RECENT TRENDS AND DEVELOPMENTS IN SECURITIES LITIGATION

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This paper provides a general overview of several recent developments and trends concerning securities litigation in the United States and abroad. Specifically, this memorandum briefly discusses: (1) circumstances where it may be appropriate to actively pursue litigation as an individual rather than seeking appointment as a “Lead Plaintiff” or remaining a passive member in class action litigation; (2) the impact of recent judicial rulings concerning statutes of repose on investors’ ability to delay the decision to actively pursue individual litigation; (3) the rise of securities litigation outside of the United States; and (4) the impact of the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) on individual and opt-out litigation.

I. Individual and Opt-Out Securities Litigation

The Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”) are the two primary federal laws that regulate securities markets and securities transactions in the United States. Claims under the Securities Act (generally applicable to securities purchased in a public offering) and Exchange Act (generally applicable to securities purchased in the secondary market, such as on a stock exchange) can be pursued as either individual actions or as class actions.

The class action mechanism, which is governed by Rule 23 of the Federal Rules of Civil Procedure, is a powerful procedural tool to hold defendants accountable for widespread damages caused to a large number of victims, particularly in securities cases where many investors may not have damages sufficient to support the cost of prosecuting individual claims.

When a class action asserting claims under the Securities Act and/or the Exchange Act is filed, an investor with potential claims typically has three options: (1) seek appointment as the “Lead Plaintiff” responsible for prosecuting the claims on behalf of a class of similarly situated investors; (2) remain a passive class member who will recover damages only if the Lead Plaintiff successfully litigates or settles the class action; or (3) file an individual action in order to directly litigate its own claims.

Disclaimer:

This article is intended to provide a background on shareholder class action litigation and trends, serving as a lead plaintiff, and litigating an action. However, it is not intended as a substitute for legal advice with your chosen counsel or your discussions with counsel as to the merits of each particular action you may consider. The purpose of this article is to provide general information only. Nothing herein constitutes legal advice, and prior results are no guarantee of similar outcomes in the future.
As noted below, empirical data on securities filings shows that 2015 class action filings asserting claims under the federal securities law were at their highest levels since 2008 despite a decrease in the number of U.S.-listed companies:

A. Serving as Lead Plaintiff

The Private Securities Litigation Reform Act of 1995 (the “PSLRA”), 15 U.S.C. § 78u-4(a)(3) and 15 U.S.C. § 77z-1(a)(3), establishes the process which governs the appointment of the Lead Plaintiff in federal class action lawsuits asserting claims under the Securities Act and/or the Exchange Act. As an initial matter, the PSLRA requires the plaintiff filing a class action lawsuit to publish notice advising investors of the pendency of the action. The notice informs investors that any class member may apply to the court to serve as the Lead Plaintiff within 60 days of the publication of the notice. See 15 U.S.C. § 78u-4(a)(3)(A); 15 U.S.C. § 77z-1(a)(3)(A). The purpose of the initial notice, and the 60-day period that follows, is to alert potential class members to the commencement of the litigation and to provide investors with sufficient time to analyze their losses and consider whether to move to be appointed Lead Plaintiff.

Once appointed by the court, the Lead Plaintiff is responsible for managing the litigation, primarily by overseeing and monitoring the progress of the action and the efforts of

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2 The PSLRA creates a rebuttable presumption that the plaintiff with the largest financial interest (of the movants seeking appointment) in the litigation should be appointed as Lead Plaintiff so long as the plaintiff is both adequate and typical of other class members. See 15 U.S.C. § 78u-4(a)(3)(B)(iii); 15 U.S.C. § 77z-1(a)(3)(B)(iii).
Lead Counsel and by providing input on litigation and settlement strategies. The decisions made by the Lead Plaintiff, who acts as a fiduciary for all members within a class, generally bind every passive class member. Moreover, settlement data confirms the trend showing that class action litigation under the federal securities laws led by public pension funds produces a higher median settlement than litigation led by non-pension investors:3

![Chart showing median settlements](chart.png)

B. Pursuing Individual or Opt-Out Claims

As an alternative to serving as a Lead Plaintiff or remaining a passive class member whose recovery will depend upon the success of the class action, investors may consider filing an individual action (also known as an “opt-out” action if a class has been certified in a companion class action) in order to pursue claims and recover losses on their own behalf and without any direct involvement from the Lead Plaintiff.

