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Article

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INTRODUCTION

In *Morrison v. National Australia Bank Ltd.*, the U.S. Supreme Court dramatically limited the extraterritorial reach of federal securities law, finding that the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 do not extend to securities transactions outside the United States.[1] The decision rejects over four decades of case law embracing the Second Circuit's "conduct and effects" tests.[2] Instead the Court adopts a geographic test it perceives to be a bright-line rule, applying Section 10(b) only to securities transactions inside the United States.[3]

In *Morrison*, Australian plaintiffs, who purchased shares of National Australia Bank (NAB) on an Australian stock exchange, claimed that Australian bank officials had misled them about the performance of a U.S. mortgage subsidiary.[4] The plaintiffs sued NAB and other defendants in New York under Section 10(b), claiming that the involvement of the U.S. subsidiary in the alleged fraud was sufficient justification to apply Section 10(b) extraterritorially to transactions in the parent company's stock on the Australian stock exchange.[5] The Second Circuit rejected this claim under its conduct and effects tests,[6]

1. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881–83 (2010); *see* 15 U.S.C. § 78j (2006 & Supp. IV 2011); 17 C.F.R. § 240.10b-5 (2012).

2. *Morrison*, 130 S. Ct. at 2879 (citing SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003)). Under the Second Circuit's "conduct and effects" tests, the extraterritorial application of the antifraud provisions in Section 10(b) and Rule 10b-5 of the Exchange Act required that the alleged wrongful conduct had substantial effects in the United States (the "effects test") or that sufficient conduct occurred in the United States even though the effect was only on investors elsewhere (the "conduct test"). *Berger*, 322 F.3d at 192–93.

3. *Morrison*, 130 S. Ct. at 2883–86.

4. *Id.* at 2873.

5. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 169 (2d Cir. 2008), *aff'd*, 130 S. Ct. 2869 (2010).

6. *Id.* at 176.

but the Australian shareholders appealed. The Supreme Court again rejected their claim, but the Court also rejected the conduct and effects tests.[7] The Court held that securities-fraud suits cannot be brought under U.S. law against foreign defendants by foreign plaintiffs who bought securities outside the United States because "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[8] Thus, the Court rejected the views of the U.S. Solicitor General and the Securities and Exchange Commission (SEC) that the Act should apply to fraud in an extraterritorial securities transaction that "involves significant conduct in the United States that is material to the fraud's success."[9] The Court stated that Section 10(b) reaches only fraud in connection with the "purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[10]

The logic of the holding in *Morrison* strongly suggests that the SEC would no longer have enforcement rights with respect to securities transactions taking place outside the United States. Congress, however, intervened one month later with Section 929P of the Dodd-Frank Act that purported to reinstate the conduct and effects tests for lawsuits brought by the SEC or the Department of Justice (DOJ).[11]

For private lawsuits, *Morrison's* curtailment of the reach of U.S. securities laws potentially expands the opportunity for other jurisdictions to compete with U.S. securities law by providing their own combination of legal rules, private rights of action, and government enforcement mechanisms.[12] Whereas

7. *Morrison*, 130 S. Ct. at 2885–86.

8. *Id.* at 2884.

9. *Id.* at 2886 (quoting Brief for United States as Amicus Curiae Supporting Respondents at 16, *Morrison*, 130 S. Ct. 2869 (No. 08-1191)).

10. *Id.* at 2888.

11. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C.). There is some debate about whether this provision actually changed the scope of Section 10(b), which would be required to legislatively overrule *Morrison*. Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 205 (2011) [hereinafter Painter, *Extraterritorial Jurisdiction*].

12. *See generally* Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141, 173 (2010) (discussing some of the effects of class actions in the United States that could have precipitated increased

before *Morrison* there was always the possibility that U.S. law might also apply to some transactions outside the United States, after *Morrison* transacting parties can be confident that U.S. law will not apply in private suits provided their transactions are definitively outside the United States. In an attempt to restrict the reach of the *Morrison* decision and to test its limits, however, plaintiffs' attorneys have brought other cases.[13] Most of these cases focus on determining the geographic location of a transaction—a critical factor in the *Morrison* decision that was not fully explained because the location of the Australian transactions was relatively easy to determine.[14]

The *Morrison* decision has important implications for jurisdictional competition in securities law. Because of indicia that jurisdictional competition post-*Morrison* could evolve in two different ways, this Article distinguishes between "Choice of Law Competition" and "Forum Competition."[15] Jurisdictions

competition from other countries); Merritt B. Fox, *Fraud-on-the-Market Class Actions Against Foreign Issuers* (Colum. L. & Econ. Working Paper No. 400, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831453.

13. *See, e.g.*, *In re* Infineon Techs. AG Sec. Litig., No. C04-04156 JW, 2011 WL 7121006 (N.D. Cal. Mar. 17, 2011); *In re* Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327 (S.D.N.Y. 2011); Elliott Assocs. v. Porsche Auto. Holding SE, 759 F. Supp. 2d 469 (S.D.N.Y. 2010); Absolute Activist Value Master Fund Ltd. v. Homm, No. 09-CV-08862 (GBD), 2010 WL 5415885 (S.D.N.Y. Dec. 22, 2010); Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166 (S.D.N.Y. 2010); *In re* Société Générale Sec. Litig., No. 08-Civ.-2495, 2010 WL 3910286, (S.D.N.Y. Sept. 29, 2010); *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469 (S.D.N.Y. 2010); Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, 732 F. Supp. 2d 1345 (S.D. Fla. 2010); Sgalambo v. McKenzie, 739 F. Supp. 2d 453 (S.D.N.Y. 2010); *In re* Banco Santander Sec.-Optimal Litig., 732 F. Supp. 2d 1305 (S.D. Fla. 2010); Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620 (S.D.N.Y. 2010).

14. *See Morrison*, 130 S. Ct. at 2876.

15. The parameters of jurisdictional competition in U.S. and European substantive corporate law have been analyzed extensively by commentators. *See, e.g.*, ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009); Christian Kirchner, Richard W. Painter & Wulf A. Kaal, *Regulatory Competition in EU Corporate Law After* Inspire Art*: Unbundling Delaware's Product for Europe,* 2 EUR. COMPANY & FIN. L. REV. 159 (2005) (discussing European law and to some extent securities law); Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91 (2011); Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661 (2008); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387 (2001); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998). The characteristics of competition among jurisdictions hoping to estab-

competing to design securities laws that appeal to transacting parties ex ante (before a dispute emerges) engage in "Choice of Law Competition."[16] Jurisdictions that are successful in Choice of Law Competition often bring securities transactions within their borders because locating a transaction within a jurisdiction is one of the easiest ways to choose its law. Jurisdictions engaged in Choice of Law Competition usually offer a litigation forum as well as substantive law. Transacting parties sometimes choose both the substantive law and the same jurisdiction's forum, but sometimes they choose a jurisdiction's substantive law with a different forum by agreeing to arbitrate or to litigate in another jurisdiction.

Jurisdictions that take steps only to expand the jurisdiction of their courts as venues for litigation engage in "Forum Competition." Forum Competition usually involves a jurisdiction's courts applying the jurisdiction's own law, but sometimes courts will apply the law of another jurisdiction. A jurisdiction can engage in Forum Competition by inducing parties to agree ex ante to use its courts as a litigation forum, but most Forum Competition turns on a jurisdiction's attractiveness to lawyers ex post. These jurisdictions ignore the preferences of transacting parties ex ante and appeal only to the preferences of some transacting parties and their lawyers after a dispute has arisen.[17] Before *Morrison*, the United States was to some extent

lish a forum within their borders for litigation that appeals to lawyers, i.e., "Forum Competition," has not been addressed in as much of the commentary, particularly in the transatlantic context. Competition for substantive legal rules plays only a secondary role in Forum Competition, because substantive legal rules may have a diminished level of relevance if national courts do not have an opportunity to enforce their substantive legal rules and transacting parties cannot rely upon other courts to enforce those rules.

16. Choice of Law Competition is a subcategory of jurisdictional competition. The emphasis in Choice of Law Competition is on substantive legal rules to attract contracting parties. Adjudication of disputes may be of secondary importance in Choice of Law Competition.

17. On the supply side, the latter form of Forum Competition does not involve states offering a bundled product of corporate law and adjudication. A country that makes it more difficult to draw transacting parties to its courts for litigation is less likely to attract plaintiffs' attorneys wishing to file lawsuits in that country. A number of factors on the supply side could make it less likely for courts in some competing countries to attract lawsuits: (1) language barriers (particularly for countries whose courts do not do business in English), (2) lack of ability to overcome differences between common law and civil law approaches to adjudication (some civil law countries, like Germany, may struggle with this problem particularly), (3) lack of ability to overcome procedural differences between courts of different countries, (4) lack of judicial expertise of judges in the required areas of law (not all countries have judges

engaged in this type of Forum Competition when U.S. courts provided a forum for "foreign cubed" cases in which foreign plaintiffs sued foreign defendants over securities transactions taking place outside the United States (none of the Australian parties to the *Morrison* case had expressed a preference for U.S. law at the time of their securities transactions in Australia).[18]

As a result of the *Morrison* decision, limiting application of U.S. securities laws to transactions inside the United States, plaintiffs' attorneys may increasingly look to European countries and other venues to file securities class actions and similar suits. Even lawsuits involving securities transactions inside the United States face steep hurdles as the Supreme Court has curtailed plaintiffs' securities litigation in several other decisions.[19] There is some doubt about the continued viability of

with substantial training), (5) the cost to a country of building specialized judicial expertise in the required areas of the law, (6) incomplete information about real or perceived judicial bias in the respective country, and (7) uncertainty about mutual recognition of judgments internationally and within the European Union.

On the demand side of Forum Competition, plaintiffs' attorneys seek out the jurisdiction that offers the highest chance of procedural success in any given lawsuit. Procedural success here can mean a high likelihood that a court in the respective country will find subject matter jurisdiction and will enable the attorneys to overcome a motion to dismiss. While the substantive legal rules in the respective country would have to offer adequate and comparable legal protections for the plaintiffs, the likelihood of succeeding on the merits under the substantive legal rules in that respective jurisdiction, i.e., substantive success, may be secondary. Plaintiffs' attorneys may be willing to forego some substantive claims if the respective jurisdiction offers a lot of procedural leeway by, for instance, allowing suits to proceed with parties who are not citizens or residents of the respective country and have otherwise rather tenuous connections to the jurisdiction.

18. The evaluations in this article pertaining to competitive structures between fora are based on limited data. The authors evaluate trends in a limited number of European countries and recognize that the number of securities litigation cases in Europe is substantially lower than the number of cases in the United States.

19. *See* Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 152 (2008) (holding that fraud claims cannot be brought against a third party who did not directly mislead investors but was a business partner with those who mislead investors); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 310 (2007) (stating that courts must take into account "plausible opposing inference" when examining whether a plaintiff adequately plead strong inference of scienter). With respect to curtailment of class actions generally, see also Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (curbing class certification); AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1756 (2011) (upholding standard form consumer contracts that mandated arbitra-

class actions in the United States in general.[20] Given these developments, European countries may have enhanced opportunities to capitalize on the increasing demand for a jurisdiction outside of the United States in which to litigate. European jurisdictions may also have an opportunity to engage in Forum Competition with the United States by providing and improving upon features of the U.S. legal system that lawyers find attractive. The European Union is also a particularly attractive place for Forum Competition with the United States if a judgment obtained against a defendant in one member state can be enforced anywhere in the European Union, a region with an aggregate economy about the same size as the U.S. economy.[21]

Thus, even those securities fraud lawsuits that could be filed in the United States after *Morrison* might still be filed in a European jurisdiction that has substantive law and procedures that are superior to U.S. substantive law and procedures for plaintiffs and their lawyers. Unlike U.S. class actions, these suits could include plaintiffs whose securities transactions took place outside the United States as well as plaintiffs whose securities transactions took place inside the United States.

There is some evidence that, post-*Morrison*, other jurisdictions—most notably the Netherlands—have started to expand the jurisdiction of their courts to cover securities transactions taking place elsewhere.[22] These jurisdictions may be setting up forums within their borders that appeal to lawyers, and after *Morrison* may replace the United States as the leader in extraterritorial securities litigation Forum Competition.

The Netherlands appears to be replicating some of the most attractive attributes of the U.S. securities-litigation system. An important distinguishing feature that so far has made U.S. courts very appealing to international litigants—at least

tion despite state law determination that they were unconscionable adhesion contracts).

20. John C. Coffee Jr., *The Death of Stockholder Litigation?*, NAT'L L.J., Feb. 13, 2012, at 14, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202541959250&The_death_of_stockholder_litigation&slreturn=1.

21. *See The U.S. and Europe: Governments of Equal Size?*, ECON. POLICIES FOR THE 21ST CENTURY (Feb. 8, 2012), http://www.economics21.org/commentary/us-and-europe-governments-equal-size.

22. *See Class Actions: A Global Update*, ALLEN & OVERY (Jan. 18, 2011), http://www.allenovery.com/publications/en-gb/Pages/Class-Actions--A-Global-Update.aspx; Kevin LaCroix, *Dutch Court Holds Collective Securities Settlement to Be Binding*, D & O DIARY (Jan. 19, 2012, 3:32 AM), www.dandodiary.com/2012/01/articles/securities-litigation/dutch-court-holds-collective-securities-settlement-to-be-binding/.

plaintiffs—is the availability of class actions and the "fraud-on-the-market theory" that allows plaintiffs to allege that they were defrauded because they bought or sold a security at a market price that was affected by the alleged fraud.[23] While an increasing number of jurisdictions may recognize class actions in limited circumstances,[24] only a few countries, such as the United States, Canada, South Korea, and the Netherlands, recognize some variation of the fraud-on-the-market theory.[25] Un-

23. Basic Inc. v. Levinson, 485 U.S. 224, 241–42 (1988). Under the fraud-on-the-market theory, a plaintiff is presumed to have relied on a defendant's material misrepresentation if the misrepresentation pertained to a security that was traded in an efficient market and the price of the security was affected. *Id.*

24. *See infra* Part III (discussing Choice of Law Competition, as jurisdictions compete to design laws and procedures that induce parties to locate transactions in their jurisdictions).

25. *See* Province of Ontario Securities Act, R.S.O. 1990, c. S.5, 138.3 (Can.); [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007 (S. Kor.), *available at* http://www.fsc.go.kr/eng/lr/list03.jsp?menu=0203&bbsid=BBS0087; HR 27 november 2009, JOR 2010, 43 m.nt. K. Frielink (VEB e.a./World Online e.a.) (Neth.), *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BH2162; Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1508 (2004) ("Korea has often looked to the U.S. securities regime as a model for how to regulate the Korean securities markets."); Dae Hwan Chung, *Introduction to South Korea's New Securities-Related Class Action*, 30 J. CORP. L. 165 (2004); Erik S. Knutsen, *Closing the Gate on Ontario Securities Class Actions*, 2006 QUEEN'S BUS. L. SYMP. 157, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1164262 ("[P]roof of reliance is unnecessary under s. 138.3(4). The representative class plaintiff only has to prove the misrepresentation elements enumerated in the statute: that the person who bought or sold the security suffered damage because of the issuer's failure to report a material change. Reliance upon the actual incorrect information is not a relevant consideration for success."); A. C. Pritchard & Janis P. Sarra, *Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada*, 47 ALBERTA L. REV. 881, 892 (2010) ("As with the primary market provisions, there is a deemed reliance provision under the new secondary market provisions in Canada. Under this provision, the plaintiff does not need to demonstrate reliance on the misrepresentation or on the issuer's failure to disclose as required."); Chung Dong-yoon, *Open Season for Securities-Related Class Actions*, KOREA HERALD (Apr. 5, 2010), http://www.koreaherald.com/specialreport/Detail.jsp?newsMLId=20070109000043 ("The Korean Securities Exchange Act has the same burden of proof rule in the exchange market as in the new issuance market and as a result, a plaintiff need not prove the scienter, reliance, transaction and loss causation, which really is a vexing problem."); Kim Rahn, *First Class-Action Suit in Offing*, KOREA TIMES (June 25, 2009), http://www.koreatimes.co.kr/www/news/nation/2009/06/113_47475.html. Similarly, after a class action regime was introduced in Italy, the Italian Supreme Court adopted something comparable to the U.S. fraud-on-the-market theory, introducing a presumption of reliance and, thus, allowing investors to bring a claim based on a misleading statement in a prospectus or

like courts in other European countries, the Dutch Supreme Court in its *World Online* decision established a presumption of reliance/causation for cases involving prospectus liability.[26] The *World Online* decision uses a variant of the fraud-on-the-market theory,[27] at least in the context of prospectus liability. Dutch courts could extend the theories used in the *World Online* holding to other areas of Dutch law, such as liability for misrepresentation in periodic disclosure and other types of securities fraud. The Netherlands also allows plaintiffs' lawyers to use an opt-out class, e.g., class members described in the complaint are included in the litigation unless they opt out, rather than requiring an opt-in class, the approach favored by most other European countries.[28]

Another Dutch case, *Stichting Investor Claims Against Fortis v. Ageas N.V.*,[29] illustrates the possible appeal of the Dutch legal system to plaintiffs' lawyers. The case was originally filed in the Southern District of New York but had been dismissed for lack of subject matter jurisdiction under the pre-*Morrison* conduct and effects tests.[30] The case was subsequently filed in a court in Utrecht, the Netherlands, where it is pending.[31] Similarly, in its *Converium* decision, another case that had initially been filed in the United States, the Amsterdam

official company announcement without having read the respective document. ALLEN & OVERY, *supra* note 22; *see also* Bas J. de Jong, *Liability for Misrepresentation—European Lessons on Causation from the Netherlands*, 8 EUR. COMPANY & FIN. L. REV. 352, 364–65 (2011) (discussing the *World Online* decision and its implications); Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAW. 1121, 1139–41 (2007) (explaining the differences between the Dutch and U.S. systems of securities litigation and underscoring the attractiveness of the Dutch rules).

26. *See* HR 27 november 2009, JOR 2010, 43 m.nt. K. Frielink (VEB e.a./World Online e.a.) (Neth.), *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BH2162; *see also* de Jong, *supra* note 25, at 364–65 (discussing the *World Online* decision and its implications); Thompson, *supra* note 25 (explaining the differences of the Dutch and U.S. systems of securities litigation and underscoring the attractiveness of the Dutch rules).

27. *See infra* Part II.B.3. (discussing the fraud-on-the-market theory).

28. Thompson, *supra* note 25, at 1141.

29. Writ of Summons, (Stichting Investor Claims Against Fortis/Ageas N.V.) (Utrecht July 7, 2011) (Neth.) [hereinafter Fortis Writ], *available at* http://investorclaimsagainstfortis.com/Attachment/194_00052559.PDF.

30. Copeland v. Fortis, 685 F. Supp. 2d 498, 502–03 (S.D.N.Y. 2010). The court dismissed the case for lack of subject matter jurisdiction over the claims brought by plaintiffs and reasoned that the alleged fraudulent activity took place abroad. Plaintiffs did not adequately allege substantial "effects" in the United States. *Id.*

31. Fortis Writ, *supra* note 29.

Court of Appeal declared an international collective settlement to be binding on the parties.[32] In *Converium*, the class members had very limited ties to the Netherlands (none of the defendants and only a few plaintiffs were domiciled in the Netherlands), the alleged wrongdoing took place outside the Netherlands, and the claims were not brought under Dutch law.[33] There is some evidence that even without a single interested person domiciled in the Netherlands, the Court could have upheld jurisdiction in the Netherlands to declare the settlement binding.[34]

The *Fortis*, *World Online*, and *Converium* cases, among others, provide a first impression of a possible trajectory for Forum Competition after *Morrison.* If these cases are representative of future trends, some litigation may move toward the Netherlands and away from the United States.

U.S. courts could respond to these developments and continue to engage in limited Forum Competition by retaining jurisdiction over some cases and applying foreign securities law to transactions that take place outside the United States. Hannah L. Buxbaum notes in this context that "it appears both theoretically and doctrinally possible that U.S. courts in the future might consider applying foreign securities law to fraud claims, thus opening an avenue for recovery by investors injured in foreign investment transactions."[35] Another approach may be for U.S. courts to apply state law to some claims concerning securities transactions outside the United States if

32. Hof's-Amsterdam 12 november 2010, JOR 2011, 46 m.nt. J.S. Kortmann (Converium Foundation VEB/SCOR ZFS) (Neth.), *translated in* http://www.blbglaw.com/cases/00172_data/Judgmentof12Novermber2010CourtofAppeal.pdf; *see also* Hof's-Amsterdam 17 januari 2012, JOR 2012, 51 m.nt. B.J. de Jong (Converium Foundation VEB/SCOR ZFS) (Neth.) [hereinafter Converium COA Decision], *available at* http://www.cohenmilstein.com/media/pnc/9/media.1139.pdf.

33. Hof's-Amsterdam 12 november 2010, JOR 2011, 46 m.nt. J.S. Kormann (Converium Foundation VEB/SCOR ZFS) (Neth.), *translated in* http://www.blbglaw.com/cases/00172_data/Judgmentof12Novermber2010CourtofAppeal.pdf.

34. *See Legal Alert,* Converium*: Dutch Court Has Jurisdiction to Declare an International Collective Settlement of Mass Claims Binding*, DE BRAUW BLACKSTONE WESTBROEK (Nov. 15, 2010) [hereinafter *Legal Alert* Converium], http://www.debrauw.com/SiteCollectionDocuments/Legal%20Alerts/Litigation%20Arbitration/Legal%20Alert%20International%20Litigation%20-%2015%20November%202010.html.

