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§ 1:10 Foreign cubed cases: The Supreme Court contains a potential flood in securities litigation

Theodore J. Sawicki and Todd Chatham[*]

In the securities world, the extraterritorial application of the securities laws has been a relevant issue for decades. Recently, however, it has become a critical issue due to the increasing globalization of the securities markets and the exceedingly plaintiff-friendly litigation environment in the United States. Many foreign issuers have faced so-called "foreign cubed" litigation situations in recent years, with much publicity and close scrutiny from investors and plaintiffs' lawyers. In these cases, foreign investors who purchase shares of a foreign issuer on a foreign stock exchange sue for damages in American courts under the anti-fraud provisions of American federal securities laws.

The most well known victim of recent foreign cubed litigation, of course, is Vivendi Universal S.A., a French issuer. Vivendi's attempts to argue against the extraterritorial application of the securities fraud laws failed before a New York federal court,[1] and Vivendi went on to sustain an adverse jury verdict in its securities fraud trial, potentially exposing the company to billions of dollars in civil liabilities. Other foreign companies, including Fairfax Financial Holdings Limited, Fortis N.V., Royal Dutch/Shell Transportation, Bayer AG, and Siemens AG, similarly have faced the issue and resisted it, with varying degrees of success.

Foreign cubed litigation turns on the extraterritorial application of the United States' securities fraud laws. Historically, extraterritorial application of U.S. securities laws presented a vexatious problem because it created contrapositions of great consequence. On the one hand, it manifested the interests of utilizing the U.S. securities laws to protect investors and of preventing the export of fraud. On the other hand, it implicated international comity considerations, incentives to forum-shop, and the overburdening of the U.S. courts by making them fora for disputes related solely to foreign interests. This quandary has been further complicated by the fact that, oftentimes, the allegedly wrongful conduct occurred partially domestically and partially internationally.

The landscape of the foreign cubed issue changed dramatically in June, 2010 when the Supreme Court of the United States decided *Morrison v. National Australia Bank Ltd.*, No. 08-1191, 2010 WL

[Section 1:10]

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[1]In re Vivendi Universal, S.A., 381 F. Supp. 2d 158, Fed. Sec. L. Rep. (CCH) ¶ 92619 (S.D. N.Y. 2003).

2518523 (U.S. June 24, 2010). In *Morrison*, the Court held that a foreign investor's claim against a foreign issuer in connection with securities purchased or sold on a foreign exchange fails to state a Section 10(b) or Rule 10b-5 claim.[2] This article will discuss this case, its background, the Court's holding and its impact.

I. The Facts Before the Supreme Court in *Morrison*

The facts of the *Morrison* case involved National Australia Bank's ("NAB") former subsidiary HomeSide Lending Inc. ("HomeSide").[3] Whereas NAB was headquartered in Australia, HomeSide was a Florida-based mortgage service company.[4] As a wholly owned subsidiary, HomeSide's financial numbers rolled up into NAB's financial numbers and disclosures, although some financial numbers allegedly were also reported on a stand-alone basis.[5] In 2001, NAB disclosed that HomeSide had used incorrect interest rate assumptions in a valuation model, causing reported estimates of mortgage servicing fees to be artificially inflated by over $2 billion.[6] As a result, NAB suffered a $450 million write-down.[7] Upon disclosure of the news in Australia, NAB's shares fell more than 5%.[8] A subsequent disclosure related to the same misvaluation resulted in an additional 13% drop in NAB's stock price.[9]

At all relevant times, NAB ordinary shares traded on the Australian Securities Exchange, the London Stock Exchange, the Tokyo stock exchange, and the New Zealand stock exchange.[10] Only NAB's American Depository Receipts ("ADRs") traded on the New York Stock Exchange, which represented 1.1% of NAB's outstanding shares.[11]

[2]Morrison v. National Australia Bank Ltd., No. 08-1191, 2010 WL 2518523, at *14 (U.S. 2010).

