

vergeben und diese wie von Zauberhand durch Verbriefung in Schuldtitel mit hohem Rating verwandelt wurden. Aber die gesetzlichen Vorschriften, die die Banken gezwungen haben, ein Minimum von Hypothekendarlehen in den Büchern zu halten, wurden nicht revidiert. Somit sind weiterhin die Überinvestition im Immobiliensektor und die Unterinvestition im produktiven Sektor vorprogrammiert.

Der Kongress hat zudem eine historische Chance vertan, die undurchsichtige Gesetzgebung, die auf der Grundlage der Gesetzgebung aus den Jahren 1933-1040 entstanden ist, grundlegend zu revidieren und den Gegebenheiten des Internetzeitalters und der globalen Finanzmärkte anzupassen. Nach wie vor ist die Regelung der extraterritorialen Wirkung der amerikanischen Börsengesetzgebung lückenhaft und inkonsequent. In vielen Fällen, wie etwa bei Swaps, weitet der Dodd-Frank Act die extraterritoriale Wirkung der US-Gesetzgebung weiter aus. Vermutlich

wird sie wieder von der SEC und der Rechtsprechung in einem nicht vorhersehbaren Maße wieder eingeschränkt.

Bei den neuen Corporate Governance-Regeln wird sich erst nach Jahren zeigen, ob die in der Weltwirtschaftskrise zu Tage gekommenen Exzesse durch mehr Mitsprache der Aktionäre unter Kontrolle gehalten werden. Um nur ein Beispiel zu nennen, einer der ersten Auslöser der Krise war der Zusammenbruch von Bear Stearns. In März 2008, als Bear Stearns an JP Morgan mit finanzieller Unterstützung der US-Regierung verkauft wurde, war der – hoch bezahlte – CEO Jimmy Cayne auf einer Bridge-Tournee in Detroit und nicht in New York für die Verhandlungen. Bei Bridge Tourneen könne Cayne nicht gestört werden. Fraglich ist, ob die tendenzielle Stärkung der Unabhängigkeit der betreffenden Ausschüsse des Verwaltungsrates zu einem ausgewogeneren Verhältnis von Leistung und Vergütung führen wird.

AGORA – Morrison v. National Australia Bank

Part 1: Are the United States' Judicial Borders (Really) Closed to Foreign Investors?

Andreas Tilp*/Marc Schiefer** and Stephan Wilske***/Willi Obel****

On June 24, 2010, the U.S. Supreme Court decided in *Morrison v. National Australia Bank, Ltd.* (hereinafter “*Morrison*”),¹ that § 10(b) of the Securities Exchange Act of 1934 does not provide a cause of action to foreign plaintiffs to recover investment losses relating to foreign-issued securities traded on foreign exchanges, the so called “f-cubed”² claims. The much-anticipated³ opinion adopted a theoretically simpler, but potentially still ambiguous, standard that – on first glance – limits the statute’s application to securities transactions that occur within the United States, rendering irrelevant the location of any underlying deceptive conduct. In doing so, the Court af-

firmed the result reached by the U.S. Court of Appeals for the Second Circuit, but overturned the analytical approach lower courts had followed for nearly four decades. The full impact of the decision is not yet clear, but for now, the U.S. Supreme Court has seemingly brought an end to f-cubed claims and claims filed by U.S. investors alleging fraud on U.S. soil without having purchased securities on a U.S. stock exchange.

I. Factual Background

The shares of National Australia Bank (hereinafter “NAB”), one of the largest banks in Australia, trade on the Australia, London, Tokyo, and New Zealand stock exchanges, while its American Depository Receipts (hereinafter “ADRs”) are listed and traded on the New York Stock Exchange.⁴ The plaintiffs in *Morrison* represented a class of Australian investors who purchased the bank’s shares in Australia on the Australia Stock Exchange.

In 2001, NAB acknowledged accounting flaws in the valuation model of its U.S. subsidiary HomeSide Lending, Inc. (hereinafter “HomeSide”), a mortgage servicing company.⁵ Ultimately, HomeSide’s calculations overstated the value of its servicing rights. As a result, NAB disclosed in July 2001 that it would incur a write-down first in the amount of \$ 450 million, and then, in September 2001, a second write-down of \$ 1.75 billion. In response, the value of both its ordinary shares and ADRs first dropped by 5% in July, and then subsequently dropped by 13% and 11.5% respectively in September. Petitioner Robert Morrison, a U.S. citizen, and two other citizens of Australia who purchased NAB ADRs on the New York Stock Exchange brought suit against HomeSide, NAB, and various individual officers and directors, alleging violations of §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934.

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1 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (U.S. 2010).

2 F-cubed cases are actions involving three (hence “cubed”) levels of foreignness: “(1) foreign plaintiffs [are] suing (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries.” *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. N.Y. 2008).

3 *Ashby Jones*, The Whole World is Watching: ‘F-Cubed’ Case Moves to High Court, WSJ LAW BLOG (MARCH 29, 2010, 9:06 AM ET), <http://blogs.wsj.com/law/2010/03/29/the-whole-world-is-watching-f-cubed-case-moves-to-high-court/>. (“We can’t remember a case about jurisdiction that’s generated such feverish interest as the one to be argued Monday at the U.S. Supreme Court”).

4 ADRs are negotiable certificates issued by a U.S. bank representing a specified number of shares (or one share) in a foreign stock that is traded on a U.S. exchange. ADRs are denominated in U.S. dollars, with the underlying security held by a U.S. financial institution overseas. ADRs help to reduce administration and duty costs that would otherwise be levied on each transaction.

5 *Morrison*, 547 F.3d 167, 168-69 (2d Cir. 2008) (HomeSide calculated the present value of the fees it would generate from servicing mortgages in future years using a valuation model, booked that amount on its balance sheet as an asset called Mortgage Servicing Right (MSR), and then amortized the value of that asset over its expected life).

The District Court for the Southern District of New York dismissed the foreign plaintiffs' claims for lack of federal subject matter jurisdiction and dismissed the domestic plaintiff's claim for failure to state a claim in that no damages were alleged.⁶ The foreign plaintiffs appealed, and the Second Circuit affirmed the dismissal. In the opinion, Judge Parker, Jr. focused on the "conduct [that] comprises the heart of the alleged fraud" and agreed with the district court that federal subject matter jurisdiction was lacking because "[t]he actions taken and the actions not taken by [the bank] in Australia were ... significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida."⁷

The Second Circuit analyzed the case under the so called "conduct" and "effects" tests, complicated and often inconsistent tests that have grown from the assumption that in the 1930s, Congress did not anticipate the international nature of modern securities markets.⁸ Under the conduct component, "subject matter jurisdiction exists if activities in this country were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad."⁹ Though they did not employ the effects test, the court noted "the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets."¹⁰ Following affirmation of the dismissal, the foreign plaintiffs sought review in the U.S. Supreme Court.

II. At the U.S. Supreme Court

On November 30, 2009, the U.S. Supreme Court granted the petition for writ of certiorari. Oral arguments took place before the Court on March 29, 2010,¹¹ and from the outset the tone of questioning was strongly against allowing foreign investors to sue for fraud that occurred mainly overseas. Plaintiffs argued that the scope of U.S. securities laws permits foreign investors to sue foreign issuers based on losses sustained from trades on foreign exchanges where alleged material and substantial fraudulent conduct took place on U.S. soil. NAB argued that the Court should affirm the Second Circuit because the plaintiffs cannot overcome the presumption against extraterritoriality and that the securities laws should only apply to securities purchased or sold on U.S. exchanges, not to transactions involving securities of foreign issuers on foreign exchanges. The U.S. federal government, in support of Respondent NAB's position, argued for a legal standard that would dismiss the Australians' lawsuit but preserve a chance to enforce the Securities Exchange Act in some transnational fraud cases.¹²

The case received considerable attention abroad and coincidentally six justices of the Supreme Court of Canada were in attendance at oral arguments, seated in the gallery. Eighteen amicus briefs were submitted to the Court, including briefs from the governments of Australia, France, and the United Kingdom, the International and U.S. Chambers of Commerce, and numerous securities industry groups. Fifteen of the amicus briefs supported Respondent's position that the Exchange Act did not extend to f-cubed claims. The amici urged the Court not to adopt a rule that would validate "the U.S. taking on the role of international securities policeman" merely because of concerns that "some jurisdictions may not have regulatory and legal systems that are perceived as adequate."¹³ The Court acknowledged the overwhelming foreign interest in the case, saying that the amici "all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence."¹⁴

At oral arguments the justices did not seem predisposed to granting f-cubed cases jurisdiction. Indeed, Justice Ginsburg remarked that the case "has Australia written all over it."¹⁵ She asked, "Isn't the most appropriate choice the law of Australia rather than the law of the United States?"¹⁶ Neither Ginsburg nor any other Justice who spoke up seemed to accept the response of the lawyer for the foreign investors that "the case has Florida written all over it."¹⁷ Afterwards, there was wide consensus among media reports that the Court would have little difficulty determining that f-cubed cases are not governed by U.S. securities laws.¹⁸

In its opinion, written by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, the Supreme Court held: "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."¹⁹ The Court based its determination on the text of the statute and reiterated 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."²⁰ The Court noted that the failure to apply this principle in § 10(b) cases "has produced a collection of tests for divining what Congress would have wanted, complex in formulation

6 *In re Nat'l Australia Bank Ltd. Sec. Litig.*, 2006 WL 3844465 (SDNY Oct. 25, 2006).

