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A Comparative Law Analysis of Private Securities Litigation in the Wake of *Morrison v. National Australia Bank*

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A COMPARATIVE LAW ANALYSIS OF PRIVATE SECURITIES LITIGATION IN THE WAKE OF MORRISON V. NATIONAL AUSTRALIA BANK

GRANT SWANSON

INTRODUCTION

In one of the most expensive corporate scandals in history, Jérôme Kerviel, a French banker, lost his firm, Société Générale, nearly seven billion dollars betting on the U.S. subprime mortgage market. Nick Leeson’s $1.3 billion trading blunder that sunk his two-hundred year old firm, Barings Bank, in the 1990s pales in comparison to the amounts of money at stake in today’s financial markets. While Société Générale did not go under like Barings Bank, it did have to issue restated financial statements, resulting in a significant decline in Société Générale stock. Mr. Kerviel will be sitting in a French prison for the next three years, with a restitution order to Société Générale in the amount of seven billion dollars. With the probability of collection from Mr. Kerviel being remote, Société Générale shareholders are looking for other ways to recover their lost shareholder value. Accordingly, three American investors brought suit in United States district court alleging that Société Générale violated the Securities and Exchange Commission’s antifraud rule by making false statements regarding the risk of its subprime mortgage portfolio. Two of these investors purchased their securities on the Euronext Paris, a foreign exchange; the third, purchased an American Depository Receipt (ADR) on an over-the-counter market in the United States.

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1. In re Société Générale Sec. Litig., No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *2–3 (S.D.N.Y. Sept. 29, 2010); see also Nicola Clark, Rogue Trader at Société Générale Gets 3 Years, NEW YORK TIMES (Oct. 5, 2010), http://www.nytimes.com/2010/10/06/business/global/06bank.html (noting that the €4.9 billion loss was approximately $7 billion at the time of the fraud).
4. Given Mr. Kerviel’s current salary working as a technology consultant, it will take him 177,000 years to pay off his debt. See Margaret Canning, Jerome Kerviel’s 177,000 years to clear debt, and no sick days, BELFAST TELEGRAPH (Oct. 7, 2010), http://www.belfasttelegraph.co.uk/business/business-news/jerome-kerviels-177000-years-to-clear-debt-and-no-sick-days-14969500.html.
Prior to the Supreme Court's decision in *Morrison v. National Australia Bank*, all three investors could have brought suit in the United States if they could allege either (1) a substantial amount of the conduct resulting in the misstatement occurred in the United States (the "conduct" test); (2) the misstatement resulted in a substantial effect to investors in the United States (the "effects" test); or (3) an "admixture" of the two tests.\(^5\) Thus, in the Société Générale litigation, if the plaintiffs could allege that Société Générale’s misstatements caused a sufficient detrimental effect to American investors, the suit could proceed in United States courts. Alternatively, the plaintiffs could have brought an antifraud claim if they could successfully allege that Société Générale took some step in the United States in furtherance of the fraud, including, for example, preparing or disseminating communications (such as SEC filings) that contained the misstatement.

However, in *Morrison*, the Supreme Court overturned the conduct and effects test used by the Second Circuit for nearly forty years. Instead, the Court adopted a bright-line "transactional" test that essentially requires that the investor purchased the security on an American exchange or purchased it otherwise domestically.\(^6\) What does this mean? Foreign investors can no longer seek refuge in American courts, which have traditionally provided much greater remedies to private securities litigants than courts in any other country in the world. At first glance, this result seems intuitive. But this decision goes much further than only impacting foreign investors, and it may have an impact on several high-profile cases\(^7\) here in the United States. Look, for example, at the BP Deepwater Horizon oil spill in the Gulf of Mexico, which caused a massive decline in the value of BP shares.\(^8\) Under the Second Circuit’s conduct test, investors almost certainly could have brought suit in the United States because BP has substantial opera-

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6. *Id.* at 2888.
tions here and the allegedly unsafe practices leading to the oil spill and subsequent financial misstatements occurred here. However, the *Morrison* transactional test requires that an investor purchased the stock on an American stock exchange to bring suit in the United States. Thus, American (and foreign) investors who purchased BP shares directly on the London Stock Exchange (representing approximately 72% of BP’s total equity) will have *no* federal securities cause of action in a U.S. court when they previously would have.9