While individual litigation allows an investor to actively pursue litigation in a manner specifically designed to maximize its own recovery—potentially recovering more than the investor would have recovered as a passive class member—filing an individual action is appropriate only in a limited number of circumstances. Given the absence of certain economies of scale attendant to the class action mechanism, the filing of an individual action is typically appropriate only when an investor has suffered substantial losses and the theory of liability is particularly strong.

For example, in the last year, securities claims against Petróleo Brasileiro S.A.—Petrobras (“Petrobras”)4 and American Realty Capital Properties, Inc. (“ARCP”)5 have prompted

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3 Data provided by NERA Economic Consulting.
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substantial individual litigation by institutional investors who have exited pending class actions against each company. These cases against Petrobras and ARCP are noteworthy in that they involve billions of dollars in investor losses and the disclosure of facts that strongly support liability against the defendants.

1. Petrobras

Petrobras, a Brazilian state-run energy company headquartered in Rio de Janeiro, Brazil, is currently embroiled in the largest corruption scandal in Brazilian history in relation to claims of collusion between company executives, contractors, and members of the ruling “Workers’ Party” over the last decade. Through a series of disclosures beginning in March 2014, investors learned that senior Petrobras officials repeatedly authorized billions of dollars in overpayments on contracts with third-party contractors in exchange for personal bribes and the payment of kickbacks to dozens of high-ranking Brazilian politicians. According to Paulo Roberto Costa, the company’s former Chief Downstream Officer, politicians received three-percent commissions on the value of all contracts authorized by him and Renato de Souza Duque, the company’s former Chief Engineering, Technology and Procurement Officer, from 2004 to 2012. Moreover, Pedro Barusco, a former Petrobras manager, testified before a Brazilian Congressional hearing that he amassed nearly $100 million in bribes, and that he met regularly with the Workers’ Party treasurer to coordinate their efforts and how to share bribes. As a result of these admissions and the Brazilian government’s ongoing investigation, Petrobras was forced to take billions of dollars in write-downs as its market capitalization value declined substantially.

In response to these disclosures, class action litigation was filed in the Southern District of New York against Petrobras and certain of its current and former officers and directors. Given the size of investors’ losses and the strength of the claims against the defendants, several large institutional investors have already filed individual actions rather than participating as passive class members in the Petrobras class action. These investors include, among others:

- Aberdeen
- Alaska Permanent Fund Corporation
- Bill & Melinda Gates Foundation
- Danske Invest
- Dimensional Fund Advisors
- Janus Capital

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- John Hancock
- Lord Abbett
- Manning & Napier
- MassMutual
- New York City Employees’ Retirement System
- Ohio Public Employees Retirement System
- PIMCO
- Russell Investment
- Transamerica
- SKAGEN
- State of Alaska Department Of Revenue, Treasury Division
- Washington State Investment Board

The court presiding over the class action certified two classes of investors under the Exchange Act and the Securities Act on February 2, 2016 and noted that “it is not uncommon for large institutions to opt out of class actions simply so that they can improve their bargaining position if, as usually occurs, settlement discussions begin.”

2. ARCP

ARCP, now known as VEREIT, Inc., is a real estate investment trust (“REIT”) that admitted in October 2014 to falsifying its reported adjusted funds from operations (“AFFO”) figures—a critical financial metric for REITs—in order to appear more profitable. Specifically, the company conceded that certain “errors” in its financial statements were “intentionally made,” while other “errors” were “identified but intentionally not corrected.” Several days after this announcement, ARCP’s Chief Accounting Officer—who had been forced to resign in connection with the accounting scandal—filed suit against ARCP, its Chief Executive Officer, and its Chairman alleging that the Chief Executive Officer and Chairman had directed her and the former Chief Financial Officer to ignore accounting issues and manipulate quarterly financial results in order to conceal the improper accounting. These disclosures eliminated billions from the company’s market capitalization value:

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Investors have filed class action litigation against ARCP in the Southern District of New York. Like the Petrobras litigation, the claims against ARCP are particularly strong—having survived defendants’ motion to dismiss—and investors have suffered substantial losses. As a result, several notable institutional investors have filed individual actions, including BlackRock, PIMCO, and Vanguard.