[3]Morrison v. National Australia Bank Ltd., 547 F.3d 167, 169, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[4]Morrison v. National Australia Bank Ltd., 547 F.3d 167, 169, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[5]Morrison v. National Australia Bank Ltd., 547 F.3d 167, 169, 171, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[6]Morrison v. National Australia Bank Ltd., 547 F.3d 167, 169, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[7]Morrison v. National Australia Bank Ltd., 547 F.3d 167, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[8]Morrison v. National Australia Bank Ltd., 547 F.3d 167, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[9]Morrison v. National Australia Bank Ltd., 547 F.3d 167, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[10]Morrison v. National Australia Bank Ltd., 547 F.3d 167, 168, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[11]Morrison v. National Australia Bank Ltd., 547 F.3d 167, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008); In re National Australia Bank Securities Litigation,

HomeSide was not a publicly traded company.[12] In 1999 and 2000, HomeSide comprised between four to six percent of NAB's total profits.[13]

Following the stock price drops, three Australian investors and one American investor filed a purported class action suit against NAB, Washington Mutual Bank, F.A., the successor to HomeSide, and various executives of HomeSide and NAB in the United States District Court for the Southern District of New York.[14] The three Australian named plaintiffs had purchased NAB ordinary stock on the Australian Securities Exchange.[15] The American named plaintiff had purchased NAB ADRs on the New York Stock Exchange.[16]

The Consolidated Class Action Complaint alleged that the defendants violated Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 promulgated thereunder by making false and misleading statements regarding HomeSide's operations and NAB's resulting financial condition.[17] The misrepresentations were alleged to have been made in both domestic and foreign filings.[18] The investors alleged that the misstatements artificially inflated the prices of NAB's securities and ultimately resulted in losses to the investors.[19] Further, the Complaint charged that HomeSide and NAB had conspired in the fraudulent scheme.[20]

II. The Parties' Arguments Before The Supreme Court in *Morrison*

After losing at the District Court and Court of Appeals, the investors appealed to the Supreme Court. The parties' arguments exhibit the complex issues presented by foreign cubed cases and the potential ramifications of permitting such claims to be litigated in the U.S. federal courts.

On the merits, the investors emphasized, both in their briefs and at oral argument, the factual links to the United States. They continued to emphasize that the fraud occurred in Florida. "The facts of record make clear that the connection to the United States was not a matter

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No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *4 (S.D.N.Y. 2006), affirmed, 547 F.3d 167, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[12] In re National Australia Bank Securities Litigation, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *1 (S.D.N.Y. 2006).

[13] Morrison v. National Australia Bank Ltd., 547 F.3d 167, 169, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[14] *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, at *1.

[15] *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, at *2.

[16] *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, at *1.

[17] *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, at *1.

[18] *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, at *1.

[19] *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, at *1.

[20] *In re National Australia Bank Securities Litigation*, 2006 WL 3844465, at *1.

of happenstance, but was the very essence of the fraud alleged."[21] The suit allegedly has "Florida written all over it because Florida is where the numbers were doctored, Florida is where the fraudulent conduct in putting the phony assumptions into the valuation portfolio were done."[22] The investors also argued that the underlying mortgages were in American homes, that the bank had $25 billion of assets in the U.S., and that the bank had a "huge" trading operation in New York. They also asserted that HomeSide's numbers were "ministerially" incorporated by NAB into its public filings "line-by-line."[23] The investors highlighted that NAB maintained a hedging outpost in New York, which tried to offset the mortgage exposure HomeSide faced.[24] Lastly, they noted that several HomeSide employees became whistleblowers and notified NAB of the accounting fraud ongoing.[25]

As to legal authority, the investors took issue with the "effects" test and "conduct" test used by the lower courts and, instead, advanced the test proposed by the SEC before the Second Circuit. As noted above, the SEC proposed that "[t]he antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme."[26] Accordingly, the investors asserted that conduct in Florida was both substantial and material to the foreign investors' losses. "Without this domestic misconduct, there would have been no fraudulent release of information in Australia nor a resulting inflation of NAB's stock."[27]

In addition, the investors purported to anchor their argument in the language of Section 10(b) of the 1934 Act. Section 10(b), they argued, captures conduct that uses "any means or instrumentality of interstate commerce *or* of the mails, *or* of any facility of any national securities exchange. . . ."[28] The investors faulted the lower courts for ignoring the first two clauses of Section 10(b) and focusing only on whether the conduct used a "national securities exchange in the United States."[29] The investors further asserted that the preamble to the 1934 Act speaks to regulation of both "interstate and *foreign*

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[21] Brief for Petitioners, Morrison v. National Australia Bank, No. 08-1191, 2010 WL 265632, at *15 (U.S. Jan. 19, 2010).