As this comment will discuss in greater detail, the *Morrison* bright line rule is not as clear as Justice Scalia may have intended it to be due to the increasing complexity and interconnectivity of securities markets today. For example, American Depository Receipts (ADRs) are essentially foreign securities held by an American depository bank, which then issues shares directly to individuals either on an American stock exchange or over-the-counter.10 Because these securities are traded on an American stock exchange, they should pass *Morrison*’s transactional test. However, since *Morrison*, the Southern District of New York—considered the Mecca of federal securities law jurisprudence—recently held in *Société Générale* that ADR investors could not bring their claims in U.S. courts.11 Thus, if the Southern District of Texas, where the BP litigation is ongoing, follows the Southern District of New York,12 then every U.S. investor in BP ordinary shares will have to travel to the United Kingdom to bring their securities law claims.13 It is important to note, however, that several other Southern District of New York cases have allowed ADR claims to proceed.14

On its face, the Supreme Court’s transactional test may seem harsh towards investors who may have legitimate claims, but the Court had good reason to reject the conduct and effects test in favor of a bright line rule. The Second Circuit’s conduct and effects test resulted in extremely fact-intensive analyses and unpredictable outcomes—problems that the transactional test should address to a great degree. In addition to providing greater certainty for judicial outcomes, the transactional test addresses many stakeholders’ concerns with American courts applying U.S. law to predominate-

9. BP p.l.c., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Mar. 5, 2010) (27.74% of BP’s total ordinary shares deposited with JPMorgan Chase for ADSs).
12. As will be discussed in Part I, most courts give significant deference to the Southern District of New York and the Second Circuit’s interpretation of federal securities laws.
13. Alternatively, investors could bring state securities law claims—known as “Blue Sky Laws” or state common law fraud claims.
ly foreign securities transactions. Many foreign governments felt that the United States was impinging upon their own state sovereignty and violating international principles of comity.

Regardless of whether you agree with the Court’s transactional test, one point seems clear: investors in foreign securities will now have to bring securities fraud claims in the country where the security originates. As Part III of this comment will discuss, countries have adopted significantly different securities law frameworks, and perhaps more importantly, countries have significantly different rules for group litigation—if they exist at all—which is an important mechanism in private securities enforcement to overcome the collective action problem.

This comment will examine the Supreme Court’s analysis in *Morrison* and why it overruled four decades of securities fraud jurisprudence by the Second Circuit. Part I of this comment briefly reviews the jurisprudence on the extraterritorial application of section 10(b), the antifraud provision of the Securities Exchange Act of 1934, in the Second Circuit. Part II of this comment will analyze the *Morrison* decision, the subsequent decisions in the district courts applying *Morrison*, and the congressional response to partly overturn the decision. Part III of this comment will survey securities fraud laws in Australia, England, Canada, and China to demonstrate the difficulty that investors may have bringing private securities claims in foreign jurisdictions after *Morrison*. And finally, Part IV of this comment will analyze the efficacy of the current securities regime in the United States relative to other countries.

I. BACKGROUND OF EXTRATERRITORIAL APPLICATION OF SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934

Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), the antifraud provision, makes it “unlawful for any person” to commit securities fraud “by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange.” 15 Pursuant to its authority under Section 10(b) of the Exchange

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15. 15 U.S.C. § 78j(b). The statute 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) . . .
(b) 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, 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 Com-
Act, the Securities and Exchange Commission (SEC) promulgated Rule 10b-5, the regulation containing substantially similar language to Section 10(b) and under which most plaintiffs bring antifraud claims. Because Rule 10b-5 "does not extend beyond conduct encompassed by Section 10(b)," the courts generally analyze the language of Section 10(b) rather than Rule 10b-5.17

Given that the definition of "interstate commerce" includes communication between any two states and between any foreign country and any state,18 the statute seems as if it was intended to apply to almost any communication, including foreign ones, so long as that communication ended in a U.S. state—an argument that the Court takes up in Morrison. It is important to note, however, that the Act does not contain a clear expression of extraterritorial application in any section related to antifraud.19 Despite a lack of clear intent in the statute, the Second Circuit often inferred an extraterritorial application based on whether the plaintiff could successfully allege that "Congress would have wished the precious resources of United States courts" to be devoted to type of alleged fraud at issue.20 Exacerbating the difficult task of interpreting congressional intent (particularly congressional intent eighty years ago) is the fact that the private right of action itself is not even within the language of the statute; the courts have inferred that as well. So, how then is it possible to discern Congress' intent on the reach of the private right of action when it did not even include a private right of action when it wrote the statute?

