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'Foreign cubed' cases put back in their box: United States Supreme Court reins in extraterritorial application of securities fraud law

The United States Supreme Court recently held in *Morrison v National Australia Bank Ltd*, 130 S Ct 2869 (2010) (*Morrison*), that US laws against securities fraud do not apply to private civil actions arising from the purchase or sale of securities on exchanges outside the United States. The high court ruled that private investors may pursue claims alleging securities fraud under Section10(b) of the *Securities Exchange Act of 1934* (the '1934 Act') only when there has been a purchase or sale of securities in the US or the purchase or sale of securities listed on an American stock exchange. In adopting this 'transactional test', the Court overturned more than 40 years of jurisprudence of the US Federal Courts and effectively barred foreign plaintiffs from bringing proceedings in the United States against a foreign company arising out of a

foreign securities transaction – commonly referred to in the US as 'foreign cubed' cases.

The application of the decision in *Morrison* will quickly be tested in proceedings commenced by Australian hedge fund, Basis Yield Alpha Fund ('Basis'), in the United States District Court, Southern District of New York. Basis claims more than US$1 billion in damages from the global investment bank Goldman Sachs Group Inc ('Goldman Sachs').[1] Basis argues that Goldman Sachs engaged in securities fraud under the 1934 Act and common law fraud in 2007 when it sold exposure to collateralised debt obligations to Basis via credit default swaps. Goldman Sachs has filed a motion to dismiss the action, principally on the basis of the decision in *Morrison*.

This article examines the decision of the US Supreme Court in *Morrison* and in particular its implications on the prevalence of 'foreign cubed' litigation in the United States, including in the *Basis* proceedings.

The decision in *Morrison* – 'foreign cubed' cases

'Foreign cubed' or 'f-cubed' securities lawsuits are claims brought under the 1934 Act in the US by foreign investors against foreign issuers to recover losses from purchases on foreign securities exchanges.

Until the late 1960s, US courts consistently concluded that they lacked subject-matter jurisdiction to hear Section 10(b) lawsuits arising from overseas securities transactions because the 1934 Act did not specify that it reached conduct outside the US (see 130 S Ct at 2878). But beginning in 1967, the Second Circuit and the district court for the Southern District of New York concluded that, in certain circumstances, US courts did have subject-matter jurisdiction over those disputes. Under the 'effects' test, the courts had jurisdiction when the wrongful conduct had a substantial effect in the US or upon US citizens. Under the 'conduct' test, the courts had jurisdiction when the wrongful conduct took place in the US (see *idem* at 2879).[2]

Owing to those permissive jurisdictional rules, as well as the globalisation of the securities markets, and competitive pressures within the plaintiffs' bar to identify new clients, securities fraud class actions became a major American export.[3] Today, it is common for securities fraud lawsuits to be brought against foreign issuers and on behalf of a class that includes foreign, as well as American, investors. Indeed, between 2005 and 2009, securities fraud class actions filed against non-US companies constituted as much as 16.4 per cent and no less than 11 per cent annually of all securities fraud class action filings in the US.[4] Most recently, for example, plaintiffs' lawyers have targeted foreign financial institutions that have suffered losses from US mortgage-related investments, including Credit Suisse, UBS, RBS, CIBC, Société Générale, and Fortis.

In a recent reminder of the economic impact of those suits, the US and European shareholders who obtained a jury verdict in a securities fraud class action against the French conglomerate Vivendi in a federal court in Manhattan claim that the judgment could be worth more than US$9 billion, a figure that excludes attorneys fees for the eight-year litigation.[5] But the judgment could be reduced by more than 80 percent if non-US investors are ultimately excluded from the class.[6] Vivendi has moved to set aside the judgment or for a new trial based, in part, on *Morrison*.

In *Morrison*, the United States Supreme Court considered the territorial scope of the 1934 Act, specifically, whether Section 10(b) of the Act permits fraud-on-the-market claims by a class of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company.

