the case, or even a particular argument in the case, faces the risk of paying the winning side’s legal fees. Accordingly, litigation has been difficult to fund because, given the size and complexity of securities class actions, those shifted fees may be enormous, posing an unacceptable risk to investors. After-the-event (“ATE”) insurance and/or third-party litigation funding may help mitigate the downside risk, but will not always eliminate or sufficiently reduce it.

**Australia:** Securities class actions arrived in Australia in 1999. Although the number of class actions has been increasing, the overall numbers are dwarfed by those in the United States. In Australia, there were six securities class actions in 2014, five in 2013, two in 2012, and two in 2011.

Settlement amounts in Australian cases tend to be significant. In 2014, aggregate settlements in Australian securities class actions exceeded AUS$1 billion. Like Canada, Australia has adopted opt-out procedures for class actions. Also similar to Canada (and the United Kingdom), the Australian legal system operates as a “loser-pays” system. However, unlike most provinces in Canada, Australia has yet to affirm a fraud-on-the-market approach to proving reliance for misrepresentations or omissions. Additionally, contingency fees are limited to “conditional
fees,” with a permitted “uplift” upon success of no more than 25 percent.

Given the limits on the “conditional fee” that Australian lawyers can charge, litigation funding by professionals has become the norm. In fact, even though Australia is an opt-out jurisdiction, the legal uncertainties still present and the limitations on lawyers’ fees have encouraged litigation funders to develop an opt-in process. Accordingly, in most Australian securities class actions, the funding of the litigation is only available to select investors who opt in by reaching a funding agreement with the entity funding the case. As a practical matter, therefore, many class action securities recoveries in Australia ironically may be limited to a small number of institutional investors.

**The Netherlands:** Although the Netherlands lacks a class action procedure, it may well become a destination of choice for parties simply wishing to obtain court approval and European-wide recognition of securities settlements reached outside the United States. The Netherlands owes this preferred status to its procedures for settling mass claims contained in the 2005 Wet Collectieve Afwikkeling Massaschade (the Collective Settlement Act, or “WCAM”). The WCAM was originally created to resolve mass claims around pharmaceuticals, but was also utilized to adjudicate the European settlement reached in the *Royal Dutch Shell* matter. The WCAM allows a settling defendant to negotiate a European-wide binding contract with a Dutch Stichting (i.e., a foundation) formed of damaged investors, to provide the defendant “peace” regarding European claims.

Upon court approval of the settlement, investors who have chosen not to join the Stichting, or file their own case, are bound by the settlement and barred thereafter by the Netherlands court from filing their own case. While the procedure was first employed in a securities context in 2009 for the *Royal Dutch Shell* matter (where a significant party was Dutch), it was unclear whether the procedure would be available where there was not a significant Dutch party/presence. The 2012 decision in a case against Converium Holdings AG confirmed that the WCAM does not require significant Dutch participation to be viable.
The *Converium* case, a U.S. class action against the Swiss company Converium Holdings AG, yielded an $85 million settlement for investors who purchased Converium Holding securities on a U.S. exchange. Investors who purchased their shares on the Swiss exchange were excluded from the U.S. action. However, because Converium sought a comprehensive resolution, Converium cooperated with a Stichting of Converium investors and sought court approval in the Netherlands of a settlement amounting to $58 million.

The Netherlands Court of Appeal approved the settlement. Notably, however, the $58 million paid to the investors who participated amounted to just a quarter of the compensation per share that investors in the U.S. settlement enjoyed, reflecting the relatively weaker investor protection laws in European jurisdictions. It should be noted that anyone can create a Stichting, and they are often formed by litigation promoters—not lawyers. Indeed, the Dutch landscape is littered with empty Stichtings, abandoned because their promoters could not make economic sense of their litigation plans: the overwhelming majority of Stichtings have never brought legal action, nor have they obtained any recovery for investors. Accordingly, each opportunity presented to join and commit to such a vehicle should be approached with great caution.

**United Kingdom:** In the wake of *Morrison*, investors who purchase their shares on the U.K. exchanges in circumstances where the same misconduct is the subject of litigation in the United States may sometimes persuade the U.S. courts to also hear their claims. In such circumstances, the U.S. court is likely to apply U.K. law to the claims based on the U.K. transactions. In other cases, where there is no jurisdictional hook, such investors can expect to be forced to pursue their statutory and common law claims in the High Court in London. However, for multiple reasons, including the lack of a class action mechanism, the presence of a “loser-pays” rule, the inability to utilize the “fraud on the market” theory of reliance, and the absence of juries in civil cases, the number of investor-led actions in the United Kingdom will continue to grow only slowly.
As a weak alternative to a class action procedure, the United Kingdom permits “group” actions, which require participants effectively to affirmatively opt in to the proceedings. The opt-in requirement, which necessitates not just adding your name to a list but being prepared to affirmatively prove your losses and other elements of the cause of action, rather than an opt-out mechanism, where you are included and must simply demonstrate your loss to a settlement or judgment claims administrator unless you choose to exclude yourself, severely limits the ability of investors to aggregate losses and generate sufficient leverage over defendants.