35. Hannah L. Buxbaum, *Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 L. & CONTEMP. PROBS. 161, 175 (2012) (discussing contingency for applying foreign securities laws in U.S. courts).

fraudulent selling efforts are directed at residents of a state (courts will probably dismiss most state law claims on forum non conveniens grounds when a transaction is outside the United States, but *Morrison* does not directly rule on the applicability of state securities fraud laws, and some instances of fraud might be actionable under state law after *Morrison*). After *Morrison*, applying foreign law or state law to foreign transactions may be the only viable way for U.S. courts to engage in Forum Competition in this segment of securities litigation.

Another consequence of *Morrison* is that transacting parties now have a clear path to avoid private litigation under U.S. law by locating their transactions outside the United States. Private parties—presumably, including U.S. investors and issuers—thus can opt in to the law of another jurisdiction. Although the Dodd-Frank Act still contemplates SEC and DOJ enforcement actions in some circumstances,[36] the parties can bind themselves not to sue each other under U.S. law by agreeing to complete the transaction off shore. In private transactions in particular, private parties will notice the factors that courts consider important to determining a transaction's geographic location and then manipulate those factors depending upon whether they want the transaction to be subject to U.S. law.

This Article suggests that problems presented in the context of Choice of Law Competition and Forum Competition could require different policy responses. Ambiguities in the geographic "transactional" test in *Morrison* suggest that the United States should consider a choice of law policy response, at least for those cases that are unclear as to the geography of a transaction and the applicable law. The Supreme Court's transactional test in *Morrison* is easy to manipulate, so to some extent transacting parties already can choose their law by choosing their geography. We propose redirecting the focal point of securities regulation in geographically ambiguous transactions away from tests for determining geographic location of transactions and toward the parties' choice of law.

The developments in the Netherlands suggest a possible proliferation of Forum Competition. This suggests that the Netherlands could attempt to take over a role similar in some respects to that of U.S. courts prior to the *Morrison* decision.

36. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C.).

Meanwhile, the SEC and DOJ could aggressively use powers bestowed by the Dodd-Frank Act to pursue fraud in connection with securities transactions outside the United States. It is possible that all sides will exercise constraint, but is it also possible that a broad bilateral or multilateral policy response may be needed to constrain these and other Forum Competition developments. The acceptable outer bounds of Forum Competition between the United States and Europe could be defined by treaty or multilateral agreement.

Part I of this Article reviews the costs and benefits of jurisdictional competition in securities regulation in light of other alternatives such as coordination and harmonization of securities laws in different jurisdictions. We show that experimentation with different securities regulation regimes can be beneficial. Jurisdictional competition in securities law after *Morrison* is also likely to be bifurcated with private lawsuits moving on a different trajectory than government enforcement. Part II explores recent developments in Europe that indicate a proliferation of European collective procedures that will likely attract plaintiffs and their lawyers. We show that recent case law in Dutch settlement procedures expands the jurisdiction of Dutch courts. Although the collective settlement of securities matters in the Netherlands does not offer plaintiffs all of the attractive features provided by securities class actions in the United States, the Netherlands is becoming increasingly attractive as a jurisdiction for securities litigation. Part III contrasts the expanding jurisdiction of Dutch courts with the limitations imposed by the *Morrison* decision. Part III also discusses ambiguities that arise when *Morrison* is applied to private securities transactions as well as to derivative transactions, such as securities-based swaps, that are not easy to define geographically as being "inside" or "outside" the United States. We argue that relying on parties' choice of law pertaining to private transactions, and Choice of Law Competition among jurisdictions offering legal rules to transacting parties, could be more effective than relying on geography that is both indeterminate and easy to manipulate. Part IV recognizes that the Netherlands, the United States, and perhaps other jurisdictions, may ignore transacting parties' ex ante choices and instead engage in Forum Competition that extends the reach of a jurisdiction's securities law extraterritorially in private lawsuits, government enforcement, or both. Part IV discusses ways in which the acceptable outer bounds of Forum Competition between the

United States and Europe could be defined by treaty or multilateral agreement.

I. THE FUNDAMENTALS OF JURISDICTIONAL COMPETITION

Jurisdictional competition is now recognized as an important factor in legal evolution in areas ranging from corporate law to admiralty law.[37] Jurisdictions design legal regimes to govern certain relationships—mostly contractual in nature—and then private parties choose which regime to use. The optimal legal regime for a transaction, series of transactions, or ongoing contractual relationship depends upon a number of factors such as the quality and predictability of legal rules, the flexibility of legal rules (does the jurisdiction allow parties to choose their rules?), and the cost and quality of adjudication. Jurisdictions compete to offer legal rules and adjudication procedures that attract users. Some users of the legal regime may be more attractive to a jurisdiction than others; many jurisdictions, for example, do not want to bring fraudulent transactions within their borders. The payoff for the jurisdiction from this competition is franchise and other taxes, fees for lawyers and other professionals, private sector opportunities for government officials and judges, and collateral benefits for other businesses in the jurisdiction such as banks and broker-dealers.

Perhaps most important for the discussion in this Article, jurisdictional competition is sometimes allowed to be independent of the geographic location of parties or transactions.[38] The legal systems that provide rules and adjudication are usually (but not always) rooted in geography, but the users of these systems need not always be in the same geographic location. This is very different from the traditional geographically-rooted jurisdictional competition that still prevails in areas such as income taxation and some aspects of employment and environmental regulation.[39] In the traditional geographically-rooted form of jurisdictional competition, if parties or transactions are located in the particular jurisdiction, they are stuck with its rules unless they choose to move. The "seat theory" of corporate law that prevailed in Europe for many years[40] is an example of this more limited type of jurisdictional competition constrained

37. *See* O'HARA & RIBSTEIN, *supra* note 15, at 29–31.
38. *Id.* at 68.
39. *See* Kirchner, Painter & Kaal, *supra* note 15, at 160–61.
40. *See id.*

by geography, whereas the "incorporation theory" in U.S. corporate law and now to some extent in E.U. corporate law is an example of the more expansive type of jurisdictional competition that is less restricted by geography.[41]

The economic benefits of jurisdictional competition are usually described from the vantage point of rational actors acting with near perfect information. One group of rational actors designs legal rules and adjudicates disputes over those rules, and another group of rational actors decides which legal rules shall govern their relationships.[42] Another approach to jurisdictional competition, however, emphasizes the fact that both providers and consumers of legal rules have imperfect information and benefit from experimentation with different rules. Some commentators draw on theories of "New Institutional Economics" to suggest that jurisdictional competition can be superior to harmonization and coordination if jurisdictional competition gives decision makers more opportunity to learn about the effects of different legal rules.[43]

In addition to imperfect information, another important factor is change. Because market conditions to which legal rules apply constantly evolve, rules need to change as well. Experimentation, observation, and rule revision are part of an ongoing process that may never end with a stable "optimal" rule.

41. *Id.*

42. *See id.* at 164–65.

43. *See id.* at 182 (discussing the phenomenon of jurisdictional competition in the evolution of European corporate law). *See generally* EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 5 (3d ed. 2003) (providing an overview of New Institutional Economics); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 7–8 (1990) (discussing the role of institutional change in historical change and economics); STEFAN VOIGT, INSTITUTIONENÖKONOMIK [INSTITUTIONAL ECONOMICS] 22–23 (2d ed. 2009); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 15–17 (1985) (discussing transaction-cost economics and the role of organizations and institutions in the capitalist system); Ronald Coase, *The New Institutional Economics*, 88 AM. ECON. REV. 72, 72–74 (1998) (commenting on the inclusion of transaction and information costs and the role of social and cultural change in New Institutional Economics); Christian Kirchner, *Public Choice and New Institutional Economics: A Comparative Analysis in Search of Co-operation Potentials*, *in* PUBLIC ECONOMICS AND PUBLIC CHOICE 19, 32 (Pio Baake & Rainald Borck eds., 2007) (comparing the Public Choice approach in political science to New Institutional Economics); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 *passim* (1979) (analyzing the role of transaction costs in New Institutional Economics theories).

The only constant is that continued experimentation with different rules is more advantageous than forming a consensus around static rules.[44] Learning through experimentation is probably most effective when jurisdictions experiment with different rules and then discover which ones work and which ones do not. Transacting parties affected by legal rules do the same. When underlying economic circumstances change, it is more likely that a jurisdiction will change its rules if there is jurisdictional competition than if all jurisdictions are bound to agree upon the same rule before they change it.

Finally, experimentation allows for jurisdictions to work with non-governmental organizations and other international institutions to build consensus—albeit a changing consensus—on the "soft law" that defines generally accepted standards for securities transactions.[45] For example, the International Organization of Securities Commissions (IOSCO) is an important standard setter for securities regulation in key areas such as disclosure regulation in cross border offerings of securities. In 2008, IOSCO issued a Multilateral Memorandum of Understanding setting forth a process that allows national securities regulators to obtain assistance from their counterparts in other countries with obtaining evidence, witnesses, and the proceeds of securities fraud.[46] The International Accounting Standards Board (IASB) is another critically important organization that has recently turned its attention to valuation of derivative securities and other financial assets in times of financial stress.[47]

Many of the agreements, memoranda of understanding, and procedures developed by these institutions may not be codified in statutes and regulations of any jurisdiction, but they will have a substantial impact on how the legal rules in different jurisdictions are actually implemented. Jurisdictions that experiment with legal rules, and different ways of enforcing those rules, will be able to integrate their legal rules with both the legal rules of other jurisdictions and the "soft law" of international institutions. Jurisdictions that seek unilaterally to define a single theoretically "correct" approach to a problem, and then codify that approach in rules that are difficult to change,

44. *See* Kirchner, Painter & Kaal, *supra* note 15, at 182.

45. *See generally* CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY (2012) (discussing the purpose, operation, and limitations of non-binding international financial rules).

46. *Id.* at 77–78.

47. *Id.* at 83.

will find it more difficult to integrate their rules with a global financial system that could be headed in a different direction.[48]

Despite its many advantages, jurisdictional competition has some detractors. Some commentators emphasize the "race to the bottom" phenomenon in which jurisdictions compete for private patronage of their legal systems by designing rules that bestow lopsided advantages on private actors able to choose the legal regime and impose that choice on other actors.[49] For example, corporate managers may take advantage of jurisdictional competition to impose a jurisdiction's pro-management corporate law on investors because those investors, for whatever reason, have no choice.[50] One alternative to jurisdictional competition is harmonization of the law in different jurisdictions through multilateral agreements or some other form of standardization. Another approach is coordination among jurisdictions that have different legal rules so there are some minimum standards for investor protection, employee protection, cross border enforcement of judgments or other objectives. Finally, jurisdictional competition in securities law, as in other areas of law, may be bifurcated between private litigation and government enforcement, with some jurisdictions seeking aggressively to apply their law extraterritorially to securities transactions in one of these spheres but not both.

A. THE HARMONIZATION ALTERNATIVE

The most often mentioned alternative to jurisdictional competition is harmonization of legal rules and adjudication systems across jurisdictions. The European Union, for example,

48. Arguably the United States has done this in implementing a securities regulation regime that adheres to rules based on Generally Accepted Accounting Principles (GAAP) instead of the International Accounting Standards (IAS) used in many other parts of the world, although U.S. securities regulation has recently moved to accommodate issuers using International Financial Reporting Standards. *See* Commission Statement in Support of Convergence and Global Accounting Standards, 75 Fed. Reg. 9494 (Mar. 2, 2010).

49. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666–68, 705 (1974); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 906, 948–50 (1998); Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, 14 YALE L. & POL'Y REV. 177, 178 (1996). *But see* RALPH K. WINTER, GOVERNMENT AND THE CORPORATION 7–11 (1978) (arguing that there is instead a "race to the top" as jurisdictions compete to design better corporate law).

50. O'HARA & RIBSTEIN, *supra* note 15, at 122, 129–30.

attempts to harmonize corporate and securities law as well as many other areas of the law. Efforts to harmonize the law of various jurisdictions are undertaken for a range of reasons, including the perceived threat of disparate rules in different jurisdictions. Harmonization can be accomplished through bilateral or multilateral agreements, but it can sometimes be imposed unilaterally. The Sarbanes-Oxley Act of 2002 was an attempt to harmonize some aspects of corporate governance law—for example, by imposing a requirement for independent directors and audit committees—inside the United States and even for non-U.S. issuers with publicly traded securities in the United States.[51] The Dodd-Frank Act of 2010 imposed additional corporate governance requirements on financial institutions that do business in the United States.[52]

There are several problems with harmonization. First, the "harmonious" rule may be the wrong rule for solving a particular problem, or the rule could become wrong later based on changing circumstances. Financial regulation, for example, is a quickly evolving area of law given the enormous changes in capital markets in the past several decades and the changes that are likely to take place in the future. A harmonious legal regime for financial regulation is likely to be the one that all jurisdictions agree upon, not necessarily the legal regime that is best for all, or even most, of the jurisdictions where it is implemented. Second, harmonization is difficult to accomplish politically unless there is a central authority that can preempt the law in a multitude of jurisdictions or, alternatively, a jurisdiction has so much economic clout that it can impose its rules on others. These political problems make harmonization difficult to take beyond national borders. Third, harmonization invites efforts to undermine harmony by "rogue" jurisdictions that seek to benefit by attracting to their legal systems private actors who do not agree with the harmonization. Even in organized communities of jurisdictions—such as the European Union—collective action problems make it very difficult to avoid "defection" by members of the community or other jurisdictions that seek to undermine harmonization. In sum, harmonization of legal regimes may not be desirable and, furthermore, may be a political and practical impossibility.

51. *Id.* at 30–31.

52. Painter, *Extraterritorial Jurisdiction*, *supra* note 11, at 199.

B. THE COORDINATION ALTERNATIVE

Coordination is a "compromise" approach whereby jurisdictions have different legal regimes, and to some extent compete to design better regimes, but also coordinate their approaches in one or more areas such as: (1) establishing an agreed upon ceiling or floor for how much or how little regulation there will be in a given area, (2) coordinating enforcement regimes so the consequences of breaking legal rules are similar across jurisdictions, (3) coordinating adjudication regimes so private parties have relatively similar remedies across jurisdictions, (4) providing for enforcement of judgments from other jurisdictions, (5) promoting cross-jurisdictional arbitration and enforcement of arbitration awards, and (6) harmonizing some areas of the law (for example, disclosure rules) while allowing jurisdictional competition in other areas (for example, substantive rules governing fiduciary obligations of business managers).[53]

Most coordination efforts are likely to experience the same political and other impediments that face harmonization efforts, although to a lesser degree when coordination focuses only on isolated issues and jurisdictions otherwise have autonomy in determining their own rules. Nonetheless, for policy makers worried that unrestrained jurisdictional competition can lead to a "race to the bottom" and impose externalities or unwanted costs on persons other than the parties to transactions, some form of coordination may be an attractive alternative. Some E.U. directives allow individual Member States enough flexibility to be characterized as coordination rather than harmonization, and this approach often emerges when efforts to harmonize laws across the European Union are unsuccessful.[54] For example, Germany and other Member States rejected the European Union's attempt in the early 2000s to impose the United Kingdom's "strict neutrality rule," barring directors from implementing defenses to hostile takeovers without shareholder consent, after harsh criticism by German industry and academic commentators who feared an uneven playing field favoring foreign bidders.[55] As a result, a revised E.U. takeover directive

53. Kirchner, Painter & Kaal, *supra* note 15, at 161–63.

54. *Id.*

55. *See generally* Christian Kirchner & Richard W. Painter, *European Takeover Law: Towards a European Modified Business Judgment Rule for Takeover Law*, 1 EUR. BUS. ORG. L. REV. 353 (2000) (criticizing the strict neutrality rule in Article 9(1)(a) of the proposed directive); Richard W. Painter, *Don't Disadvantage Europe: The European Parliament Made the Right Call in*

allowed Member States to opt out of the strict neutrality rule and permit board initiated takeover defenses.[56]

C. BIFURCATED JURISDICTIONAL COMPETITION IN SECURITIES LAW

Jurisdictional competition could follow a different trajectory in private litigation than it does in government enforcement actions. Private suits could be permitted in some jurisdictions but not in others, and among jurisdictions that allow private suits, some might be more willing to apply their law extraterritorially than others. Government enforcement could be more robust in some jurisdictions than in others, and some jurisdictions may be more aggressive than others in extending government enforcement beyond their borders.

Private litigation and government enforcement thus could respond differently to the same fundamental problem: the difficulty of confining effects of regulation to defined geographic boundaries. As Chris Brummer points out in his book *Soft Law and the Global Financial System*, "[h]ow geographic borders are defined for regulatory purposes is not always a straightforward matter" and "[b]y operating as a gateway to investors, consumers, and capital, territoriality can be leveraged in a way that can affect foreign firms (at a minimum those operating in the country) and, potentially, the conduct or approach by foreign regulators . . . ."[57] Defined geographic borders for securities transactions—the overarching assumption behind the *Morrison* decision—are an unstable basis for limiting the extraterritorial reach of both private litigation and government regulation. Courts adjudicating private lawsuits may deal with the problem one way, for example, by developing a jurisprudence that defines as best it can when a transaction is within certain boundaries or, alternatively, by honoring parties' choice of law. Government regulators, on the other hand, may focus on other criteria such as whether the conduct occurs within their borders or the effects of certain conduct within their borders; they may do so through coordination with other jurisdictions or uni-

Rejecting the Strict Neutrality Rule, WALL ST. J. EUR., July 19, 2001, at 9 (criticizing the proposed E.U. corporate takeover directive rejected by the E.U. Parliament).

56. *See* Directive 2004/25/EC, of the European Parliament and of the Council, 2004 O.J. (L142) art. 12 (setting forth "optional arrangements" allowing Member States not to require companies with registered offices within its territory to comply with the strict neutrality rule in Article 9).

57. BRUMMER, *supra* note 45, at 34–35.

laterally, provoking possible confrontation with regulators in other jurisdictions.

Bifurcated jurisdictional competition will characterize global securities litigation after *Morrison* because some jurisdictions recognize private rights of action whereas others do not, and some jurisdictions such as the United States have sought to extend government enforcement actions extraterritorially in situations where private lawsuits would not be permitted.[58]

The *Morrison* decision has not affected government enforcement of U.S. securities law as much as civil litigation. First, Section 929P of the Dodd-Frank Act reinstates for SEC suits and DOJ criminal prosecutions the conduct and effects tests[59] that prevailed before *Morrison*. Second, at least one court has held that "offers" of securities inside the United States are covered by Section 17(a) of the 1933 Securities Act, even if there is no transaction giving rise to other securities law claims, such as under Section 10(b) of the 1934 Act.[60] The SEC or DOJ under this theory can bring an action over the illegal "offer" even though the actual sale took place somewhere else.

Against this background, other countries may still compete with the United States to design better legal rules and enforcement regimes to attract securities transactions within their borders, but they must do so knowing that there still could be intervention by the SEC or DOJ. The extraterritorial reach of SEC or DOJ actions can be implicated if there is an "offer" in the United States or if the U.S. conduct component is sufficient to allow a suit under Section 929P. A U.S. enforcement overlay, for example, might occur if information is misap-

58. Bifurcated jurisdictional competition could be limited to government enforcement in countries, such as Germany, that emphasize public law enforcement over private rights of action.

59. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C.). There is some debate about whether Section 929P does, in fact, change the substantive reach of the securities laws in SEC and DOJ cases or whether its express language merely confers jurisdiction on federal courts to hear these cases. *See* Richard W. Painter et al., *When Courts and Congress Don't Say What They Mean: Initial Reactions to* Morrison v. National Australia Bank *and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 1–5, 14–25 (2011); Painter, *Extraterritorial Jurisdiction*, *supra* note 11, at 205–08.

60. *See* SEC v. Tourre, No. 10-Civ.-3229(BSJ)(MHD), 2011 WL 1458545 (S.D.N.Y. Apr. 8, 2011).

propriated in the United States for insider trading in a non-U.S. market.[61]

Civil litigation under U.S. securities laws, on the other hand, has been substantially changed because after *Morrison* plaintiffs must now satisfy Justice Scalia's "transactional test" and show that they bought or sold in a transaction within the borders of the United States in order to sue.[62] A person trading contemporaneously with an insider trader on a non-U.S. market would have no cause of action under U.S. law, even if Section 929P gave the SEC and the DOJ the power to pursue the perpetrator.

This bifurcated jurisdictional competition—with SEC and DOJ enforcement going in one direction and civil litigation in another—poses some unique challenges. Even if the parties to a transaction can choose to remove their transaction from the United States and, thereby, opt into the law of another jurisdiction, the possibility remains that the SEC or DOJ could follow them. A party to a disputed transaction outside the United States can even reintroduce U.S. law into the civil liability regime by threatening to involve the SEC or DOJ if the other party does not offer an attractive settlement. Uncertainty about the significance of such a threat can cast a long shadow over the civil liability regime.

Nonetheless, Section 929P does not restore private rights of action. The Dodd-Frank Act ordered an SEC study on this topic,[63] but the chances are slim that Congress will restore private rights of action under the conduct and effects tests. The most powerful weapon in plaintiffs' arsenal, the fraud-on-the-market theory in class actions, is thus thwarted in those instances where transactions are outside the United States. The fact that an SEC action is still possible may change the settlement value of a foreign lawsuit, but not as much as if there were also the potential for a private class action under the indeterminate Second Circuit case law that preceded *Morrison*.