The facts in *Morrison*

The defendant in *Morrison*, National Australia Bank Limited ('NAB'), is one of Australia's leading domestic financial institutions. In February 1996, NAB bought HomeSide Lending, Inc ('HomeSide'), an American company. HomeSide's business consisted of mortgage servicing which involved collecting mortgage payments and performing associated administrative work for a fee, known as a 'mortgage servicing right'. On 5 July 2001, NAB announced to the Australian Stock Exchange ('ASX') that it would write down the value of HomeSide's mortgage servicing rights by US$450 million. On 3 September 2001, NAB announced to the ASX that the carrying value of HomeSide would be reduced by a further US$1.75 billion. The value of NAB shares fell sharply.

Three Australian shareholders and one American shareholder brought a class action in the United States District Court for the Southern District of New York on behalf of non-American investors who bought ordinary NAB shares outside the US and American

purchasers who bought NAB's American Depository Receipts on a US exchange. The suit alleged violations of Section 10(b) by NAB and HomeSide and their former executives for misrepresenting HomeSide's profitability and economic health, and 'control person liability' claims against former executives under Section 20(a) of the 1934 Act.[7]

Defendants successfully moved to dismiss for lack of subject-matter jurisdiction. (See *In re Nat'l Australia Bank Securities Litigation*, No 03 Civ 6537(BSJ), 2006 WL 3844465 (SDNY 25 October 2006)). Addressing the non-US investors claims and the applicability of the conduct and effects test, the court held that the effects of the fraud upon US markets was minimal at best and the alleged conduct in the US was merely 'a link in the chain of an alleged overall securities fraud scheme the culminated abroad.' (*Idem* at *8.) The Second Circuit affirmed. See 547 F 3d 167 (2d Circuit 2008).[8] The non-US investors appealed to the Supreme Court.

The decision

The Supreme Court affirmed the Second Circuit's decision against the plaintiffs, but adopted a distinctly different reason for doing so.[9]

As a threshold matter, the Court reframed the question as one going to the merits of the dispute, not the Court's subject-matter jurisdiction to hear the dispute. The Court noted that the 1934 Act conferred subject-matter jurisdiction upon the district court to hear claims alleging violations of Section 10(b). The question before the Court, however, was whether Section 10(b) prohibited the alleged fraud.

Turning to that question, the Court first addressed the extraterritorial application of federal statutes generally. The Court held that it is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States' (at 2877 (quotation marks, citations omitted)). According to the Court, this principle 'represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate' (*idem*); and that presumption should be applied in all cases to effect a 'stable background against which Congress can legislate with predictable effects' (at 2881). Finding no indication in the text of Section 10(b) that it was intended to apply outside the US, the Court concluded that Section 10(b) had no extraterritorial application.

The Court next addressed the petitioners' contention that the presumption against extraterritorial application did not dispose of their complaint because they sought to apply the 1934 Act to US-based conduct. Petitioners argued that Florida is where HomeSide and its senior executives engaged in the alleged deceptive conduct of manipulating HomeSide's financial models and making allegedly misleading statements. The Court rejected the contention. It held that the 1934 Act did not focus on the place where the deception originated, but on the purchase or sale of securities in the US:

> 'Section 10(b) does not punish deceptive conduct, but only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 USC Section 78j(b). . . Those purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to regulate (at 2884 (citations omitted)).'

Accordingly, the Court held that Section 10(b) applies only to the purchase or sale of securities listed on a US exchange or the purchase or sale in the US of non-exchange-traded securities (*idem* at 2884, 2886).

The Court provided several reasons why this new 'transactional test' was superior to the conduct and effects tests that it replaced. The transactional test gives effect to the presumption against extraterritorial action, which the conduct and effects tests did not. It is consistent with the plain text of the 1934 Act, which the conduct and effects tests were not. And it is easier to apply in a uniform manner, which the conduct and effects test were not. The Court also criticised the conduct and effects tests for promoting adverse consequences. For instance, the Court noted the concern that the US had become the 'Shangri-La of class-action litigation' for lawyers representing those investors allegedly cheated in foreign securities markets (at 2886). The Court also noted that commentators criticised the 'unpredictable and inconsistent application' of Section 10(b) to cross-border cases.[10]

The Court also found support for the transactional test in considerations of international comity. It observed that interpreting the 1934 Act to regulate US-based conduct in the context of non-US exchanges or transactions almost certainly

would interfere with regulation of the same commerce in the host country. The Court referred to the *amicus curiae* briefs filed by Australia, France and Britain as well as a diplomatic note from the Swiss government, in which it was argued that US securities laws should not impinge upon a country's sovereign territory and efforts to regulate its own securities markets (at 2885–86).