[22] Oral Argument, at 8, Morrison v. National Australia Bank, No. 08-1191, 2010 WL 1285394 (U.S. Mar. 29, 2010); *see also* Brief for Petitioners, 2010 WL 265632, at *7.

[23] Brief for Petitioners, 2010 WL 265632, at *6-*7.

[24] Brief for Petitioners, 2010 WL 265632, at *9.

[25] Brief for Petitioners, 2010 WL 265632, at *9-*10.

[26] Brief for Petitioners, 2010 WL 265632, at *19.

[27] Brief for Petitioners, 2010 WL 265632, at *25.

[28] Brief for Petitioners, 2010 WL 265632, at *13 (emphasis added).

[29] Brief for Petitioners, 2010 WL 265632, at *14.

commerce."[30] In addition, "interstate commerce," as defined for the 1934 Act, includes "trade, commerce, transportation, or communication. . . between *any foreign country and any state*."[31] The investors also noted that the securities fraud laws and regulations do not expressly limit themselves to violations involving both conduct and loss in the United States.[32] Indeed, the investors said, Congress used express language in any provisions that it intended should not apply extraterritorially.[33]

Further, the investors challenged any assertions by foreign governments that allowing such cases to proceed in the United States would impinge on the sovereignty of other nations. They asserted that antifraud policies and goals are generally similar between nations and fraudulent conduct is certainly not encouraged by other nations. Even if United States laws are stricter, another nation "will surely not be offended by their application."[34] In addition, according to the investors, the forum non conveniens doctrine constitutes the appropriate approach where comity concerns are truly in play.[35]

In response to the investors, NAB emphasized that the disclosures themselves were made in Australia in NAB's consolidated financial statements, with HomeSide constituting only four percent of NAB's after-tax profits.[36] NAB further asserted that HomeSide itself had no duty to disclose.[37] At most, according to NAB, HomeSide's conduct constituted aiding and abetting a scheme, which is barred under Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008).[38] NAB classified HomeSide's conduct as being "in the realm of business operations," not in the securities arena.[39]

NAB levied a two-front assault on the investors' statutory interpretation argument. First, NAB contended that a presumption against extraterritoriality governs all statutory interpretation, unless the "statutory language . . . clearly expresses an affirmative intention of Congress to apply the statute extraterritorially."[40] Congress did not intend Section 10(b) to apply extraterritorially, as manifested by the absence of any express language in the statute to that effect. Rather, Australian law provides a framework by which Australian investors

[30]Brief for Petitioners, 2010 WL 265632, at *23.

[31]Brief for Petitioners, 2010 WL 265632.

[32]Brief for Petitioners, 2010 WL 265632, at *38.

[33]Brief for Petitioners, 2010 WL 265632, at *39-*40.

[34]Brief for Petitioners, 2010 WL 265632, at *35.

[35]Brief for Petitioners, 2010 WL 265632, at *41-*42.

[36]Brief for Respondents, 2010 WL 665167, at *11, *13-*14.

[37]Brief for Respondents, 2010 WL 665167, at *37-*38.

[38]Brief for Respondents, 2010 WL 665167, at *36.

[39]Brief for Respondents, 2010 WL 665167, at *37.

[40]Brief for Respondents, 2010 WL 665167, at *20.

can recover for any securities fraud, including via private litigation and class actions.[41] NAB dismissed the language cited by the investors as mere "boilerplate language" that cannot surmount the axiomatic presumption against extraterritoriality.[42]

Second, NAB relied on what it deemed to be "the *Charming Betsy* rule—that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' "[43] NAB advocated that it is Congress's practice to incorporate international choice-of-law principles into its legislation. At the time the 1934 Act was enacted, that principle was lex loci delicti, i.e., "the local law of the place of wrong." NAB asserted that this principle means that the applicable law is that of "the state where the last event necessary to make an actor liable for an alleged tort takes place."[44] NAB argued, therefore, that permitting the suit to go forward would amount to "legal imperialism."[45] Because the purchase or sale of the NAB ordinary shares on the Australian exchange was the last event necessary to liability here, the law of Australia should apply.[46] NAB rejected any suggestion that the investors' position does not impinge upon principles of comity because all countries want to penalize fraud. Although countries may agree about what conduct should be prohibited, they differ significantly about remedies for such conduct, "with the United States being the easiest place in the world for investors to recover damages caused by fraud."[47]