One advantage of bifurcated jurisdictional competition is that the SEC and DOJ enforcement regimes can be a backstop

61. *See* Painter, *Extraterritorial Jurisdiction*, *supra* note 11, at 216–17.

62. *Morrison* ruled on Section 10b of the 1934 Act but the ruling probably extends to all private rights of action under the federal securities laws.

63. *See* Dodd-Frank Act § 929Y; SEC. & EXCH. COMM'N, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 (2012), *available at* http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.

against a race to the bottom in the civil liability arena. The argument for allowing choice of law freedom for transacting parties is more persuasive when bad choices by contracting parties—such as moving securities transactions offshore to regimes with little or no regulation—do not thwart enforcement action by government authorities. Proponents of the race to the bottom theory will have a less compelling argument against allowing contractual freedom than they would if the parties' choice of legal regime allowed them to opt out of SEC and DOJ enforcement as well as civil liability.

In sum, jurisdictional competition in securities regulation may be mixed with efforts to harmonize the law in different jurisdictions and, where harmonization is not possible or practical, efforts to coordinate the law of different jurisdictions. Private securities litigation may proceed along one trajectory while government enforcement proceeds along another. In some instances, jurisdictions will engage in Choice of Law Competition, allowing transacting parties to choose a legal regime for their transactions, and in other instances jurisdictions will engage in Forum Competition, allowing private plaintiffs access to their courts. Some jurisdictions may also engage in government-enforcement-oriented Forum Competition in which courts and other government agencies are used to facilitate enforcement initiatives reaching across geographic boundaries.

II. FORUM COMPETITION AFTER *MORRISON*

It is possible that other jurisdictions will follow the United States in accepting the basic premise of *Morrison* and then design rules and adjudication procedures that apply only to securities transactions within the geographic boundaries of the jurisdiction. Although, as explained above, it would be difficult to identify the location of some transactions, most transactions would be subject only to the law of one jurisdiction. Jurisdictions also might use coordination or some other strategy to agree upon rules for determining the "transaction location" of private sales of securities, security-based swaps, and other transactions that do not take place on organized exchanges.

In this type of jurisdictional competition, the focus would be on Choice of Law Competition as jurisdictions compete to design laws and procedures that make transacting parties want to locate transactions in their jurisdictions. Securities exchanges and other intermediaries would presumably play a significant role in designing legal regimes with this end in mind. The

"race to the top" versus "race to the bottom" debate is central to assessing the qualitative outcome of this type of jurisdictional competition.

Forum Competition, however, could evolve quite differently if one or more countries seek to do what the United States did before *Morrison*—and what Section 929P of the Dodd-Frank Act still allows the United States to do in SEC and DOJ actions—and superimpose their law on securities transactions outside their geographic borders. If plaintiffs' lawyers and other interest groups that benefit from securities litigation find a way to influence the relevant jurisdiction to apply securities law extraterritorially, such a "race to extraterritoriality" can be expected.[64] Even though the United States in *Morrison* unilaterally withdrew from this race to extraterritoriality in the civil litigation arena, this does not mean that other countries will also stand down.

Several factors may, over time, increase Forum Competition between the United States and Europe. One factor is the proliferation of "piggyback" suits. Piggyback suits are lawsuits that plaintiffs bring in one jurisdiction after unsuccessful suits—or suits in which plaintiffs have only limited success—in another jurisdiction.[65] European piggyback suits can be based on suits pending in U.S. courts that are dismissed under *Morrison* as well as upon suits that are allowed to proceed in the United States.[66] These piggyback suits may be encouraged by a judicial trend allowing the enforcement of U.S. class action settlements in the Netherlands.[67] There is some evidence that Dutch and other European courts could expand their extraterritorial reach beyond the enforcement of settlements to cover cases being litigated as class actions.[68] American piggyback suits could be lawsuits brought by the SEC and the DOJ under Section 929P(b) of the Dodd-Frank Act "for conduct occurring outside the United States that has a foreseeable substantial ef-

64. The plaintiffs' bar in the United States and its supporters in Congress sought to legislatively preempt the holding in *Morrison* with legislation drafted before *Morrison* was decided, but Congress adopted a compromise position in Section 929Y of the Dodd-Frank Act simply mandating an SEC study of whether an extraterritorial private right of action should be created. For discussion of the Dodd-Frank provisions, see Painter, *Extraterritorial Jurisdiction*, *supra* note 11, at 199.

65. *See infra* Part II.B.2.a–b (describing the *Fortis* and *Converium* cases).

66. *See infra* Part II.B.2.a–b (describing the *Fortis* and *Converium* cases).

67. *See infra* text accompanying notes 182–84 & 204–10.

68. *See infra* Part II.B.3 (describing the *World Online* case).

fect in the United States."[69] In these situations, the SEC or DOJ would "piggyback" on civil litigation or enforcement efforts in Europe or elsewhere outside the United States.

An important factor in Forum Competition is the existence of procedural rules that increase or decrease the size of the class in a class action or other collective procedure. Plaintiffs' lawyers often prefer larger classes because they result in larger settlements; defendants' lawyers sometimes seek to limit the size of the plaintiff classes, although they may prefer larger classes in settlements. Most of the collective procedures for class actions in Europe allow for an opt-in procedure but prohibit or curtail procedures that require plaintiffs to opt-out of a suit.[70] Without an opt-out mechanism, European class sizes will likely be substantially smaller than their U.S. counterparts. This could impact settlement amounts and damages awards.[71] The smaller class size of European collective procedures for securities actions could limit the number and impact of European suits.

The Netherlands has adopted both opt-in and opt-out mechanisms. The Dutch Act on the Collective Settlement of Mass Claims (WCAM)[72] allows the parties to a settlement agreement to request the Amsterdam Court of Appeal to declare the settlement agreement binding on all persons involved in the action.[73] Compared to other European collective procedures, the WCAM comes closest to U.S. class actions in providing an opt-out mechanism with regard to settlements.[74] By con-

69. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1865 (2010) (codified as amended in scattered sections of 15 U.S.C.).

70. *See* sources cited *infra* note 224.

71. Another factor is that punitive damages are rarely awarded in Europe.

72. Wet Collectieve Afwikkeling Massaschade [WCAM] [Collective Settlement of Mass Claims], Stb. 2005, p. 340 (Neth.), *available at* http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzzc/vh22drdk4jr7/f=y.pdf; *Legal Alert* Converium, *supra* note 34.

73. *See infra* Part II.B.1.

74. Eberhard Feess & Axel Halfmeier, The German Capital Markets Model Case Act (KapMuG)—A European Role Model for Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reform 14 (January 2012), (unpublished manuscript), *available at* http://ssrn.com/abstract=1684528 ("Thereby, a two step notification process is adopted where the first notification refers to class members already known, and the second one to unknown class members by means of public communications. After the settlement is approved, the court determines a period of at least 3 months for persons who want to opt out because they prefer to proceed with individual claims.").

trast, the German Act on Model Procedures for Mass Claims in Capital Markets Cases (KapMuG)[75] does not provide an opt-out mechanism.[76] Sweden's Group Proceedings Act (GPA)[77] also prohibits an opt-out procedure; each member of a class must individually opt into the class. In 2008, however, Denmark introduced an opt-out option for group actions involving small individual claims.[78]

Yet another issue is how the United States and Europe will address situations where the geographic location of a transaction is ambiguous. These include securities that are listed on securities exchanges in two or more jurisdictions (dual-listed securities),[79] securities-based swap agreements entered into by parties in one jurisdiction that reference a security traded in another jurisdiction,[80] and private transactions that are de-

75. Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Market Investors' Model Proceeding Act], Aug. 16, 2005, BUNDESGESETZBLATT, Teil I [BGBL. I] at 2437 (Ger.), *available at* http://www.gesetze-im-internet.de/bundesrecht/kapmug/gesamt.pdf.

76. It is unclear if reform efforts will result in an increasing or broader application of the KapMuG. *See* Entwurf eines Gesetzes zur Reform des Kapitalanleger-Musterverfahrensgesetzes, DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 17/8799 (Ger.), *available at* http://dipbt.bundestag.de/dip21/btd/17/087/1708799.pdf; Referentenentwurf des Bundesministeriums der Justiz: Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetzes, July 21, 2011 (Ger.), *available at* http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RefE_KapMuG.pdf?__blob=publicationFile; Stellungnahme des Verbraucherzentrale Bundesverbandes zum Gesetzesentwurf der Bundesregierung für ein Gesetz zur Reform des Kapitalanleger-Musterverfahrensgesetzes, Apr. 20, 2012 (Ger.), *available at* http://www.bundestag.de/bundestag/ausschuesse17/a06/anhoerungen/archiv/20_KapMug/04_Stellungnahmen/Stellungnahme_Westphal.pdf; AXEL HALFMEIER ET AL., ABSCHLUSSBERICHT: EVALUATION DES KAPITALANLEGER-MUSTERVERFAHRENSGESETZES (Oct. 14, 2009), *available at* http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Abschlussbericht_KapMuG_Frankfurt%20School_2009.pdf?__blob=publicationFile; Press Release, Deutscher Bundestag, Experten uneinig über Zukunft von KapMuG und Musterverfahren, (Apr. 25, 2012), http://www.bundestag.de/presse/hib/2012_04/2012_209/02.html.

77. LAG OM GRUPPRÄTTEGÅNG (Svensk författningssamling [SFS] 2002:599) [Group Proceedings Act] (Swed.), *available at* http://www.sweden.gov.se/content/1/c6/02/77/67/bcbe1f4f.pdf.

78. Feess & Halfmeier, *supra* note 74, at 16.

79. *See, e.g.*, *In re* Vivendi Universal Sec. Litig., 765 F. Supp. 2d 512, 528–31 (S.D.N.Y. 2011) (holding that Section 10(b) does not apply to dual-listed securities where the purchase and sale did not arise from the domestic listing).

80. *See, e.g.*, Elliott Assocs. v. Porsche Auto. Holding SE, 759 F. Supp. 2d 469, 475–76 (S.D.N.Y. 2010) (holding that Section 10(b) does not apply to secu-

signed and marketed from one jurisdiction but executed in another jurisdiction.[81] In cases involving these situations plaintiffs and defendants will sometimes have sharp differences over the geographic location of transactions. It is not at all certain that U.S. courts will predictably apply the geographic test in *Morrison* to these types of transactions.[82] Furthermore, non-U.S. courts may apply a geographic test differently than the U.S. case law. Non-U.S. courts could also respond to ambiguous geography by rejecting geographic tests and resorting to a variation of the conduct and effects tests, or a similar "balancing" formula. It is possible that both U.S. courts and courts of one or more foreign countries could consider a transaction as taking place within their individual borders. Alternatively, defendants might successfully persuade courts in all jurisdictions that a transaction took place outside their borders or for some other reason outside their jurisdictions. Such a "no man's land" transaction would be governed by no law and there would be no forum.

Finally, non-U.S. jurisdictions could choose to split off government enforcement from civil litigation as the United States did in Section 929P of the Dodd-Frank Act.[83] Bifurcated jurisdictional competition thus could lead some jurisdictions to exercise enforcement powers over a transaction that is subject to civil litigation in only one, or perhaps none, of these jurisdictions. Misappropriation of confidential information in the United States for trading in German securities markets, for example, might give rise to a Section 929P(a) SEC enforcement action or DOJ insider trading prosecution. At the same time, such conduct could be subject to civil litigation or an insider trading prosecution in Germany. If the misappropriated information originated in Italy, for example, Italian enforcement au-

rities-based swap agreements executed in the United States that reference foreign-traded securities).

81. *See, e.g.*, SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 150–51 (S.D.N.Y. 2011) (holding that Section 10(b) does not apply to securities marketed in the United States but sold in another country).

82. *See* Wulf A. Kaal & Richard W. Painter, *The Aftermath of* Morrison v. National Australia Bank *and* Elliott Associates v. Porsche, 1 EUR. COMPANY & FIN. L. REV. 77, 80–92 (2011) (discussing open questions and ambiguities related to *Morrison*'s geography test).

83. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C.) (allowing SEC civil enforcement against some violations of federal securities law in some transactions outside the United States).

thorities could become involved as well. A difficult situation could arise if the underlying facts constituted illegal insider trading under U.S. law but did not violate the insider trading laws of Italy or Germany. In that situation, the fact that the information—but not the securities—passed through the United States might be sufficient to support a U.S. criminal prosecution for securities fraud. Civil suits and government enforcement would, however, be unlikely to occur in Italy and Germany because the conduct was not illegal in those countries.

Extraterritorial enforcement, however, is a game that several countries can play. One or more jurisdictions might enforce their own laws against transactions in U.S. securities markets that are legal under U.S. law but illegal under the laws of another jurisdiction (some forms of short selling might be an example). Criminal prosecution for the U.S. transactions could ensue if the jurisdiction where the conduct is illegal has an extraterritorial enforcement provision similar to Section 929P of the Dodd-Frank Act.[84] Foreign governments could thus regulate activity in U.S. markets, forcing some participants in those markets to play by their rules. Other non-U.S. jurisdictions might go even further and allow civil suits based on conduct in U.S. markets.

This paper speculates about a few of the many possible evolutionary paths for global securities law after *Morrison*. Although a few patterns are emerging, particularly in the Netherlands, it remains to be seen how European law will respond to the prospect of increased jurisdictional competition after *Morrison*, and whether the law of one or more European countries will consistently reach transactions elsewhere. Other regions besides Europe are outside the scope of this article, although we briefly discuss developments in Canada because some securities litigation may move from the United States to Canada after *Morrison*.[85] These and other jurisdictions may join

84. *See id.* § 929P(b) (providing jurisdiction for extraterritorial violations of the antifraud provisions of federal securities laws where conduct within the United States significantly furthered the violation or where extraterritorial conduct had a substantial effect within the United States).

85. There is some evidence that Canada may continue to increase its attractiveness for U.S. class action litigants. For example, *Vivendi* plaintiffs' lawyer Michael Spencer, who practices in New York, has joined the Canadian bar. According to Mr. Spencer, "[s]imply put, Canada presents a great opportunity." Sandra Rubin, *Top U.S. Class-Action Lawyer Coming to Canada*, GLOBE & MAIL (May 10, 2011), http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/top-us-class-action-lawyer-coming-to-canada/article580187; *see* Tanya Monestier, *Is Canada the New "Shangri-La"*

in the jurisdictional competition, seeking to attract either securities transactions or securities litigation or both within their borders. It also remains to be seen how far the SEC and DOJ will go with Section 929P, and whether other jurisdictions will adopt a similar approach to extraterritorial enforcement.

A. THE PROLIFERATION OF EUROPEAN COLLECTIVE PROCEDURES

Jurisdictions involved in Forum Competition attract one or both of the parties to a transaction to choose that jurisdiction as a forum for litigation. The United States engaged in some Forum Competition for global securities litigation under the conduct and effects tests, but the *Morrison* decision considerably narrowed the ability of the United States to provide a litigation forum for parties to non-U.S. transactions. There are some indications that one or more European jurisdictions—particularly the Netherlands—may provide some aspects of the type of global securities forum that the *Morrison* court decided would no longer be available in the United States.

Forum Competition in private litigation depends in part upon procedural features that lawyers find attractive. Pro-plaintiff substantive law is also an important factor. One feature of the U.S. legal system that attracts lawyers is that litigants pay their own lawyers' fees, whereas European cases, including collective procedures on behalf of multiple plaintiffs, are usually governed by a "loser-pays" rule in which unsuccessful plaintiffs are responsible for successful defendants' legal fees. Another distinguishing procedural feature that makes the United States attractive is the relative ease of class certification in class actions. The United States also allows certification of "opt-out" classes in which individual class members must affirmatively opt-out of the class in order not to be bound by a

of Global Securities Class Actions?, 32 NW. J. INT'L L. & BUS. (forthcoming 2012) (manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1929090; *see also* Pritchard & Sarra, *supra* note 25, at 892; Michael D. Goldhaber, *Global Class Actions After* Morrison v. National Australia Bank, AM. LAW (Feb. 6, 2012), http://americanlawyer.com/PubArticleTAL.jsp?id=1202541502514 ("The two leading candidates [for filing global class actions] are Canada and [t]he Netherlands."); Kevin LaCroix, *Canadian Securities Class Action Lawsuit Filings Hit Record in 2011*, D & O DIARY (Feb. 2, 2012), http://www.dandodiary.com/2012/02/articles/securities-litigation/Canadian-securities-class-action-lawsuit-filings-hit-record-in-2011. *But see* Knutsen, *supra* note 25, at 153–55 (arguing that Ontario's new securities legislation makes it more difficult for plaintiffs to bring successful securities class actions).

judgment or settlement of the action. European collective procedures approximate U.S. class actions in some ways but, as discussed below, in other ways they fall short.

With respect to substantive law, one of the most attractive features of U.S. securities litigation is the fraud-on-the-market theory. This theory allows plaintiffs to show that they relied on a market that was misled by defendants' misrepresentations instead of showing individual reliance by each plaintiff on the defendants' misrepresentations.[86] The alternative approach, adhered to in most other jurisdictions including in Europe, is to require each plaintiff to show individual reliance on the defendants' misrepresentations. This difference in substantive law has an impact on procedural issues because class action litigation and collective procedures are easier if plaintiffs in the class share common questions of law and fact. Common issues are more predominant if the plaintiffs can succeed by showing that they all relied upon the same market rather than individual reliance on the defendants' misrepresentations.[87]

Class action filings in the United States remain robust, despite efforts by both Congress and the federal courts to tighten the requirements for plaintiffs.[88] In recent years, some European jurisdictions have adjusted their laws, allowing for a type of collective procedure that is similar to a U.S. securities class ac-

86. *See* Basic Inc. v. Levinson, 485 U.S. 224, 250 (1988).

87. *See id.* at 242, 245 ("Requiring proof of individualized reliance . . . would have prevented . . . a class action, since individual issues then would have overwhelmed the common ones.").

88. *See Securities Class Action Filings: 2011 Year in Review*, CORNERSTONE RESEARCH, 3–5 (2012), http://securities.stanford.edu/clearinghouse_research/2011_YIR/Cornerstone_Research_Filings_2011_YIR.pdf. There are varying explanations for the number of suits in the United States, including the large number of financial frauds in the first decade of the twenty-first century, the significant investor losses in financial markets, and the fact that despite anti-plaintiff legislation and case law, the United States is still more favorable to plaintiffs, and their lawyers, than many other jurisdictions. Anti-plaintiff legislation in the United States includes the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), and anti-plaintiff case law includes a series of cases rejecting Section 10(b) liability for aiding and abetting securities fraud and for conspiring to commit securities fraud. *See* Stoneridge Inv. Partners v. Scientific-Atlanta, 552 U.S. 148, 160–61 (2008) (holding that conduct in furtherance of a "scheme" of misrepresentation is not a basis for Section 10(b) liability if the misrepresentation was not disclosed to the public); Cent. Bank of Denver v. First Interstate Bank, 511 U.S. 164, 177 (1994) (rejecting aiding and abetting as a basis for Section 10(b) liability).

tion.[89] Following these developments, in 2007 the London-based law firm Lovells LLP (now Hogan Lovells due to a 2010 merger) created a practice group focused on class actions in Europe.[90] However, only some European countries, including the United Kingdom, Poland, Sweden, Denmark, Norway, the Netherlands, and Germany, have instituted a mass-claim procedure.[91]

Most importantly, with the notable exception of the Netherlands,[92] European jurisdictions thus far have not been receptive to the fraud-on-the-market theory in securities litigation, meaning that—unlike in the United States—each plaintiff in a suit usually must show individual reliance on defendants' alleged misrepresentations, a requirement that would make cer-

89. *See infra* notes 94–108 and accompanying text (discussing European collective procedures).

90. *See* Werner R. Kranenburg, *Lovells Dispute Lawyers Focus on Class Actions*, WITH VIGOUR & ZEAL: A EUROPEAN'S VIEWS ON SEC. LITIG. (Sept. 26, 2007, 2:29 AM), http://kranenburgesq.com/blog/2007/09/lovells-dispute-lawyers-focus-on-class-actions ("The formation of the Class Actions Unit comes at a time when a number of continental European jurisdictions have implemented or are considering legislation to introduce new group litigation procedures."); *see also Examples of U.S. Legal Community Interest in Europe,* INST. FOR LEGAL REFORM, U.S. CHAMBER OF COMMERCE, http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/international/examplesofuslegalcommunityinterestineuroperev.pdf ("Several of the most aggressive U.S. class action law firms are setting up offices in Europe, taking advantage of proposed class action laws at the EU and member state levels."); Aviva Freudmann, *United We Stand*, CORP. SEC'Y: GOVERNANCE, RISK & COMPLIANCE (May 1, 2007), http://www.corporatesecretary.com/articles/case-studies/11756/united-we-stand ("To capitalize on the changes in European legislation governing class action lawsuits and litigation funding, several US law firms have set up European offices or established partnerships with European firms. In some cases, the firms are seeking European plaintiffs to join existing US class actions, particularly in securities cases."); Alexia Garamfalvi, *U.S. Firms Prepare for European Class Actions: As Europe Becomes More Friendly to Private Suits, U.S. Law Firms Look to Capitalize on Emerging Market*, LAW.COM (June 25, 2007), http://www.law.com/jsp/article.jsp?id=900005555895 (describing a law firm's expectation that the class action market will significantly expand in Europe based on legal changes in several European countries, and due to the European Commission's interest in private enforcement of competition law); Brendan Malkin, *UK Firms Gear Up as Class Action Culture Hits Europe*, THE LAWYER (Feb. 7, 2005), http://www.thelawyer.com/uk-firms-gear-up-as-class-action-culture-hits-europe/113914.article (discussing an American law firm's plans to launch securities class actions in Germany, Italy, and Poland after rule changes are passed).