The Court also held that even certain US-based conduct could not overpower the presumption against extraterritorial application:

> '[It] is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case (at 2884).'

In conclusion, the Court held that petitioners had failed to state a claim because they did not purchase their NAB shares on an American exchange, and all aspects of the relevant purchases occurred outside the US.[11]

Implications of the decision in *Morrison*

The Supreme Court has a recent history of limiting private securities class actions in a variety of ways, emphasising the burdensome and often vexatious nature of those law suits.[12] Consistent with that, the decision in *Morrison* limits the reach of Section 10(b) and sets a precedent to rein in the extraterritorial reach of US securities fraud law. The decision effectively bars foreign cubed litigation in the US. But its impact already has proven more far reaching than that.

A number of courts have applied *Morrison* to securities lawsuits. These decisions can be separated into at least four categories, with some overlap.

The first category of cases involves would-be class action lawsuits in which non-US members of the proposed classes purchased shares of a non-US entity on a non-US exchange or otherwise outside the US. In those cases, courts have had little difficulty deciding to dismiss the claims of the non-US investors because, under the express holding of *Morrison*, Section 10(b) does not apply to foreign investors who made investments abroad in a foreign entity.[13]

In another category of cases, courts have considered whether US, as opposed to non-US, investors are barred from proceeding under Section 10(b) when they purchase securities on a non-US exchange, but claim that they made their investment decision and initiated the purchase of the shares from the US, took the shares into their own account in the US, and incurred an economic risk in the US. Refusing to limit *Morrison* to its foreign-cubed facts, courts have uniformly concluded that *Morrison* bars the claims of US investors who purchase shares of a non-US issuer on a non-US exchange.[14]

In *Cornwell*, the leading case in this category, the court explained that plaintiffs' allegations do little more than attempt to revive the Second Circuit's conduct and effects tests, which *Morrison* roundly rejected:

> 'In essence, plaintiffs would exclude from operation of the new [transactional] test transactions in securities traded only on exchanges abroad if the purchase or sale involves American parties, or if some aspects or contacts of such foreign transactions occur in the United States. But insofar as this proposition superimposes an exclusion based strictly on the American connection of the purchase or seller, it simply amounts to a restoration of the core element of the effect test. Similarly, to carve out of the new rule a purchase or sale of securities on a foreign exchange because some acts that ultimately result in the execution of the transaction abroad take place in the United States amounts to nothing more than the reinstatement of the conduct test (at *3).'

The holding in *Cornwell* and other cases appears rooted in the Supreme Court's desire for doctrinal clarity and respect for non-US regulatory regimes (at *4).

A third category of cases involves transactions that did not take place on any exchange. In these cases, the courts had to consider whether the purchase or sale occurred in the US. *Morrison* did not address how to determine the location of the purchase or sale, and these cases have approached the issue in different ways.

In one case, the court dismissed the plaintiff's Section 10(b) claim because the allegations in the complaint did not indicate that the purchase or sale had taken place in the US. (See *Quail Cruises Ship Mgmt Ltd v Agencia de Viagens CVC Tur Limitada*, F Supp 2d, 2010 WL 3119908 (SD Fla 6 August 2010).) In fact, the complaint alleged that the agreement actually was executed in Europe and Latin America and provided for notices

to be sent to the parties in their European and Latin American offices. Seeking to work around those facts, the plaintiff argued that, by designating the closing to take place in an attorney's office in Florida, the parties signalled their intent that US securities laws would apply. The court held that *Morrison* does not permit the intent of the parties to control the application of US securities laws. Instead, *Morrison* instructs that Congressional intent 'is dispositive of the application of foreign securities law to foreign securities transactions' (at *3).