7 *Morrison*, 547 F.3d at 176.

8 Beginning in the 1960s, the lower federal courts developed an elaborate jurisprudence aimed at clarifying how far judicial reach extended. That jurisprudence – largely the creation of the renowned Judge Henry J. Friendly of the Second Circuit – sought to ascertain what Congress would have done if it had actually addressed the question. In *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. N.Y. 1968), Judge Friendly and others formulated what came to be known as the "conduct" test and the "effects" test. The most often-mentioned rationale for these tests was that Congress would not have wanted the U.S. to serve as a haven for fraud that did harm elsewhere, and that U.S. investors and U.S. markets were Congress' primary concern. While Judge Friendly and others recognized the possibility that other countries might object to assertions of jurisdiction by the U.S., they regarded the risk as minimal because, in their estimation, all countries were of one mind about fraud.

9 *Morrison*, 547 F.3d at 171.

10 *Id.*, at 176.

11 Justice Sotomayor, who sat on the Second Circuit at the time of the appeal, but was not on the *Morrison* panel, recused herself from this case.

12 In the amicus brief for the United States, Elena Kagan as Solicitor General

along with her assistants and Senior Counsel for the Securities and Exchange Commission, advocated for a "significant and material conduct" test. Under that test, the petitioners' suit would still be dismissed because the United States component of the alleged fraud did not directly cause their alleged injury, and a transnational securities fraud violates § 10(b) only if significant conduct material to the fraud's success occurs in the United States.

13 *Brief for United Kingdom of Great Britain and Northern Ireland as amicus curiae*, at 27.

14 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (U.S. 2010).

15 Transcript of oral arguments at 7, (*Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (U.S. 2010) (No. 08-1191)).

16 *Id.* at 8.

17 *Id.*

18 *James Vicini*, US court questions Australia bank case jurisdiction, Reuters (March 29, 2010, 1:40 PM ET), <http://www.reuters.com/article/idUSN296002820100329>; *Lyle Denniston*, Analysis: Curb on Securities Suits?, *ScotusBlog* (March 29, 2010, 12:28 PM ET), <http://www.scotusblog.com/2010/03/analysis-curb-on-securities-suits/>; Brent Kendall, High Court Weighs Suit Against Australian Bank, *The Wall Street Journal* (March 29, 2010, 5:35 PM ET), http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052702304370304575151772036776684.html.

19 *Morrison*, 130 S. Ct. 2869, 2888 (U.S. 2010).

20 *Id.*, at 2877 (internal citations omitted).

and unpredictable in application.”²¹ Justice Scalia explained that the focus of the Exchange Act “is not on the place where the deception originated, but on purchases and sales of securities in the United States.”²²

In doing so, the Court rejected the fact-intensive conduct and effects tests, the SEC’s “significant and material conduct” test, and adopted a bright-line “transactional test” – “whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange.”²³ In the final paragraph of the majority opinion, Scalia notes that the case “involves no securities listed on a domestic stock exchange, and all aspects of the purchases ... occurred outside the United States.”²⁴ The new transactional test leaves open several possibilities for future litigation, particularly about the meaning of purchases or sales inside or outside the United States, what qualifies as a domestic exchange, and instances where only some aspects of the purchase occurred outside the United States.

In his concurrence, Justice Stevens, joined by Justice Ginsburg, concurred in the judgment, but disagreed with the Court’s rejection of the conduct and effects tests. According to Justice Stevens, “the federal courts have been construing § 10(b) in a different manner for a long time, and the Court’s textual analysis is not nearly so compelling ... as to warrant the abandonment of their doctrine.”²⁵ Justice Stevens also pointed out “[n]o one contends that § 10 (b) applies to wholly foreign frauds. Rather, the real question in this case is how much, and what kinds of, domestic contacts are sufficient to trigger application of § 10 (b).”²⁶ Justice Breyer’s brief opinion concurring in part and concurring in the judgment said § 10(b) is inapplicable because “the purchased securities are listed only on a few foreign exchanges ... and the relevant purchases of these unregistered securities took place entirely in Australia and involved only Australian investors.”²⁷

Part 2: The Impacts and Implications of Morrison v. National Australia Bank as Seen by European Investors’ Attorneys

Andreas Tilp/Marc Schiefer

I. The Impact of Amicus Briefs and Foreign Governments on Morrison

A. Amicus Briefs in U.S. Court Practice Generally

Persons or organizations are termed as *amicus curiae* (Latin for “friend of the court”) where they are involved in court proceedings without themselves being a party to them.²⁸ Primarily, an amicus will highlight essential aspects of the action and the consequences of a decision potentially taken, and may submit in-depth information and expertise to the court ruling on the action. However, the amicus need not be entirely independent – it suffices for the amicus to not be a party to the action. Notwithstanding, courts in the United States have the right to choose their friends themselves.²⁹

21 *Id.*, at 2878.

22 *Id.*, at 2874.

23 *Id.*, at 2886.

24 *Id.*, at 2888.

25 *Id.*, (Stevens, J., concurring).

26 *Id.*, at 2892 (Stevens, J., concurring).

27 *Id.*, at 2888 (Breyer, J., concurring).

28 See Black’s Law Dictionary, 6th edition 1990, p. 82; Timothy S. Huebner, *Amicus Curiae*, in: Kermit L. Hall (ed.), *The Oxford Companion to The Supreme Court of the United States*, 1992, p. 32.

29 *Id.*

By contrast, this construct is foreign to German procedural law. German courts will not accept any letters filed by third parties in support of a party to an action.

Various Chambers of Commerce and professional associations filed amicus briefs, in particular on behalf of the respondent. They wished to see the extraterritorial reach of § 10(b) Securities Exchange Acts (hereinafter “§ 10(b)”) curtailed.

B. Amicus Briefs Filed by the International Chamber of Commerce and other National Chambers in Europe

Several Chambers of Commerce and industrial associations, acting as “*amici curiae*” as described above, have sent written statements to the court in support of the respondent and its position, indicating that in their view, § 10(b) cannot be applied to fraudulent representations made by a non-U.S. issuer outside of the United States.³⁰ They argue that the wording of the law already does not allow for the option of applying § 10(b) on an extraterritorial basis.³¹ Essentially, the point made in these submissions was that, should this statute be applied to cases involving fraud concluded, for the most part, outside the United States, this might have a deterrent effect on foreign enterprises intending to invest in the U.S. The reason they cited was that, due to the unforeseeably far-reaching nature of U.S. laws, investors might be concerned about being subject to § 10(b) for whatever kind of investment they might make in the country.³² The risk for non-U.S. enterprises, the amici continued, who fear that they may be subject to the liability statutes stipulated by U.S. securities laws simply by opening a branch office in the U.S., was going to discourage investors from investing in the United States.³³ This line of argument of course gives rise to a question regarding the principle of the matter: should not a company investing in the U.S. be willing to subject itself to the securities laws existing in the country?

Another argument raised by the European Chambers of Commerce and associations was that if the stipulations under securities laws of § 10(b) and Rule 10b-5 are applied, efforts made nationally in the countries of Europe to control and monitor securities fraud might be undermined.³⁴

On this, it should be noted that the work done in Europe to promote the protection of investors’ rights is progressing only slowly, as opposed to developments in the United States. To cite an example, the legal statutes existing in Germany allowing claims for the compensation of damages to be enforced under capital market law require, at least where the statutes governing tortious acts are concerned, that causality be proven in detail. The assumption as given according to the U.S. fraud-on-the-market theory,³⁵ according to which the market price is comprised of all of the essential and available information, on which investors will rely just as they rely on market integrity in general, is not a concept informing German laws governing tortious acts.³⁶ Section 826 of the *Bürgerliches Gesetzbuch*

30 See *Brief of the International Chamber of Commerce, The Swiss Bankers Association, Economiesuisse, The Federation of German Industries and the French Business Confederation as Amici Curiae in support of respondents*, p. 3.

31 *Id.*, p. 8.

32 *Id.*, p. 6.

33 *Id.*, p. 3.

34 *Id.*, p. 18, 20, 26.

35 *Basic Inc. v. Levinson*, 108 S.Ct. 978, 988 et seq. (1988).