III. The Supreme Court's Opinion in *Morrison*

As a threshold matter, the Supreme Court agreed with both the investors and NAB that the lower courts incorrectly treated the question as one of subject matter jurisdiction. Correcting the lower courts, the Supreme Court declared, "[t]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case."[48] The Court, however, declined to remand as the investors had requested, saying that "subject matter jurisdiction" and

[41]Brief for Respondents, 2010 WL 665167, at *10-*11.

[42]Brief for Respondents, 2010 WL 665167, at *19.

[43]Brief for Respondents, 2010 WL 665167, at *20 (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

[44]Brief for Respondents, 2010 WL 665167, at *42.

[45]Brief for Respondents, 2010 WL 665167, at *52. Several foreign nations filed Amicus briefs urging the court to disallow an American forum for such suits, arguing that such suits would impose on their sovereignty.

[46]Brief for Respondents, 2010 WL 665167, at *43.

[47]Brief for Respondents, 2010 WL 665167, at *48 (internal quotations omitted).

[48]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *4 (U.S. 2010).

"merits" in the context presented were just two different labels for the same analysis and same outcome.[49]

On the merits, the Court's pronouncement in *Morrison* was surprisingly austere and straightforward. The Court found an avenue to avoid addressing many of the intricate questions triggered by foreign cubed cases and raised by both the investors and NAB.

The chief opinion by Justice Scalia focused, predictably, on the actual text of Section 10(b) and the 1934 Act, even though the Court had been presented with myriad theoretical and pragmatic arguments by the parties and by amici. The Court held that the statute contained no evidence that Congress intended it to apply extraterritorially. "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."[50]

In conducting a textual analysis, the Court rejected any suggestions that Congress intended to inject extraterritorial application into Section 10(b). Dismissing statutory definitions as not dispositive, the Court interpreted the specific mention of extraterritorial jurisdiction in certain provisions of the 1934 Act to preclude such extended jurisdiction for those provisions in which such jurisdiction was not specifically referenced.[51] "Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications. . . ."[52]

Building upon this approach, the Court established the transactions test. "[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[53] Accordingly, the Court held that Section 10(b) provides a cause of action only where "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange. . . ."[54] Importantly, the Court also described the transactions test slightly differently, in the following terms: "[I]t is in our view only transactions in securities listed on domestic exchanges,

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[49]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *5 (U.S. 2010).

[50]Morrison v. National Australia Bank Ltd., 2010 WL 2518523 (U.S. 2010) (internal citations omitted).

[51]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at **9-10 (U.S. 2010).

[52]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *10 n.8 (U.S. 2010).

[53]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *11 (U.S. 2010).

[54]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *12 (U.S. 2010).

and domestic transactions in other securities, to which § 10(b) applies."[55]

During the months of advocacy before the Court on this case, the Court had been deluged with arguments regarding the impact of extraterritorial jurisdiction on the sovereignty of foreign nations. Dodging the weighty policy considerations and implications, the Court allocated very few words to discussing these subjects and the contentions levied by various stakeholders. Ultimately, the Court only briefly acknowledged the policy concerns of foreign nations that an extraterritorial application of Section 10(b) would engender conflicts with the securities laws of those foreign nations.[56]

IV. The Conducts and Effects Tests and the Significant and Material Conduct Test

Notably, while crafting the transactions test, the Court rejected the conducts and effects tests that federal courts had developed on this issue and that the lower courts in *Morrison* had applied in favor of NAB.[57] Under those tests, a Section 10(b) claim could be successful in a foreign cubed case if "the wrongful conduct occurred in the United States" and/or "the wrongful conduct had a substantial effect in the United States or upon United States citizens. . . ."[58] The Court dismissed these tests for not being textually based and for being difficult to administer.[59]

The Court likewise rejected the "significant and material conduct" test put forth by the United States.[60] The United States Solicitor General, advocating for dismissal of the suit, had presented her own standard to the Court. Under this standard, a cross-border securities fraud would be in violation of the United States securities fraud laws only if "significant conduct material to [its] success" took place in the United States.[61] The Solicitor General also urged a nexus-to-the-injury test, asserting that a cross-border securities fraud should be actionable under United States securities laws only if the claimant's loss is

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[55]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *11 (U.S. 2010).