Another court took a different tact altogether. In *Anwar v Fairfield Greenwich Ltd*, F Supp 2d, 2010 WL 3341636 (SDNY 18 August 2010), the court deferred the deciding defendants' *Morrison* motion to dismiss in favour of permitting discovery on whether the plaintiffs' purchase of shares in two offshore investment funds occurred in the US. The plaintiffs included American non-profit organisations and non-US citizens. Defendants had argued that plaintiffs' purchases occurred overseas because they involved a series of administrative steps that took place overseas and because one of the offshore fund's shares was registered on the Irish Stock Exchange. Plaintiffs responded that no transaction actually occurred until the subscription agreements were accepted by the funds, which took place in New York. The court invited the parties to raise the issue on a new motion when the facts became clearer.

The fourth category of cases concerns the US Supreme Court's use of the term 'listed' in describing one prong of the transaction test. The Court wrote that Section 10(b) applies 'only [to] transactions in securities *listed* on domestic exchanges' (at 2884 (emphasis added); *accord idem* at 2886). Some investors have read this language to mean that '*Morrison* neither categorically requires that the purchases occur in the United States (on an American exchange or otherwise), nor categorically excludes purchases on foreign exchanges. Rather, so long as the security is *listed* on an American stock exchange, purchases of the security are covered by Section 10(b), regardless of where they occur.'[15] Under this view, investors who purchased the shares of a non-US corporation on non-US exchanges still may bring a Section 10(b) claim so long as those shares are listed on an American exchange, as is the case with ordinary shares of non-US corporations that are listed on an American exchange incident to the corporation's issuing American Depository Receipts for trading on the American exchange.

In the one reported decision addressing the argument, thus far, the court rebuffed the investors. (See *In re Alstom SA Securities Litigation*, F Supp 2d, 2010 WL 3718863 (SDNY 14 September 2010)). The court found that the 'listed' argument ignored the central tenet of the *Morrison* decision, which is that Section 10(b) focuses on the purchase or sale of a security. A listed security that does not trade – such as ordinary shares of non-US issuers posted in connection with the issuance of ADRs – fails the purchase or sale element of the transactional test.[16]

Unfortunate timing for the plaintiffs

Morrison could not have come at a worse time for the plaintiffs in *Basis*. Like *Morrison*, *Basis*, presently before the US District Court, Southern District of New York, concerns the purchase and sale of securities with both US and non-US elements to the transactions. The complaint was filed by Basis on 9 June 2010, some 15 days before the US Supreme Court handed down its judgment in *Morrison*. Whilst Basis claims that the transactions essentially occurred in the US and therefore are captured by the Act, Goldman Sachs claims that the proceedings are a dispute between two foreign entities over a contract executed abroad, and therefore, following from the decision of the US Supreme Court in *Morrison*, the US District Court has no jurisdiction to hear the case under Section 10(b) of the Act.

Goldman Sachs has submitted in documents filed with the Court that the decision in *Morrison* establishes that no cause of action exists under Section 10(b) in circumstances where the relevant securities are purchased or sold outside the US and are not listed on a US exchange.[17] Goldman Sachs submits that Basis and Goldman Sachs International ('GSI') (a selling agent for Goldman Sachs incorporated in England) are organised under the laws of the Cayman Islands and the United Kingdom respectively, that the credit default swaps and the CDOs that they referenced were not listed on any US exchange and that the swap agreements were executed by Basis in Australia and governed by English law. Goldman Sachs submits that in these circumstances the complaint by Basis fails to satisfy the bright-line transactional test established in *Morrison*.

On the other hand, Basis submits in their opposition to Goldman Sachs' motion to dismiss that the principles in *Morrison* do not require both parties to engage in the transaction in the US. Basis submits that on the face of Section 10(b), and pursuant to the construction of Section 10(b) by the Court in *Morrison*, the 1934 Act requires fraud in connection with a domestic purchase or fraud in connection with a domestic sale of securities, but not both elements of the transaction.[18] Basis submits that the sale of securities was a 'New York sales transaction from start to finish':[19] the credit default swaps were derivatives of US securities, the location of the transaction was New York, and GSI was acting as an agent of New York-based Goldman Sachs. Basis asserts that these facts of the transaction satisfy the test enunciated in *Morrison* that the underlying purchase or sale of the securities occurred in the US.