3. Individual Recovery Premiums

Data regarding the frequency and success of individual litigation is not robust given that, unlike class action settlements, individual and opt-out settlements are privately negotiated and do not require disclosure or court approval. However, a 2013 analysis from Cornerstone Research reported that 53 percent of class actions filed between 1996 and 2011 that resulted in settlements above $500 million had related individual and/or opt-out actions. This data supports the notion that investors tend to pursue individual litigation in cases with significant losses. Moreover, Cornerstone Research provided anecdotal information from the individual recoveries in several securities actions—including litigation against AOL Time Warner Inc. and Qwest Communications International Inc.—demonstrating that certain institutional investors that filed individual and opt-out actions recovered far greater amounts than what they would have recovered had they remained passive class members (e.g., “up to 90 percent of investor losses” or “38 times the size of what they would have received without opting out”).

Nevertheless, individual and opt-out litigation, like all forms of securities litigation, are inherently uncertain and there can be no guarantee that individual plaintiffs will obtain any recovery premium from actively litigating an individual action rather than remaining passive class members.

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10 In re AOL Time Warner, Inc. Sec. & “ERISA” Litig., No. 02-md-1500 (SWK) (S.D.N.Y.).
11 In re Qwest Commun. Int’l Inc. Sec. Litig., No. 01-cv-1451-REB-CBS (D. Colo.).
12 Cornerstone Report at p. 4.
II. Statutes of Repose and Individual and Opt-Out Litigation

While investors are permitted to file an individual action at any time prior to the certification of the companion class action, recent court decisions concerning statutes of repose are now forcing investors to act more quickly (often at the outset of the class litigation) to decide whether filing an individual action is appropriate.

Generally speaking, statutes of limitations set the time limit on how long a plaintiff can wait to bring suit after discovering (or after the plaintiff should have discovered) that he has a claim. For example, claims under Section 10(b) of the Exchange Act must be brought within two years of the date the plaintiff discovered (or should have discovered) the existence of the claim. Similarly, claims under the Securities Act must be brought within one year of the date the plaintiff discovered (or should have discovered) the existence of the claim.

On the other hand, statutes of repose prevent plaintiffs from bringing suit after a certain amount of time has elapsed and do not take into consideration the timing of when the plaintiff first learned that a claim could be brought or whether a defendant actively concealed its wrongdoing. Claims under Section 10(b) of the Exchange Act must be brought within five years of the false and misleading statement, irrespective of when or if the falsity of that statement is discovered, and claims under the Securities Act may be brought no more than three years after the security at issue was offered to the public.

Since the Supreme Court’s ruling in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), federal courts have held that the statutes of limitations applicable to claims under the Securities Act and the Exchange Act are delayed (or “tolled”) for individual class members while a securities class action is pending. In holding that statutes of limitations are tolled during the pendency of a putative class action, the Supreme Court explained that, because Rule 23 of the Federal Rules of Civil Procedure (the rule allowing class actions in federal court) was designed, in part, to prevent the duplicative filing of complaints, such a policy would be

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13 Once a court approves class certification plaintiffs must file an opt-out action within a court-designated period of time.

14 28 U.S.C. § 1658(b) (“a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than . . . 2 years after the discovery of the facts constituting the violation. . . .”).

15 15 U.S.C. § 77m (“No action shall be maintained to enforce any liability . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . .”).

16 28 U.S.C. § 1658(b) (“a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than . . . 5 years after such violation”).

17 15 U.S.C. § 77m (“No action shall be maintained to enforce any liability . . . more than three years after the security was bona fide offered to the public. . . .”).
undermined if class members needed to file duplicative individual complaints in order to proactively assert their rights while a class action was still pending. *Id.* at 553-54.

Notwithstanding the Supreme Court’s ruling on the tolling of statutes of limitations in *American Pipe*, several courts have recently held that statutes of repose cannot be tolled in a similar manner. Most notably, in *Police & Fire Retirement System v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), the Second Circuit Court of Appeals, broke from decades of case law and held that the Securities Act’s statute of repose period was a firm deadline that could not be tolled during the pendency of a class action. 18 Specifically, the Second Circuit reasoned that statutes of repose provide defendants with the substantive right to be free from suit after a certain time and that tolling would only serve to abridge defendants’ substantive rights. *Id.* at 109. *IndyMac* represents a minority view. 19 However, since the ruling applies to all cases filed in the Second Circuit it has an outsized impact on securities fraud actions. Thus, investors who may be interested in filing an individual or opt-out action may now be required to file suit prior to the expiration of the statute of repose period so as to avoid the risk that a court will bar their claims as untimely. 20