[56]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *12 (U.S. 2010).

[57]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *7 (U.S. 2010); In re National Australia Bank Securities Litigation, 2006 WL 3844465, at *8 (S.D. N.Y. 2006); Morrison v. National Australia Bank Ltd., 547 F.3d 167, at 169-70, 177, Fed. Sec. L. Rep. (CCH) ¶ 94880 (2d Cir. 2008).

[58]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *7 (U.S. 2010).

[59]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *7 (U.S. 2010).

[60]Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *13 (U.S. 2010).

[61]Brief for United States, Morrison v. National Australia Bank, No. 08-1191, 2010 WL 719337, at *7 (U.S. 2010).

directly caused by the U.S.-based aspect of the fraud.[62] In advocating this approach, the Solicitor General seemed to distinguish between whether the disclosures caused the plaintiff's injury, and whether the underlying financial misconduct did.

The "significant and material conduct" test was designed, in part, to ensure that the standard is sufficiently strict so as to avoid "allowing the United States to become a base for orchestrating securities frauds for export."[63] However, the Court was dismissive of the policy concern that the United States would become a launching pad for the perpetration of fraud in foreign markets. Instead, the court was more "repulsed by its adverse consequences. . . . [S]ome fear that [the United States] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[64]

V. *Morrison's* Impact

The *Morrison*[65] ruling will continue to have substantial implications for foreign entities operating in the United States. The decision is a clear victory for foreign issuers, especially those who have recently encountered prominent securities litigation in the United States and/or suffered adverse verdicts. The Supreme Court's holding that plaintiffs cannot pursue fraud claims for securities they purchased on foreign stock exchanges is likely to result in a pronounced decrease in future filings in the United States, impacting many multi-national firms.

At the same time, the case has forced investors to search for friendlier securities laws in other jurisdictions. In countries where the framework for such cases had been laid prior to *Morrison*, the pace of securities class action filings has already quickened. In Canada, for example, outstanding securities class actions reached a new record in 2010.[66] Because many countries have not yet developed statutes and structure for securities litigation and class actions to the extent the United States has, the evolution of the securities and class actions laws of other countries may accelerate. However, other countries considering any plaintiff-friendly legal remedies may be deterred by the fact that such development could discourage issuers from registering in that country.

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[62] Brief for United States, Morrison v. National Australia Bank, No. 08-1191, 2010 WL 719337, at *7 (U.S. 2010).

[63] Oral Argument, 2010 WL 1285394, at *44.

[64] Morrison v. National Australia Bank Ltd., 2010 WL 2518523, at *13 (U.S. 2010).

[65] Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 177 L. Ed. 2d 535, Fed. Sec. L. Rep. (CCH) ¶ 95776, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 11932, 76 Fed. R. Serv. 3d 1330 (2010).

[66] NERA Economic Consulting, *Trends in Canadian Securities Class Actions: 2010 Update* (January 31, 2011).

As *Morrison* turns on a transactions test, the decision's impact extends beyond just "foreign-cubed" cases. Domestic investors who purchase securities of a foreign issuer on a foreign exchange will no longer enjoy the ability to resort to the U.S. courts and legal remedies in the event that they sustain any loss due to securities fraud. Such investors are now left to seek redress in a foreign country, under the laws of the issuer's country and possibly the laws governing the foreign exchange on which the shares are traded. Since most foreign countries lack the robust class action framework that exists in the United States, the transactions test may discourage foreign investment by U.S. investors.

Likewise, foreign issuers may be more cautious now about their shares trading on a United States exchange. Many foreign issuers have ADRs trading in the United States on a domestic exchange. A trend reducing such trading may materialize, in an effort to further seal the limited opportunity for filing suit that domestic investors may still have in such circumstances.