The opt-in approach also means that defendants are unable to settle all claims in one action, thereby precluding defendants from being able to obtain complete peace. Additionally, the “loser-pays” model typically means that plaintiffs must purchase ATE insurance coverage in order to mitigate the risk of having to pay the huge defense fees of both solicitors and barristers typically incurred during complex securities litigation cases.

While the recent advent of contingency fees in the United Kingdom may eventually encourage more securities fraud actions, the procedural impediments and consequent financial risks facing litigants in the United Kingdom remain daunting. That being said, there are large cases pending or threatened against the Royal Bank of Scotland, Lloyds and Tesco, which offer examples of scenarios where securities fraud litigation may arise in the United Kingdom. Because of *Morrison*, investors who purchased shares of these companies in the United Kingdom are no longer able to invoke the protection of U.S. anti-fraud provisions. Thus, they must either explore a remedy in the United Kingdom despite the impediments discussed above, or accept the losses and do nothing.

**Germany:** The massive fraud recently revealed at Volkswagen, regarding the dirty performance of its allegedly clean diesels, has generated significant interest in litigating securities fraud claims in Germany. While there is no general collective redress mechanism in the German legal system, there is legislation allowing capital market claims, where identical issues of law or fact exist, to utilize a model case
proceeding. The legislation is the Kapitalanleger-Musterverfahrensgesetz (the Capital Market Model Claims Act, or “KapMuG”).

Under the KapMuG, a minimum of 10 claimants who invoke the KapMuG is required to initiate the model case proceedings. Thereafter, the findings of the model case proceeding are binding on the other claimants, but the individual cases are each kept separate. Similar to proceedings under the WCAM in the Netherlands, proceedings under the KapMuG, although ultimately aimed at compensation of damages, are limited to a declaratory judgment on certain preliminary questions – for example, relating to the potential liability of the issuer of a financial product. The amount of damages is then determined in each individual case, once the test case has been successfully heard.

As to evidence, generally there is no pre-trial discovery in the German legal system. Yet, in some cases, findings of authorities are used as a basis for a trial. For example, liability may be established in antitrust law via a finding of cartel activity by the European Commission. Some public authorities, such as the Bundesanstalt für Finanzdienstleistungsaufsicht (the German Federal Financial Supervisory Authority, or “BaFin”), have a duty of disclosure of information within certain limits. As to costs, Germany follows the “loser-pays” system. However, there are specific rules that allow for splitting costs of the KapMuG model proceedings among all claimants. Lastly, contingency fees for lawyers are no longer generally excluded in Germany. The former prohibition was struck down as unconstitutional, thus contingency fees are now permissible, though only under exceptional circumstances.

**Japan:** Historically, the concept of securities litigation arising from misstatements as defined by Japan’s Financial Instruments and Exchange Act (“FIEA”) has been unfamiliar to investors. However, after amendments in 2004, reducing the burden of proof for plaintiffs and introducing the presumptive rule for damages related to continuous disclosure (i.e., estimated damages are the difference in the one-month average of a stock price before and after the disclosure in question), the
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volume of litigation increased dramatically—and this increase occurred despite the fact that Japan’s legal system does not provide for class-action lawsuits. Indeed, the FIEA may lead to more favorable outcomes for plaintiffs in Japan than they could realize under the U.S. securities laws. Not only has the presumptive rule significantly reduced the plaintiff’s burden of proof, but also the FIEA stipulates no-fault liability on the part of corporations for their misstatements, thereby making it easier to file a lawsuit and claim damages under the FIEA.

Although the number of Japanese court decisions on filings related to misstatements decreased to 7 in 2012 from 11 in 2011, 2012 will perhaps be remembered as the year when Japanese securities litigation was “discovered” by foreign investors. In prior years, plaintiffs had been mostly domestic – typically groups of individuals or institutional investors such as pension funds. The Olympus action became the first major litigation in Japan to be initiated by foreign institutional investors. Following lawsuits filed by domestic investors, 48 institutions and overseas pension funds filed a lawsuit on June 28, 2012. Later, 68 foreign institutions filed a collective lawsuit against the company. As a result, those investors have recovered $92 million in aggregate from Olympus. It remains to be seen whether recent allegations of securities fraud against Toshiba and Takata will lead to similar litigation in Japan by non-Japanese institutional investors.

III. Informed Decision Making

Owing to the fact that there are multiple jurisdictions that may be utilized by investors seeking to recover losses caused by financial misconduct, it is now more desirable than ever for institutional investors to be properly informed of the extent to which the fund assets may be diminished because of financial misconduct. In pursuit of that objective, nearly 1000 institutional investors worldwide ensure they are properly informed by retaining Robbins Geller to monitor their securities portfolios for such financial misconduct, at no cost. Through the Firm’s Portfolio Monitoring ProgramSM, investors can promptly understand the amount of losses sustained – and available litigation options – when an investment is damaged by misconduct, no matter where the
underlying transaction took place. By providing this information and the means to pursue recoveries, in the last decade alone, Robbins Geller has been able to help its clients obtain recoveries in multiple jurisdictions.

The above article summarizes the 2015 Securities Fraud and Investor Remedies Made Simple Guide with content provided by Robbins Geller partner Mark Solomon, and such information is printed with the permission of the UK’s National Association of Pension Funds. For a copy of the guide, please contact Robbins Geller.

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