Given that the abbreviated window to file an individual action may prevent investors from having the benefit of the court’s orders when deciding whether to pursue litigation, investors and their counsel must be more proactive in analyzing whether an individual action would be favorable over passive membership in a class. For example, in the Petrobras litigation, claims under the Exchange Act were asserted on behalf of a class of investors who purchased the relevant Petrobras securities between January 22, 2010 and January 28, 2015. 21 Given that the initial class action complaint was filed in December 2014 22—nearly five years after the start of the Class Period—institutional investors were required to quickly analyze the merits of filing an

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18 Prior to the Second Circuit’s decision in *IndyMac*, the Tenth Circuit held that tolling should apply to the Securities Act’s statute of repose because the members of a putative class were effectively parties to the class action and, by extension, effectively brought their claims when the class action was first filed. See Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000). Similarly, Judge Laura Taylor Swain of the Southern District of New York previously held that tolling applies to the Securities Act’s statute of repose and explained that application of the *American Pipe* tolling rule was consonant with Rule 23’s goal of reducing duplicative motions from large numbers of plaintiffs because, but for tolling, class members would “have significant incentives to file protective motions to secure their claims.” *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 668 (S.D.N.Y. 2011).


20 For example, in *Pacific Investment Management Company LLC v. American International Group, Inc.*, No. 30-2015-00779738-CU-SL-CXC (Super. Ct. of Cal.), a defendant cited *IndyMac* when arguing that plaintiffs had filed their opt-out action after the expiration of the Securities Act’s statute of repose. Despite *IndyMac*’s holding, the court found that *IndyMac* was not binding on courts in California and held that the question of whether the statute of repose could be tolled must be affirmatively decided by a California court. The resolution of this issue is still pending.


22 *Id.*, ECF No. 1.

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individual action before the Exchange Act’s five-year statute of repose rendered their claims untimely. Indeed, under *IndyMac*, investors still considering the possibility of filing an individual action continue to lose claims as each day passes (for example, as of March 10, 2016, investors can no longer assert claims based on purchases prior to March 11, 2011 due to the Exchange Act’s statute of repose):

![Lost and Active Claim Periods in Petrobas](image)

### III. Foreign Securities Litigation

In June 2010, the Supreme Court of the United States held in *Morrison, et al. v. National Australia Bank Ltd., et al.*, 561 U.S. 247 (2010), that claims brought under the U.S. federal securities laws only apply to domestic securities transactions. Specifically, the Supreme Court explained that coverage under the federal securities laws requires that the transactions at issue involve a “purchase or sale made in the United States, or involve[] a security listed on a domestic exchange.” *Id.* at 269-70. In doing so, the Supreme Court effectively barred investors from bringing federal securities claims in connection with securities purchased on foreign stock exchanges even if conduct in the United States was central to the defendants’ fraud. *Morrison* has had a seismic impact on the U.S. federal securities laws and the volume of securities actions pursued outside of the United States by U.S. and non-U.S. investors. Moreover, the Supreme Court’s decision now requires investors to actively evaluate non-U.S. litigation opinions (for securities purchased outside of the U.S.) even if similar litigation is pending in the United States.

Since the Supreme Court’s decision in *Morrison*, there has been an increase in foreign securities class and collective litigation—with a particular concentration of litigation in Canada, Japan, and several European countries. According to data provided by Institutional Shareholder Services, in the four years prior to the *Morrison* decision (2006 through 2009), an average of 32 foreign securities class and collective actions were filed per year. In the five years following the *Morrison* decision (2011 through 2015), an average of 42 foreign securities class and collective actions were filed per year.

Most recently, significant non-U.S. litigation/arbitration has been (or will be) initiated on behalf of investors in the non-U.S. traded securities of Petrobras, Volkswagen AG (“VW”), Olympus Corp. (“Olympus”), and Toshiba Corp. (“Toshiba”).
A. Petrobras

In addition to claims being pursued against Petrobras in the United States (in connection with U.S.-traded securities), several investors who purchased certain foreign Petrobras securities (including common and preferred stock traded on BOVESPA, the Brazilian stock exchange) have retained counsel and are preparing to arbitrate claims in Brazil. Brazilian arbitration became necessary after the court overseeing the U.S. action issued an order in July 2015 requiring arbitration of claims pertaining to BOVESPA-traded securities.