As for litigation, the impact of *Morrison* has altered the jurisprudence from a factually intensive one, as demonstrated by the District Court and Court of Appeals opinions in this case, to one that relies on one limited fact and draws a clearer, more consistent line. To the extent that the securities class-action plaintiffs' bar continues to bring such cases, they will now be more easily subject to motions to dismiss, as demonstrated by the series of district court decisions after *Morrison* that have consistently rejected attempts to find loopholes in the language of the Supreme Court's decision.[67]

It is important to note that *Morrison* does not limit its holding to private plaintiffs. It makes no distinction as to the limits imposed in

[67] *See, e.g.*, Stackhouse v. Toyota Motor Co., 2010 WL 3377409 (C.D. Cal. 2010); Cornwell v. Credit Suisse Group, 729 F. Supp. 2d 620 (S.D. N.Y. 2010) (holding that U.S.-based purchasers of Swiss-issued shares traded on Swiss Stock Exchange had no cause of action under Section 10(b) per *Morrison*); Sgalambo v. McKenzie, 739 F. Supp. 2d 453, Fed. Sec. L. Rep. (CCH) ¶ 95829 (S.D. N.Y. 2010) (holding that *Morrison* warranted dismissal where plaintiffs purchased Canadian-issued shares on Toronto Stock Exchange, despite registration of the non-U.S. issuer on the New York Stock Exchange and with the Securities and Exchange Commission); Elliott Associates v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469 (S.D. N.Y. 2010) (dismissing hedge fund claims of fraud in connection with the purchase of security swap agreements, even though the swaps did not trade on any exchanges and all the steps necessary to transact the swap agreements were allegedly carried out in the U.S.); In re Royal Bank of Scotland Group PLC Securities Litigation, 765 F. Supp. 2d 327 (S.D. N.Y. 2011) ("The idea that a foreign company is subject to U.S. securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*. Plaintiffs seize on specific language without at all considering, or properly presenting, the context."); In re Vivendi Universal, S.A. Securities Litigation, 765 F. Supp. 2d 512, Fed. Sec. L. Rep. (CCH) ¶ 96212 (S.D. N.Y. 2011) (The language in the Supreme Court's *Morrison* decision "cannot bear the freight that plaintiffs ask it to bear. There is no indication that the *Morrison* majority read Section 10(b) as applying to securities that may be

this context on private plaintiffs and on the SEC. Accordingly, as of now, securities claims levied by the SEC must also meet the transactions test. Because the SEC has traditionally had broader rights than private plaintiffs, it is likely that the issue of whether the Court intended to apply its dictates to the SEC will arise in the lower courts.

Morrison will also continue to impact settlements of securities fraud class action claims and their administration. Going forward, settlement claims administrators must know from a claimant the exchange on which his or her shares were purchased and/or sold. After *Morrison*, this information is necessary to determine whether the claimant is properly a member of the class.

Although the impact of *Morrison* is expected to grow stronger as the lower courts continue to apply it in a variety of specific factual settings, this impact will last only so long as Congress chooses not to intervene by changing the law. And Congress has already expressed a desire to make some modifications. Recently proposed financial reforms contain some provisions that may cut against *Morrison*, namely in the form of SEC enforcement rights and SEC rule-making authority. In addition, there is a possibility that Congress may enact the conducts and effects test via legislation, thereby annulling the transactions test and re-empowering foreign investors to bring claims in U.S. courts.

Thus, many angles of *Morrison*'s future impact remain unclear. What is clear, however, is that the case is of great consequence to the securities class action framework that has developed in the United States. The case will leave its mark in this arena, no matter whether it is allowed to flourish or is limited by future legislation or interpretation.

§ 1:11 Litigation against financial institutions and their directors and officers in the global economic crisis

Robert R. Long, David A. O'Neal, and Austin M. Hall[1]

I. The Fallout from the Subprime Debt Market: An Update on Subprime Securities Class Actions

Beginning in 2007, economic conditions triggered fears of widespread defaults in subprime mortgages that had carried the day dur-

cross-listed on domestic and foreign exchanges, but where the purchase and sale does not arise from the domestic listing.").

[Section 1:11]

[1]Robert R. Long is a Partner, and David A. O'Neal and Austin M. Hall are Associates in the Securities Litigation Group at Alston & Bird LLP. This chapter does not constitute legal advice. It represents the judgment and analysis of the authors.