36 *Cf.*, as one of many examples, the ruling handed down by the German Federal Court of Justice (BGH) on June 4, 2007 in re Comroad, II ZR 147/05, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2007, 1560 = *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2007, 708 and II ZR 173/05, *Zeit-*

(BGB, German Civil Code) as the key general stipulation concerning the compensation of damages does not relieve any party of the obligation to provide evidence. The stipulations of Section 37 b and Section 37 c of the *Wertpapierhandelsgesetz* (WpHG, German Securities Trading Act), a specialized law, govern cases in which essential information is either provided erroneously to the capital market or withheld from it. Their reach is extremely limited, since they only cover strictly defined special cases of securities transactions and provide for short limitation periods. To cite an example in procedural terms, it might be noted that none of the jurisdictions in Europe – to the exception of the United Kingdom – allow for the concept of discovery proceedings.³⁷

C. The Amicus Brief Filed by the United States Government

The objective of the brief filed by the United States of America was entirely clear: to prevent the U.S. from becoming the forum for actions in which only a small portion of the many fraudulent acts were completed in the United States.³⁸ Ultimately the brief was intended to ensure that the resources of the U.S. courts are used properly, for U.S. interests and causes and not for purely foreign actions.

D. The Amicus Brief Filed by the Securities Exchange Commission

The Securities Exchange Commission (SEC), in contrast, argued partly on behalf of the petitioners, since the SEC itself is interested in prosecuting such cases and in arriving at a broader interpretation of § 10(b). The SEC suggested that a new provision be created in regard to the scope of the so-called “conduct” test, the intention being to uphold the concept on which the United States Court of Appeals for the Second Circuit had based its adjudication. The wording suggested by the SEC to govern the application of the conduct test is as follows:

*“The 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.”*³⁹

II. Reactions in Germany and Europe

A. In General

Foreign companies who had been subject to actions for damages for having violated securities laws heaved a great sigh of relief. This decision is likely to result in many proceedings filed by foreign investors being dismissed that are currently pending with the U.S. courts, because the transactions for the securities were implemented abroad.

Since, contrary to usual practice where newly enacted laws are concerned, there is no prohibition on the retroactive effect⁴⁰ of rulings handed down by the Supreme Court, this decision will directly influence all of the proceedings currently pending before U.S. courts.

schrift für Wirtschaftsrecht (ZIP) 2007, 1564 = Neue Zeitschrift für Gesellschaftsrecht (NZG) 2007, 711.

37 On the insufficient legal protection granted to petitioners, based on that protection’s inefficient design, in Germany and Europe cf. *Tilp/Roth* in *Neue Juristische Wochenschrift* (NJW) 2009, issue 10, p. XII et seq.

38 See *Brief for the United States as amicus curiae supporting respondents* (February 2010), p. 19.

39 *Brief of the Securities and Exchange Commission as Amicus Curiae, in response to the court’s request*, 22.

40 See, e.g., *Landgraf vs. USI Film Prods.*, 511 U.p. 244, 273 (1994).

B. Effects on the Porsche/VW Action

At present, an action against Porsche is pending in the United States⁴¹ filed by 35 U.S. institutional investors and foreign institutional investors. Leaving aside the question of whether any of these claims will be enforceable under substantive law, the problem is that some of the securities transactions were not implemented on U.S. stock exchanges, and instead concluded outside the United States. The consequence of *Morrison* is that the funds which may have suffered damages – also those whose registered seat is in the U.S. – will now have to file any action before a court in another jurisdiction, such as the *Landgericht* (Regional Court) of Stuttgart, where Porsche has its registered seat.

C. Effects on the Vivendi Action

Following the decision handed down by the United States District Court for the Southern District of New York in re *Vivendi*, European groups of plaintiffs, including some from Germany, encountered difficulties when they wished to be appointed as lead plaintiffs in U.S. class actions. Accordingly, those groups of plaintiffs who had been excluded from the class action filed suit separately, by way of individual complaints, against the defendants.⁴² *Morrison* may result in the defendant companies now having to deal with substantial actions for damages in the United States as well as, and in parallel, in a number of other jurisdictions.

In *Vivendi*, a number of class actions plaintiffs were excluded from the class action in the U.S., among them plaintiffs from Germany, Austria and Spain.⁴³ The reasoning was that these countries did not accept any extension of the *res judicata* effect to parties not directly involved in the proceedings. Later various institutional investors filed individual complaints before the United States District Court for the Southern District of New York. Since such individual complaints are not subject to the issue entailed by a class action, they would not be equated to a failure to grant the right to an effective and fair legal hearing.⁴⁴

As a result of *Morrison*, claims in U.S. Courts will most likely now be for all those – primarily European – investors who exchanged acquired Vivendi securities on non-U.S. exchanges.

III. Criticism and Legal Issues left unaddressed by *Morrison*

A. Introduction

While the ruling handed down by the Supreme Court seems clear when it is first read, including the new concept of the “transactional” test, substantial legal issues soon become apparent, in particular the way in which this decision will define future developments. Independently of that, this ruling potentially opens up the option to any enterprise having the requisite criminal energy to exploit this new situation in terms of the law by initiating fraudulent acts from U.S. soil without being subject to prosecution in the United States.

41 See *Elliott Associates, L.P. vs. Porsche Automobile Holding SE*, No. 1:10-cv-00532-HB (S.D.N.Y. filed January 25, 2010).

42 Cf. *Tilp/Schiefer*: Aktuelle Entwicklungen im US-Recht der Wertpapier(sammel)klagen – eine exemplarische Momentaufnahme Ende 2007, *DAJV Newsletter* 2007, p. 3 et seq.

43 *In re Vivendi Universal, S.A. Securities Litigation*, 2007 WL 1490466 (S.D.N.Y., May 21, 2007), p. 55 et seq.

44 See, e.g. *Deka Investment et al. vs. Vivendi, S.A. et al*, No. 1:07-cv-07776-RJH (S.D.N.Y. filed August 31, 2007); *Eurizon Capital SGR S.p.A. vs. Vivendi, S.A. et al*, No. 1:07-cv-11483-RJH (S.D.N.Y. filed December 21, 2007).

This is why Justice Stevens⁴⁵ criticized the ruling handed down by the Supreme Court in his concurrence, although ultimately he agreed with the Court's final result. He stated that the Supreme Court failed to address the so-called "*presumption against extraterritoriality*" beyond what is set out expressly in the law. Justice Stevens believed that the point is overstated where the Court holds that when a statute gives no clear indication of an extraterritorial application, it has none.⁴⁶ The wording of a statute does not relieve courts of their duty to give statutes the most faithful reading possible.⁴⁷ The wording of § 10(b) in fact does not speak with absolute geographic precision, Justice Steven wrote, so that it needed to be construed in accordance with the intention of the Congress enacting that statute. The adjudication handed down thus far and the "tests" performed by the Second Circuit, according to which substantial fraudulent acts committed in the United States or from the U.S. are covered by the area of application of the statute, are in fact in line with the intention of the Congress enacting this statute.⁴⁸ No one is alleging that § 10(b) reaches purely foreign cases of fraud that have no ties whatsoever to domestic matters. The issue is, rather, how much, and what kinds of, domestic contacts are sufficient to trigger application of § 10(b).⁴⁹

B. Problematic Results Identified by Justice Stevens

Below, two problematic cases are described that may arise as a consequence of the ruling.

1. U.S. Enterprise Acquires Stock at a Foreign Stock Exchange

In his concurring opinion, Justice Stevens states that cases are imaginable in which American investors would not be covered by the protection afforded by § 10(b) if they acquired securities of a company on an overseas exchange. Should investors become victims of a massive deception and large-scale fraud committed by that company, they would be barred from seeking relief under § 10(b) – even in those cases in which the fraud was initiated from the United States. It is conceivable, he continued, that the subsidiary of a foreign company in the United States masterminds and implements a massive fraud scheme in which the stock price is artificially inflated – but this conduct will no longer be subject to the stipulations of § 10(b) because the transaction took place outside the United States. In this regard, the question needs to be addressed whether the legal basis for filing claims to compensation of damages should in fact be made dependent on the place of the transaction, or whether it would not be advisable to have it depend on the fraudulent conduct as such.⁵⁰

This is an aspect that is all the more urgent in light of increasingly converging stock exchanges and transactions becoming ever more interdependent.

45 Justice Stevens retired from the Supreme Court on June 29, 2010 – see <http://www.supremecourt.gov/about/biographies.aspx>.

46 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2892 (U.S. 2010).

47 *Id.*

48 *Id.*, at 2894.

49 *Id.*, at 2893.

50 Sections 37b, c of the *Wertpapierhandelsgesetz* (WpHG, German Securities Trading Act) are intended to protect investors against any unfair or improper influence being taken on their intentions (*cf. Sethe* in Assmann/Schneider (ed.), *Kommentar zum Wertpapierhandelsgesetz*, 5th edition 2009, Section 37b and Section 37c, marginal no. 11); Section 37b and Section 37c of the German Securities Trading Act tie in only with the general and abstract admission to listing on a domestic stock exchange; they do not require any issuer must have its registered seat in Germany, or that the securities must have been bought in Germany: they have extraterritorial effect (*Id.*, marginal no. 41).

2. U.S. Retiree is the Victim of Fraudulent Acts in the United States

Justice Stevens expanded the above-cited example to a retiree living in Manhattan who is swindled into investing her life savings, more or less at her doorstep, into the stock of a fraudulent company, in which context the actual acquisition of the shares is implemented via a stock exchange overseas. In this case as well, the *Morrison* decision likely means that no claim to compensation of damages pursuant to § 10(b)⁵¹ exists.