As noted by the court’s July 2015 order, “Article 58 of Petrobras’ bylaws provides that ‘disputes ... involving the Corporation, its shareholders, managers and members of the Audit Board’ regarding ‘the rules issued ... by the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários—CVM) as well as in all further rules applicable to the operation of the capital market in general,’ ‘shall be resolved according to the rules of the Market Arbitration Chamber.’”23 Plaintiffs in the U.S. class action had attempted to litigate claims under Brazilian law for BOVESPA-traded securities concurrently with claims under the federal securities laws and argued that the arbitration provision was a contract of adhesion and enacted without unanimous shareholder approval. Defendants argued that Article 58 requires arbitration of BOVESPA-traded securities and moved to dismiss these claims from the U.S. case. Defendants also provided expert reports undermining the legal basis for plaintiffs’ arguments against enforcement.24 The court agreed with the defendants, stating that “under Brazilian law, Petrobras’ arbitration clause is valid and enforceable against purchasers of Petrobras securities on the [BOVESPA].”25

Investors’ arbitration against Petrobras in Brazil will be governed under the rules of the Câmara de Arbitragem do Mercado (“Market Arbitration Chamber” or “MAC”). Arbitration provides a number of advantages versus litigation of claims in Brazilian courts. First, in Brazilian courts, the losing party is required to pay a portion of the prevailing party’s attorneys’ fees and expenses, whereas the parties to an arbitration are free to waive fee-shifting (and if the parties do not agree, the arbitrators will decide prior to proceeding with the arbitration). Second, arbitration is significantly more expeditious than litigation in Brazilian court. Third, arbitration is conducted by a panel of three arbitrators: one chosen by plaintiffs; one chosen by defendants; 

23 See In re Petrobras Sec. Litig., No. 14-CV-9662 JSR, 2015 U.S. Dist. LEXIS 99322, at *45 (S.D.N.Y. July 30, 2015). The Market Arbitration Chamber was apparently created by the BOVESPA to serve as a specialized forum for resolving disputes related to corporate and securities laws. See id. at *46.

24 See id. at *50 (“Earlier this year, the Brazilian National Congress approved legislation, which was drafted by a commission of judges, arbitration experts, and government officials, providing that ‘[a]pproval of the addition of an arbitration agreement in the bylaws, with due regard for the quorum set out in art. 136 [of the BCL], binds all shareholders. . . .’ This provision is consistent with the prevailing view among Brazilian legal scholars, as described by defendants’ expert, that arbitration bylaws are valid if approved by a simple majority, are not considered contracts of adhesion, and are binding on all shareholders. Thus, the adoption of this provision provides further support for the Court's conclusion that Article 58 is valid and binding under Brazilian law.”) (brackets in original).

25 See id. at *46.
and one chosen by the other two arbitrators. As a result, plaintiffs are not bound by the rulings of a single judge, who may be heavily influenced by the political ramifications of the claims against Petrobras. One potential challenge to arbitration in Brazil is that the proceedings typically are conducted with limited document discovery. Nevertheless, the arbitrators may be inclined to take a more active approach to discovery if requested.

In pursuing arbitration against Petrobras, the successful recovery of investors’ losses will likely hinge on whether it is possible to assert claims under Article 186 of the Brazilian Civil Code for damages caused by the intentional and negligent acts of Petrobras. However, Brazilian legal experts remain divided on whether such claims are viable. As an initial matter, some experts have suggested that because claims against Petrobras concern the capital markets, Brazil’s Securities and Corporate laws would apply. Critically, the Brazilian Securities and Corporate laws—which, among other things, impose significant disclosure obligations on corporations and require corporate officers to act consistently with duties of diligence and loyalty to the corporation—do not provide a private right of action against a corporation or its officers. As such, a ruling that the Brazilian Securities and Corporate laws preempt claims under the Brazilian Civil Code may effectively bar investors’ individual recovery for losses suffered in connection with BOVESPA-traded securities.26

B. VW

1. Background

On September 18, 2015, the U.S. Environmental Protection Agency (“EPA”) issued a Notice of Violation of the Clean Air Act to VW, the German automaker, in response to the discovery that VW had intentionally installed “defeat device” software in its TDI “clean diesel” engines that was designed to detect and evade emissions tests. The Notice of Violation revealed that nearly 500,000 VW diesel vehicles in the U.S. are in violation of the EPA’s emission standards.

