Morrison Scorecard: One Year In Review

It has been nearly a year since the United States Supreme Court issued its decision in *Morrision v. National Australia Bank Ltd.*, 561 U.S. __ (June 24, 2010), pulling back the extraterritorial effect of Section 10(b) of the Securities and Exchange Act of 1934. The Court in *Morrison* commanded that "when a statute gives no clear indication of an extraterritorial application, it has none." Then, in determining whether the particular claim at issue sought an extraterritorial application of a federal statute, the Court looked to the "focus" of that statute, which is not necessarily the "bad act" prohibited by the statute, but "the object[] of the statute's solicitude." The statute at issue in *Morrison* was § 10(b) of the Securities Exchange Act, which makes it illegal for "any person . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance." The Court noted that § 10(b) focused "not upon the place where the deception originated, but upon purchases and sales of securities," and thusly concluded that "[t]hose purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to regulate; it is parties or prospective parties to those transactions that the statute seeks protect." Accordingly, the Court determined that § 10(b) was limited in scope "to purchases and sales of securities in the United States." Because the sales of securities at issue in Morrison occurred on a foreign stock exchange, the Court affirmed dismissal of the plaintiffs' claims even though the deceptive conduct occurred in Florida. Previous coverage of the decision in *Morrison* has appeared on this site here, here, here, here, here and here

At the time it was decided, the broader impact of *Morrison* was uncertain. It is now apparent, however, that the decision has had a significant impact on limiting the extraterritorial application of a number of federal statutes providing civil remedies to private plaintiffs—not just the antifraud provisions of the Securities and Exchange Act. Criminal statutes, as we will see, have fared better in *Morrison*'s wake.

As it might be expected, *Morrison* has had a dramatic impact on securities fraud

cases with foreign elements. *Morrison* itself was an "f-cubed' case, meaning that it involved foreign plaintiffs, a foreign defendant and foreign securities. More "f-cubed" cases have followed suit, and been dismissed from the federal courts. *See In re Vivendi Universal, S.A. Securities Litigation*, 02-CV-05571 (S.D.N.Y. Feb. 22, 2011). All the same, however, the presence of one or more domestic elements has not been sufficient to overcome the strong presumption against extraterritoriality expressed in *Morrison*. The placement of a "buy order" in the United States by U.S. citizens does not render the transaction at issue a domestic one, and bring the case within the purview of U.S. securities laws. *See In re Alstom SA Sec. Litig.*, No. 03 Civ. 6595 (VM) (S.D.N.Y. (Sept. 13, 2010) (dismissing claims even though the stock transactions at issue here were "initiated in the United States") and *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance co., et al.*, No. 08 Civ. 1958 (JGK) (S.D.N.Y. Oct. 4, 2010) ("the mere act of electronically transmitting a purchase order from within the United States" to a foreign exchange does create a "domestic purchase." "[J]ust as the situs of the a defendant's allegedly deceptive conduct is irrelevant to the transactional test [developed in *Morrison*], so too is the situs of the plaintiffs' alleged injury."). Nor does the closing of a transaction in the United States, *see Quail Cruise Ship Management Ltd. v. Agencia de Viagens CVC Tur Limitada*, No. 09-23248-CIV (S.D. Fla. Aug. 6, 2010) (holding that "*Morrison*'s central holding would be undermined if parties could elect United States securities law merely by designating" the United States as the place to close a transaction that otherwise has no connection to this country); the choice of U.S. law and forum in a stock purchase contract, *see Elliott Associates, et al. v. Porsche Automobil Holding SE, et al.*, 10 Civ. 0532 (HB) (S.D.N.Y. Dec. 30, 2010); and the listing of the same or similar securities on a U.S. exchange. *See Absolute Activist Value Master Fund Ltd. v. Florian Homm, et al.*, 09 CV 08862 (S.D.N.Y. Dec. 22, 2010) (holding that the "mere fact that a stock is listed on a domestic exchange does not give rise to a claim under domestic securities laws when the shares are purchased elsewhere"); *In re Vivendi Universal, S.A. Securities Litigation*, 02-CV-05571 (S.D.N.Y. Feb. 22, 2011) (admitting that the fact that foreign shares were "listed" on the NYSE and "registered" with the SEC gave the court "pause," but holding that such listing and registration alone "cannot carry the freight that plaintiffs ask it to bear" because it is "contrary to the spirit" of *Morrison*); *In re Royal Bank of Scotland (RBS) Group PLC Securities Litigation*, 09 Civ. 300 (S.D.N.Y. Jan. 11, 2011) (same).