91. Feess & Halfmeier, *supra* note 74, at 13–14.

92. *See infra* Part III.B (discussing the promise of securities class actions in the Netherlands).

tification of a class or a similar procedure difficult.[93] If, however, European jurisdictions dispense with the reliance requirement or develop some other mechanism for circumventing its debilitating effect on class actions, European class actions could begin to look much more like their U.S. counterparts.

There are some signs that European law could be moving in this direction, although thus far there is no genuine European substitute for the U.S. securities class action under the fraud-on-the-market theory. In 2005, the German legislature introduced a collective procedure for securities actions, the German Capital Markets Model Case Act (KapMuG).[94] In the Netherlands, the Dutch Act on the Collective Settlement of Mass Claims (WCAM) was enacted on July 27, 2005.[95] Sweden, in 2002, adopted the Group Proceedings Act (GPA).[96] Other Scandinavian countries, such as Norway and Denmark, followed the Swedish model with some alterations.[97] Similarly, the Italian legislature in 2009 introduced a proposal for a collective procedure in securities actions.[98] The introduction of European collective procedures, in conjunction with institutional investors' growing interest in such collective actions in Europe-

93. *See* Basic Inc. v. Levinson, 485 U.S. 224, 245 ("Requiring [individual reliance] . . . would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff.").

94. KapMuG, Aug. 16, 2005, BUNDESGESETZBLATT, Teil I [BGBL. I] at 2437 (Ger.), *available at* http://www.gesetze-im-internet.de/bundesrecht/kapmug/gesamt.pdf. The KapMuG is applicable in proceedings before a court of the first instance in which claimants assert: (1) claims for compensation of damages due to false, misleading or omitted public capital markets information, or (2) claims for specific performance of a contract based on an offer under the Securities Acquisition and Takeover Act. *See id.* at 2437, § 1(1).

95. WCAM, Stb. 2005, p. 340 (Neth.), *available at* http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzzc/vh22drdk4jr7/f=y.pdf.

96. LAG OM GRUPPRÄTTEGÅNG (Svensk författningssamling [SFS] 2002:599) [Group Proceedings Act] (Swed.), *available at* http://www.sweden.gov.se/content/1/c6/02/77/67/bcbe1f4f.pdf.

97. LOV OM MEKLING OG RETTERGANG I SIVILE TVISTER [Act Relating to Mediation and Procedure in Civil Disputes], June 17, 2005, no. 90 (Nor.), *available at* http://www.lovdata.no/all/hl-20050617-090.html; LOV OM ÆNDRING AF RETSPLEJELOVEN OG FORSKELLIGE ANDRE LOVE (Gruppesøgsmål m.v.), Feb. 28, 2007, no. 181 (Den.), *available at* https://www.retsinformation.dk/forms/r0710.aspx?id=2593.

98. Legge 23 Luglio 2009, n. 99, art. 49 (It.), *available at* http://www.parlamento.it/parlam/leggi/09099l.htm. The final draft went into effect in January 2010. *See also* Cesare Cavallini, *Azione collettiva risarcitoria e controversie finanziarie*, 2010 RIVISTA DELLE SOCIETÀ 1, 6.

an states, and an increasing availability of litigation funding,[99] could, over time, make it more likely that collective procedures in Europe become an attractive alternative for plaintiffs' lawyers. Some of the cases they bring might involve non-European plaintiffs and defendants, as well as securities transactions taking place outside of Europe (the types of cases that in the United States prior to *Morrison* were referred to as "foreign cubed cases," meaning that neither of the parties, nor the securities transaction, was within the United States).

European collective procedures for securities actions could give institutional investors a greater opportunity to participate in securities litigation if they are so inclined, or feel compelled to participate in order to comply with their fiduciary duties. For instance, under the German KapMuG,[100] plaintiffs and defendants in Germany can file an application with the trial court to establish a model case proceeding.[101] Its purpose is to establish the existence and validity of a claim and clarify the legal questions pertaining thereto.[102] The opt-in procedure under the KapMuG provides that the higher regional court will open a model case proceeding and select a lead plaintiff if, within four months, at least ten applications for a model case proceeding are filed in similar cases against the same defendant.[103] Procedurally, the higher regional court is charged with the responsibility of finding one case among the ten applications that appropriately illustrates the factual and legal questions at issue and must then hand down a judgment on the legal issues.[104] Rather than deciding all of the cases involving the same defendant, at that point, procedurally, the high court's decision becomes binding law for the trial courts in similar cases, and the trial courts must apply the new rule to the remaining pend-

99. *See* Werner R. Kranenburg, *What's More: KapMuG, Lovells' Class Actions*, WITH VIGOUR & ZEAL: A EUROPEAN'S VIEWS ON SEC. LITIG. (Oct. 11, 2007, 11:52 PM), http://kranenburgesq.com/blog/2007/10/whats-more-kapmug-lovells-class-actions.

100. KapMuG, Aug. 16, 2005, BUNDESGESETZBLATT, Teil I [BGBL I] at 2437 (Ger.), *available at* http://www.gesetze-im-internet.de/bundesrecht/kapmug/gesamt.pdf.

101. BURKHARD HESS ET AL., KÖLNER KOMMENTAR ZUM KAPMUG (Mathias Casper et al., eds., 2008).

102. *Id.*

103. Mark C. Milgard & Jan Kraayvanger, *Class Actions and Mass Actions in Germany*, LITIG. COMM. NEWSL. (Int'l Bar Ass'n Legal Practice Div., London), Sept. 2007, at 40, *available at* http://www.mayerbrown.com/public_docs/Class_Actions_Mass_Actions_Germany.pdf.

104. *See id.*

ing cases in the same matter individually. The KapMuG, however, does not discharge the trial judges from addressing the legal issues in each and every case individually. Despite an administratively burdensome process, the KapMuG does have some advantages. For instance, the statute of limitation does not start running for claimants in the same matter who have not yet opted into the class. While the test case is litigated, the other proceedings in the same matter against the same defendant are stayed. The KapMuG's features seem to have encouraged several institutional investors, including non-German institutional investors, to file cases against Daimler AG,[105] the first case brought under the KapMuG.

Sweden's GPA allows natural or legal persons to initiate collective proceedings. Like the Dutch WCAM and the German KapMuG, the GPA requires group members to share similar interests pertaining to the action as the lead plaintiff.[106] The GPA includes an opt-in procedure and the ruling is only legally binding for members of the class who did in fact opt-in and the lead plaintiff alone is party to the court proceeding.[107] Similar to contingent-fee arrangements in the United States, the GPA introduces risk agreements that allow attorneys to charge fees conditional on their success in the suit. The reluctance of Swedish attorneys to work within such an arrangement could perhaps be one reason for the lack of group actions in Sweden.[108]

So far, the German KapMuG seems to be the only coherent attempt at establishing a procedure to address collective-securities claims. Another jurisdiction that may develop law to facilitate collective procedures is the Netherlands.

105. *See* Oberlandesgericht Stuttgart [OLG] [Stuttgart Higher Regional Court] Feb. 2, 2007, 901 Kap 1/06 (Ger.), *available at* http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&Art=en&GerichtAuswahl=OLG+Stuttgart&az=901; Press Release, Oberlandesgerichts Stuttgart, Kapitalanleger-Musterverfahren gegen DaimlerChrysler AG vor dem Oberlandesgericht Stuttgart (July 13, 2006), http://www.olg-stuttgart.de/servlet/PB/menu/1200878/index.html; Press Release, Oberlandesgerichts Stuttgart, Oberlandesgericht Stuttgart Entscheidet im Kapitalanlegermuster verfahren zu Gunsten der Daimler AG (Apr. 22, 2009), http://www.olg-stuttgart.de/servlet/PB/menu/1241538/indx.html.

106. *See* Feess & Halfmeier, *supra* note 74, at 15.

107. *See id.* This minimizes transaction costs in accordance with the U.S. model. The KapMuG does not allow lead plaintiffs per se. KapMuG, Aug. 16, 2005, BUNDESGESETZBLATT, Teil I [BGBL I] at 2437 (Ger.), *available at* http://www.gesetze-im-internet.de/bundesrecht/kapmug/gesamt.pdf.

108. *See* Feess & Halfmeier, *supra* note 74, at 16 ("Swedish attorneys are traditionally very reluctant to work on a contingency fee basis.").

B. THE NETHERLANDS AS A FORUM FOR MULTI-NATIONAL SECURITIES CLASS ACTIONS

To compete with the United States in the aftermath of the *Morrison* decision, procedural and substantive rules in the Netherlands no longer need to be as attractive to non-U.S. transaction plaintiffs as when these plaintiffs had the option of suing in the United States (under *Morrison*, plaintiffs suing over securities transactions outside the United States can no longer sue under Section 10(b),[109] and for other reasons plaintiffs may not be successful suing under state law or under non-U.S. law in U.S. courts). To attract plaintiffs in non-U.S. transactions, the Netherlands only has to compete with other jurisdictions that will entertain the same suits. If the Netherlands also seeks to attract parties to U.S. transactions as plaintiffs, the Netherlands will have to provide some litigation features that are comparable to what is available in the United States.

The Dutch Act on the Collective Settlement of Mass Claims (WCAM),[110] discussed below, as well as the *Fortis* and *Converium* cases, also discussed below, illustrate how influential the Dutch securities litigation regime could become.

1. The Dutch Act on the Collective Settlement of Mass Claims

As discussed above, one or more jurisdictions could offer Forum Competition separate from the operative law which could be that of a different jurisdiction.[111] One context in which a jurisdiction's courts could apply another jurisdiction's law to securities transactions could be settlement agreements that are brought to a jurisdiction's courts for approval and enforcement.

The Netherlands is probably Europe's most successful venue for enforcing foreign settlements. Other European countries are hesitant to allow a collective settlement in a mass litigation case to be binding on all class members.[112] Dutch courts regu-

109. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881–83 (2010).

110. WCAM, Stb. 2005, p. 340 (Neth.), *available at* http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzzc/vh22drdk4jr7/f=y.pdf; *see* Burgerlijk Wetboek [BW] (Civil Code) art. 3:305a (Neth.), *translated in Dutch Civil Code*, BRECHT, http://www.dutchcivillaw.com/civilcodegeneral.htm (permitting a collective cause of action to "protect similar interests of other persons"); *id.* art. 7:907 (listing requirements and limitations of damages awards in collective action suits).

111. *See supra* note 15.

112. *See, e.g.*, HÉLÈNE VAN LITH, THE DUTCH COLLECTIVE SETTLEMENTS ACT AND PRIVATE INTERNATIONAL LAW 127–28 (2011), *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/saw_

larly apply foreign law on the basis of the Rome I Regulations[113] and other international regulations.[114] A decision by a Dutch court in this context is generally recognized in other European member states.[115] The recognition and enforcement of class action settlements in the Netherlands could foreshadow future developments in other areas of the law.[116]

An important reason for the Dutch success in this area is the Dutch WCAM.[117] The class-settlement procedures provided by the WCAM strongly resemble class action settlements in the United States.[118] Similar to U.S.-style class actions, interested parties, i.e., parties to the settlement, do not have to opt-in in order to become a party to the settlement but they may opt-out

annex_en.pdf (discussing Germany's reluctance to recognize opt-out class action decisions); *see generally* Ruud Hermans & Jan de Bie Leuveling Tjeenk, *International Class Action Settlements in the Netherlands Since* Converium, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CLASS AND GROUP ACTIONS 2012, *available at* http://www.debrauw.com/sitecollectiondocuments/CA12_de-brauw_ver3%202011.pdf (discussing class action settlements in the Netherlands and issues of enforceability in other European countries).

113. Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0006:en:PDF; *see also* Convention on the Law Applicable to Contractual Obligations (Rome Convention), 1980 O.J. (L 266) 1 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1980:266:0001:0010:EN:PDF.

114. Rob Polak & Ruud Hermans, *International Class Action Settlements in the Netherlands After the* Morrison *and* Ahold *Decisions*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CLASS AND GROUP ACTIONS 2011, at 9.

115. *See* Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I), 2001 O.J. (L 12) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF; VAN LITH, *supra* note 112, at 127–28; Tomas Arons & Willem H. van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands*, 21 EUR. BUS. L. REV. 857, 876, 880–82; Hermans & de Bie Leuveling Tjeenk, *supra* note 112, ¶¶ 36–37; *Legal Alert* Converium, *supra* note 34.

116. Arons & van Boom, *supra* note 115, at 857, 875; Polak & Hermans, *supra* note 114, at 6; Michael Goldhaber, '*Shell Model*' *Opens Door to European Class Actions*, LAW.COM (Jan. 7, 2008), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1199700328427 ("[T]he Netherlands [is] becoming a mecca for European class action settlements, in the way that Delaware has become a destination for bankruptcy law.").

117. WCAM, Stb. 2005, p. 340 (Neth.), *available at* http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzzc/vh22drdk4jr7/f=y.pdf.

118. *See* Brechje van der Velden, *Shell Non-U.S. Settlement Declared Binding by Dutch Court*, ALLEN & OVERY (Dec. 16, 2009), http://www.allenovery.com/publications/en-gb/Pages/Shell-non-U-S--settlement-declared-binding-by-Dutch-court.aspx.

of the settlement.[119] Unlike U.S. class action procedures, the WCAM does not provide a legal basis for bringing or maintaining class actions seeking monetary damages.[120] It merely provides procedures to settle claims between the defendants and a foundation representing the interests of the injured party.[121] The WCAM gives the Amsterdam Court of Appeal exclusive jurisdiction to certify settlements in WCAM cases.[122] The court's decision pertaining to a settlement is binding for the plaintiffs, and plaintiffs can only appeal the court's decision in limited circumstances.[123] The WCAM does not provide specific guidance on the distribution of proceeds or the calculation of damages.[124] However, an integral part of the settlement considerations is an evaluation of procedural and substantive fairness and the efficiency of the settlement.[125] The WCAM, thus, avoids blackmail settlements in which a defendant offers a payment to get out of a class action to avoid the prospect of endless proceedings and reputational loss in the process.[126] Given the procedural tools provided by the WCAM, the Act is an effective tool that multinational corporations can use to obtain global solutions for disputes involving multinational parties throughout the world.

2. Increasing Relevance of Dutch Courts

Since the introduction of the WCAM in 2005, settlements under the WCAM have ranged from capital markets and finan-

119. Willem H. van Boom, *Collective Settlement of Mass Claims in The Netherlands*, *in* AUF DEM WEG ZU EINER EUROPÄISCHEN SAMMELKLAGE? 178–79 (Matthias Casper et al., eds., 2009), *available at* http://ssrn.com/abstract=1456819.

120. Arjan de Boode & Allard Huizing, *The Netherlands as an Alternative Forum for Cross Border Class Settlements and the Potential Consequences for Claims by 'Foreign Cubed' Plaintiffs Under U.S. Securities Laws*, GREENBERGTRAURIG (Jan. 14, 2010), http://www.gtlaw.com/News-Events/Publications/Alerts/132898/The-Netherlands-as-an-Alternative-Forum-for-Cross-Border-Class-Settlements-and-the-Potential-Consequences-for-Claims-by-Foreign-Cubed-Plaintiffs-under-US-Securities-Laws.

121. van Boom, *supra* note 119, at 178–79.

122. WCAM, Stb. 2005, p. 304, *available at* http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzzc/vh22drdk4jr7/f=y.pdf; Wetboek van Burgerlijke Rechtsvordering [Rv] (CODE OF CIVIL PROCEDURE) art. 1013(3) (Neth.), *translated in Code of Civil Procedure*, BRECHT, http://www.dutchcivillaw.com/civilprocedureleg.htm.

123. van Boom, *supra* note 119, at 179.

124. *See* de Boode & Huizing, *supra* note 120.

125. *Id.*

126. *See id.*

cial services cases to pharmaceutical liability suits.[127] Cases in this context have involved personal injury,[128] failure to warn about risks of retail investment products,[129] bankruptcy of a life insurance company,[130] and securities fraud.[131]

Shell was the first in a line of cases involving the enforcement of international settlements in the Netherlands.[132] *Shell* was the first WCAM case with a substantial international scope.[133] As a result of mass claims initiated in the United States, Shell entered into settlements regarding the recategorization and restatement of its oil and gas reserves.[134] The *Shell* settlement is noteworthy because investors from all over the world were involved.[135] The fourteen securities class actions filed by investors in the United States were consolidated.[136] However, the U.S. court also had to rule on claims brought by plaintiffs who were not American residents and had bought Shell stock on European stock exchanges.[137] Before the American court issued a final ruling in which the court declared its incompetence to hear the claims, Shell reached a settlement with the non-U.S. investors under the WCAM.[138] The Amsterdam Court of Appeal, in a landmark decision on May 29,

127. *See* Ianika Tzankova & Daan L. Scheurleer, *The Netherlands*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 155 (2009).

128. *See* Hof's-Amsterdam 1 juni 2006, NJ 2006, 461 (Farmaceutische bedrijven en verzekeraars enerzijds/Stichting DES Centrum) (Neth.).

129. *See* Hof's-Amsterdam 25 januari 2007, JOR 2007, 71 (Stichting Leaseverlies/Dexia) (Neth.).

130. *See* Hof's-Amsterdam 29 april 2009, JOR 2009, 196 (Stichting Pensioen-en Verzekeringskamer en Staat/Vie d'Or) (Neth.).

131. *See* Hof's-Amsterdam 15 juli 2009, JOR 2009, 325 (VEB/Vedior) (Neth.) (pertaining to shareholder allegations of securities fraud related to merger and acquisition); Converium COA Decision, *supra* note 32 (addressing shareholder allegations of securities fraud related to failure to accurately disclose loss reserves).

132. Hof's-Amsterdam 29 mei 2009, JOR 2009, 197 (VEB/Shell) (Neth.); *see also* Polak & Hermans, *supra* note 114, at 6 ("[N]ow that 'foreign cubed class actions' have been made impossible in the United States . . . the Netherlands may be the place to certify a class action settlement involving non-US investors in non-US securities listed on a non-US stock exchange.").

133. Polak & Hermans, *supra* note 114, at 7.

134. *See* Van der Velden, *supra* note 118.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* ("An important consideration of the court was, apart from the fact that the damaging facts had not taken place in the United States (the so-called conduct test), that it was 'significant' that meanwhile an arrangement had been made for this group of investors under the Dutch WCAM.").

2009, approved $381 million in settlement awards.[139] The U.S. court, in declining to hear the case, emphasized that non-U.S. investors could rely on the Dutch WCAM to address alleged injuries.[140] Similarly, the decision by an Amsterdam district court in *Ahold*[141] on June 23, 2010 also involved a U.S. class action settled in the Netherlands.[142] The Dutch court recognized the U.S. class action settlement and enforced it worldwide.[143] The court in *Ahold* held that the U.S. system adequately safeguarded the interests of the injured parties because investors belonging to the class could opt-out of the collective settlement.[144]

Shell and *Ahold* are important decisions on the international application of the WCAM, showing that Dutch courts may have jurisdiction over all interested parties, regardless of their respective domicile. The decisions in *Fortis* and *Converium*, discussed below, illustrate that claims under Dutch law will likely increase and the jurisdiction of Dutch courts will likely expand.

a. Fortis

Copeland v. Fortis,[145] a case that had originally been filed in the Southern District of New York but was later dismissed

139. *See* Ben Hallman, *Dutch Court Approves Landmark Royal Dutch Shell Shareholder 'Class Action*,*'* AM. LAW., http://www.americanlawyer.com/digestTAL.jsp?id=1202431087599&slreturn=20120807141744; s*ee also Legal Alert,* Shell*: Landmark Decision Regarding International Collective Settlement of Mass Claims*, DE BRAUW BLACKSTONE WESTBROEK, 3 (June 2, 2009), http://www.debrauw.com/SiteCollectionDocuments/Legal%20Alerts/Litigation%20Arbitration/Legal%20Alert%20Shell.pdf ("[S]ome connection with the Netherlands appears to be required in any event, for example: the presence of some interested persons in the Netherlands and one or more Dutch petitioners, such as the foundation or association representing the interested persons. The Court confirmed in this ruling that it has jurisdiction in case (i) not all potentially liable parties were residing in the Netherlands and (ii) the vast majority of the potential claimants were not residing in the Netherlands. It is expected that in the near future the possibilities of the WCAM for application in international collective settlements will be further explored.").

140. *In re* Royal Dutch/Shell Transport Sec. Litig., 522 F. Supp. 2d 712, 723–24 (D.N.J. 2007).

141. Hof's-Amsterdam 23 juni 2010, JOR 2010, 225 (Ahold) (Neth.).

142. *See Legal Alert, Recognition of a U.S. Class Action Settlement in the Netherlands (Royal Ahold N.V.)*, DE BRAUW BLACKSTONE WESTBROEK (June 28, 2010), http://www.debrauw.com/SiteCollectionDocuments/Legal%20Alerts/Litigation%20Arbitration/LA%20Recognition%20of%20a%20US%20%20Class%20Action%20Settlement%20in%20the%20Netherlands.pdf.