Following the line of argument pursued by the foreign special interest groups and professional associations as amici curiae, that retiree would be free to file suit before an overseas court.

Let us pursue that concept in its practical application for the unsuspecting retiree from New York. Assuming she acquired securities traded in Germany, she would have to take the fraudulent German company to court in Germany. She would have to base her claim on German securities laws in filing for compensation of her damages. Leaving aside the practical difficulties that such proceedings overseas entail, the retiree would face substantial court fees, advance payments on legal fees and the strict requirements under German law as regards proof of culpability and cause-and-effect relationships. The retiree would have no access to any discovery of documents and proof, as she would in the U.S. legal system, since the concept of discovery is foreign to German law.⁵² How, then, will this retiree, who was defrauded in her own country, effectively enforce her rights?

Justice Stevens is very clear in that any application of § 10(b) will be out of the question in that sample case, even if the substantial wrongful conduct occurred in the United States. He makes it very clear that this will have substantial effects on the United States markets and citizens. In this regard, the Court's rule has turned § 10(b) jurisprudence on its head.⁵³

Taking this example to an extreme, this would mean that any wrongful conduct occurring from the United States will be irrelevant wherever the securities transaction is implemented at an overseas exchange, in other words a stock exchange outside the United States. Accordingly, even investment decisions that were caused and initiated by fraudulent acts will no longer be capable of being ruled on in proceedings before the U.S. courts.

This is tantamount to opening the floodgates for fraudulent conduct in the United States. All criminal companies now need to do is make sure that they are no longer listed on a U.S. stock exchange, because then, they will only be held accountable for their potential misconduct abroad. Obviously, U.S. enterprises can do just the same.

The argument that in construing § 10(b) more restrictively, the intention was to make the United States more attractive for companies as a whole is thus taken ad absurdum. The future will see more and more companies pursuing their delisting at the U.S. stock exchanges in order to safeguard against their being subject to the reach of § 10(b). The turnover on stock exchanges in the United States will decline, and will increase at those overseas. On the other hand, the investor confidence in those companies which no longer are listed on a U.S. stock exchange, or the securities of which are no longer traded in the United States, will certainly decline as these investors must

51 *Morrison*, 2010 WL 2518523, at *19.

52 On the insufficient legal protection in Germany and Europe *cf. Tilp/Roth* as cited above in footnote 11; on the inefficiency of the *Kapitalanleger-Musterverfahrensgesetz* (KapMuG, Capital Markets Model Case Act) in particular, *cf. Tilp* in *Festschrift Krämer*, 2009, p. 331 et seq.

53 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2895 (U.S. 2010).

fear that they will no longer be able to enforce their claims concerning securities laws, or will not be able to enforce them fully.

On the flip side of the coin, there is substantial risk that fraudulent securities transactions will be initiated in the United States, but implemented overseas, where neither the SEC nor any other American regulatory or supervisory institutions have any means of prosecution.

C. Exclusion of F-Squared Cases?

In recent years, U.S. courts have only addressed the issue of whether or not so-called “f-cubed” cases⁵⁴ should or should not be heard. According to the ruling handed down by the Supreme Court, investors in “f-squared” cases – these being cases in which U.S. investors acquired foreign securities at overseas exchanges and now wish to bring non-U.S. citizens to account – will likewise be barred from seeking relief under § 10(b). This limitation of the scope of § 10(b) was also criticized by Justice Stevens in his concurring opinion.

D. What Does the Purchase or Sale of Securities Listed on a U.S. Stock Exchange Actually Mean?

Initially, the decision handed down by the Supreme Court on the matter of the reach of § 10(b) seems clearcut: only cases of fraud are to be counted as purchases or sales of securities that are covered by § 10(b), to wit:

*“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.”*⁵⁵

The question is, then, whether purchases or sales of securities must have been made in the United States, or whether it suffices for the company’s securities to be traded in abstract, general terms on a U.S. exchange, without investors making the specific purchases or sales in the United States.

Following *Morrison*, the assumption will now have to be that the abstract trade at a U.S. stock exchange is not sufficient for this protection to be given – the claimant must have implemented the transaction at the U.S. stock exchange itself.

Accordingly, the location of the transaction is the link to the application of the statute, the ruling holds:

*“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.”*⁵⁶

Additionally, the ruling refers to the wording of § 10(b). However, precisely that wording indicates that the statute might also be construed differently.

§ 10(b) reads:

“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

... (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities ex-

change or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

The wording of the statute stipulates that it is not an absolute requirement for a purchase or sale to have been implemented at a U.S. stock exchange. The prerequisite needing to be met here is that the securities must as a matter of principle be traded on a U.S. stock exchange, and that the fraud must be connected to the purchase or sale of a security, regardless of the location.

However, this is how the Supreme Court has construed the statute, referring to the stipulations of § 30 (a) Securities Exchange Act showing, in its view, by way of an *argumentum e contrario* that § 10(b) precisely is not to be construed as having extraterritorial reach because, the lawmaker clearly stated in § 30(a) that this statute is applicable extraterritorially, which statement it did not make in § 10(b). The extraterritorial application of the statute expressly stipulated in § 30(a) in specific cases would be quite superfluous if the rest of the Securities Exchange Act already applied to transactions on foreign exchanges.⁵⁷

It is questionable whether or not such an *argumentum e contrario* in fact may be derived from § 30(a) Securities Exchange Act, according to which § 10(b) is specifically intended to not have any extraterritorial reach, since – historically – the Securities Exchange Act was enacted against the backdrop of the 1929 stock market crash, with the intention of protecting American investors against securities fraud. Precisely this objective would be contravened were § 10(b) to be construed restrictively, since now, even U.S. investors would no longer be protected against domestic American fraud once the perpetrator causes the investor to make purchases or sales at an overseas exchange.

E. The Reasoning of the Supreme Court Leaves Room for Further Speculation

1. How Is the Wording “all aspects of the purchases” To Be Understood?

In the last paragraph of its opinion, in which the majority of the justices joined, and which clearly argues against any application of § 10(b) to f-cubed cases, the Supreme Court has held:

“This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.”

This wording gives rise to new legal issues, because it is not clear what is to be understood as purchases or sales of securities “within” or “outside” the United States. In *Morrison*, all actions were taken abroad, *i.e.* all aspects of the purchases. However, what if there is a case in which a part of the decision-making process regarding the transaction took place within the United States? Developing an *argumentum e contrario* based on the wording of the Supreme Court shows that the reach of § 10(b) would in fact cover such a case. Accordingly, instructions to implement a purchase order issued to a broker for a foreign issuer in the United States might be held to be a purchase within the United States, since a part of the order was

⁵⁴ Foreign investor files suit against foreign respondent for securities transactions implemented at a foreign stock exchange.

⁵⁵ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (U.S. 2010), authors’ note: it is not clear how the wording “...or any security not so registered” is to be understood.

⁵⁶ *Id.*, at 2884.

⁵⁷ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (U.S. 2010).

implemented within the United States, and it was precisely not “all aspects of the purchase” that took place outside the country. The same might apply if funds on a U.S. account are used to purchase securities outside the United States. Here as well, the case would no longer be entirely located abroad.

Or what is the situation in cases in which the order was handed to the U.S. broker, in the United States, or placed by telephone, and the broker then has the order implemented via an exchange located outside of the United States?

Does it suffice, for § 10(b) to apply, for the transaction to have been initiated in the United States?

Another issue results from the enforcement of a claim to damages concerning split orders for securities. These are cases in which orders are divided up between U.S. and non-U.S. stock exchanges because, for example, it will be possible to trade the securities in the near future only by performing such trades in separate packages and on several stock exchanges. Were the ruling of the Supreme Court to be construed to the latter, only that part of the securities transaction would be protected, in the context of a complaint filed for damages in the United States, that was in fact implemented in the United States – regardless of the fact that the question of which share of such transactions is implemented at a stock exchange in the U.S. is often entirely a matter of chance.

Accordingly, the issue of whether or not the purchase or sale of a transaction must have been implemented completely in the United States has not been dealt with conclusively. The wording of the ruling as such certainly leaves room for speculation on this.

2. On Listing Stock on a U.S. Stock Exchange

To the extent the Supreme Court has held in this regard that the securities were not listed on a U.S. stock exchange, the conclusion must be drawn that the Supreme Court generally does not deem “ADRs” to be sufficient, as instruments, for opening up the application of § 10(b), and thus does not regard them to be securities – this assumption being based on the fact that in the case at hand, it was ADRs of the National Australia Bank that were being traded in the United States. According to the determination made by the Supreme Court (“*This case involves no securities listed on a domestic exchange.*”)⁵⁸ then, ADRs do not merit definition as securities. On the other hand, the question must be asked how ADRs will then be protected at all in the United States.