As detailed in the EPA’s Notice of Violation letter, VW’s “defeat device” software would detect when the vehicle’s emissions were being tested and would switch the vehicle’s engine into a cleaner running mode during the test. Once the emissions test concluded, the software enabled VW’s vehicles to drive on the road with increased fuel economy and improved torque and acceleration but with high (and illegal) levels of pollutants. Specifically, on-road testing conducted by researchers at West Virginia University found that some VW vehicles emitted as much as 40 times the legal pollution limit for nitrogen oxide (“NOx”), a particularly toxic and harmful pollutant.

26 The Brazilian Corporate law allows investors to bring claims against a corporation’s controlling shareholder or derivatively on behalf of a corporation. As such, claims could be brought against Petrobras’s controlling shareholder—the Brazilian government—if it breached any of its fiduciary duties. Alternatively, derivative claims would seek to recover on behalf of Petrobras against its officers or directors. These options would be unlikely to directly remedy investors’ losses.
In response to the EPA’s Notice of Violation letter, VW admitted to this massive fraud and issued a public apology. VW’s Chief Executive Officer, Martin Winterkorn, resigned under pressure, and Matthias Müller, the former Porsche chief, was named as his replacement. VW was also forced to cut its third-quarter earnings guidance and announced that it had set aside €6.5 billion ($7.3 billion) in its third-quarter accounts to help cover the costs of the scandal. However, Credit Suisse estimates that this scandal could cost VW as much as $87 billion—even more than what it cost BP to cover costs associated with the 2010 Deepwater Horizon oil spill in the Gulf of Mexico. In fact, setting aside any fines levied against VW by U.S. states and non-U.S. regulators, VW faces EPA penalties of up to $18 billion under the Clean Air Act alone.

Investigations into VW’s conduct are also occurring outside the United States. On October 8, 2015, German prosecutors and police raided VW’s headquarters in order to secure documents, databases, and other evidence in support of its criminal inquiry into the emissions scandal. The European Commission has also indicated that it is in contact with VW and U.S. authorities, and governments around the world have launched inquiries and investigations, including, *inter alia*, Switzerland, Italy, India, Australia, Norway, South Africa, New Zealand, Sweden, France, and Britain. Given VW’s admission that it used the manipulated diesel engine in approximately 11 million vehicles sold worldwide, VW will likely face additional fines, penalties, and lawsuits that will further depress the Company’s profits and stock price in the coming years.

The foregoing disclosures resulted in a significant decline in the price of VW common stock, VW preferred stock, and Porsche stock:

![Graph showing stock price decline](source: Yahoo Finance)

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9/18: EPA issues Notice of Violation
9/20: VW admits installing defeat device
9/22: VW reveals that 11 million vehicles are impacted

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Porsche holds a significant ownership position in VW.
2. Investor Litigation

Given that only a small fraction of VW common and preferred stock trades in the United States (as American Depositary Receipts), the vast majority of investors—those who purchased VW’s common and preferred stock (or Porsche securities) on the Frankfurt Börse stock exchange in Germany—are prohibited from bringing claims in the United States even though the U.S. markets were central to the scheme and U.S. regulators revealed the fraud. To date, several institutional investors who invested in VW’s common and preferred stock (and Porsche securities) have reportedly hired counsel and intend to pursue claims against VW in Germany. Claims in Germany will likely assert causes of action under the German Securities Trading Act (“WpHG”) and under German civil tort law. Investors purchasing VW common stock and preferred stock American Depository Receipts have separately filed suit in the United States, as permitted under Morrison.

The German system is an “opt-in” system: only claimants who file suit in their own name (or take active steps to join an existing suit) will be able to recover. This may result in multiple suits being filed, as well as multiple claimants filing one joint complaint in one case. Moreover, if at least ten suits concerning the same subject matter are filed within a four month period and the claimants request a designation of the matter as a model case proceeding, then under Germany’s Kapitalanlegermusterverfahrensgesetz (Capital Market Investors’ Model Proceeding Act) (“KapMuG”), the court will select one of those cases to serve as the “model case.” This model case procedure allows common elements of the claims to be litigated first, with the court’s rulings on those common issues binding on all petitioners. This procedure is similar to a Group Litigation Order in the United Kingdom and results in the court issuing a declaratory judgment on the common questions of law and fact.