143. *Id.*

144. *Id.*

145. Copeland v. Fortis, 685 F. Supp. 2d 498, 502 (S.D.N.Y. 2010).

under the now obsolete effects test, suggests that Dutch courts may continue to expand their jurisdiction and influence.[146] In *Copeland v. Fortis*, the purchases of American Depository Receipts (ADRs) (a dollar denominated version of a non-U.S. security) via an over-the-counter transaction did not qualify for Section 10(b) and Rule 10b-5 protection.[147] According to the court, trading "in ADRs is considered to be a predominantly foreign securities transaction."[148]

Under Dutch law, foundations can bring collective actions on behalf of investors.[149] After the *Fortis* case was dismissed in the United States, a group of international investors who were affected by the case, the Stichting Investor Claims Against Fortis[150] (the "Foundation"), in January 2011, filed a Writ in

146. *See* Fortis Writ, *supra* note 29. Under the now obsolete effects test, U.S. courts granted subject matter jurisdiction in cases where fraudulent acts committed abroad resulted "in injury to purchasers or sellers of those securities in whom the United States has an interest, not where acts simply have an adverse affect [sic] on the American economy or American investors generally." Parks v. Fairfax Fin. Holding Ltd., No. 06-CV-2820 (GBD), 2010 WL 1372537, at *5 (S.D.N.Y. Mar. 29, 2010) (quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975)).

147. *Copeland*, 685 F. Supp. 2d at 506. Much of the Court's analysis in this case is inconsistent with the Supreme Court's June 2010 holding in *Morrison*. *Compare id.*, *with* Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869 (2010).

148. *Copeland*, 685 F. Supp. 2d at 506.

149. *See* VAN LITH, *supra* note 112, at 16; Hermans & de Bie Leuveling Tjeenk, *supra* note 112, ¶ 6; Karen Jelsma & Manon Cordewener, *The Settlement of Mass Claims: A Hot Topic in The Netherlands*, INT'L L. Q., Summer 2011, at 13, *available at* http://www.hoganlovells.com/files/Publication/035a19d4-5aa9-4e43-b651-363f3031a0b9/Presentation/PublicationAttachment/28345212-16e0-43be-9bcd-4199cce6ca23/The_Settlement_of_Mass_Claims_A_Hot_Topic_in_The_Netherlands.pdf; Polak & Hermans, *supra* note 114, at 8; *Dutch Response to the Public Consultation on a Coherent European Framework for Collective Redress*, EUR. COMM'N (2011), http://ec.europa.eu/competition/consultations/2011_collective_redress/nl_gov_en.pdf; Scott Hirst, *Dutch Court Decision Impacts Global Securities Class Actions*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Feb. 18, 2012, 10:08 AM), http://blogs.law.harvard.edu/corpgov/2012/02/18/dutch-court-decision-impacts-global-securities-class-actions/ ("The Dutch Act [WCAM] permits an alleged wrongdoer, irrespective of whether any litigation is pending, to enter into a contract with a foundation that represents the interests of a purportedly injured group or class. Pursuant to that contract, the wrongdoer agrees to compensate the foundation for the injuries suffered by the group. The foundation and the alleged wrongdoer then submit the executed contract (or settlement agreement) to the Amsterdam Court of Appeal and request that the Court order the contract binding on all members of the class. The class members are given an opportunity to object to the agreement. If the Court declares the contract binding, class members are bound by the settlement unless they opt out and initiate individual proceedings.").

150. The Foundation was established as an "open foundation" under article 3:305a of the Dutch Civil Code and is seeking to represent investors who in-

Utrecht District Court.[151] They sued Fortis, now known as Ageas NV ("Fortis"),[152] and Merrill Lynch alleging that they materially misled investors between May 2007 and September 2008.[153] The writ alleges that Fortis, its officers and directors, and its underwriter, Merrill Lynch International P.U.C.,[154]

vested in Fortis from May 29, 2007 through October 14, 2008. *Home*, STICHTING INVESTOR CLAIMS AGAINST FORTIS, http://investorclaimsagainstfortis.com/index.php (last visited Oct. 21, 2012).

151. The Court's jurisdiction is based on Fortis N.V.'s registered seat and the fact that Fortis S.A./N.V.'s actions are inextricably linked with the actions of Fortis N.V. Fortis Writ, *supra* note 29, § 4 ¶¶ 16–17; *see* Rv art. 6–7 (Neth.), *translated in Code of Civil Procedure*, BRECHT, http://www.dutchcivillaw.com/civilprocedureleg.htm (pertaining to regulation on the jurisdiction and enforcement of judgments in civil and commercial matters).

152. Fortis was comprised of two companies. Fortis N.V. was a Dutch holding company of the former Dutch-Belgian Fortis banking and insurance conglomerate (now known as Ageas N.V.). Fortis S.A./N.V. was a Belgian holding company of the former Dutch-Belgian Fortis banking and insurance conglomerate (now known as Ageas S.A./N.V.). Together, Fortis N.V. and Fortis S.A./N.V. formed the conglomerate, Fortis Group ("dual set-up" whereby two companies headed the group). *See* Fortis Writ, *supra* note 29, § 2.2 ¶ 5, § 5.1 ¶¶ 25–27.

153. *See id.* § 1 ¶¶ 1–2, § 2.1 ¶ 4. The Foundation relies heavily upon the Report on the Investigation into Fortis N.V. dated June 15, 2010, *see* F.J.G.M. Cremers et al., *Verslag van het Onderzoek naar Fortis N.V.* (2010) (Neth.), *available at* http://www.ageas.com/Documents/NL_final_report_dutch_investigation_20100616.pdf, the Fortis Governance Statements dated January 25, 2008, *see Fortis Governance Statement*, FORTIS (2008), http://www.csr-news.net/directory/ebook/4199/files/4199.pdf, the AFM penalty rulings dated February 5, 2010, *see AFM legt boetes op aan Fortis voor marktmanipulatie en niet tijdig publiceren koersgevoelige informatie*, AFM (Neth.), http://www.afm.nl/nl/professionals/afm-actueel/nieuws/2010/mrt/boete-fortis.aspx, and dated August 19, 2010, *see AFM legt boete op aan Ageas, voorheen Fortis, voor niet tijdig publiceren koersgevoelige informatie*, AFM (Neth.), http://www.afm.nl/nl/professionals/afm-actueel/nieuws/2010/aug/boete-ageas.aspx, and other public information in its allegations against Fortis and Merrill Lynch. The Foundation also alleges that Fortis acted unlawfully by failing to invoke the MAC clause. Fortis Writ, *supra* note 29, § 6.3 ¶¶ 330–47. The MAC Clause in the ABN AMRO offer proposal defines a material adverse change as "any event, event or circumstance that results or could reasonably be expected to result in a material adverse effect on the business, cash flow, financial or trading position, assets, profits, operational performance, capitalization, prospects or activities of any . . . [h]oldings, . . . taken as a whole." *Id.* § 5.2 ¶ 92. Prior to being bound by the offer, Fortis had the option of invoking the MAC Clause based on the deteriorating conditions in the financial market. Fortis did not invoke the Clause because of possible legal ramifications (litigation and reputation risk). *Id.* § 5.2 ¶¶ 100–03.

154. The Foundation alleges that Merrill Lynch breached its duty of due care based on article 6:162 of the Dutch Civil Code. Fortis Writ, *supra* note 29, § 6.4 ¶ 358; *see also* BW art. 6:162 (Neth.), *translated in Dutch Civil Code,* BRECHT, http://www.dutchcivillaw.com/legislation/dcctitle6633.htm. Specifically, Merrill Lynch, while officiating as coordinator in two of Fortis' share issues,

made material misrepresentations concerning Fortis's financial condition in the fall of 2007[155] until the Dutch, Belgian, and Luxembourg governments orchestrated a bailout to save Fortis.[156] The Fortis bailout was valued at over €11 billion.[157] According to the complaint, after raising €13 billion in a 2007 rights offering, Fortis hid its significant exposure to U.S. subprime loans and overrepresented its financial health,[158] which resulted in a depreciation of shareholder equity by €26.2 billion.[159] The Plaintiffs alleged that the Defendants[160] misrepresented the extent of assets held as subprime-related mortgage backed securities,[161] the value of its collateralized debt obligations,[162] and the impact of Fortis's ABN AMRO acquisition on its solvency.[163] Because of these fraudulent misrepresentations,

failed to stop Fortis from making inaccurate statements and did not rectify the misleading statements. *See* Fortis Writ, *supra* note 29, § 1 ¶ 2. Regarding the share issue dated September 20, 2007, Merrill Lynch knew about the actual sub-prime situation at Fortis and that it departed from the description made in the Prospectus and the communications vis-à-vis the market, yet failed to prevent or rectify the inaccurate information. *Id.* § 6.4 ¶¶ 352–58. Regarding the share issue dated June 26, 2008, Merrill Lynch knew or should have known that comments made by Fortis in newspapers were inaccurate and inconsistent with the actual situation, yet failed to stop these statements or rectify them. *Id.* § 6.4 ¶¶ 359–68.

155. *See id.* § 8 ¶ 375; *see also* Press Release, Reuters, International Investors Join Forces in Support of Lawsuit Against Fortis over Massive Misrepresentation Ahead of Bank's Collapse in 2008 (Jan. 10, 2011), *available at* http://www.investorclaimsagainstfortis.com/Attachment/193_Reuters%20-%20International%20Investors%20Join%20Forces%20in%20Support%20of%20Lawsuit%20Against%20Fortis%20-%2020110110%20(00027443).PDF [hereinafter Reuters Press Release].

156. *See* Fortis Writ, *supra* note 29, § 5.5 ¶ 182, § 6 ¶ 194.

157. Reuters Press Release, *supra* note 155.

158. Fortis Writ, *supra* note 29, § 5.2 ¶ 42, § 6.1 ¶ 216.

159. STICHTING INVESTOR CLAIMS AGAINST FORTIS, *supra* note 150.

160. *See* Fortis Writ, *supra* note 29, § 2.3 ¶¶ 7–11 (identifying key ex-board members at Fortis as responsible for making material misrepresentations to potential investors).

161. From May to October 2007, Fortis made inaccurate and incomplete disclosures regarding its sub-prime exposure and its liquidity and solvency in (1) the press release dated August 9, 2007, (2) the Trading Update, and (3) the Prospectus. *Id.* § 5.2 ¶¶ 36–109, § 6.1 ¶¶ 215–47.2 (relating to the 2007 Fortis offer to take over ABN AMRO in a consortium with Royal Bank of Scotland Plc. and Spain's Banco Santander S.A.).

162. From early 2008 to June 26, 2008, Fortis engaged in misrepresentations regarding its solvency, the implementation of its solvency plan, and the dividend policy. *Id.* § 5.3 ¶¶ 110–51, § 6.1 ¶¶ 248–87.

163. From June 26, 2008 to September 26, 2008, Fortis engaged in misrepresentations regarding its solvency status, the negative impact in terms of sol-

investors claim to have lost up to ninety percent of their investment.[164]

The Foundation bases its claims on Sections 6:193a–j (unfair trade practices)[165] and 6:194 (misrepresentation)[166] of the Dutch Civil Code. Under Sections 6:193a–j, an unfair or misleading trade practice occurs if the information furnished to investors is factually inaccurate or is misleading to the average consumer,[167] and results in the consumer making a decision he or she would not otherwise have made.[168] A misleading trade practice also occurs where essential information is omitted or is formulated in an unclear, incomprehensible, or ambiguous manner.[169] Section 6:194 applies to information contained in the prospectus as well as written or oral communications made *in connection with* the offer of securities (emphasis added).[170] In determining whether a prospectus is misleading, courts use the "presumed expectation of an averagely informed, cautious and observant investor."[171] Under Dutch law,

> it does not matter whether the 'reference investor' has effectively taken cognizance of or has been influenced by the communication; all that matters is that the inaccuracy or incompleteness of the communication should be sufficiently significant materially to have been misleading to the 'reference investor.' What matters therefore is whether the inaccurate/incomplete communication *per se* is misleading.[172]

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vency of the failure of the Ping An transaction, and its evaporated liquidity. *Id.* § 5.4 ¶¶ 152–79, § 6.1 ¶¶ 288–310.

164. STICHTING INVESTOR CLAIMS AGAINST FORTIS, *supra* note 150.

165. Fortis Writ, *supra* note 29, ¶ 199. Sections 193a–j apply to actions performed vis-à-vis natural persons, i.e., private investors. *Id.*

166. *Id.* ¶ 205. Section 194 applies to non-consumers, i.e., institutional investors. *Id.*

167. *Id.* ¶ 204. "It is not the characteristics and properties of the individual consumer . . . that are decisive . . . but rather, those of the *fictitious* consumer who is representative of the specific group . . . ." *Id.* Case law from the European Court of Justice describes the average consumer as the "reasonably informed, cautious and observant consumer." *Id.*

168. *Id.* ¶ 201. This is considered proactive dissemination of information. *Id.*

169. *Id.* ¶ 202. Non-disclosure of information required by Sections 13 and 20 of Part 5 of the Financial Supervision Act gives rise to unfair trade practices as defined in Sections 6:193a–j of the Dutch Civil Code. *Id.* ¶ 203.

170. *Id.* ¶ 209. *See also* HR 27 november 2009, JOR 2010, 43 m.nt. K. Frielink (VEB e.a./World Online e.a.) (Neth.), *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BH2162.

171. Fortis Writ, *supra* note 29, ¶ 210 (quoting HR 30 mei 2008, JOR 2008, 209 m.nt. BJJ (Claimants/TMF Financial Services BV) (Neth.)).

172. *Id.* ¶¶ 211–12 ("Once the communication has been established as being misleading, and as such unlawful, the misrepresentation has also been es-

The Foundation also alleges that Fortis violated Sections 5:13, 20, 25i, and 58(1) of the Dutch Financial Supervision Act.[173] Section 5:13 stipulates that the prospectus should "contain all data which is necessary . . . to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of any guarantor, and of the rights and obligations attached to such securities."[174] Section 20 prohibits statements that are not in line with the prospectus.[175] Section 25i requires organizations to disclose price-sensitive information related to the organization.[176] Section 58(1) bans market manipulation through the dissemination of information (potentially) giving out inac-

tablished as having contributed to the investment decision. In other words, the (professional or private) investor would not have bought shares, or would not have bought shares on the same terms, had the ill-fated communication not been made.").

173. *Id.* ¶ 195; *see* Wet op het Financieel Toezicht [Wft] [Financial Supervision Act] § 5:13 (Neth.), *translated in Engelse vertaling van de Wft*, RIJKSOVERHEID (Oct. 12, 2006), http://www.rijksoverheid.nl/documenten-en-publicaties/brieven/2009/11/16/engelse-vertaling-van-de-wft.html.

174. Wft § 5:13. In *World Online*, the Supreme Court explained the purpose of the Act. The Act seeks to protect private and institutional investors alike so that they have "greater confidence in the securities market" and to ensure "the market's proper performance." Fortis Writ, *supra* note 29, ¶ 316 (quoting HR 27 november 2009, JOR 2010, 43 m.nt. K. Frielink (VEB e.a./World Online e.a.) (Neth.), *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BH2162).

175. Fortis Writ, *supra* note 29, ¶ 318.

176. *Id.* ¶ 321 (noting that price-sensitive information is "any information which a reasonably acting investor would probably" use to base his investment decision on (quoting Directive 2003/124/EC, of the European Parliament and of the Council of 22 December 2003 Implementing Directive 2003/6/EC of the European Parliament and of the Council as Regards the Definition and Public Disclosure of Inside Information and the Definition of Market Manipulation, 2003 O.J. (L339) 1(2)). The purpose of Section 25i is to prevent insider trading. *Id.* ¶ 321. The AFM imposed penalties on Fortis for non-timely disclosure of price-sensitive information regarding the transaction involving Deutsche Bank and communications related to Fortis's sub-prime related exposure in 2007. *Id.* ¶ 323; *see also* Evan Weinberger, *Fortis Dutch Fraud Suit Could Enable Non-US Claims*, LAW 360 (Jan. 10, 2011), *available at* http://investorclaimsagainstfortis.com/Attachment/192_Law360%20-%20Fortis%20Dutch%20Fraud%20Suit%20Could%20Enable%20Non-US%20Claims%20-%2020110111%20(00027266).PDF. The subprime exposure "caused shareholder equity in Fortis to fall from €33 billion . . . to . . . €6.8 billion . . . over 12 months following the rights offering. According to the [F]oundation, investors lost up to 90 percent of their investment in Fortis due to the fraud . . . . A joint investigation by the Dutch Authority for the Financial Markets and the Belgian Banking, Finance and Insurance Commission found in February that Fortis engaged in market manipulation by issuing false and misleading statements prior to the ABN Amro rights offering." *Id.*

curate or misleading signals regarding the availability of, demand for or share price of financial instruments.[177]

The sections of Dutch law cited in the previous two paragraphs give a flavor of the substantive legal rules available to plaintiffs' attorneys who choose to file lawsuits in the Netherlands. Combined, these sections approximate legal protections available in the United States under Section 10(b) and Rule 10b-5. Given the comparability, the Dutch legal system could present a possible avenue for circumventing the restrictions imposed by the *Morrison* decision. Investors who lost money in transactions on foreign exchanges and are prohibited from claiming damages in U.S. court under *Morrison* may find that the Netherlands constitutes an attractive venue.[178] Investors could make use of the Dutch law that permits foundations under Article 3:305a of the Dutch Civil Code to sue on behalf of investors.[179] It also seems possible that other countries, such as Canada, will capitalize on plaintiffs' willingness to pursue other venues.[180]

The *Fortis* case illustrates that lawsuits filed in Dutch courts based on legal claims under Dutch law can largely mirror the claims and allegations in previously dismissed lawsuits

177. Fortis Writ, *supra* note 29, ¶ 326. The AFM imposed penalties on Fortis based on its misrepresentations over the period from January 27, 2008 to June 26, 2008 regarding Fortis's solvency, solvency plan implementation, and dividend policy. *Id.* ¶¶ 327–28.

178. David Bario, *Dutch Treat? With Doors to U.S. Courts Closed by* Morrison*, Securities Class Action Lawyers Sue Fortis in Holland*, AM. LAW. (Jan. 10, 2011), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202477589137&Dutch_Treat_With_Doors_to_US_Courts_Closed_by_Morrison_Securities_Class_Action_Lawyers_Sue_Fortis_in_Holland&slreturn=20120806213334 (quoting Jay Eisenhofer, co-managing partner of Grant & Eisenhofer, as saying: "[o]ur clients are increasingly looking for forums where they're going to be able to receive compensation for their non-U.S. losses," and adding that "we're looking at other cases that are in various stages of analysis").

179. Reuters Press Release, *supra* note 155 (quoting Jay Eisenhofer as saying: "[t]he foundation's action in the Netherlands offers an innovative avenue to address securities fraud claims outside the U.S. following the restrictions imposed on international investors by the Supreme Court's decision in *Morrison v. NAB*. We believe this action could be a model for future investor claims outside the United States").

180. Bradley A. Heys & Mark L. Berenblut, *Trends in Canadian Securities Class Actions: 2011 Update*, NERA (Jan. 31, 2012), *available at* http://www.nera.com/nera-files/PUB_Recent_Trends_Canada_2011_0412.pdf; *Filings of Securities Class Actions in Canada Reach New High*, BUS. WIRE (Feb. 1, 2012), http://www.businesswire.com/news/home/20120201005968/en/Filings-Securities-Class-Actions-Canada-ReachHigh; LaCroix, *supra* note 85.

under U.S. law. The decision in *Fortis* is still pending.[181] The case may proceed to a claims phase if the foundation succeeds in establishing liability.

b. Converium

The Amsterdam Court of Appeal in its *Converium* decision declared an international collective settlement binding on the parties to a settlement where the class members had rather tenuous connections to the Netherlands (none of the defendants and only a few plaintiffs were domiciled in the Netherlands), the alleged wrongdoing took place outside the Netherlands, and the claims were not brought under Dutch law.[182] The court in *Converium* suggested that without a single interested person domiciled in the Netherlands, the court could have upheld jurisdiction in the Netherlands to declare the settlement binding.[183] This case seems to indicate that the Amsterdam Court of Appeal will broaden its jurisdictional reach to provide international investors with an attractive option for redress in class action legal suits.[184]

Similar to the *Fortis* case, *Converium* originated in 2004 in the United States when Converium[185] shareholders filed a secu-

181. *See* Weinberger, *supra* note 176.

182. *See* Hof's-Amsterdam 12 november 2010, JOR 2011, 46 m.nt. J.S. Kortmann (Converium Foundation VEB/SCOR ZFS), ¶¶ 2.1, 2.3, 2.12 (Neth.), *translated in* http://www.blbglaw.com/cases/00172_data/Judgmentof12Novermber2010CourtofAppeal.pdf; Converium COA Decision, *supra* note 32, ¶ 3.

183. *Legal Alert* Converium, *supra* note 34.

184. Press Release, Reuters, In Landmark Ruling, Dutch Court of Appeal Approves Settlements in the Converium/SCOR Securities Action (Jan. 18, 2012), *available at* http://www.reuters.com/article/2012/01/18/idUS223043+18-Jan-2012+BW20120118; Mark Cobley, *Dutch Ruling Could Pave Way for Class Action Suits*, FIN. NEWS (Jan. 25, 2012), http://www.efinancialnews.com/story/2012-01-25/dutch-class-action-ruling-converium?mod=sectionheadlines-PE-AM; *Cohen Milstein Secures Landmark Ruling as Dutch Court of Appeal Approves Settlements in the Converium/SCOR Securities Action*, COHEN MILSTEIN (Jan. 18, 2012), http://www.cohenmilstein.com/news.php?NewsID=487; LaCroix, *supra* note 22; *Legal Alert,* Converium*: Dutch Court Declares an International Collective Settlement Binding*, DE BRAUW BLACKSTONE WESTBROEK (Jan. 18, 2012), http://www.debrauw.com/News/LegalAlerts/Pages/LitigationLegalAlert-18January2012-Converium.aspx.