F. Possibility of Raising Fraud Claims Under State Law?

Following the *Morrison* ruling, it will be conceivable that in future, claims will once again be filed under state law where securities are concerned, although in many cases such complaints had thus far been ruled out by the *Securities Litigation Uniform Standards Act* (SLUSA).⁵⁹ Basically, SLUSA was to prevent strike suits from being filed, in other words frivolous lawsuits or complaints with no chance of success, which pursued only the objective of achieving as high as possible a settlement in view of the looming threat of massive court and legal fees. However, the pre-requisite for applying

SLUSA was that the case must entail “*covered securities.*”⁶⁰ Since in the past the Supreme Court has deemed securities to be covered that are traded nationally and listed at a regular stock exchange,⁶¹ any stock traded only outside the U.S. market would not be deemed to be so covered, and accordingly would not be subject to the stipulations made in SLUSA. This, then, would open the door to investors who purchased their securities abroad and now wish to file suit before a state court. No indication was made to the effect that SLUSA is to have extraterritorial reach and is to thus preclude any complaints of this nature. Nonetheless, it is in dispute whether and to what extent actions for common law fraud or negligent misrepresentation claims are precluded from being heard by state courts.

Leaving aside the debate on the principle of the matter – whether or not SLUSA will still bar investors who purchased securities at overseas exchanges from bringing their case to the state courts – it continues to be in dispute whether it must be proved, in complaints for common law fraud, that there is a cause-and-effect relationship in the sense of a plaintiff’s “reliance”, as opposed to the situation given for complaints based on § 10(b) in the context of a class action suit under federal law.⁶² According to the laws of the State of New York, for example, a plaintiff filing a complaint for common law fraud will need to prove the following: (1) a material representation or omission of fact, (2) made [by the defendant] with knowledge of its falsity, (3) with an intent to defraud, and (4) reasonable reliance on the part of the plaintiff, (5) that causes damage to the plaintiff.⁶³

IV. Outlook

A. Legislative Development in the United States

Just recently, the *Dodd-Frank Wall Street Reform and Consumer Protection Act*⁶⁴ has made it clear that for regulatory authorities, § 10(b) in fact has extraterritorial application. This Act provides for improvements regarding the regulation of the securities market. Complaints filed by the SEC and other authorities are now allowed to be applied extraterritorially.

B. Expected Trends

- (1) Investors implementing securities transactions outside of U.S. stock exchanges will file suit in greater numbers abroad in future; this will also apply to U.S. plaintiffs.
- (2) Investors wishing to benefit from the protection afforded by the capital market laws of the United States in future will implement their securities transactions at U.S. stock

exchanges, to the extent this is possible for the respective securities concerned.

- (3) Enterprises will now have to address the question of whether it still makes sense for them, and to what degree, to have their company listed on the U.S. stock exchanges; this applies likewise to U.S. corporations, for whom it may suffice to simply migrate to the Toronto Stock Exchange.

⁵⁸ *Id.*, at 2888.

⁵⁹ See <http://securities.stanford.edu/research/reports/19981001slusa.html>: Securities Litigation Uniform Standards Act of 1998: Conference Report 105th Congress 2d Session, House of Representatives Report 105-803 (October 9, 1998).

⁶⁰ 15 U.S.C. Section 78 bb (f)(1).

⁶¹ *Merrill Lynch, Pierce, Fenner & Smith, Inc. vs. Dabit*, 547 U.p. 71, 83 (2006).

⁶² *Basic Inc. vs. Levinson*, 108 S.Ct. 978, 988 et seq. (1988).

⁶³ *Schlaifer Nance & Co. vs. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997).

⁶⁴ *Infra* Part 3 (IV).

The expected exploitation of the abuse options now opened up by *Morrison* on the one hand, and the negative experiences that U.S. plaintiffs can be expected to make in filing suit in jurisdictions that, as compared to those in the United States, are hostile to plaintiffs, lead us to expect that the Supreme Court will reverse its decision, in particular in light of the nomination of *Elena Kagan*⁶⁵ as a Supreme Court Justice – and that without any further legislative.

Part 3: The Defendant and American Perspective in the Aftermath of *Morrison* – Progressing Towards More Consistency?

Stephan Wilske/Willa Obel

I. The Position Before *Morrison*: Four Decades of the Conduct and Effects Tests

A. The Silence of Federal Securities Laws as to their Extraterritorial Application

For over forty years, U.S. courts have faced federal securities class actions involving multiple foreign elements and questions of the extraterritorial reach of those securities laws. The Second Circuit faced the f-cubed claim initially in *Schoenbaum v. Firstbrook*⁶⁶ in 1968. Since then, the number of federal securities class actions filed by foreign plaintiffs or targeting foreign issuers (or both) has multiplied rapidly.⁶⁷ In 2008, federal securities class actions filed against foreign issuers “hit an all-time high” of 36 cases.⁶⁸ Filings against foreign-domiciled companies, as a share of all filings, were higher in the first half of 2010 than in any previous year since the passage of the Private Securities Litigation Reform Act in late 1995.⁶⁹ One study shows that from 1996 through 2007 there were 182 different instances of an international institu-

tional investor seeking to serve as a lead plaintiff in a U.S. securities class action.⁷⁰

To recover damages caused by securities fraud, investors typically bring claims in federal court under the Securities Act of 1933⁷¹ or under the Securities Exchange Act of 1934 (Exchange Act).⁷² The federal securities laws (1) “implement a philosophy of mandatory full disclosure that requires market participants to reveal material information pertaining to the securities they are offering, selling, or purchasing”; (2) “maintain market integrity by protecting investors from fraud”; and (3) “promote ethical standards of honesty and fair dealing” through the creation of civil liability.⁷³ The antifraud provision in the Exchange Act is § 10(b) and its implementing regulation, Rule 10b-5, under which the “overwhelming majority”⁷⁴ of securities-fraud class actions are brought.⁷⁵

The Exchange Act is silent as to its application to foreign claims and cross-border transactions⁷⁶ and § 10(b) makes no overt mention of securities violations involving foreigners, merely referring to any person who uses interstate commerce.⁷⁷ This has led to two varying interpretations of the law’s transnational reach: one argument concludes that nothing in the statutory language of § 10(b) authorizes U.S. courts to give the Exchange Act extraterritorial force, while a second argument reads it implicitly to provide for broad extraterritorial application, defining “interstate commerce” to include commerce “between any foreign country and any State.”⁷⁸

To give effect to the supposed intent of the enacting legislature and to determine whether the exercise of subject-matter jurisdiction in a particular case is proper, courts have developed two tests, the effects test and the conduct test.

65 Elena Kagan was Solicitor General of the United States Government before the Supreme Court in proceedings in which the federal government was party to a legal dispute. Moreover, Kagan is President Obama’s Supreme Court appointee, cf. the report filed by the news agency Reuters on July 20, 2010, <http://www.reuters.com/article/idUSTRE66J4A120100720>. It is to be assumed that Kagan will continue to pursue a policy of more strictly controlled financial markets, in line with President Obama’s intentions. Accordingly, §10(b) might again be applied and construed more broadly as concerns extraterritorial cases. It is also conceivable that there might be further nominees during the Obama presidency, who will follow his baseline strategy towards stricter supervision of the financial markets.

66 405 F.2d 200 (2d Cir. 1968). *Schoenbaum* involved the issuance of stock to insiders of a Canadian corporation in Canada, allegedly at an unfairly low price, thereby impairing the value of the corporation’s shares on the American Stock Exchange. The court held that the resulting injury suffered by the U.S. investors holding those shares was sufficient to establish subject matter jurisdiction.

67 Securities Class Action Litigation: The problem, the impact, and the path to reform, U.S. Chamber Institute for Legal Reform (July 2008), http://www.instituteforlegalreform.com/get_illr_doc.php?id=1213.

68 PricewaterhouseCoopers LLP, 2009 Securities Litigation Study (2009), http://10b5.pwc.com/PDF/NY-10-0559%20SEC%20LIT%20STUDY_V7%20PRINT.PDF.

69 *Jordan Milev/Robert Patton/Stephanie Plancich/Svetlana Starykh*, Trends 2010 Mid-Year Study: Filings Decline as the Wave of Credit Crisis Cases Subsides, Median Settlement at Record High, Nera Economic Consulting, http://www.nera.com/nera-files/PUB_Mid_Year_Trends_0710.pdf (calculating that in the first half of 2010, 16 filings, or 15.8% of all cases filed, named a foreign-domiciled company as the primary defendant).

70 *Adam Savett*, Accountability Goes Global: International Investors and US Securities Class Actions, Institutional Shareholder Services (May 9, 2007), <http://www.riskmetrics.com/system/files/private/Accountability-GoesGlobal.pdf>.

71 15 U.S.C. § 77a-aa (2006).

72 15 U.S.C. § 74a.

73 *Michael J. Calhoun*, Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction, 30 Loy. U. Chi. L.J. 679, 683 (1999) (footnotes and internal quotation marks omitted).

74 *Amanda M. Rose*, Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5, 108 Colum. L. Rev. 1301, 1302 (2008).