Basis also asserts that if the Court were to accept Goldman Sachs' motion to dismiss, based on the principles enunciated by the Supreme Court in *Morrison*, there would be far-reaching consequences in relation to securities fraud cases commenced by non-US residents. Basis claims that if the US District Court ruled in favour of Goldman Sachs' motion for dismissal this would render US securities laws 'a nullity any time a US seller engages in fraud in effecting the sale of a security to a foreign purchaser' and that this is 'not the holding of *Morrison*'.[20]

The position advanced by Basis resembles the one taken by the Australian Shareholders' Association as *amicus curiae* in support of the investors in *Morrison*. The Australian Shareholders' Association argued if the US fails to enforce the 1934 Act against non-US residents, it risks inviting reciprocal responses from foreign jurisdictions, ultimately preventing investors from seeking any redress against international fraudulent conduct, and effectively amounting to 'exporting' the fraud that occurs within its borders.[21]

Thus, the US District Court has an opportunity in *Basis* further to clarify the extent of the limitations placed on Section 10(b) of the Act, particularly the approach to determining the whereabouts of the sale or purchase of securities and distinguishing between a purchase or sale, on the one hand, and solicitation, on the other.

Other implications: farewell Shangri-La?

Morrison is a blow to the plaintiffs' bar. It should end the practice of recruiting non-US clients to bring Section 10(b) claims against non-US issuers in US courts, and it should curtail the practice of lumping together US and non-US investors in securities fraud class actions. As a result, securities fraud class actions should decline in number, and the size of the proposed classes in the lawsuits that are brought should be smaller. In turn, damage claims should be smaller too. The plaintiffs' bar may very well determine that the money at stake is not worth the risk of pursuing the claims.

Less certain is whether Congress will act to override *Morrison* to provide for a private right of action in cases involving securities transactions outside the US. Congress had the opportunity to do so – but did not – when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act just weeks after the Supreme Court decided *Morrison*. Taking a more oblique approach, Congress used Dodd-Frank to direct the US Securities and Exchange Commission to study and report on 'the extent to which private rights of action under [Section 10(b)] should be extended to cover – (1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; and (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.' See Dodd-Frank Act, Pub L 111–203, Section 929Y(a), 124 Stat 1376 (2010).[22]

The SEC report is due in early 2012. It will not force Congress to take any action, and absent some extraordinary and ill-timed investment scandal, it is doubtful that Congress would act quickly to override the *Morrison* decision. This is particularly so considering the weight of *amici* briefs from around the world which submitted that the extraterritorial application of US securities laws would interfere with the regulatory regimes of other countries.

Does *Morrison* bar public enforcement actions?

Morrison would appear to bar the SEC from bringing lawsuits to enforce the US securities laws in connection with transactions outside the US. But the Dodd-Frank Act might

countermand that effect. Dodd-Frank amends the jurisdictional provisions of the 1934 Act (as well as several companion statutes) to provide US District Courts with the authority to hear lawsuits, brought by the SEC, involving '(1) 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 (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.' See Dodd-Frank Act, Pub L 111–203, Section 929P(b)(2), 124 Stat 1376 (2010) (codified as amended at 15 USC 78aa). Thus, Congress appears to have resuscitated SEC enforcement actions involving the purchase or sale of securities outside the US and revived the conduct and effects tests that *Morrison* dispatched.

Yet *Morrison* might have the last word, at least for the time being. The Dodd-Frank amendments expand the jurisdiction of the US District Courts to hear cases under Section 10(b). But as the Supreme Court ruled in *Morrison*, the question of the extraterritorial reach of Section 10(b) is one of substantive law (what conduct is proscribed), not one of jurisdiction (what cases a court may hear) (130 S Ct at 2876–77). Accordingly, while Dodd-Frank gave the US District Courts expanded jurisdiction to hear cases involving extraterritorial conduct, purchases or sales of securities outside the US do not violate Section 10(b).[23] Whether the new Congress will address this disconnect remains to be seen.

Will *Morrison* disadvantage US markets?