185. Converium Holding AG (Converium) is a Swiss reinsurance company (currently known as SCOR Holding Company) that was a wholly owned subsidiary of Zürich Financial Services Ltd. (ZFS) until 2001, when ZFS sold its Converium shares through an IPO. Reuters, *supra* note 184. Converium shares were listed on the SWX Swiss Exchange and Converium American De-

rities class action in the Southern District of New York.[186] The plaintiffs alleged that the price of Converium's stock was artificially inflated during the class period because Converium had misrepresented its financial condition and had concealed a massive deficiency in its loss reserves for its North American business.[187] Converium disclosed the misrepresentation and the deficiency in loss reserves in September 2004.[188] The disclosure resulted in adverse stock price reactions and losses to investors.[189] The U.S. class action was settled and the settlements were approved by the U.S. Court on December 12, 2008.[190]

The U.S. Court had excluded the Non-U.S. Purchasers from participation in the U.S. class action, so that they had no effective course for validating their potential claims.[191] Non-U.S. Converium investors represented by the Stichting Converium Securities Compensation Foundation (the Foundation)[192] and Vereniging VEB NCVB (VEB),[193] petitioned the Amsterdam Court of Appeal under the WCAM to approve separate settlement agreements with Converium and ZFS.[194] In an interim decision, the Amsterdam Court of Appeal on November 12, 2010 recognized the Settlement Agreements between the

pository Shares (ADS) were listed on the New York Stock Exchange. *Id.*

186. Plaintiffs' attorneys had filed a worldwide putative class action against Converium and ZFS in the United States. *In re* SCOR Holding (Switzerland) AG Litigation, 537 F. Supp. 2d 556, 558 (S.D.N.Y. 2008), *available at* http://www.blbglaw.com/cases/00019_data/2008.12.12 -ConveriumOrderFinalJudgment.pdf. The U.S. District Court for the Southern District of New York (the U.S. Court) certified a class consisting of all U.S. citizens who had purchased Converium securities on any exchange as well as persons, regardless of their residence, who had purchased Converium securities on a U.S. exchange (the U.S. Purchasers). *Id.* at 569–79, 583. The U.S. Court excluded from the class all non-U.S. persons who had purchased Converium securities on any non-U.S. exchange (the Non-U.S. Purchasers). *Id.* at 569.

187. Converium COA Decision, *supra* note 32, ¶ 5.2.1.

188. *In re SCOR Holding*, 537 F. Supp. 2d at 565, 583.

189. *Id.* at 585.

190. *See id.* at 559.

191. Converium COA Decision, *supra* note 32, ¶¶ 6.4.1–2.

192. The Foundation represents the interests of Non-U.S. exchange purchasers. *Id.* ¶ 5.1.3. Materials from the Foundation available at http://www .converiumsettlement.com/.

193. VEB represents the interests of Dutch exchange purchasers. Converium COA Decision, *supra* note 32, ¶ 5.1.3.

194. Hof's-Amsterdam 12 november 2010, JOR 2011, 46 m.nt. J.S. Kortmann (Converium Foundation VEB/SCOR ZFS), ¶¶ 2.1–3, 2.10. (Neth.), *translated in* http://www.blbglaw.com/cases/00172_data/ Judgmentof12November2010CourtofAppeal.pdf.

Foundation and VEB with SCOR Holding/Converium (First Agreement) and ZFS (Second Agreement, together the Agreements) pursuant to the WCAM.[195]

The Amsterdam Court of Appeal declared the Settlement Agreements binding on January 17, 2012.[196] The court found that in view of the extent of the loss, the ease and speed with which the compensation could be obtained, and the possible causes of the loss, the compensation awarded was reasonable.[197] The court argued that the sum awarded to the Non-U.S. Purchasers was proportionally lower than the settlement payment ($84,600,000) for the smaller group of U.S. Purchasers because

195. The Settlement Agreements provide for compensation to eligible Non-U.S. Purchasers of Converium stock. Converium COA Decision, *supra* note 32, ¶¶ 5.1.1–3. Specifically, the Agreements aim to compensate Non-U.S. Purchasers who purchased Converium shares from January 7, 2002 to September 2, 2004 on a non-U.S. stock exchange, and who incurred a loss as a result of the company's (non)disclosures regarding its North American loss reserves. *Id.* The total settlement payment (before deduction of costs and fees) is USD 40,000,000 under the First Agreement and USD 18,400,000 under the Second Agreement. *Id.* ¶ 5.2.3. Both agreements contain elaborated settlement distribution plans for the distribution of the awards. *See id.* The settlement payment is in one or more segregated bank accounts administered by a civil law notary. *Id*. ¶ 7. The distribution plan is set forth in Exhibit C to the Settlement Agreements. *See Settlement Agreement Between the Foundation and VEB and SCOR*, BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP (July 2, 2010), http://www.blbglaw.com/cases/00172_data/SettlementAgreementwithSCOR.pdf; *Settlement Agreement Between the Foundation and VEB and ZFS*, BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP (July 2, 2010), http://www.blbglaw.com/cases/00172_data/SettlementAgreementwithZFS.pdf.

196. Converium COA Decision, *supra* note 32, ¶ 4.1. The Court stated that the Agreements satisfy the requirements of article 1013(1) and (2) of the Dutch Code of Civil Procedure regarding the announcement of the hearing and notification of interested parties. *Id.* ¶ 4.1; *see* Rv art. 1013(1), (2) (Neth.), *translated in Code of Civil Procedure*, BRECHT, http://www.dutchcivillaw.com/legislation/civilprocedure033.htm#1013. Interested parties were notified by writ, registered letter, or ordinary letter. Converium COA Decision, *supra* note 32, ¶ 4.2.2. In addition, the hearing was announced in newspapers in Germany, France, Italy, Luxemburg, the Netherlands, the United Kingdom, and Switzerland in the Wall Street Journal Europe and the Economist, and on the websites www.converiumsettlement.com, www.blbglaw.com, www.srkw-law.com, www.cohenmilstein.com, and www.VEB.net. Converium COA Decision, *supra* note 32, ¶¶ 4.2.3–4. They also satisfy the requirements of articles 7:907(3) and 7:908(2). *Id.* ¶ 5.1.4; *see* BW art. 7:907(3), 908(2) (Neth.), *translated in Code of Civil Procedure*, BRECHT, http://www.dutchcivillaw.com/legislation/dcctitle771515.htm (regarding reasonableness of the compensation awarded, representativeness of the foundation, and the availability of opt-out statements). The decision was rendered by Justices W.J.J. Los, A.H.A. Scholten, and J.W. Rutgers. Converium COA Decision, *supra* note 32.

197. Converium COA Decision, *supra* note 32, ¶ 6.

the legal position of the Non-U.S. Purchasers differed substantially from the legal position of the U.S. Purchasers.[198]

Importantly, the court held that the amount of fees and expenses awarded to Principal Counsel[199] (twenty percent of the settlement payment)[200] was not excessive and was compatible with Dutch standards. Principal Counsel's work was performed to a large extent within the American system and by U.S. law firms. The U.S. court awarded a similar fee in its 2008 decision, suggesting that the fee was customary and reasonable.[201] Empirical studies on the level of fees in comparable situations indicate that a twenty percent fee is customary.[202] Finally, comparing the contingent fee with an hourly fee (lodestar calculation) indicates that the two fees do not differ significantly.[203]

The court found that it was sufficient for petitioners to be jointly represented, thus, affirming the standing of foundations under Dutch law.[204] The court also found that Non-U.S. Purchasers who wanted to bring an individual claim to court had the option of opting out of the binding nature of the agreements by issuing an opt-out statement.[205]

198. *Id.* ¶ 6.4.1.

199. Principal Counsel is a collaboration of three U.S. law firms (Bernstein Litowitz Berger & Grossmann LLP, Cohen Milstein Hausfeld & Toll, PLLC and Spector Roseman & Kodroff, PC). *Id.* ¶ 6.5.3.

200. *Id.* ¶ 6.5.1.

201. *Id.* ¶¶ 6.5.2–6.5.4; DE BRAUW BLACKSTONE WESTBROEK, *supra* note 184.

202. Converium COA Decision, *supra* note 32, ¶ 6.5.5.

203. *Id.* ¶ 6.5.6.

204. *Id.* ¶¶ 10.1–.2. The court held that VEB was sufficiently representative with respect to the interests of the Dutch exchange purchasers. *Id.* ¶ 10.3. The Foundation was incorporated to represent the interests of non-U.S. Purchasers and has the support of twenty-nine foreign organizations, including European representative organizations and various representative organizations and institutional investors from Switzerland and the United Kingdom (the countries where most of the known Non-U.S. Purchasers are domiciled). *Id.* ¶ 10.4.

205. *Id.* ¶ 6.4.3. The Court believes that in view of the time, costs, and risks associated with conducting individual litigation, most Non-U.S. Purchasers are unlikely to bring their own litigation and therefore would not receive any compensation at all if the Agreements were not declared binding. The court stated that a person entitled to compensation could, within a period of three months following the announcement of the court decision, inform the appropriate authority in writing or by e-mail of his or her wish not to be bound. *Id.* ¶¶ 14.1–.2, .4. For the person entitled to compensation who could not be cognizant of his loss at the time of the announcement of the court decision, the time period for submitting an opt-out statement is six months after the entitled

The *Converium* decision adds several features to those established by the *Fortis* decision. Jointly, these decisions could make the Dutch system even more attractive to investors who, before *Morrison,* would have considered bringing a claim in the United States. The application of Dutch civil law in the *Fortis* case suggests that the Dutch legal system can match legal protections available in the United States under Section 10(b) and Rule 10b-5.

By allowing U.S.-style fee arrangements, the *Converium* decision adds an important incentive for plaintiffs' attorneys to bring claims in the Netherlands. While awarding twenty percent of the settlement to lead counsel[206] is not quite at the level of some fee arrangements in the United States,[207] twenty percent should suffice to attract plaintiffs' attorneys' interest, especially in light of the cases that will no longer be brought in the United States because of the restrictions imposed by *Morrison*. While the court's decision that a twenty percent fee is compatible with Dutch standards[208] could make the Dutch legal system more attractive to plaintiffs' attorneys, the lead counsel's work in the *Converium* case was performed to a large extent within the American legal system and by U.S. law firms. It remains to be seen whether a case that is litigated in Dutch courts without exposure to the U.S. legal system will yield a comparable fee structure.

Another attractive feature of the Dutch legal system that could make it a favorite choice for plaintiffs' attorneys is that decisions by Dutch courts under WCAM have to be recognized, at least in principle, in all European Member States, Switzerland, Iceland, and Norway under the Brussels I Regulation and the Lugano Convention.[209] The likely recognition of *Shell*, *Ahold*, *Fortis*, and *Converium* by other European Courts[210] could make the Dutch WCAM a valuable alternative for U.S.

person has been informed in writing that he is eligible for compensation and may opt out of the binding declaration. *Id.* ¶ 14.3.

206. Converium COA Decision, *supra* note 32, ¶ 6.5.1.

207. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 11–12 (N.Y. Univ. Ctr. for Law, Econ., and Org., Working Paper No. 09-50, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1497224.

208. Converium COA Decision, *supra* note 32, ¶ 6.5.1.

209. *Legal Alert* Converium, *supra* note 34.

210. Under the Brussels I Regulation, a Dutch collective settlement declared binding under the WCAM is binding for all other EU Member States. The same applies to Switzerland, Iceland, and Norway under the Lugano Convention. *See id.*

class action settlements, which are less likely to be recognized by courts in European countries.

The Netherlands is already Europe's most attractive venue to facilitate such settlements because it is the only European country that allows a collective settlement in a mass litigation to be binding on all class members who do not opt-out of the class.[211] Given the developments in the *Fortis* and *Converium* decisions, it is conceivable that Dutch courts could expand their exterritorial reach beyond settlements. The literature contrasting *Shell* and its progeny with *Morrison* suggests the increasing prominence of Dutch courts after *Morrison*.[212] There is even some evidence that the *Converium* court knew the implications of its judgment and was purposefully creating an alternative European venue for international collective settlements in mass claims.[213] The court's decision has some references to the limitations of U.S. courts in securities and anti-trust cases as a result of the U.S. Supreme Court's decision in *Morrison.*[214]

3. Fraud-on-the-Market

In the United States, plaintiffs in securities class actions are not required to prove reliance on defendants' alleged misstatements or omissions. Under the fraud-on-the-market theory, plaintiffs in U.S. courts merely have to show that they relied on the integrity of the stock price when they purchased their stock.[215] By contrast, private plaintiffs suing in European courts to recover damages for securities law violations are required in most European countries to establish individualized reliance.[216]

211. *See* sources cited *supra* note 149.

212. Polak & Hermans, *supra* note 114, at 6 ("[N]ow that 'foreign cubed class actions' have been made impossible in the United States . . . the Netherlands may be the place to certify a class action settlement involving non-US investors in non-US securities listed on a non-US stock exchange.").

213. *Legal Alert* Converium, *supra* note 34 ("It should be noted that the Court is fully aware of the significance of its judgment in creating an alternative venue to declare international collective settlements in mass claims binding on all class members. The Court explicitly referred to the limitations for the U.S. courts to do so in securities and anti-trust cases as a result of the U.S. Supreme Court's decisions in *Morrison v. National Australia Bank* and *Hoffman-La Roche v. Empagran*.").

214. *Id.*

215. Basic Inc. v. Levinson, 485 U.S. 224, 241–42 (1988).

216. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 22, 2005, Bull. civ. IV, No. 03-20600 (Fr.) (holding that under French law individual plaintiffs are required to prove actual reliance);

Unlike other European countries, the Dutch Supreme Court in its *World Online* decision established a presumption of reliance/causation for cases involving prospectus liability.[217] The court recognized that investors are guided by a multitude of considerations in making an investment decision. Proving reliance and causation leading to an investment decision because of a misleading statement in a prospectus could be near impossible.[218] Given the problems with causality and reliance, and recognizing that the Prospectus Directive[219] envisions investor protection as one of its core objectives,[220] the court established a presumption of a causal connection between the misleading statement in the prospectus and the investment decision.[221] Accordingly, under the holding in *World Online,* plaintiffs do not

Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 28, 2005, II ZR 80/04 (Ger.) (rejecting *Basic Inc. v. Levinson*'s fraud-on-the-market theory); Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM. J. COMP. L. 31, 71 (2005) (contrasting the U.S. fraud-on-the-market theory with the German requirement of actual reliance); Hubert de Vauplane & Odile Simart, *The Concept of Securities Manipulation and Its Foundations in France and the USA*, 23 BROOK. J. INT'L L. 203, 205 (1997) (noting that France has not adopted the fraud-on-the-market theory); Eilís Ferran, *Are US-Style Investor Suits Coming to the UK?*, 9 J. CORP. L. STUD. 315, 327, 336 (2009) (noting that the fraud-on-the-market theory has not yet been adopted in the United Kingdom or Australia).

217. HR 27 november 2009, JOR 2010, 43 m.nt. K. Frielink (VEB e.a./World Online e.a.) (Neth.), *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BH2162; *see also* de Jong, *supra* note 25, at 364–65 (discussing the *World Online* decision and its implications); Thompson, *supra* note 25, at 1138–40 (explaining the differences of the Dutch and U.S. systems of securities litigation and underscoring the attractiveness of the Dutch rules). Similarly, after a class action regime was introduced in Italy, the Italian Supreme Court adopted something comparable to the U.S. fraud-on-the-market theory, introducing a presumption of reliance and, thus, allowing investors to bring a claim based on a misleading statement in a prospectus or official company announcement without having read the respective document. *See* ALLEN & OVERY, *supra* note 22.

218. *See* de Jong, *supra* note 25, at 356.

219. Directive 2010/73, of the European Parliament and of the Council of 24 November 2010 Amending Directives 2003/71/EC on the Prospectus to Be Published When Securities Are Offered to the Public or Admitted to Trading and 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose Securities Are Admitted to Trading on a Regulated Market, 2010 O.J. (L 327) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF.

220. *See id.* at Preamble ¶ 3.

221. de Jong, *supra* note 25, at 364.

have to show actual reliance on a fraudulent statement in prospectus liability cases.[222]

Dutch courts could extend the theory of the Dutch Supreme Court, establishing a presumption of reliance in prospectus liability cases, to other areas of the law. The "line of reasoning of the court extends quite naturally to claims dealing with the violation of ad hoc disclosure obligations and misleading periodic reports."[223] These developments suggest that the Dutch legal system could effectively compete with the United States, at least as it pertains to lowering the crucial threshold requirement of reliance in securities actions. Lower substantive and procedural requirements for securities actions in the Netherlands could attract plaintiffs that would have brought a foreign-cubed securities action in the United States before *Morrison* and perhaps even some plaintiffs who still can sue in the United States.

4. Countervailing Factors

The Dutch WCAM includes an opt-out procedure similar to the securities class action rules in the United States.[224] As explained above, the Netherlands may also relax the reliance requirement in some cases. Other factors, however, could weigh against the Dutch legal system in attracting international plaintiffs, particularly those from the United States. The Dutch legal system also has not played a significant role in attracting lawsuits in the past.[225]

English being the official language of a court system plays an important role in litigants' selection criteria.[226] Dutch courts hear cases in Dutch, although this could change in the future if

222. *Id.*

223. *Id.* at 375.

224. DE BRAUW BLACKSTONE WESTBROEK, *supra* note 142. The Netherlands is one of only four countries that allow the opt-out procedure to be used. Other countries are the United States, Canada, and South Korea. *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 61 (2007) ("[T]he United States is unusual in recognizing presumed reliance based on the fraud on the market theory, rather than requiring investors to prove actual reliance on misleading information."); Luke Green, *Multi-National Securities Class Actions Go Global*, INST. S'HOLDER SERVS., INC. BLOG (Jan. 26, 2011, 6:26 PM), http://blog.issgovernance.com/slw/2011/01/multi-national-securities-class-action-go-international.html.

225. *See* Thompson, *supra* note 25, at 1141.

226. *See* Kirchner, Painter & Kaal, *supra* note 15, at 176–77 (explaining the importance of the English language in the competition of legal systems).

lawyers are given an option to plead and argue in English.[227] The attorney compensation framework in the Netherlands could also be detrimental to the development of a competitive regulatory framework. Although cases such as *Converium* with large exposure to the U.S. legal system have resulted in attorney fees of up to twenty percent of the settlement payment,[228] the lack of contingent-fee arrangements generally and the loser-pays rule in the Netherlands may not provide sufficient incentives for plaintiffs' attorneys to pursue legal claims in the Netherlands.[229] Other crucial differences between the class action systems of the United States and the Netherlands include differences in plaintiff representation. The WCAM in the Netherlands requires a court-approved foundation to pursue the securities class action on behalf of investors.[230] This WCAM requirement makes the Dutch regime somewhat more burdensome than the United States' system, which simply requires a lead plaintiff and class approval.

Under the WCAM, only court-authorized representatives, such as the aforementioned foundation, can pursue claims on behalf of investors.[231] Because Dutch courts in WCAM proceed-

227. In Germany, North Rhine-Westphalia and Hamburg introduced the English language in court proceedings. *See* Michael Karger, *NRW und Hamburg: die Gerichtssprache ist: . . . auch Englisch*, BECK-BLOG, http://blog.beck.de/2010/01/15/nrw-und-hamburg-die-gerichtssprache-ist-auch-englisch. The reform of German procedural law to establish English in German courtrooms arguably would benefit German attorneys. *See Im Namen der Globalisierung*, ZEIT ONLINE (May 23, 2010, 2:49 PM), http://www.zeit.de/2010/21/Justiz-Prozesse-Englisch.

228. Converium COA Decision, *supra* note 32, ¶ 6.5.1 (holding that a twenty percent attorney fee was compatible with Dutch legal standards).

229. On the other hand, legal practices focusing exclusively on class actions in Europe seem to indicate that the monetary incentives could be sufficient. *See supra* note 119 and accompanying text; John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously,* 110 COLUM. L. REV. 288, 292 (2010) (discussing the respective attorney compensation schemes in the United States and Europe); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 180–81 (2009); *see also* Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 303 (2007); Mark A. Behrens et al., *Global Litigation Trends*, 16 MICH. ST. J. INT'L L. 165, 183 (2009); Richard Cappalli, *The Style and Substance of Civil Procedure Reform: Comparison of the United States and Italy*, 16 LOY. L.A. INT'L & COMP. L. REV. 861, 869 (1994); Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 365 (2001); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653–54 (discussing the loser pays practices in European legal systems).

230. *See supra* Part II.B.1 (discussing the features of the WCAM).