75 § 10(b) and Rule 10b-5 together prohibit manipulation or deception in the offer or sale of any security; Rule 10b-5 provides: “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

76 See, e.g., *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 355 (D. Md. 2004) (“The Securities Act of 1933 and the Securities Exchange Act of 1934 are silent as to whether they apply extraterritorially, and Congress has provided little guidance on the issue.” (citing *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987)); *Hannah L. Buxbaum*, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat’l L. 14, 18-19 (2007) (“[T]he anti-fraud provisions of the federal securities laws do not speak directly to the scope of their application in the international context.”); *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995).

77 *Katherine J. Fick*, Such Stuff as Laws Are Made On: Interpreting the Exchange Act to Reach Transnational Fraud, 2001 U. Chi. Legal F. 441, 449 (2001).

78 *Fick*, *id.* at 450 (quoting 15 U.S.C. § 78c(17)).

B. The Effects Test on Focus of Impact on U.S. Investors and Markets

Courts applying the effects test focus their attention on the impact of foreign conduct on U.S. investors and markets.⁷⁹ The test was originally articulated in *Schoenbaum v. Firstbrook*,⁸⁰ the first major securities-fraud case to extend subject-matter jurisdiction extraterritorially. In *Schoenbaum*, a shareholder derivative suit involving an American shareholder of a Canadian corporation, the Second Circuit concluded that the plaintiff had rebutted the traditional presumption against extraterritorial jurisdiction⁸¹ by showing that the defendants' foreign conduct adversely affected U.S. purchasers and markets.⁸² The court stated explicitly that they believed "Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."⁸³

C. The Conduct Test on Extent and Nature of Defendant's U.S.-Based Conduct

Courts applying the conduct test focus their attention on the extent and nature of the defendant's U.S.-based conduct and whether such conduct was part of a fraudulent scheme resulting in losses to investors abroad.⁸⁴ The test was formulated in *Leasco Data Processing Equipment Corp. v. Maxwell*,⁸⁵ a case in which American and British plaintiffs sued British defendants under section 10(b) of the Exchange Act. In contrast to *Schoenbaum*, where fraudulent acts committed abroad harmed American investors, *Leasco* involved a "significant" or "extensive" amount of domestic conduct – sufficient, in the court's view, to confer subject-matter jurisdiction.⁸⁶ The *Leasco* court speculated that Congress would have "wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad."⁸⁷ The Second Circuit has refined the test over the years to its current form, which requires that "substantial acts" relating to the fraud which occur in the United States must (1) be more than merely preparatory to the fraud and (2) directly cause the plaintiff's loss.⁸⁸

D. Lack of Predictability because of Divergent Standards

Application of these tests and approaches to subject-matter jurisdiction in f-cubed cases has been anything but consistent. Some courts have not always applied the conduct and effects tests in isolation. The Second Circuit has held that they are

79 See *In re Rhodia S.A. Sec. Litig.*, 531 F. Supp. 2d 527, 538 (S.D.N.Y. 2007) (citing *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 (2d Cir. 1998)).

80 405 F.2d 200 (2d Cir. 1968).

81 There is a general presumption in statutory interpretation against applying congressional legislation extraterritorially. See, e.g., *Foley Bros., Inv. v. Filardo*, 336 U.S. 281, 285 (1949).

82 *Schoenbaum*, 405 F.2d at 206.

83 *Id.*

84 *Hannah L. Buxbaum*, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 23 (2007).

85 468 F.2d 1326 (2d Cir. 1972) (Rule 10b-5 action against a London solicitor, for damage allegedly resulting from the purchase of shares of a British company on the London Stock Exchange, induced in part by misrepresentations made by agents physically in the U.S., as well as telephone calls and mail in the U.S.).

86 *Id.* at 1334-35.

87 *Id.* at 1337.

88 See *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008).

not mutually exclusive, and in *Itoba Ltd. v. Lep Group PLC*, explained that "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."⁸⁹ Alternatively, some courts have required plaintiffs to not only fully satisfy at least one of the tests, but also "additional tipping factors."⁹⁰ As the NAB plaintiffs argued in their certiorari petition "the lower courts [are] floundering in disarray with divergent standards."⁹¹

II. The New Transactional Test – A Call for More Predictability?

By adopting the "transactional test," which drastically reins in the extraterritorial reach of U.S. securities fraud laws, the U.S. Supreme Court created a bright-line rule with far reaching implications in an attempt to end the decades-long development of "judicial-speculation-made-law."⁹² Some view this decision as a continuation of the Court's "business friendly" holdings and a pointed response to the "plaintiff-friendly" approach of the conduct and effect tests.⁹³

A. A more 'Business-Friendly' U.S. Supreme Court?

This "business-friendly" approach is considered to be due in great part to the leadership of Chief Justice Roberts, who was sworn in September 29, 2005.⁹⁴ Since then, the profile of the court has notably changed away from judicial minimalism, towards a much more assertive although sometimes unpredictable phase.⁹⁵ Observers have noted, for example, the U.S. Chamber of Commerce's impressive success at the Court in recent years through direct litigation and amicus filings.⁹⁶

A review of the past few terms confirms this trend with a series of pro-business decisions in the several different areas of law. One such area is antitrust, and the Court has issued a number of significant opinions that, together, indicate a trend toward restricting antitrust suits brought by private individuals.⁹⁷

89 *Itoba*, 54 F.3d 118, 122 (2d cir. 1995).

90 See *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998).

91 Petition for a Writ of Certiorari at 5, *Morrison v. Nat'l Austl. Bank Ltd.*, No. 08-1191 (March 23, 2009).

92 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (U.S. 2010).

93 *Nathan Koppel*, *Supreme Court Deals Blow to Plaintiffs' Securities Lawyers*, Wall Street Journal Law Blog (June 24, 2010, 1:46 PM ET), <http://blogs.wsj.com/law/2010/06/24/supreme-court-deals-blow-to-plaintiffs-securities-lawyers/>.

94 See, e.g., *Tony Mauro*, *Supreme Court Continues Pro-Business Stance*, LEGAL TIMES (February 21, 2008); *Greg Stohr*, *Alito Champions Business Causes in First Full High-Court Term*, BLOOMBERG (June 26, 2007) (referring to the 2006-07 Supreme Court term as "what may have been the most pro-business U.S. Supreme Court term in decades"); *Robert Barnes/Carrie Johnson*, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASHINGTON POST (June 22, 2007) (describing a case as another "victory for business in what has been a resoundingly successful year before the nation's highest court").

95 New York Times, *U.S. Supreme Court 2009-2010 Term*, (June 30, 2010), <http://www.nytimes.com/info/us-supreme-court-2009-2010-term/>.

96 See, e.g., David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 Santa Clara L. Rev. 1019 (2009).

97 See *Leegin Creative Leather Products v. PSKS Inc.*, 551 U.S. 877 (2007) (reversing an almost century-old rule that treated vertical resale price maintenance as *per se* illegal, and holding that vertical agreements are subject to the "rule of reason"); *Credit Suisse Securities (USA) L.L.C. v. Billing*, 551 U.S. 264 (2007) (holding that immunity can be implied when application of the antitrust laws might create a conflict with a competing federal regulatory regime); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc.*, 549 U.S. 312 (2007) (holding that in order to prove predatory bidding – the practice of bidding up input costs to drive rivals out of business – the plaintiff must satisfy the *Brooke Group* standard,

In another “business-friendly” move, the Court has also shown a trend towards supporting mediation and arbitration as vehicles for resolving disputes and avoiding costly litigation, a common objective for businesses. In the 2008-2009 term, the Court affirmed the strong federal policy favoring arbitration. In *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (U.S. 2009), the Court held that a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims is enforceable as a matter of federal law. In *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (May 4, 2009), the Court held in a 6-3 opinion written by Justice Scalia that a nonparty to a written arbitration agreement may seek to stay the proceedings under § 3 of the FAA if state law allows that nonparty to enforce the agreement. In *Vaden v. Discover Bank*, 129 S. Ct. 1262 (U.S. 2009), the Court held that, in keeping with the well-pleaded complaint rule, a federal court could not entertain a § 4 of the Federal Arbitration Act petition based on the contents of a counterclaim when the whole controversy between the parties did not qualify for federal-court adjudication.

In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (May 18, 2009), a 5-4 opinion written by Justice Kennedy elaborating on the oft-analyzed *Twombly*⁹⁸ interpretation of Federal Rule of Civil Procedure 8(a)(2)’s requirement that a pleading contain a “*short and plain statement of the claim showing that the pleader is entitled to relief*,” the Court resolved any doubt about the scope of *Twombly* (an antitrust case) and held that the newly articulated standard applies to all federal civil cases and all elements of the plaintiff’s claims, including intent. In the 2009-2010 term, the Court produced a landmark ruling in the 5-to-4 decision of *Citizens United v. FEC*, 130 S. Ct. 876 (U.S. 2010), giving corporations the same free speech rights as individuals and allowing unlimited election spending by corporations when not coordinated with candidates. In response to the decision, Senator Sheldon Whitehouse (D-RI) said “*Citizens United* [. . .] created a constitutional right for corporations to spend unlimited money in American elections, opening our democratic system to a massive new threat of corruption and corporate control. There is an unmistakable pattern. For all the talk of umpires and balls and strikes at the Supreme Court, the strike zone for corporations gets better every day.”⁹⁹

B. The Future Direction of the U.S. Supreme Court

It should be noted, however, that the Court is not completely heavy handed towards business interests. In April 2010, the Court in *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1790 (U.S. 2010), held that the limitations period in 28 U.S.C. § 1658(b) (1) begins to run only once the plaintiff actually discovered

which requires a plaintiff prove that the alleged predatory bidding led to below-cost pricing of the predator’s outputs) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (holding that in a single-product predatory pricing case, a plaintiff must prove that (1) its rival’s low prices were below an appropriate measure of its rival’s costs and (2) its rival “had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices”); *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (February 25, 2009) (holding that vertically integrated producers are not subject to antitrust liability for so-called “price squeezes” unless they (1) have an “antitrust duty to deal” with their competitors at the wholesale level and (2) engaged in “predatory pricing” at the retail level of competition. The Court held that a “price squeezing” claim cannot be brought under § 2 of the Sherman Act when the defendant is under no duty to sell inputs to the plaintiff in the first place).

