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Three Options for Institutional Investors Pursuing Claims Against Non-U.S. Issuers in the Wake of Morrison and City of Pontiac

May 21, 2014| Blog | By **Joel D. Rothman**

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In its 2010 *Morrison* decision, the Supreme Court decided that Section 10(b) of the Securities Exchange Act of 1934, **15 U.S.C. § 78j(b)** ("Section 10(b)"),only reaches "transactions in securities listed on domestic exchanges" and "domestic transactions in other securities," regardless of whether the alleged fraudulent conduct occurred within the United States or caused a substantial effect within the United States. ***Morrison v. National Australian Bank Ltd.*, 561 U.S. 247, 266 (2010)**; c*ontrast **Alfadda v. Fenn***, **935 F.2d 475, 478-79 (2d Cir. 1991)**.

Morrison did not foreclose Section 10(b) claims for purchases of **American Depository Shares (ADS)** or **American Depository Receipts (ADR)**. Indeed, investor class actions asserting Section 10(b) claims for ADS or ADR purchases are not uncommon. As a result of this door left open by *Morrison*, both foreign and U.S. investors have argued that they should be able to pursue Section 10(b) claims for purchases of common stock on a foreign exchange so long as the company has shares cross-listed on a U.S. exchange. This became known as "listing theory."

But the Second Circuit recently rejected this "listing theory" in ***City of Pontiac Policemen's and Firemen's Retirement System et al. v. UBS AG et al*., No. 12-4355 (2d Cir. May 6, 2014)**. The court found that the "listing theory" is "irreconcilable" with *Morrison* because *Morrison* "evinces a concern with the location of the securities *transaction* and not the location of an exchange where the security may be dually listed."

So, with at least one circuit rejecting the "listing theory," what options remain for institutional investors seeking to recover losses resulting from frauds committed by non-U.S. issuers? **Mintz Levin's Institutional Investor Class Action Recovery Practice** has worked closely with institutional investors in pursuing the following options:

(1) Seek Recovery in Overseas Courts

One undeniable result of *Morrison* is that securities fraud cases in non-U.S. courts are increasing. Most times, an action in a foreign jurisdiction will be an investor's only potential source of recovery for losses on common stock purchases not made on a U.S. exchange.

However, investors not accustomed to foreign courts must tread carefully. For example, an investor usually has to be a named plaintiff in overseas cases. Additionally, many foreign jurisdictions do not follow the "American rule," meaning that in these jurisdictions, the losing party may have to pay the winning party's attorneys' fees and costs. Also, many jurisdictions bar attorneys from financing their clients' cases, resulting in large cases being funded by third parties. These litigation funders often take a large share of any recovery, on top of the share taken by the attorneys for fees, and require investors to sign "funding agreements" in order to be eligible to take part in a case.

Mintz Levin's Institutional Investor Recovery Practice has experience evaluating proposals from foreign firms and litigation funders and advising clients on whether to participate in foreign actions.

(2) Bring Common Law Fraud Claims In United States Courts

The Securities Litigation Uniform Standards Act of 1998 precludes common law claims in securities fraud class actions. But one limited option for U.S. investors is to opt-out of a securities class action and maintain a separate claim based on common law.

For example, in the *BP Securities Litigation* now progressing through the United States District Court for the Southern District of Texas, the court ruled that investors must bring claims under English Common law seeking recovery for losses in BP common shares, which trade on the London Stock Exchange, because England had "the most significant relationship" to the claims and because "the Court is certainly capable of applying English law, which shares so many strong similarities with U.S. law due to a common heritage." *In re BP Sec. Litig.*, MDL No. 10-md-2185 (S.D. Tex. Dec. 5, 2013).

In contrast, the United States District Court for the Central District of California, declined to exercise jurisdiction over Japanese law claims in the case arising out of Toyota's alleged misrepresentations about its vehicles "unintended acceleration." *In re Toyota Motor Corp. Sec. Litig.*, No. 2:10-cv-00922 (C.D. Cal. July 7, 2011). In the *Toyota* case, the Court noted that "[t]he clear underlying rationale of the Supreme Court's decision in [*Morrison*] is that foreign governments have the right to decide how to regulate their own securities markets," and that "respect for foreign law would be completely subverted if foreign claims were allowed to be piggybacked into virtually every American securities fraud case." Thus, the Court concluded: "[w]hile there may be instances where it is appropriate to exercise supplemental jurisdiction over foreign securities fraud claims, any reasonable reading of *Morrison* suggests that those instances will be rare."

(3) Recovery of Common Share Losses Through SEC Settlements

SEC settlements with non-U.S. issuers often include ADS or ADR purchasers in the plan of distribution of the settlement funds. But what about including common shares purchased on a foreign exchange in a SEC settlement's plan of distribution? Notably, while *Morrison* eliminated investors' ability to pursue a private action under Section 10(b) for securities trading on a non-U.S. exchange, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") amended the Exchange Act to grant "extraterritorial jurisdiction" in actions brought by the SEC.

Specifically, **Section 929P(b)(2)(A) of Dodd-Frank** grants U.S. District Court jurisdiction over "an action or proceeding brought or instituted by the Commission or the United States" involving "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."

As a result and in some circumstances, the SEC could include common stock purchasers within the plan of distribution in a settlement with a non-U.S. issuer. However, while the plan of distribution in some case may cover common stock traded on a foreign exchange, the plan may only cover U.S. purchasers because an important rationale of including common stock would be to protect U.S. investors. **Mintz Levin's Institutional Investor Recovery Practice** has experience working with the SEC to develop inclusive plans of distribution that cover both common share purchasers and ADR/ADS purchasers.

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