231. BW art. 3:305a (Neth.), *translated in Dutch Civil Code*, BRECHT,

ings are limited to certifying the class and approving out-of-court settlements,[232] court-authorized representatives cannot seek damages.[233] Instead, under the WCAM an agreement between the alleged wrongdoer and the foundation, representing the interests of the injured class, determines the compensation for the class.[234] After class members have the opportunity to reject the agreement, the Amsterdam Court of Appeal has the discretion to declare the agreement binding.[235] Although the judgment of the Dutch court is in principle enforceable in courts outside the Netherlands, it remains to be seen whether or not courts in other jurisdictions will, in fact, recognize the judgment. There are also different discovery practices in the United States than in the Netherlands[236] and different settlement mechanisms.[237]

Given these limitations, the WCAM system could limit the number of successful settlements. While the largest cases, such as *Shell* and *Fortis*, would probably still provide sufficient leverage for the plaintiffs to result in large settlements with defendants, smaller cases may not be successfully settled in Dutch courts. Lawyers who have the option to sue in the United States after *Morrison* may prefer to do so.

http://www.dutchcivillaw.com/civilcodebook033.htm; VAN LITH, *supra* note 112, at 16; Hermans & de Bie Leuveling Tjeenk, *supra* note 112, ¶ 6; Tzankova & Scheuerleer, *supra* note 127, at 152; van Boom, *supra* note 119, at 10; Briefing Note, *Overview of Existing Collective Redress Schemes in EU Member States*, DIRECTORATE GEN. FOR INTERNAL POLICIES POLICY DEP'T A: ECON. & SCIENTIFIC POLICY, § 2.11, IP/A/IMCO/NT/2011-16 (July 2011), *available at* http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf; EUR. COMM'N, *supra* note 149, at 4.

232. van Boom, *supra* note 119, at 858 n.3; DIRECTORATE GEN. FOR INTERNAL POLICIES POLICY DEP'T A: ECON. AND SCIENTIFIC POLICY, *supra* note 231, § 2.11; EUR. COMM'N, *supra* note 149, at 6.

233. van Boom, *supra* note 119, at 864; EUROPEAN COMM'N, *supra* note 149, at 4.

234. *See* Hirst, *supra* note 149.

235. *Id.*

236. Plaintiffs can usually obtain broad discovery in the United States although only after a motion to dismiss has been decided in their favor. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 67 (2010); *see* van Boom, *supra* note 119, at 10.

237. *See* van Boom, *supra* note 119, at 10.

C. CANADA AS A FORUM FOR MULTI-NATIONAL SECURITIES CLASS ACTIONS

Because there is already extensive English language commentary on securities litigation in Canada, this Article will not explore securities litigation in Canada in as much detail as recent developments in the Netherlands. Nonetheless, because most Canadian courts use the English language, and because of Canada's geographic proximity to the United States, Canada is a natural venue for securities litigation that can no longer be conducted in the United States after *Morrison*. European jurisdictions that provide a forum for global securities litigation will likely engage in Forum Competition with Canada. Plaintiffs' lawyers will urge European jurisdictions to mimic pro-plaintiff developments in Canada and vice versa. Defendants, on the other hand, will look to both Europe and Canada for restraint, perhaps similar to that imposed by the U.S. Supreme Court in *Morrison*.

U.S. courts applying *Morrison* have thus far refused to apply U.S. securities laws to transactions taking place in Canada, even if the same securities are also listed for trading in the United States.[238] Canada thus has an opportunity to engage in Forum Competition with the United States if its courts assume a different posture and allow suits under Canadian law with respect to all transactions in securities listed for trading in Canada, even if some of those transactions take place in the United States. A single class of Canadian and U.S. investors that cannot be assembled in the United States after *Morrison* could, in this scenario, be assembled in Canada. It remains to be seen, however, what Canada will do to accommodate extra-territorial securities litigation of this or any other sort.

For plaintiffs and their lawyers, however, Canada is already an attractive alternative to the United States when it comes to filing securities class action lawsuits.[239] Several factors, including recent Supreme Court decisions in *Wal-Mart Stores, Inc. v. Dukes*[240] and *AT&T Mobility LLC v. Concep-*

238. *See In re* Vivendi Universal Sec. Litig., 765 F. Supp. 2d 512, 531 (S.D.N.Y. 2010).

239. Ashby Jones, *Lawyers Looking to Canada for Shareholder Litigation*, WALL ST. J., Feb. 27, 2012, at B4.

240. 131 S. Ct. 2541 (2011).

cion,[241] suggest a judicial hostility to class action litigation in the United States that may not be present in Canada. Since the U.S. Supreme Court handed down the *Morrison* decision on June 24, 2010, securities class action suits appear to have gained traction in Canada.[242] Although there is some evidence that class actions were already on the rise in Canada prior to the *Morrison* decision,[243] in 2011 alone, fifteen new class actions were filed in Canada, increasing the number of active class actions from thirty to forty-five as of December 31, 2011.[244] Nine of the fifteen cases filed in 2011 were filed under the continuous disclosure provisions of Part XXIII.1 of the Ontario Securities Act (OSA), enacted in 2005.[245]

241. 131 S. Ct. 1740 (2011); *see also* Coffee, *supra* note 20, at 14 (discussing the impact of these and other Supreme Court decisions on class actions in the United States).

242. Jones, *supra* note 239, at B4; LaCroix, *supra* note 85.

243. Mark L. Berenblut et al., *Trends in Canadian Securities Class Actions: 1997–2008*, NERA (Jan. 2009), https://www.complianceweek.com/s/documents/PUBTrendsCanada.pdf. According to the NERA report, a spike in class actions took place in 2008. *Id*. at 2, 4. Claims focused mainly on improper accounting, misleading earnings guidance, insider trading, product/operational defects, and customer/vendor issues. *Id*. at 6. This upsurge was due in part to the effects of the credit crisis on Canadian financial markets. *Id*. at 6.

244. Heys & Berenblut, *supra* note 180, at 1.

245. *Id*. Bill 198 cases refer to cases brought under the continuous disclosure provisions of Part XXIII.1 of the Ontario Securities Act enacted in 2005 or analogous provisions of other provincial securities acts. *See* Ontario Securities Act, R.S.O. 1990, c. S.5 (Can.), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s05_e.htm#BK247 (providing a statutory cause of action for secondary market misrepresentation); *see also Keeping the Promise for a Strong Economy Act (Budget Measures)* ONT. SEC. COMM'N (2002), http://www.osc.gov.on.ca/documents/en/Securities/ar_20021112_bill-198.pdf. These new class actions are estimated to represent approximately CAD $24.5 billion in claims. Heys & Berenblut, *supra* note 180, at 1. Bill 198 claims were filed against the following issuers in 2011: Alange Energy, Armtec Infrastructure Inc., BCE Inc., Canada Lithium Corporation, Cathay Forest Products, Eastern Platinum Limited, North American Palladium, Sino-Forest Corporation, Zungui Haixi Corporation. *Id*. at 4. The plaintiffs in two of the Bill 198 cases—IMAX and Arctic Glacier—were granted leave to proceed with their claims and the cases were certified as class actions. *Id*. at 12; *see* Kevin LaCroix, *In Landmark Rulings, Ontario Court Allows IMAX Securities Suit to Proceed, Certifies Class,* D & O DIARY (Dec. 15, 2009), http://www.dandodiary.com/2009/12/articles/securities-litigation/in-landmark-rulings-ontario-court-allows-imax-securities-suit-to-proceed-certifies-class/; Kevin LaCroix, *Leave to Proceed, Class Certification Given in Another Ontario Securities Suit*, D & O DIARY (Mar. 9, 2011), http://www.dandodiary.com/2011/03/articles/international-d-o/leave-to-proceed-class-certification-given-in-another-ontario-securities-suit/; *see also* Dobbie v. Arctic Glacier Income Fund 2011 ONSC 25 (Can. Ont. Sup. Ct. J.), *available at* http://www.canlii.org/en/on/onsc/doc/2011/2011onsc25/2011onsc25.html (certifying class action for secondary mar-

There is some evidence that securities class action filings in Canada will continue to proliferate.[246] Several factors may contribute to a continuing increase in Canadian class action filings in 2012 and beyond: (1) the impact of *Morrison* on claims in U.S. courts for non-U.S. investors in non-U.S. stocks (which makes Canada a more attractive venue for these cases), (2) the growth in the Canadian class action bar in terms of both firms and lawyers bringing and defending the cases, (3) Canadian rulings granting certification of global classes and giving plaintiffs leave to proceed, and (4) the success of class counsel in reaching multi-million dollar settlements in Canada (and class-counsel fee awards).[247]

The growth in the Canadian class action bar suggests that plaintiffs' attorneys view Canadian courts as an increasingly attractive venue for investors to pursue their claims.[248] Recently, plaintiffs in *Abdula v. Canadian Solar Inc.*[249] chose to file in Canada even though the shares were listed on the NASDAQ in the United States.[250] On March 30, 2012, the Ontario Court of Appeals held that "[e]xtra-territorial application is specifically envisaged by . . . the definition of 'responsible issuer,' with its reference to issuers with a 'real and substantial connection' to Ontario."[251] As a result, Ontario class action filings against foreign issuers could increase dramatically.[252]

ket misrepresentations); Silver v. IMAX Corp. (2008), 167 A.C.W.S. (3d) 881 (Can. Ont. Sup. Ct. J.), *available at* http://www.canlii.org/en/on/onsc/doc/2008/2008canlii21905/2008canlii21905.html (granting leave to proceed with first claim under OSA). The other cases include a shareholder class action involving prospectus claims, a claim related to a takeover bid, two actions related to the management of investment funds, and two allegations of a Ponzi scheme. Heys & Berenblut, *supra* note 180, at 4.

246. *Id*. at 13.

247. *Id*. at 1.

248. LaCroix, *supra* note 85; *see* Rubin, *supra* note 85 (discussing U.S. class action attorney relocating to Canada).

249. 2011 ONSC 5105 (Can. Ont. Sup. Ct. J.), *available at* http://www.canlii.org/en/on/onsc/doc/2011/2011onsc5105/2011onsc5105.html, *aff'd*, 2012 ONCA 211 (Can. Ont. Ct. App.).

250**.** Heys & Berenblut, *supra* note 180, at 5; *see also* Brandon Kain, *OCA to Address Secondary Market Claims Against Foreign-Listed Issuers*, CAN. APPEALS MONITOR (Jan. 20, 2012), http://www.canadianappeals.com/2012/01/20/oca-to-address-secondary-market-claims-against-foreign-listed-issuers/ (discussing the potential impact of the Court of Appeals' ruling).

251. *Canadian Solar*, 2012 ONCA 211, at para. 88, *available at* http://www.ontariocourts.ca/decisions/2012/2012ONCA0211.htm.

252. Kain, *supra* note 250.

The plaintiff in *Canadian Solar*, an Ontario investor,[253] commenced an action against the defendant issuer and two of its officers and directors, seeking damages for misrepresentation, leave to commence an action for secondary market misrepresentations under section 138.3 of the OSA,[254] and an oppression remedy pursuant to the Canada Business Corporations Act.[255] The court denied defendant's motion to dismiss[256] finding that Canadian Solar fell under the definition of "responsible issuer" in section 138.1 of the OSA[257] and had a "real and substantial connection to Ontario"[258] because: (1) it was incorporated in Canada, (2) it had an executive office in Ontario, (3) it carried on business and held its annual meeting in Ontario, and (4) the alleged misrepresentations were con-

253. The plaintiff resides in Markham, Ontario. 2011 ONSC 5015 at para. 4. The plaintiff purchased a total of 2,000 shares of Canadian Solar between January 21 and May 4, 2010. *Id.* at para. 5.

254. Ontario Securities Act, R.S.O. 1990, c. S.5 (Can.), *available at* http://www.elaws.gov.on.ca/html/statutes/english/elaws_statutes_90s05_e .htm#BK262.

255. Canada Business Corporations Act, R.S.C. 1985, c. C-44, *available at* http://laws-lois.justice.gc.ca/PDF/C-44.pdf; *Canadian Solar*, 2011 ONSC 5105, at para. 1.

256. *Canadian Solar*, 2011 ONSC 5105, at para. 1. The defendants moved to dismiss the case arguing that the court lacked jurisdiction because: (1) Canadian Solar's shares traded exclusively on the NASDAQ, (2) Canadian Solar was governed by the federal CBCA rather than Ontario corporations law, (3) Canadian Solar's principal place of business was in China, (4) the majority of Canadian Solar's manufacturing operations occurred in China, (5) the majority of Canadian Solar's senior executives resided in China, including the two director/officer defendants, (6) the press releases were filed with the U.S. Securities and Exchange Commission, (7) the press releases were followed by conference calls in which the director/officer defendants participated from China, (8) the annual report was filed with the SEC, and (9) the prospectus supplement was filed with the SEC. *See* Kain, *supra* note 250.

257. *Canadian Solar*, 2011 ONSC 5105 at para. 46; *see also* Ontario Securities Act, R.S.O. 1990, c. S.5 (Can.), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s05_e.htm#BK262 ("Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against, (a) the responsible issuer; (b) each director of the responsible issuer . . . ; (c) each officer of the responsible issuer who authorized, permitted, or acquiesced in the release of the document . . . .").

258. *Canadian Solar*, 2011 ONCA 5105 at para. 46.

tained in press releases and other documents such as financial statements that were released or presented in Ontario.[259]

Some Canadian jurisdictions have recently eliminated the reliance requirement for securities-fraud actions,[260] another factor that could encourage plaintiffs to file securities class actions in Canadian courts rather than in courts in the United States.[261] Class certification requirements and contingent-fee arrangements in the United States and Canada are relatively similar, which could also attract plaintiffs familiar with the U.S. system.[262]

Despite these similarities, the certification of global classes raises conflict-of-laws issues that could be an obstacle.[263] Courts may have to specify under what circumstances an Ontario court can assume jurisdiction over foreign class members. *Silver v. IMAX Corp.*[264] raises many choice of law concerns. As Tanya Monestier notes: "What law governs the statutory claims of claimants who purchase and sell securities on a foreign exchange? Would a Canadian court apply foreign securities law in a domestic proceeding . . . ?"[265]

In *IMAX*, plaintiffs sought leave to commence a proceeding under section 138.3 of Part XXIII.1 of the OSA and certification as a class action.[266] IMAX was a Canadian company headquartered in Ontario, plaintiffs were Ontario residents, and IMAX shares were traded on both the TSX and NASDAQ.[267] Plaintiffs claimed that several of IMAX's financial filings and press releases contained misrepresentations that caused the value of their shares to decline.[268] Plaintiffs asserted common law misrepresentation and statutory misrepresentation under the

259. *Id.*

260. Knutsen, *supra* note 25, at 157; Pritchard & Sarra, *supra* note 25, at 892.

261. Noam Noked, *A New Playbook for Global Securities Litigation and Regulation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 2, 2012, 9:53 AM), http://blogs.law.harvard.edu/corpgov/2012/02/02/a-new-playbook-for-global-securities-litigation-and-regulation/.

262. *Id*.

263. Monestier, *supra* note 85, at 16.

264. Silver v. IMAX Corp. (2009), 86 C.P.C. (6th) 273 (Can. Ont. Sup. Ct. J.), *available at* http://www.canlii.org/en/on/onsc/doc/2009/2009canlii72334/2009canlii72334.html.

265. Monestier, *supra* note 85, at 53.

266. *IMAX*, 86 C.P.C. (6th) 273 at paras. 5–6.

267. *Id*. at paras. 1, 4.

268. *Id*. at paras. 1, 2.

OSA.[269] The court certified both the statutory and common law causes of action "despite the fact that [the plaintiffs] had not pleaded individual reliance on the defendant's misstatements."[270] The court in *IMAX* thus seems to have lowered the threshold for class certification in Canadian common law misrepresentation cases in securities class actions.[271]

The still unresolved issue—and indeed the critical issue for Forum Competition—is the extent to which Canada will allow suits to be brought in its courts over transactions taking place outside Canada. Will Canada apply a transactional test similar to *Morrison*, or will Canada apply a more expansive test, perhaps similar to the conduct and effects tests previously used in the United States, that would allow at least some U.S. securities transactions, and also, perhaps, transactions taking place in other countries, to be subject to litigation in Canada? If Canada chooses to allow these suits, will its courts apply Canadian law or the law of the country where the transaction took place? Will Canada apply its own law to all transactions in securities listed for trading in Canada (even if they are also listed for trading in New York), regardless of where the plaintiffs' transactions took place? Canada has an opportunity to engage in vigorous Forum Competition with the United States and, perhaps, with Europe and other jurisdictions, to the benefit of plaintiffs and their Canadian lawyers, but it remains to be seen whether Canada will choose to do so.

Clearly some securities litigation will migrate from the United States to Canada after *Morrison*, such as litigation involving securities transactions taking place in Canada. The unresolved question is whether Canada will also provide a forum for litigation over other securities transactions that took place in the United States, in Europe, or somewhere else outside of Canada.

269. *Id*. at paras. 4, 5.

270. Monestier, *supra* note 85, at 8; *see also IMAX*, 86 C.P.C. (6th) 273 at para. 190.

271. *IMAX*, 86 C.P.C. (6th) 273 at paras. 25, 56–75 ("For the purpose of certification, the question is whether the Claim discloses a cause of action in negligent misrepresentation. I have concluded that it does disclose such a cause of action, notwithstanding the absence of a pleading of direct individual reliance by each class member. In the event that the plaintiffs are unable to prove reliance, it will remain open for them to argue at trial that reliance is not required."); *see also* Monestier, *supra* note 85, at 8 (discussing the low parameters set by *IMAX*).

III. CHOICE OF LAW COMPETITION AFTER *MORRISON*

The Supreme Court's holding in *Morrison* is likely to have a profound impact on Choice of Law Competition, although in a very different way than its impact on Forum Competition. Whether or not the Court intended such a result, the *Morrison* holding will give at least some transacting parties considerable latitude to decide what law applies to their transactions.

The transactional test in *Morrison* could be relatively short lived because it is rooted in geography and an increasing number of securities transactions defy geographical boundaries. While the transactional test provides more predictability than the conduct and effects tests that preceded it, there is ample room for ambiguity, particularly for transactions that do not take place on organized exchanges. Even transactions that do take place on organized exchanges may be difficult to define geographically if the exchanges themselves cross geographical boundaries.

Redirecting the focal point of securities regulation from the geographic location of securities transactions toward the choice of law by buyers and sellers of securities—or the choice of law of the exchanges where securities are listed—could prove more effective than trying to impose a single body of law on securities transactions within a certain geographic area, at least in cases where the geographic location of a transaction and the applicable law are uncertain.

A. CHALLENGES FOR A TRANSACTION TEST ROOTED IN GEOGRAPHY

Erin O'Hara and Larry Ribstein devote much of their book on jurisdictional competition to Choice of Law Competition that is decoupled from the geographic location of parties or transactions.[272] Transacting parties, regardless of where they are located, choose the law they want to apply, and jurisdictions compete to induce transacting parties to choose their law. Nobody has to move anywhere to affect a choice of law.

In the post-*Morrison* regime, however, the geographic location of the transaction determines whether U.S. law applies. The contract between the buyer and seller will determine choice of law only if the contract removes the securities transaction from the geographic boundaries of the United States. This transactional test severely limits Choice of Law Competi-

272. O'HARA & RIBSTEIN, *supra* note 15.

tion by tying parties to U.S. transactions to U.S. law; any transaction within the territorial boundaries of the United States is subject to U.S. law.

The geographic location of a transaction, however, is in some instances difficult to identify. It is also in some instances relatively easy to manipulate. For organized exchanges, the location is usually easy to determine if there is only one location for the exchange, but it may not be easy to determine if the exchange has branches in more than one country and trades are executed electronically rather than on an exchange floor. Exchanges will probably specify rules stating what transactions on an exchange take place in the United States and what transactions do not. The SEC must approve the rules of U.S. exchanges, but foreign exchanges are subject to supervision by foreign regulators. Exchanges that operate in both the United States and in other countries will need to implement rules identifying the transaction location that are acceptable to regulators and courts in all relevant jurisdictions.

There is some controversy over securities that are listed in the United States but also traded somewhere else. The Court in *Morrison* states in two places in its opinion that Section 10(b) applies if a security is "listed" in the United States.[273] This distinction is relevant for "dual listed" securities, for example, those that are listed and traded in New York and Toronto. The Court probably did not mean that Section 10(b) applies to the trades in Toronto as well as the trades in New York, but, arguably, this is literally what the Court said in these passages in *Morrison*. The better argument—so far endorsed by the district courts in the Southern District of New York—is that applying Section 10(b) to the Canadian transactions would be contrary to the transaction test that is emphasized throughout the *Morrison* opinion.[274] Indeed, National Australia Bank itself had American Depository Receipts (ADRs) listed for trading in New York, and yet the Court refused to allow a private right of action for purchasers of its stock in Australia that was the functional equivalent of these ADRs.[275] However, some commentators argue that this issue is not so clear cut, and there are

273. Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2884 (2010).

274. *See* Painter et al., *supra* note 59, at 8–9 (discussing *In re* Vivendi Universal Sec. Litig., 765 F. Supp. 2d 512 (S.D.N.Y. 2010)).

275. *See id.* at 2.

policy arguments for applying Section 10(b) to Canadian transactions if the securities are listed in the United States.[276]

Transactions off of organized exchanges are even more complicated. Private transactions in securities can be difficult to locate.[277] It is often unclear if the physical location of one or both parties or their agents is an important factor, or whether the place where the transaction clears—where title to securities is transferred or where the money or other consideration changes hands—matters more. Another test, embraced by the Second Circuit in *Absolute Activist Value Master Fund v. Ficeto*,[278] is that the transaction takes place in the United States for purposes of *Morrison* if either the title to the securities is transferred in the United States or the parties incur irrevocable liability to purchase or deliver the securities in the United States. This test may provide a clear answer for some transactions, but for others it may not be clear where irrevocable liability was incurred. Furthermore, this test is easy to manipulate by agreeing that one or both parties will take steps to create irrevocable liability outside the United States, for example, by making liability on the transaction contingent upon approval of the transaction by an agent located outside the United States.

