



Case Study: Morrison V. National Australia Bank

Law360, New York (June 29, 2010) -- On June 24, 2010, the Supreme Court of the United States held that Section 10(b) of the Securities Exchange Act reached “only transactions in securities listed on domestic exchanges and domestic transactions in other securities.” Morrison v. [National Australia Bank Ltd.](#)

In an earlier column from this publication, entitled “Clarifying Jurisdiction For Foreign Claimants” (May 18, 2010), I briefly discussed the issues present in National Australia Bank Ltd., then pending in the United States Supreme Court. The case came to the Supreme Court through the United States Court of Appeals for the Second Circuit and originated in the Southern District of New York.

The case dealt with an F3 transaction — that is what the industry referred to as claims by foreign investors in non-United States companies, whose stock trades or investments are made on a foreign exchange or otherwise outside of the United States.

Essentially, the issue presented was whether Section 10(b) of the Exchange Act is intended to extend United States jurisdiction over claims by non-U.S. residents for shares of a non-U.S.-based company purchased on a non-U.S. exchange. Taking the case, I suggested, was the beginning of a closer examination of the issues raised by the interposition of non-U.S. resident claims than had heretofore been evidenced by the courts.

On June 24, 2010, the court issued its opinion expressing a more expansive view of the issue than had seemed evident from the decisions of the lower court. In a unanimous ruling, the court affirmed dismissal (Justice Sonya Sotomayor did not participate).

Five of the justices, in an opinion written by Justice Antonin Scalia, held that the Section 10(b) of the Exchange Act was not intended to provide a claim for relief for purchases or sales of securities outside of the United States.

Accordingly, the case was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, failure to state a claim for relief, and not, as had been argued by defendants in the courts below, pursuant to Rule 12(b)(1) relating to subject matter jurisdiction.

Justice Stephen Breyer concurred that § 10(b) did not provide claims for purchases of securities entirely in Australia involving only Australian investors. Justice John Paul Stevens also wrote a concurrence, joined by Justice Ruth Bader Ginsburg. He reached the same result but preferred the analysis developed by the Courts of Appeals (the “effects and significant conduct” test).

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his concurrence. For the time being, however, regardless of those implications, Justices Stevens and Ginsburg agreed with the result because “this case has Australia written all over it.”

Both the New York District Court and the Federal Second Circuit had dismissed the case holding that the federal courts lack subject matter jurisdiction over the controversy (Rule 12(b)(1)). All justices took a different approach agreeing that under the Exchange Act there was no claim for relief for these plaintiffs (Rule 12(b)(6)).

The distinctions among the justices dealt with the rationale and the scope of the extraterritorial reach of Section 10(b). For this reason, there is the possibility the Congress could pass a legislative amendment to the Exchange Act to provide such a claim. Whether the Congress and this administration have an interest in doing so is debatable.

The court approached with caution the subject of whether the Exchange Act — or any legislation — was intended to reach conduct outside of the United States whether it was extraterritorial in scope. A “long standing principle of American law that legislation of Congress, confers a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”

For this reason, there is a presumption against extraterritorial reach. The statute’s silence was sufficient, for the court, to demonstrate the absence of intent that it be so applied.

Informing the court were various amici from foreign countries urging the court not to interpret the statute as to be incompatible with their own laws more immediately touching securities transactions within their borders.

Applying this analysis, the court concluded 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.” Accordingly, the holding of the court is: “only transactions in securities listed on domestic exchanges and domestic transactions in other securities, to which § 10(b) applies.”

Justice Breyer's single-page concurrence essentially agreed with his five colleagues adhering to Justice Scalia's opinion. He, however, would allow room for claims for foreign transactions in securities under state laws or other federal fraud statutes.

The considerably lengthier concurrence by Justice Stevens took a different approach in coming to a similar conclusion regarding the claim before the court. It is from Justice Stevens that the full implications of the court's holding can be discerned.

While in his view the U.S. Securities and Exchange Commission is not foreclosed "from bringing enforcement action in additional circumstances," the court's ruling "will foreclose private parties from bringing § 10(b) actions whenever the relevant securities were purchased or sold abroad and are not listed on a domestic exchange."

Therefore, no claim will exist for "an American investor who buys shares listed only on an overseas exchange" regardless of where the misrepresentations were made. Likewise, the defrauder who face-to-face persuades Americans to invest overseas could escape civil liability in the federal courts.

Justices Stevens and Ginsburg viewed the holding as part of the "Court's continuing campaign to render the private cause of action under § 10(b) toothless."

The majority viewed matters through different spectacles entirely: "While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating fraud on foreign securities markets, some fear that it has become the Shangri-La of class action litigation for lawyers representing those allegedly cheated in foreign securities markets."

A unanimous court consisting of justices whose philosophies extend along the political spectrum saw no merit to the National Australia Bank case, nor did judges of the District Court of New York or the Court of Appeals.

To be sure, the reasoning of these numerous jurists differed. At base, however, what troubled them all is

inherit in Justice Ginsburg's statement to the plaintiffs' attorney whose successful petition brought the case to the Supreme Court: "This case is Australian plaintiffs, Australian defendants, shares purchased in Australia. It has Australia written all over it."

In short: What were these Australian investors doing in the American courts when Australia had its own fine courts and its own laws governing these activities?

It is the nature of those who represent plaintiffs to push on the outer borders of the law. Often enough, important society-changing rulings are the result. In more recent years, the courts are examining with far greater scrutiny the claims of investors, particularly foreign investors.

One can anticipate that, given the holding in National Australia Bank, there will be a disinclination to include within investor classes non-U.S. resident investors whose transactions in the securities occurred outside of the United States or absent class members residing outside of the United States, whose investments may have occurred on the United States Exchange, but over whom personal jurisdiction cannot be obtained under international law and treaties simply through the usual class certification notice.

To reiterate, the courts are likely to be taking a closer examination of the interposition of claims by and for investors residing outside of the United States.

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