When a model case is designated, the claimant(s) whose case is designated as the model case will be in a position to oversee and direct the litigation of common issues. In a sense, the “model claimant” is like the Lead Plaintiff in a U.S. class action. In deciding which case to designate as the model case, and which claimant(s) to designate as the model claimant(s), the court will consider numerous factors, including the number of claimants in the case, the amount in controversy, the experience of counsel representing the claimants, the claimants’ suitability to represent all those similarly situated, and whether the proposed model case covers all aspects of the claims asserted by others. Another relevant factor will be the extent to which other claimants consent (or object) to a particular claimant’s designation of its case as a model case.

Those claimants who file a claim, but who are not selected as the model claimant, are automatically included in the KapMuG proceedings. However, their individual case is stayed pending the outcome of the model case and, if they so choose, the claimants may participate in the model case proceedings on a limited basis by filing briefs and attending hearings. Otherwise, these claimants have very limited influence on the case strategy.
Once the model case reaches judgment (and assuming the decision is in favor of the model claimant), all individual cases resume in order to litigate unique factual and legal issues, such as “reliance” and the amount of each claimant’s damages. Similarly, if the model claimant reaches a settlement with the defendant, it can apply to have the settlement approved by the court. At that time, each claimant is given the opportunity to opt out of the settlement and, if fewer than 30% of all claimants opt out in a 30-day period, the settlement will be binding on all claimants who did not opt out. Any settlement proceeds are available only to claimants who previously filed an individual lawsuit that was included in the model case proceedings. We believe German actions against VW and related defendants will proceed under the KapMuG.

C. Japanese Actions

Since the Japanese securities laws were amended in 2004, there has been a significant increase in the volume of securities litigation filed in Japan. However, it was not until 2012—and the Olympus litigation in particular—that non-Japanese investors began to take advantage of Japan’s Financial Instruments and Exchange Act (“FIEA”) and started filing claims. Specifically, the post-\textit{Morrison} environment, combined with the FIEA’s provision of no-fault liability for corporations’ misstatements, has made Japan an attractive venue for recovering losses, despite its “opt-in” mechanism which requires active participation by impacted investors.

We highlight two notable securities actions filed in Japan.

1. Olympus

In November 2011, Olympus—a large Japanese optics manufacturer—admitted to employing fraudulent accounting practices in order to conceal more than $1.5 billion in investment losses, questionable fees, and payments to criminal organizations. Among other things, Olympus admitted to using corporate acquisitions to conceal significant investment losses the Company had incurred since 1998. As a result of the scandal, several Olympus Directors, including the Company’s Chairman of the Board of Directors, were forced to resign. Ultimately, the Company’s Chairman, Executive Vice-President, and Auditor were found guilty for their roles in the accounting scandal and received multi-year suspended sentences.

In the wake of these disclosures, investors suffered significant losses as Olympus’s stock price on the Tokyo Stock Exchange declined more than 75%. In response, approximately 90 institutional investors—including several large non-Japanese investors—who had purchased Olympus stock on the Tokyo Stock Exchange filed an action under the FIEA against Olympus in 2012 in Japan. The action settled in 2015 for approximately ¥11 billion (approximately $90 million).\textsuperscript{28}

A separate lawsuit asserting claims on behalf of investors purchasing Olympus’s ADRs was filed in the United States. Ultimately, the U.S. lawsuit—which covered only a fraction of Olympus’s investors—resulted in a $2.6 million settlement.

2. Toshiba

In July 2015, Toshiba—one of Japan’s largest electronics manufacturers—announced that the company had artificially inflated its pre-tax profits by more than $1.2 billion since 2008. Over the following months, investors learned additional details about the accounting scandal, which has prompted Japan’s Financial Services Agency to recommend substantial fines against Toshiba and its outside auditor, Ernst & Young ShinNihon LLC. Specifically, investors learned that Toshiba’s President and Vice Chairman had knowledge of the inflated profits and related delays in reporting losses, and had forced Toshiba employees to meet unrealistic financial targets. Toshiba’s President and Vice Chairman resigned shortly after the scandal broke and Toshiba subsequently filed a lawsuit against five former executives, including three former Chief Executive Officers, for mismanagement.