While *Morrison* reflects the Supreme Court's concern for the proper interpretation of US law, some observers are concerned with the potential effect of *Morrison* on US economic competitiveness. For example, the Securities Industry and Financial Markets Association submitted an *amicus curiae* brief in *Morrison* in favour of the position advocated by NAB and warned that the increased costs from compliance and private causes of action would discourage new international investment in the US, a particularly distressing situation at a time when American markets are vulnerable.[24] On the other hand, Alecta Pensionsförkäkring submitted an *amicus curiae* brief in *Morrison* in favour of the position advocated by the investors and warned that a failure to apply US securities regulations and rights for private causes of action to non-US investors would adversely impact the US's own interest in maintaining its reputation as a safe and reliable place to conduct business and invest.[25] The Supreme Court did not indicate that these considerations affected its decision.

Will *Morrison* have an impact beyond the securities laws?

While *Morrison's* new transactional test has grabbed the headlines, the Court's ruling on the presumption against the extraterritorial application of statutes is potentially more far reaching, especially for non-US corporations and individuals who fear being dragged into the US legal system over acts committed outside the US. Some courts have already applied *Morrison* to determine whether certain US statutes reach beyond the US borders, with varying results.

The Second Circuit recently ruled that the Racketeer Influenced and Corrupt Organization Act ('RICO')[26] does not reach alleged conspiracies that primarily involve non-US actors and acts because the statute does not expressly state that it applies extraterritorially. See *Norex Petroleum Ltd v Access Indus Inc*, F3d, 2010 WL 3749281 (2d Cir 28 September 2010).[27] RICO is a common basis for civil actions against companies and individuals, and it will be a relief outside the US that a leading US court has cabined in its reach in certain circumstances.

Moreover, in 1995, Congress amended the RICO statute to bar the popular practice of coupling RICO claims with Section 10(b) claims. See 18 USC Section 1964(c). While the plaintiffs' bar might have envisioned bringing RICO claims in place of those Section 10(b) claims that *Morrison* barred, *Norex* indicates that the strategy is unsustainable. Still, RICO is a critical enforcement tool in the federal government's fight against organised crime, terrorism, narcotics trafficking, and money laundering. It will be interesting to see if the new Congress takes up this issue.

The Lanham Act, the US trademark protection statute,[28] is another federal law that has cast its shadow abroad. This past summer, the US Court of Appeals for the Ninth Circuit decided that *Morrison* did not require it to reconsider its earlier rulings that the Lanham Act may reach wrongdoing outside the US when the wrongdoing causes

material monetary injury in the US. See *Love v Associated Newspapers, Ltd*, 611 F3d 601, 612 n6 (9th Cir 2010). The court explained that, unlike the 1934 Act, the Lanham Act expressly applies to 'all commerce which may lawfully be regulated by Congress', meaning domestic as well as foreign commerce (*id* (quoting 15 USC Section 1127)). As a result, the Lanham Act may continue to affect international trademark disputes that affect US interests.

Conclusion

Morrison is a far-reaching decision that will continue to mold the application of US law abroad. Narrowly read, the decision is a firm reminder to adventurous 'foreign cubed' plaintiffs who have suffered loss in dealing with securities that a purchase or sale in the US is necessary to establish a viable cause of action under Section 10(b). Certainly, a plaintiff who is not domiciled in the United States and purchases securities on a non-US exchange will not be able to access the substantial award of damages possible under the 1934 Act. The United States District Court, Southern District of New York, will shortly consider the limits on foreign cubed cases not fleshed out in *Morrison*. The presumption that unless expressly stated to the contrary, US statutes will not have extraterritorial effect will impact upon the ability of the plaintiffs' bar to commence proceedings in the US for conduct undertaken beyond US territory. The extent of this impact remains to be seen.

Notes

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1 *Basis Yield v Goldman Sachs*, 10-cv-04537, US District Court, Southern District of New York (Manhattan). Similar to Australia, the United States has a federal system of courts and a state system of courts. The federal court of first instance is referred to as the district court. There are 94 district courts, including the Southern District of New York. There are 13 federal Circuit Courts of Appeals, the intermediate court in the federal system. The Supreme Court is the court of last resort in the federal system.

2 The Court of Appeals for the Second Circuit first applied the 'effects test' in *Schoenbaum v Firstbrook*, 405 F 2d 200 (2d Cir 1968), and first applied the conduct test in *Leasco Data Processing Equip Corp v Maxwell*, 468 F 2d 1326 (2d Cir 1972). These tests were not applied uniformly by the US lower federal courts. See *Morrison v Nat'l Australia Bank Ltd*, 547 F 3d 167, 172 n 6 (2d Cir 2008) (reviewing the approach of other federal Courts of Appeals to the conduct and effects tests); 130 S Ct 2869, 2880 (same).