Morrison has been applied to limit the extraterritorial reach of other federal statutes as well. The Racketeer Influenced Corrupt Organizations Act (RICO) is notoriously silent as to any extraterritorial application. Federal courts have consistently held post-*Morrison* that the RICO Act's "solicitude" is the how a pattern of racketeering acts affects an domestic enterprise, not how those acts effect a domestic plaintiff. Like the location of the relevant stock exchange in the securities context, the important point for determining the extraterritorial effect of RICO claims is the location of the enterprise. *See Cedeno, et al. v. Intech Group, Inc.*, 09 Civ. 9716 (S.D.N.Y. Aug. 25, 2010) (RICO does not "evidence any concern with foreign enterprises," and thus does not apply extraterritorially to claims by a foreign plaintiff against a RICO enterprise comprised of the "[t]he foreign exchange regime of the government of Venezuela." It is not enough to allege that predicate acts of money laundering involved transfers into and out of the District by U.S. banks); *European Community v. RJR Nabisco, Inc.*, 2011 U.S. Dist. LEXIS 23538 (E.D.N.Y. Mar. 8, 2011) (holding that it is the location of the RICO enterprise that mattered to the extraterritoriality analysis under *Morrison*, and that making that determination "should focus on the decisions effectuating the relationships and common interest of its members, and how those decisions are made." Plaintiffs' RICO claims were dismissed because "the Complaint, when read as a whole, strongly suggests [that] the money laundering cycle [engaged by the alleged enterprise] was directed by South American and European criminal organizations, . . . [and] not [by] Defendants in the United States"). These courts have eschewed any continued reliance on the "conduct and effect test" traditionally used to determine RICO's extraterritorial application. *See Norex Petroleum Limited v. Access Industries, Inc., et al.*, No. 07-4553-cv (2d Cir. Sept. 28, 2010) (applying *Morrison's* "bright line rule" as to extraterritoriality and holding that RICO does not reach the alleged conduct of an enterprise "to take over a substantial portion of the Russian oil industry". The statute's express reference to "foreign commerce" and the explicit extraterritorial effect of certain predicate acts in the RICO statute were not enough to demonstrate that the statute had extraterritorial effect).

Finally, and most recently, *Morrison* has been applied to narrow the reach of the Robinson-Patman Act, which proscribes the payment of bribes and kickbacks. The court dismissed a claim concerning the payments made to Iraqi and Indonesian officials because "the language of [that Act] contains no intention that it is to apply extraterritorially." *See Newmarket Corp. v. Afton Chemical Corp.*, 2011

U.S. Dist LEXIS 54901 (E.D. Va. May 20, 2011).

Of course, in many of these same contexts (and a few others), courts have rejected Defendants' attempts to dismiss federal civil claims on the basis of *Morrison*. *See, e.g., In re Le Nature's Inc. v. Krones, Inc.*, 2011 U.S. Dist. LEXIS 56682 (W.D. Pa. May 26, 2011) (holding that a domestic RICO enterprise still falls within the ambit of the RICO statute, despite the presence of foreign predicate acts); *Stansell v. BGP, Inc.*, No. 8:09-cv-2501-T-30AEP (M.D. Fla. Mar. 31, 2011) (holding that, despite Morrison, "Congress . . . clearly intended the ATA have extraterritorial application" and "provide[] civil remedies for victims of international terrorism"); *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 (9th Cir. July 8, 2010) (due to the "sweeping language" of the Lanham Act, "we see no need to revisit our case law regarding extraterritorial application" as a result of Morrison's holding with respect to the Securities and Exchange Act) And, to be sure, many of the decisions discussed above are presently on appeal. So, at the time of writing, the long-lasting effect of *Morrison* remains to be seen. But on the basis of what we are seeing so far, *Morrison* appears to be having a dramatic impact on limiting the subject matter jurisdiction of U.S. courts in a variety of civil cases.

Criminal cases, however, have been treated a bit differently. Soon after the *Morrison* decision, the Dodd-Frank Act revived extraterritorial application of the anti-fraud provisions of the securities laws by authorizing actions brought by the Securities and Exchange Commission involving "conduct occurring outside the U.S. [that] has a foreseeable substantial effect within the U.S." In other criminal and enforcement contexts, too, federal courts have been more willing to find that criminal statutes express a "clear indication of . . . extraterritorial application." *See United States v. Weingarten*, No. 09-2043-cr (2d Cir. Jan. 18, 2011) (holding that 18 U.S.C. § 2423(b) was intended by Congress to criminalize travel by a U.S. citizen between two foreign countries to have sex with a minor) and *United States v. Finch*, 2010 U.S. Dist LEXIS 104496 (D. Haw. Sept. 30, 2010) (holding that 18 U.S.C. §§ 201(b)(2)(A) and (C), concerning bribery and fraud committed against the United States by an officer of the United States, is not "limit[ed] to domestic enforcement"). Courts have also been willing to find that the application of certain criminal statutes to foreign schemes does not offend the holding in *Morrison. See United States v. Coffman*, 2011 U.S. Dist LEXIS 14600 (E. D. Ky Feb. 14, 2011) (the use of U.S. mail to effect a foreign scheme to defraud does not

offend Morrison) and *United States v. Mandell*, 2011 U.S. Dist LEXIS 27064 (S.D.N.Y. Mar. 16, 2011) ("The fact that defendants engaged in some conduct abroad does not mean that that conduct and conduct here in the United States is not covered by the [criminal] mail and wire fraud statutes."). The outcomes of these cases suggest that criminal laws are being treated differently than civil laws, and that courts have continued to expand the extraterritorial application of U.S. criminal law in *Morrison*'s wake. *But see U.S. v. Philip Morris USA, Inc.*, No. 99-2496 (D.D.C. Mar. 2011) (nullifying its prior decision applying prospective injunctive relief against a foreign criminal RICO defendant)