Boehm on Private Securities Fraud Litigation after Morrison

Joshua L. Boehm, who is a J.D. Candidate at Harvard Law School, has published Private Securities Fraud Litigation after *Morrison v. National Australia Bank*: Reconsidering a Reliance-Based Approach to Extraterritoriality in the last issue of the *Harvard International Law Journal*.

> *In June 2010, the U.S. Supreme Court issued a momentous decision in Morrison v. National Australia Bank, upending decades of federal appeals court precedent in transnational securities law. The Court established a bright line, transaction-based test for when Section 10(b) ("Sec. 10(b)") of the Securities Exchange Act of 1934 ("Exchange Act") can apply extraterritorially. Morrison essentially requires that the fraud-related transactions at issue be conducted in the United States to allow a claim for relief in U.S. courts. This has had a significant impact on securities litigation because Sec. 10(b) and its implementing regulation, Rule 10b-5, provide the most common cause of action for securities fraud in the United States.*
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> *This new test has resulted in a narrower field for private Sec. 10(b) litigation than that available under the dominant regime before Morrison, the Second Circuit's conducts and effects test ("conducts-effects"). Lower federal courts, principally the Southern District of New York ("SDNY"), have already cited Morrison to dismiss multiple Sec. 10(b) cases with a transnational element. But this effect may well be short-lived. In July 2010, with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA"), Congress restored conducts-effects for transnational securities fraud suits brought by the U.S. government, while also directing the Securities and Exchange Commission ("SEC") to conduct a study on whether and to what extent a private right of action should be extended beyond Morrison's transactional test.*
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> *For years before Morrison, the conducts-effects test was consistently criticized on the grounds that it was overly broad and unevenly applied. While Morrison answered those who called for predictability, the Dodd-Frank Act's partial overruling of the decision has, at least for the moment, infused this area of law*

with more ambiguity than it had pre-Morrison. Courts, shareholders, and companies will continue to operate in this uncertain state until at least early 2012, when Congress will receive the SEC's report on private rights of action and decide how to finalize the extraterritorial scope of that realm of law.

The financial, legal, and even diplomatic implications of these developments are immense. Yet all ultimately relate to a fundamental tension arising from the goal of ensuring that the United States is neither a "Barbary Coast" for "international securities pirates" nor a "Shangri-La of class-action litigation representing those allegedly cheated in foreign securities markets." Reconciling such aims requires consideration of the ever-internationalizing nature of corporate activity and securities markets, as well as class-action litigation trends, the availability of securities fraud remedies abroad, and coherence with other areas of law in which presumptions of extraterritoriality are made.