Since these disclosures—which eliminated approximately half of the company’s market capitalization value and generated substantial investor losses—several institutional investors who purchased Toshiba stock on the Tokyo Stock Exchange have retained counsel and have initiated claims against Toshiba. Separately, a class action lawsuit has been filed in the United States on behalf of purchasers of Toshiba’s ADRs—which make up a small portion of the company’s outstanding stock.

D. U.S. v. Non-U.S. Venues

In addition to the impact of the Morrison decision, successful results in class and collective securities litigation in certain foreign jurisdictions have increased the interest in pursuing claims in those jurisdictions. In some instances, certain foreign jurisdictions have proved to be more favorable venues than the United States for the recovery of investor’s damages. For example, in 2011 and 2012, investors in Agnico-Eagle Mines Ltd. filed securities class action lawsuits against the company in the United States (on behalf of investors in the company’s U.S.-traded common stock) and in Canada (on behalf of investors who traded in the company’s securities on the Toronto Stock Exchange and other Canadian trading platforms). The U.S. action was dismissed for failure to state a claim under the U.S. securities laws while the Canadian action, which was premised on the same theory, was certified as a class action and settled for CAD$17 million.

With the increased frequency of foreign securities litigation, institutional investors are tasked with the additional need to actively monitor and evaluate non-U.S. litigation options.

29 In re Agnico-Eagle Mines Ltd. Sec. Litig., No. 11 Civ. 7968 (JPO) (S.D.N.Y.).
30 AFA Livförsäkringsaktiebolag, et al. v. Agnico-Eagle Mines Ltd., et al., No. CV-12-448410-00CP (Ontario Sup. Ct.).
This obligation is particularly important given that many non-U.S. jurisdictions follow an “opt-in” model (rather than the “opt-out” model followed in the U.S.) for class and collective actions. Critically, “opt-in” jurisdictions do not allow investors to remain passive and collect a recovery at the end of litigation, and the failure to affirmatively opt in to the litigation may preclude recovery entirely. Furthermore, non-U.S. litigation may include other risks such as: limited development of legal precedents (liability, damages, etc.); reliance on non-U.S. lawyers without significant securities experience; varying discovery rules and obligations; and translation issues and costs.

IV. **SLUSA’s Impact on Individual and Opt-Out Litigation**

Plaintiffs’ inability to bring claims under the federal securities laws due to the extraterritorial limitations of *Morrison* or the statute of repose issue (*IndyMac*) discussed above may not be avoided simply by bringing claims under state laws that may be applicable to certain foreign securities or have more favorable repose periods.

Under SLUSA, no “covered class action” may assert state law claims alleging false and misleading statements or omissions in connection with the purchase or sale of a “covered security.” As a result, class action lawsuits are generally prohibited from simultaneously asserting claims under the federal securities laws and state common law or statutory fraud theories.

Recently, several courts have further held that individual actions pending in the same court as, or consolidated with, a parallel federal securities class action also fall within SLUSA’s broad definition of a “covered class action” and are similarly prohibited from asserting state law claims. *See, e.g., In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017 (LAK), 2012 U.S. Dist. LEXIS 179558 (S.D.N.Y. Dec. 17, 2012). In most cases, this limitation effectively prevents investors from relying upon favorable state law claims that may be applicable to foreign securities transactions, have lower pleading standards or longer repose periods than the federal securities laws. If a class action has been filed, individual investors are likely limited to pursuing claims only under the Exchange Act and/or the Securities Act.

V. **Conclusion**

As discussed above, several recent decisions have radically altered the contours of class action and individual securities litigation, both in the United States and abroad. Increasingly, institutional investors are seemingly being driven by developments in U.S. case law (*e.g., Morrison* and *IndyMac*) to become more aware of their litigation options in the U.S. and abroad. We believe this trend will likely continue as non-U.S. laws and procedures continue to mature and non-U.S. litigation continues to provide meaningful recoveries to active participants.

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31 Notable collective action jurisdictions—which allow investors to join together (via a variety of mechanisms) to collectively litigate securities claims—include France, Germany, Japan, the Netherlands, and the United Kingdom.