⁹⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁹⁹ *Emi Kolawole*, Excerpts of Senator Sheldon Whitehouse (D-RI), The Washington Post (June 28, 2010; 4:17 PM ET), <http://voices.washingtonpost.com/44/2010/06/excerpts-of-sen-sheldon-whiteh.html>.

or a reasonably diligent plaintiff would have “*discover[ed] the facts constituting the violation*” – whichever comes first.

The ideology of the court will likely remain the same in the near future despite the retirement of Justice John Paul Stevens in June, at the conclusion of the 2009-2010 term. Upon his retirement, Justice Stevens was hailed as a “bulwark” against the Courts recent trend of “*giv[ing] extraordinary preference to powerful interests at the expense of ordinary Americans.*”¹⁰⁰ Justice Stevens is replaced by former Solicitor General, Elena Kagan, who was confirmed on August 5, 2010 as the 112th justice and fourth woman to serve on the Court. Both Kagan and the Court’s other recent addition, Justice Sonia Sotomayor, are expected to do little to alter the balance of the court’s political view. Kagan is anticipated to be a counterweight to the Court’s conservative majority and Sotomayor has voted in a predictably left-of-center direction her first major dissent in a case narrowing Miranda rights.¹⁰¹

While labels such as “business-friendly” or “plaintiff-friendly” are often used when trying to summarize various decisions or to characterize a court, it should be noted that the portrayals are rarely so cut-and-dry. The view of which way an opinion or court trends may change from commenter to commenter, industry to industry, and region to region. It is at least not surprising that Justice Antonin Scalia who wrote the majority opinion is particularly well-known for his skepticism of courts making decisions that should be made by the legislature.¹⁰²

III. Immediate Reactions to *Morrison*

A. Positive Responses

F-cubed cases and the mere existence of foreign plaintiffs in a proposed class raise many complicated and challenging issues for courts and litigants alike. One author responded that the decision is a step towards shifting the responsibility of managing international regulatory conflicts away from the courts to Congress.¹⁰³ Many felt the decision came not a moment too soon since the highly fact-based conduct and effects tests made it nearly impossible for foreign companies to predict what litigation risks may accompany various levels of association with the

United States. Some noted that foreign companies had already started withdrawing from United States capital markets, and threatening to retreat from doing business in the United States, due to the unpredictable risk of being subjected to a United States securities class action brought on behalf of a foreign issuer’s foreign investors who purchased

¹⁰⁰ *Scott Neuman/Ari Shapiro/Pam Fessler*, Stevens Earns Kudos, Kind Words From Left To Right, NPR (April 9, 2010), <http://www.npr.org/templates/story/story.php?storyId=125761601>.

¹⁰¹ Mark Arsenault, Kagan Heads to High Court, The Boston Globe (August 6, 2010), http://www.boston.com/news/nation/washington/articles/2010/08/06/kagan_heads_to_high_court/?page=2; *Skilling v. United States*, 130 S. Ct. 2896 (U.S. 2010).

¹⁰² See Scalia Speech Critical of ‘Judge-Moralist’ Era, ASSOCIATED PRESS, March 17, 2006:

Supreme Court Justice *Antonin Scalia* railed against the era of the “judge-moralist,” saying judges are no better qualified than “Joe Six-pack” to decide moral questions ... “Anyone who thinks the country’s most prominent lawyers reflect the views of the people needs a reality check,” he said during a speech to New England School of Law students and faculty at a Law Day banquet.

¹⁰³ *Paul B. Stephan*, *Morrison v. Nat’l Australia Bank Ltd.*: The Supreme Court Rejects Extraterritoriality, ASIL Insights (August 2, 2010), <http://www.asil.org/files/insight100802pdf.pdf>.

their securities on a foreign exchange. Over the years, many scholars have criticised the conduct and effects tests and the *ad hoc*, case-by-case manner in which they are applied as inherently unpredictable and unnecessarily complicated.¹⁰⁴ Following the release of the *Morrison* decision, there was significant support for the decision and many felt it was in line with the scope of federal securities laws and would lead to more consistent and predictable outcomes. For some foreign institutions who have had to defend suits in U.S. courts, where the securities laws have conflicted with the laws of the issuer's home country, it was a relief.

For many companies, both in the United States and elsewhere, the decision meant relief not only because the test to apply is clearer, but also because it significantly curtailed the opportunities for liability. Resultantly, many securities suits may now simply go unfiled, at least in the U.S. particularly in instances where a foreign company does not have significant numbers of ADRs or other securities trading on U.S. exchanges. Most countries do not enforce their securities laws with private class actions, driven aggressively by plaintiffs' attorneys who are not subject to any 'loser pays' requirement. The United States also provides an underlying discovery framework that is exponentially more costly and burdensome than exists elsewhere in the world. To make basic business decisions, foreign companies need to be able to assess their exposure to the risk of a U.S. securities class action. Because of the costs of American-style litigation, in particular the often-overwhelming burden of document production during the pre-trial discovery process, the new clearer limits on liability enable foreign companies to reconsider pulling out of (or entering) the U.S. markets.

Several agreed with the *amici* submission in favor of the Respondents, that if Congress had originally intended to have the laws apply extraterritorially they would have explicitly said so, but their intention was not to regulate foreign securities. For example, Huston Thompson, a drafter of the Securities Act of 1933 testified before Congress that the language of the statute meant that “we were not going to attempt to go

beyond our own national limits” and that the Act covers foreign securities only if they are “[s]old in this country.”¹⁰⁵

104 *Erez Reuveni*, Extraterritoriality as Standing: A Standing Theory of Extraterritoriality Application of the Securities Laws, 43 U.C. Davis L. Rev. 1071, 1133 (2010) (suggesting a simple, bright-line rule that eliminates the unpredictability of the conduct and effects test's jurisdictional regime and facilitates the early dismissal of nonmeritorious lawsuits); *Julie B. Rubenstein*, Note: Fraud on the Global Market: US Courts Don't Buy It; Subject-Matter Jurisdiction in F-Cubed Securities Class Actions, 95 Cornell L. Rev. 627 (2010) (evaluating the wisdom of most courts' rejection of jurisdiction over the claims of F-cubed plaintiffs); *Natalya Shmitser*, A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers, 119 Yale L.J. 1638 (2010) (noting the importance to U.S. financial markets to have the ability to attract foreign companies to raise capital in the United States by listing or crosslisting on U.S. exchanges); *Hannah L. Buxbaum*, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat'l L. 14 (2007) (concluding that courts using conduct and effects tests cannot adequately manage the regulatory conflicts that f-cubed claims present, and supporting a jurisdictional limit based on the location of investment transactions).

105 *Federal Securities Act, Hearings on H.R. 4314 Before Hour Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. (1933), quoted in *Margaret V. Sachs*, The International Reach of Rule 10b-5: The Myth of Congressional Silence, 28 Colum. J. Transnat'l L. 677, 700-01 (1990).

Finally, in response to reactionary claims that U.S. investors would simply become victims to infinite fraudulent schemes, with no recourse beyond attempting to maneuver foreign legal systems, several authors have noted that allowing one country to manage global securities law does nothing to enhance that country's role in the world economy. In particular, several international commentators, as well as the majority of amicus briefs in favor of Respondent, expressed concern over the “long arm” of U.S. capital markets law.¹⁰⁶ Whether or not § 10(b) and Rule 10b-5 are able to protect every U.S. investor from fraud, Congress is free – within the limits of international law – to change the jurisdictional scope and to write new laws to address other issues. As is discussed in Part 4: The Future Impact of *Morrison* on Private Securities Fraud Action, the enactment of the Dodd-Frank Act could still keep the United States as a “magnet for global class actions,”¹⁰⁷ but this is for Congress to legislate, not the U.S. Supreme Court to decide.

B. Negative Responses

Many of the responses following the *Morrison* decisions expressed a variety of concerns. High among them were concerns about whether the new bright-line rule would allow foreign companies to avoid enforcement by simply deciding not to list their shares on U.S. exchanges, or to delist their shares. Others noted the sheer impact of the case and the burden the lower courts faced in interpreting the new transactional test on the dozens of cases involving claimants who purchased their shares on foreign exchanges.