3 See generally Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, Wall Street Journal (2 September 2005).

4 See Cornerstone Research, *Securities Class Action Filings, 2009: A Year in Review* 11, **http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_Research _Filings_2009_YIR.pdf**, viewed last 11 Nov2010.

5 See *Viva Vivendi! New York Plaintiffs' Firms Score Huge Victory*, Wall Street Journal Law Blog (accessed 29 January 2010).

6 See *In re Vivendi Universal, SA Securities Litigation*, 02 Civ 5571, DE 1077, at 15-16 (SDNY 16 July 2010) (Vivendi SA's Supplemental Memorandum of Law Regarding the Supreme Court's Decision in *Morrison v National Australia Bank Ltd*).

7 Section 20(a) of the 1934 Act provides – 'Joint and several liability; good faith defense: Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.'

8 As for the American investors, the district court dismissed their claims for failure to plead damages. The plaintiffs did not appeal that decision. See 130 US at 2876 n1

9 Justice Scalia wrote the majority opinion in which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Stevens, joined by Justice Ginsburg, and Justice Breyer wrote concurring opinions. Justice Sotomayor took no part in the case.

10 130 S Ct at 2880 (citing Choi and Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis L Rev 465, 467–68; Chang, *Multinational Enforcement of US Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 Fordham J Corp and Fin L 89, 106–08, 115–16 (2004); Langevoort, Schoenbaum *Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 Law & Contemp Probs 241, 244–48 (1992)).

11 Justice Breyer wrote a separate opinion concurring in part with the opinion and concurring in the judgment. He noted that it was sufficient that the relevant NAB shares were not purchased in the US. Justice Stevens, joined by Justice Ginsburg, joined in the judgment but rejected the Court's transactional test, favouring instead the Second Circuit's conduct and effects test. He did not consider compelling the majority's analysis that Section 10(b)'s plain language did not support extraterritorial application. He found that the securities laws required greater flexibility regarding the presumption against extraterritorial application, rather than applying that presumption as a bright-line rule.

12 See *Stoneridge Investment Partners, LLC v Scientific-Atlanta, Inc*, 552 US 148, 163–64 (2008) (rejecting scheme liability theory against secondary actors under Section 10(b) because plaintiffs did not rely on any deceptive act on the part of the secondary actors, and noting that to hold otherwise would expose a new class of defendants to the choice of paying settlements to dispose of potentially weak claims or engaging in extensive discovery, uncertainty, and business disruption); *Tellabs Inc v Makor Issues & Rights, Ltd*, 551 US 308, 313 (2007) (holding that to plead a Section 10(b) claim, a plaintiff must plead facts

demonstrating that the inference of scienter is at least as likely as any plausible opposing inferences, and noting that Congress set a stringent pleading standard in recognition of the fact that '[p]rivate securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.'); *Dura Pharm Inc v Broudo*, 544 US 336, 347 (2005) (holding that, to prevail on a Section 10(b) claim, a plaintiff must prove that the defendant's misrepresentation proximately caused the plaintiff's economic loss, and noting that in the absence of that requirement, a 'plaintiff with a largely groundless claim [could] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence') (quotation marks, citation omitted).

13 See *Terra Sec ASA Konkursbo v Citigroup Inc*, F Supp 2d, 2010 WL 3291579, at *5 (SDNY 16 August 2010) (dismissing Section 10(b) claims brought by non-US investors who purchased fund-linked notes on European stock exchanges and entered into a total-return swap that was sold in Europe, but permitting certain common law claims to proceed); *In re Banco Santander Securities-Optimal Litigation*, F Supp 2d, 2010 WL 3036990, at *5–6 (SD Fla July 30, 2010) (dismissing Section 10(b) claims brought by non-US investors who made offshore purchase in offshore investment funds that were closed to US citizens).