B. FROM GEOGRAPHIC LOCATION TOWARD CHOICE OF LAW

Jurisdictional competition in U.S. corporate law is based on contracts rather than geography. To some extent this is also true of European corporate law after the European Court of Justice's *Inspire Art* decision rejected some aspects of "seat theory."[279] Incorporators—and persons who become shareholders, directors, and officers in their corporations—opt into a particular jurisdiction's corporate law. If shareholders, directors, and officers perceive their initial choice as suboptimal later, they can opt out of the original jurisdiction and opt into another jurisdiction's corporate law by reincorporating somewhere else. It does not matter where the corporation is located or where it does business.

Securities law traditionally has rejected this approach. Contractual opting-out is not permissible under the Securities

276. *See* Fox, *supra* note 12, at 85–89.

277. *See* Kaal & Painter, *supra* note 82, at 88–91.

278. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 62 (2d Cir. 2012).

279. *See* Kirchner, Painter & Kaal, *supra* note 15, at 89.

Act of 1933 or the Securities Exchange Act of 1934.[280] *Morrison*, however, may force a reconsideration of this position, at least for those transactions that are easy to structure to take place outside the United States so that U.S. securities laws will not apply. If the parties contractually agree to have the transaction take place somewhere else, such as in London, *Morrison* requires that U.S. courts respect this choice. This is true even if most of the design and marketing of the transaction occurred inside the United States; Section 10(b) does not apply in private lawsuits if there is no actual U.S. transaction.[281] By choosing the location of the transaction, the parties have effectively chosen to opt out of U.S. securities law.

One alternative is to abandon *Morrison*'s transactional test—as well as the hostility of U.S. securities laws to private ordering—and substitute a pure choice of law regime in which contracting parties specify the jurisdiction whose securities law applies. Congress is unlikely to enact such a regime, however, and the statutory restrictions on parties contractually opting out of U.S. securities law will prevent U.S. courts from imposing a pure choice of law regime. On the other hand, courts will also have to deal with the wide range of transactions that cannot definitively be identified as taking place inside or outside the United States. For these transactions in which the transactional test cannot easily be applied anyway, the choice of law rule might be the best solution.

A rule that allows the parties' choice of law to control for geographically ambiguous transactions could be harmonized with both *Morrison* and the existing statutory framework. The rule would stipulate that unless a transaction is unambiguously inside the United States, the transaction does not take place inside the United States if the parties have expressly stated their intent that it does not take place inside the United States. When the parties express no intent, U.S. law could be deemed to be the default rule if one of the parties is located inside the United States. Conversely, non-U.S. law could be the default rule if none of the parties are located inside the United States. Alternatively, the default rule could depend upon the place where the transaction clears. Other factors could be considered

280. Securities Act of 1933, 15 U.S.C. § 77n (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78cc (2006).

281. See the district court's holding on 1934 Act claims in SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 163–64 (S.D.N.Y. 2011), but not on all of the 1933 Act claims brought by the SEC.

as well, although it is best that the rule be clear enough that the relevant factors are known to the parties at the time of the transaction. In sum, unless other indicators of geography provide a clear answer as to the location of the transaction, the parties' choice should determine the transaction location and, hence, the law that will apply and most likely also the forum in which litigation over the transaction will be heard.

A danger from a pure contract-based approach is the race to the bottom phenomenon: if some contracting parties choose a jurisdiction with regulations that offer inadequate protection to other parties. Such a race to the bottom, however, requires at least the consent of both parties (buyers as well as sellers); the race to the bottom argument assumes that buyers will simply accept whatever securities laws sellers choose. This may be true for some exchange-traded securities, and this is a reason for preventing choice of law to trump geography for transactions that unequivocally take place inside the United States. In private transactions where geography is ambiguous, however, buyers may be more sophisticated and also are put on notice that foreign law may apply by the very factors that make geography ambiguous, for example, where there are non-U.S. parties to the transaction or if the transaction clears outside the United States. In these instances, the race to the bottom argument may not be persuasive.

The race to the bottom concern is also addressed to some extent if SEC and DOJ enforcement follow some securities transactions outside the United States, as contemplated by Section 929P(b) of the Dodd-Frank Act.[282] While this approach may have costs, particularly the risk that a transaction is subject to the law of more than one jurisdiction, it could mitigate the threat of a race to the bottom.

Regulating buyers rather than transactions could also help address the race to the bottom problem. Statutes or regulations could restrain some buyers from engaging in securities transactions governed by the laws of jurisdictions that do not offer adequate protection to buyers. Indeed, the Dodd-Frank Act already regulates what types of securities certain financial institutions may buy, and this trend toward regulating buyers' decisions may continue. Regulating some buyers' choice of law could be a better approach than insisting that the parties have no choice of law. Indeed, regulating buyers' choices may be the

282. *See supra* Part II.

only effective way of keeping their investments under U.S. securities law because, even if a pure geography based transaction test is retained, it is easy to manipulate. It is relatively effortless for sophisticated parties to move a transaction to a different location if they want a different law to apply.

In sum, if certain transacting parties' decisions about choice of law seem suboptimal, whether because they are ill-informed or for some other reason, it could be preferable to require these particular parties to choose U.S. securities law. This approach could be preferable to pretending that there is no choice of law for transactions deemed to be in the United States, but then allowing parties to take evasive action to relocate transactions outside the United States.

One way to regulate buyers' investment decisions is to use the "suitability rule" requiring brokers to put customers into "suitable" investments.[283] This rule could be interpreted to provide that U.S. brokers must recommend to all but the most sophisticated individual clients brokerage transactions governed by U.S. securities law or the law of other countries with similar protections. Persons making investment decisions for retirement funds, foundations, non-profit endowments, and some mutual funds could be similarly restricted, at least with respect to a certain percentage of their investment portfolios. State and local governments could pass laws providing that public funds would only be invested in securities transactions governed by U.S. law or the law of some countries but not others.

C. INTEGRATING CHOICE OF LAW INTO POST-*MORRISON* SECURITIES LAW

There are several ways in which transacting parties' choice of law could become a factor in determining when U.S. securities law applies to a transaction. One approach would be for courts interpreting *Morrison* to take the parties' choice of law into consideration in deciding the location of a transaction.[284]

283. *See* Wulf A. Kaal, *Hedge Fund Valuation—Retailization, Regulation, and Investor Suitability*, 28 ANN. REV. BANKING & FIN. L. 581, 630–37 (2009) (discussing the application of investor suitability principles in the context of hedge fund investing).

284. If, as suggested in this article, the parties' choice of law was considered a determining factor for identifying the location of a transaction, an additional complication arises if one of the parties seeks to use a choice of U.S. law to sue a third party that did not make that choice—for example, an issuer of the securities that is outside the United States and takes no steps to cause its securities to be traded in the United States. For this reason, the parties' choice

Courts could clarify the post-*Morrison* environment by identifying certain categories of transactions where transaction location will be determined by the parties' choice of law. This "choice of law" category might include private transactions where both parties have a presence outside the United States, even if the parties also have a presence inside the United States as do many large financial institutions. Choice of law might also be allowed to determine transaction location where only one party has a presence outside the United States but the transaction also clears outside the United States—for example, a U.S. buyer agrees to purchase securities privately from a U.K. seller in a transaction that will settle in London.

A more debatable situation arises if only one party is present in the United States and the transaction clears in the United States. Arguably, sophisticated parties in this situation should be permitted to agree that the transaction will be governed by the securities laws of the jurisdiction of the non-U.S. party. However, the statutory prohibition on contracting around U.S. securities law[285] suggests that the U.S. party who transfers funds inside the United States to buy securities should be protected by U.S. law. Another debatable situation arises if both parties only have a U.S. presence but the transaction clears outside the United States. Should two U.S. parties with no U.K. presence be permitted to agree that only U.K. law will apply to their private transaction that clears in London?

An important factor in determining transaction location in all of these situations should be whether the foreign jurisdic-

of law is most helpful for identifying the location of a transaction in a dispute between the transacting parties, or where the SEC or DOJ claims that one of the parties defrauded the other. Choice of law is a less helpful factor in situations where the alleged violator had no role in the choice of law. For example, in the *Porsche* case, discussed *supra* notes 13 & 80, even if the swap parties had agreed that their swap referencing VW stock would be governed by U.S. law, this should not give them a right to allege a claim under U.S. law against VW, a company whose stock is traded in Germany and not in the United States, or a claim against Porsche for its trades in VW stock in Germany.

285. Securities Exchange Act of 1934 § 78cc (providing in Section 29(a) that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." Section 29(b) provides that "[e]very contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void . . . .").

tion chosen by the parties actually will accept jurisdiction over the transaction and apply its law. If the parties contract for U.K. securities law, one risk is that U.K. courts will decline to apply U.K. law because the transaction did not clear in the U.K, or because one or both parties do not have a U.K. presence, or for some other reason. If so, the contract to apply non-U.S. law might as a practical matter mean that no law applies. One of the parties—perhaps the party more likely to commit securities fraud—might be more aware of this risk than the other party. A contract allowing a securities transaction to end up in a lawless no-man's-land probably should not be permitted.

The complexities in the above discussion suggest, however, that U.S. courts have a limited capacity to integrate choice of law into a post-*Morrison* regime defining transaction location. There are enough variables in the equation already that courts may be reluctant to vary their analysis of transaction location because of the parties' choice of law. The risk of inconsistent case law in different districts and in different circuits also increases with the number of variables that courts consider. This could be an additional disincentive for courts to embark upon a choice of law regime rather than try to make their geographic definition of transaction location as consistent as possible with that of other courts. Thus, without any clear mandate in *Morrison* to consider contractual choice of law in determining transaction location, and with a statutory prohibition on "opting out,"[286] lower federal courts may prefer to struggle with the ambiguities of geography rather than consider choice of law.

This is where the SEC could step in to implement a choice of law regime through rulemaking. Under the *Chevron* doctrine,[287] federal courts give considerable deference to federal agencies in interpreting the statutes Congress has charged them with implementing. If the SEC promulgates a rule defining transaction location for purposes of the holding in *Morrison*, the federal courts will probably defer to the rule. Indeed, courts may welcome such a rule if it helps them avoid struggling to define transaction location on their own. The SEC rule could take the parties' choice of law into account in those situations where transaction location is otherwise ambiguous.

286. *See* Securities Exchange Act of 1934 § 78cc.

287. *See* Chevron U.S.A, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1984).

The SEC could also address the problem of dual-listed exchange-traded securities which arose in the *Vivendi* securities litigation, although it appears that in this area the district courts are defining a relatively clear rule, namely that Section 10(b) does not apply to dual-listed securities when the transaction takes place on a non-U.S. exchange.[288] The problem may become more difficult to resolve for exchanges that establish a presence both in the United States and in a non-U.S. jurisdiction. In those instances, an SEC rule could provide that the exchange can establish rules designating in which of the two jurisdictions a particular transaction takes place.

Another area of complexity is security-based swaps. These include transactions that involve U.S.-swap parties and reference a security only traded outside the United States as in the *Porsche* case,[289] as well as those that involve only non-U.S. parties but reference a security that is traded inside the United States, for example, a German swap referencing common stock in General Motors. The SEC should probably promulgate rules identifying the location of the transaction for purposes of Section 10(b) and perhaps also other relevant provisions of U.S. securities laws.[290]

Redirecting the focal point of securities regulation from the geographic location of securities transactions toward the choice of law by buyers and sellers of securities will be controversial, but in some transactions where geography is ambiguous it may be inevitable. Focusing on the choice of law could be more effective than trying to impose a single body of law on securities transactions within a single geographic area when many securities transactions at least arguably take place in more than one geographic area. Geographic constraints are also rather limited in a globalized world where parties can readily change transaction locations as they please. If parties' efforts to manipulate geography are successful, parties will be able to evade the statutory prohibition on opting out of U.S. securities law anyway. Clear guidelines for contractually defining the location of a securities transaction could be the best alternative.

288. *See In re* Vivendi Universal Sec. Litig., 765 F. Supp. 2d 512, 525–34 (S.D.N.Y. 2011).

289. *See* Elliott Assoc. v. Porsche Auto. Holding SE*,* 759 F. Supp. 2d 469, 476 (S.D.N.Y 2010); Brief of Richard W. Painter et al. as Amici Curiae Law Professors Supporting Respondents, Viking Global v. Porsche Auto. No. 11-397 (2d. Cir. Aug. 3, 2011), 2012 WL 453966, at *3.

290. *See* Painter, *Extraterritorial Jurisdiction*, *supra* note 11, at 228 (discussing various proposals for SEC rulemaking in this area).

Much of the above discussion has focused on parties opting out of U.S. securities law and choosing the law of another jurisdiction. For two reasons, however, some parties might prefer U.S. law. First, to the extent U.S. law provides more effective remedies for securities fraud and better deterrence, parties to securities transactions may prefer it and even insist upon it. (As already pointed out above, some buyers should perhaps be required to engage only in transactions governed by U.S. securities law.) Second, if exposure to litigation in Dutch courts, or in some other non-U.S. jurisdiction, is undesirable, parties may want to make sure their transactions are covered by U.S. law. Although application of U.S. law is no guarantee that the Netherlands or some other jurisdiction will not engage in Forum Competition and allow simultaneous litigation over the same transactions, taking steps to locate a transaction inside the United States for purposes of *Morrison* might convince non-U.S. courts to stand down and let U.S. courts adjudicate a dispute.

In sum, choice of law should replace the geographically-based transactional test in those circumstances where geography is ambiguous. Regardless of whether geography or choice of law controls, parties should be able to know in advance whether U.S. securities laws apply, and not have this decision be made by courts unpredictably after the fact. Choice of Law Competition between the United States and other jurisdictions would recognize that different jurisdictions have different substantive and procedural law and would allow the parties to determine for themselves ex ante which securities laws govern their transactions.

IV. COORDINATION OF JURISDICTIONAL COMPETITION IN THE UNITED STATES AND EUROPE

In *Morrison,* the United States took an important unilateral step away from overreaching in Forum Competition. Before *Morrison*, there was a significant risk that U.S. law would be applied to securities transactions taking place outside the United States because the conduct and effects tests suggested a U.S. connection with the alleged fraud. Now the transaction itself must have a connection with the United States that is sufficiently strong that a U.S. court will deem the transaction to have taken place inside the United States. There is still the potential for U.S. overreaching in some private transactions and in unorthodox transactions, such as security-based swaps ref-

erencing foreign-traded securities, but so far the lower federal courts have exercised considerable restraint. Plaintiffs' lawyers and perhaps some transacting parties may seek application of U.S. law to transactions that take place beyond our borders, but U.S. courts will likely not participate in extensive Forum Competition absent a statutory mandate that they do so.

The notable exception to this restraint is Section 929P of the Dodd-Frank Act. Section 929P may apply to securities transactions taking place outside the United States. There is a risk that SEC and DOJ actions under Section 929P and the laws and enforcement policies of non-U.S. jurisdictions may collide. When Section 929P is used, transacting parties are at risk of being subjected to the securities laws of two or more jurisdictions whose rules may be inconsistent.

The developments in the Netherlands thus far do not pose too big a risk that parties to securities transactions inside the United States will be subjected to litigation in Dutch courts as well as in U.S. courts. However, given the massive expansion of Dutch jurisdiction in the cases under the WCAM and the trend towards a continuing expansion, future developments could make it possible that "purely" American cases that pass the transactional test under *Morrison* could also be litigated in the Netherlands.

Dutch courts have already enforced international collective settlements where none of the defendants and only a few plaintiffs were domiciled in the Netherlands, the alleged wrongdoing took place outside the Netherlands, and the claims were not brought under Dutch law.[291] There is some evidence that Dutch courts may uphold jurisdiction in the Netherlands, even without a single interested person domiciled in the Netherlands.[292] There is also evidence that Dutch courts are acting with full knowledge of the significance and the implications of their judgments, in effect creating an alternative European venue for international collective settlements in mass claims.[293] Given the Dutch Supreme Court's presumption of reliance/causation in

291. *See* Converium COA Decision, *supra* note 32, ¶ 3.

292. *See Legal Alert* Converium, *supra* note 34, at 2.

293. *Id.* at 3 ("It should be noted that the Court is fully aware of the significance of its judgment in creating an alternative venue to declare international collective settlements in mass claims binding on all class members. The Court explicitly referred to the limitations for the U.S. courts to do so in securities and anti-trust cases as a result of the U.S. Supreme Court's decisions in *Morrison v. National Australia Bank* and *Hoffman-La Roche v. Empagran*.").

prospectus liability cases,[294] and its expansion beyond the fraud-on-the-market theory,[295] it seems possible, if not likely, that Dutch courts will continue to expand their theories to other areas.[296] In light of these trends, it seems possible that even American cases that were not dismissed under *Morrison* could in the future be litigated in Dutch courts.

We are not speculating herein as to what the possible consequences of such developments could be. Depending on future developments in this context, however, the acceptable outer bounds of jurisdictional competition by both Europe and the United States might eventually be defined by treaty or other multilateral agreement. If the trend toward a substantial expansion of the Netherlands jurisdiction continues and increasses, the Netherlands, and perhaps, the other E.U. member states, could agree that civil litigation in Dutch courts, or the courts of another E.U. member state, will not include securities transactions that take place inside the United States and that are subject to U.S. law. Alternatively, countries could agree that litigation over extraterritorial securities transactions would not go forward if the country where the transactions took place formally objects to the proceeding and provides assurance that its own securities laws will be applied to the transaction in either a government enforcement proceeding or a private lawsuit. If there were to be such a treaty or other agreement, the United States could agree to restrain the exercise of the powers that the SEC and DOJ purportedly have under Section 929P so that U.S. enforcement actions do not disrupt non-U.S. markets or the enforcement agenda of non-U.S. regulators.

Short of treaties or other bilateral and multilateral agreements, U.S. executive branch agencies and courts, as well as their foreign counterparts, could take steps to curtail Forum Competition that undermines relations with other countries. The United States already did so when the Supreme Court de-

294. *See* HR 27 november 2009, JOR 2010, 43 m.nt. K. Frielink (VEB e.a./World Online e.a.) (Neth.), *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BH2162; de Jong, *supra* note 25, at 364–65 (discussing the *World Online* decision and its implications); Thompson, *supra* note 25, at 1129–44 (explaining the differences of the Dutch and U.S. system of securities litigation and underscoring the attractiveness of the Dutch rules).

295. *See supra* Part II.B.3.

296. *See supra* Part II.B.3. Expansion of Dutch courts' theories could include liability for misrepresentation in periodic disclosure and other types of securities fraud.

cided *Morrison* and Congress in 2010 declined to reinstate private lawsuits under the conduct and effects tests. The possibility that the SEC and DOJ will aggressively use Section 929P remains, however, and the SEC should consult with foreign regulators and perhaps with the U.S. Department of State before this provision is used to conduct enforcement actions or investigations concerning non-U.S. securities transactions. If Section 929P causes problems with foreign regulators in the future, Congress should amend the statute to require such consultation or even provide the State Department with the power to terminate a Section 929P proceeding upon a finding that it interferes unacceptably with foreign relations. Countries such as the Netherlands that may entertain private lawsuits over securities transactions outside their borders should seriously consider judicial doctrines based on comity to dismiss or modify suits that create a conflict with the laws of other countries. In this regard, the pre-*Morrison* observations of Professor Hannah Buxbaum on comity could be very helpful; she suggested in 2007 that courts applying the conduct and effects tests should exercise discretionary dismissal of suits and apply foreign law instead of U.S. law in cases where doing otherwise creates a serious conflict with foreign laws.[297] Although the conduct and effects tests are now defunct in private litigation in the United States after *Morrison*, Professor Hannah Buxbaum's suggestion and similar suggestions should inform the jurisprudence of other jurisdictions that allow private suits over extraterritorial transactions. These jurisdictions also might consider a "right to sue" procedure in which a domestic securities regulator and the jurisdiction's foreign office must give prior approval for a suit over extraterritorial securities transactions to go forward.

CONCLUSION

While many jurisdictions could be worse than the United States at protecting investors, it is not at all certain that U.S. law does a better job of deterring securities fraud. While private rights of action (particularly class actions under the fraud-on-the-market theory) and the SEC enforcement regime in the United States are at times vigorous, securities fraud is a persistent problem in the United States. U.S. investment bankers, who are supposed to function as gatekeepers, may have worse incentives than in some other countries and some cultural

297. Buxbaum, *supra* note 224, at 64–67.

norms in the United States may encourage securities fraud.[298] The U.S. system of civil litigation (class actions under the fraud-on-the-market theory) and regulation (including the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010) is expensive. Compliance and litigation costs are likely passed on to investors. It is not certain that the payoff in less fraud is worthwhile. At the very least, there is a good case for allowing jurisdictional competition to continue with both the United States and other countries using coordination to define both the outer limits of choice of law by transacting parties and the outer limits of jurisdictional overreach by their regulators and courts.

298. *See* Claire Hill & Richard W. Painter, *Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability*, 33 SEATTLE U. L. REV. 1173, 1177–78 (2010) (arguing that investment banks switching from partnerships to corporate forms left bankers with no personal liability for failures leading to excessive risk taking).