A significant portion of the commentary expressed concern over upending forty years of jurisprudence saying the Court “overturns one vague standard in favor of another.”¹⁰⁸ Others were perplexed by the Court engaging in a “convoluted and unconvincing application of the presumption against extraterritoriality rather than rely[ing] on traditional analysis of international-law limits on regulatory jurisdiction.”¹⁰⁹ Finally, some echoed the sentiments of the minority of the amicus briefs, in a plea to leave U.S. courts open to foreigners, that “both foreign and domestic investors alike rely on American Law to ensure that corporations doing business in America are not tainted by fraud.”¹¹⁰

IV. What Comes Next – What Will the Impact of *Morrison* Ultimately Be?

On July 21, President Obama signed into law what has been called the most sweeping modification to United States financial regulatory laws since the Great Depression. The scope and reach of the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter “Act”) is extremely

106 See, e.g., *Sascha Lotze*, US-amerikanisches Kapitalmarktsrecht und Internet, 2002 at 78; *Peter Versteen*, in: *Kölner Kommentar zum WpÜG*, 2003, § 24 WpÜG, at 34; *Rainer Süßmann*, in: *Geibel/Süßmann Kommentar zum WpÜG*, 2002, § 24 WpÜG, at 8.

107 *John C. Coffee, Jr.*, High Court and Congress on a Collision Course, Nat'l L.J., January 18, 2010.

108 *Louis M. Solomon/Solomon B. Shinerock*, *Morrison*: Judicial running in place, *The National Law Journal* (July 5, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463238173&slreturn=1&hbxlogin=1>.

109 *Hanna L. Buxbaum*, *Morrison v. NAB* and the implied right of action under 10(b), *The Conglomerate* (June 29, 2010), <http://www.theconglomerate.org/2010/06/morrison-v-nab-and-the-implied-right-of-action-under-10b.html>.

110 http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1191_PetitionerAmCuAlelectaetal.pdf.

broad and is not solely limited to the financial industry.¹¹¹ Proponents of the bill stated that its objectives include restoring public confidence in the financial system, preventing another financial crisis, and allowing any future asset bubble to be detected and deflated before another financial crisis ensues.¹¹²

The Act effectively nullifies the holding of *Morrison* in the context of SEC and Department of Justice (DOJ) enforcement actions. Congress specifically gives U.S. courts extraterritorial jurisdiction in proceedings brought by the SEC or the United States (but not private plaintiffs) alleging certain violations of the 1933 Act,¹¹³ the 1934 Act,¹¹⁴ and the Advisers Act¹¹⁵ by persons outside the United States for conduct within the United States that constitutes significant steps in furtherance of securities violations even where the securities transaction occurs outside the United States and involves only foreign investors. Jurisdiction is also available where conduct occurred outside the United States but had a foreseeable substantial effect within the United States. The Act also instructs the SEC to review public commentary and conduct a study on the propriety of allowing private causes of action based on extraterritorial jurisdiction within 18 months of enactment.¹¹⁶

Congress clearly expresses in § 929 of the Act the “affirmative intention ... to give a statute extraterritorial effect”¹¹⁷ that Justice Scalia repeatedly notes in *Morrison* is necessary to overcome the presumption against extraterritoriality. Whether or not this particular section of the Act is meant as a direct response to *Morrison*, the timing of its release is interesting to note. *Morrison* was released at approximately 10:19am on Thursday, June 24. The House supposedly completed the Act at 5:39am Friday, June 25, making this possibly one of the fastest responses to a Supreme Court opinion ever.¹¹⁸

Part 4: The Future Impact of *Morrison* on Private Securities Fraud Actions?

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Willi Obel

The ultimate impact of *Morrison* remains to be seen, particularly in light of the Dodd-Frank Act. For now, companies such as Vivendi SA, Porsche SE, Societe Generale and BP Plc. seem to be benefiting.¹¹⁹ Some have suggested that the limitation on U.S. securities fraud laws to domestic exchanges could mean as much as a 10% reduction in cases filed in the U.S. annually.¹²⁰ In light of the general decline in the number of federal securities class actions, however, it is difficult to determine at this stage what the true impact of *Morrison* and the Dodd-Frank Act has been and will be.¹²¹ Given that the SEC must still conduct a study and report on private securities fraud cases, and it is uncertain what action, if any, Congress might take after considering the SEC report, there is the possibility that the future relevance of *Morrison* might become marginalized.

Other questions remain as to the impact of *Morrison* on upcoming cases and the interpretation of other laws involving foreign elements. It has been suggested that the Alien Tort Statute, which provides some basis for lawsuits brought by aliens for violations of international law, may be the next area to test where the presumption against extraterritoriality, as applied in *Morrison*, extends this far.¹²²

For better or for worse, one should expect the SEC and DOJ will continue to bring actions based on fraudulent conduct in the United States, and private plaintiffs’ ability to bring such actions may ultimately be resurrected to a large extent. At least, it seems that the classical f-cubed claims do not find much sympathy in U.S. courts and U.S. public opinion. It is hard to imagine that foreign plaintiffs will be allowed in the future under U.S. law to sue foreign issuers in U.S. courts for violations of U.S. securities laws based on securities transactions in foreign countries. However, it is not hard to imagine that plaintiffs’ lawyers will work hard trying to “naturalize” these f-cubed claims to make them look more American.

111 Peter J. Henning, A New World Begins for Wall Street Oversight, New York Times DealBook Blog (July 19, 2010, 12:00 PM ET), <http://dealbook.blogs.nytimes.com/2010/07/19/a-new-world-begins-for-wall-street-oversight/?scp=3&sq=dodd-frank&st=cse> NYTimes Blog; for a very thorough review of the complete Act please see the Alston & Bird Financial Services and Products Advisory available at: <http://www.alston.com/files/Publication/4afc64ee-b4f6-482c-8166-70f8687eaf1/Presentation/PublicationAttachment/f5bd6e50-6bcb-49f2-a030-8a588f-6b3a44/Financial%20Reform%20Advisory.pdf>.

112 William Sweet, Dodd-Frank Act Becomes Law, The Harvard Law School Forum on Corporate Governance and Financial Regulation (July 21, 2010 at 11:49 AM ET), <http://blogs.law.harvard.edu/corpgov/2010/07/21/dodd-frank-act-becomes-law/>.

113 § 929P(b)(1) of the Act, amending § 22 of the Securities Act of 1933 (15 U.S.C. 77v(a)).

114 § 929P(b)(2) of the Act, amending § 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa).

115 § 929P(b)(3) of the Act, amending § 214 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-14).

116 § 929Y of the Act.

117 *Morrison*, 130 S. Ct. 2869, 2877 (U.S. 2010) (internal citation omitted).

118 Julian Ku, *Morrison*: The Fastest Reversal Ever (?) of a U.S. Supreme Court Decision, *Opinio Juris* (June 30, 2010, 12:41 AM ET), <http://opiniojuris.org/2010/06/30/morrison-the-fastest-reversal-ever-of-a-us-supreme-court-decision/>; cf. Paul B. Stephan, *Morrison* v. Nat’l Australia Bank Ltd.: The Supreme Court Rejects Extraterritoriality, ASIL Insights (August 2, 2010), <http://www.asil.org/files/insight100802pdf.pdf> (characterizing the Congressional action as “supportive” of the decision rather than a reversal).

119 Greg Stohr, Vivendi Among Companies That May Save Billions From Ruling, Bloomberg (Jul 28, 2010, 12:01 AM ET), <http://www.bloomberg.com/news/2010-07-28/bp-vivendi-among-companies-that-may-save-billions-after-high-court-ruling.html>; Chad Bray, Vivendi Argues to Overturn Judgment, The Wall Street Journal (July 26, 2010, 2:58 PM ET), http://online.wsj.com/article/SB10001424052748704700404575391390368078382.html?mod=googlenews_wsj; H. Alich/A. Dörner/M. Buchenau, US-Gericht hilft Porsche und Vivendi, Handelsblatt (June 28, 2010), <http://www.handelsblatt.com/unternehmen/industrie/wertpapiergesetz-us-gericht-hilft-porsche-und-vivendi;2608806>.

120 Luke Green, *Morrison* Overturned? What Dodd Act Means For Securities Class Actions, RiskMetrics Group (July 26, 2010 5:54 PM ET), <http://blog.riskmetrics.com/slw/2010/07/morrison-overturned-what-dodd-act-means-for-securities-class-actions.html>.

121 Jordan Milev/Robert Patton/Stephanie Plancich/Svetlana Starykh, Trends 2010 Mid-Year Study: Filings Decline as the Wave of Credit Crisis Cases Subsides, Median Settlement at Record High, NERA ECONOMIC CONSULTING, http://www.nera.com/nera-files/PUB_Mid_Year_Trends_0710.pdf.

122 Paul B. Stephan, *Morrison* v. Nat’l Australia Bank Ltd.: The Supreme Court Rejects Extraterritoriality, ASIL Insights (August 2, 2010), <http://www.asil.org/files/insight100802pdf.pdf>