14 See *Cornwell v Credit Suisse Group*, F Supp 2d, 2010 WL 3069597 (SDNY 27 July 2010) (dismissing putative class members who purchased Credit Suisse Group shares on the Swiss Stock Exchange); see also *In re Société Générale Securities Litigation*, No 08 Civ 2495(RMB), 2010 WL 3910286 (SDNY 29 September 2010) (following *Cornwell* and dismissing putative class action under Section 10(b) brought by US investors who purchased ordinary shares of a French bank on the Euronext Paris Stock Exchange, but also dismissing the claims of US investors who purchased American Depository Receipts of the same French bank over-the-counter in the US because trades in ADRs are considered to be predominately foreign securities transactions); *In re Alstom SA Securities Litigation*, F Supp 2d, 2010 WL 3718863, at *2 (SDNY 14 September 2010) (following *Cornwell* and dismissing the Section 10(b) claims of putative class members who alleged that their purchases of Alstom securities on the Euronext exchange 'were initiated in the United States'); *Sgalambo v McKenzie*, F Supp 2d, 2010 WL 3119349 (SDNY 6 August 2010) (dismissing putative class members, including US investors, who purchased a Canadian company's shares on the Toronto Stock Exchange, but not dismissing claims brought by putative class members who bought shares on the American Stock Exchange); *Stackhouse v Toyota Motor Co*, No 10 Civ 0922(DSF)(AJWx), 2010 WL 3377409, at *1 (CD Cal 16 July 2010) (appointing lead plaintiff in a putative class action under Section 10(b) and holding that 'transactions in foreign-traded securities where the ultimate purchaser or seller has physically remained in the United States' are not 'domestic transactions' and, therefore, are not subject to Section 10(b)).

15 *In re Vivendi Universal, SA Securities Litigation*, 02 Civ 5571, DE 1074, at 11 (SDNY 16 July 2010) (Pls.' Supp Mem Concerning the Impact of *Morrison v Nat'l Australia Bank Ltd*).

16 It also has been pointed out that in financial industry parlance, 'listed' connotes trading and, therefore, securities that are listed but do not trade fall outside the ambit of 'listed' as used in *Morrison*. See Irwin Warren, Margarita Platkov, *Further Look at 'Morrison': A Plain Meaning Analysis*, NYLJ 4, 7 (2 November 2010).

17 Memorandum of Law of Defendants the Goldman Sachs Group Inc and Goldman Sachs & Co in support of their Motion to Dismiss under *Morrison v National Australia Bank Ltd* (4 August 2010), at 8.

18 Opposition to the Goldman Sachs Group Inc and Goldman, Sachs & Co Motion to Dismiss (24 August 2010), at 11.

19 Opposition to the Goldman Sachs Group Inc and Goldman, Sachs & Co Motion to Dismiss (24 August 2010), at 1.

20 Opposition to the Goldman Sachs Group Inc and Goldman, Sachs & Co Motion to Dismiss (August 24, 2010), at 2.

21 Brief of Amicus Curiae Australian Shareholders' Association, *et al*, in support of Petitioners, at 8, 11–12.

22 The Dodd-Frank Act directs the SEC to consider whether all investors or just a subset of investors, such as institutional investors, should have a private right of action under Section 10(b), the implications of a private right of action on international comity, the costs and benefits of a private right of action for transnational securities fraud, and whether a narrower extraterritorial standard should be adopted. See Dodd-Frank Act, Pub L 111203, Section 929Y(b), 124 Stat 1376 (2010).

23 This position has been advanced most prominently by the lawyer who briefed and argued *Morrison* before the Supreme Court on behalf of National Australia Bank. See George T Conway III, *Extraterritoriality After Dodd-Franks* (5 August 1010), available at The Harvard Law School Forum on Corporate Governance and Financial Regulation, **http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank/**, accessed 9 November 2010.

24 Brief of Amici Curiae the Securities Industry and Financial Markets Association, *et al*, in support of Respondents, at 11, 15–16.

25 Brief of Amici Curiae Alecta Pensionsförkäkring, *et al*, in support of Petitioner, at 34.

26 See 18 USC Section 1961 *et seq*

27 *Accord Cedeňo v Intech Group Inc*, F Supp 2d, 2010 WL 3359468 (SDNY 25 August 2010) (dismissing private RICO action alleging money laundering by Venezuelan officials: 'RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.').

28 See 15 USC Section 1051 *et seq.*