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16. 17 C.F.R. § 240.10b-5. In full, 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 a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading ... in connection with the purchase or sale of any security.


18. 15 U.S.C. Section§ 78c(a)(17). The full definition provided by the Act is:

The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

19. Note, Dodd-Frank amended the Exchange Act to give it extraterritorial application for actions brought by the SEC and the U.S. Department of Justice, as discussed infra Part II.

Commentators have been writing about the Second Circuit’s conduct and effects tests for as long as the Second Circuit first posited them forty years ago.\textsuperscript{21} Thus, it would be a redundant exercise to analyze these doctrines in great detail. Nevertheless, a brief examination of the major cases responsible for the development of the law is useful before analyzing the Court’s new legal test in \textit{Morrison} and its impact on securities fraud litigants. The following cases illustrate the development of the Second Circuit’s jurisprudence on the extraterritorial application of Section 10(b) and demonstrate the difficulties encountered by courts in applying the conduct and effects test—often resulting in unpredictable outcomes.

The Second Circuit has been applying Section 10(b) extraterritorially based on whether the underlying conduct resulting in the alleged fraud occurred in the U.S. (the “conduct” test) or whether the alleged fraud had a substantial impact in the U.S. (the “effects” test).\textsuperscript{22} The Second Circuit first articulated the effects test in \textit{Schoenbaum v. Firstbrook} when it held that Section 10(b) reached cases where the conduct alleged to have violated Section 10(b) occurred outside the U.S. “at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors.”\textsuperscript{23} There, stockholders brought a derivative suit on behalf of Banff Corporation, a Canadian company, which had common stock listed and traded on the Toronto Stock Exchange and the American Stock Exchange.\textsuperscript{24} Aquitane, another Canadian corporation, acquired control of Banff through a tender offer.\textsuperscript{25} Subsequently, Banff and Aquitane formed a joint venture to conduct oil exploration in Canada.\textsuperscript{26} In order for Banff to raise capital to cover its share of the drilling costs, it agreed to sell treasury shares to Aquitane at its current market price.\textsuperscript{27} Stockholders brought suit alleging that Aquitane knew

\begin{itemize}
\item \textsuperscript{22} The first case in which the Second Circuit applied Section 10(b) extraterritorially was in 1967. See \textit{Schoenbaum v. Firstbrook}, 405 F.2d 200, 208, \textit{rev’d en banc on other grounds}, 405 F.2d 215 (2d Cir. 1968).
\item \textsuperscript{23} \textit{Schoenbaum}, 405 F.2d at 208.
\item \textsuperscript{24} \textit{Id.} at 204.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 205.
\end{itemize}
that Banff had valuable oil properties but failed to disclose that information in order to purchase Banff’s treasury shares at artificially low prices.\textsuperscript{28}

Despite that the alleged fraud in Schoenbaum occurred in Canada, the Second Circuit held that it had subject matter jurisdiction because the fraud had a substantial effect on American investors who purchased their shares on the American Stock Exchange.\textsuperscript{29} The court relied on its interpretation of congressional intent to posit that Congress intended the Exchange Act “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.”\textsuperscript{30} While Schoenbaum certainly set the tone for expanding the reach of Section 10(b) over the next several decades, the Second Circuit clearly limited the availability of the effects test to plaintiffs who purchased securities in the U.S.\textsuperscript{31} Accordingly, courts have generally dismissed what are known as “f-cubed” claims—i.e., claims brought by foreign plaintiffs suing a foreign defendant over foreign securities—at least based on the effects test, because they purchased their shares on foreign exchanges.\textsuperscript{32}

Five years later, in 1972, the Second Circuit articulated the conduct test in Leasco Data Processing Equip. Corp. v. Maxwell.\textsuperscript{33} Leasco involved an American company that purchased shares in a British corporation based on allegedly fraudulent statements made by the British company’s controlling shareholder while he was in the United States.\textsuperscript{34} The British corporation did not trade any securities in the U.S.\textsuperscript{35} Nevertheless, the Second Circuit held that the plaintiffs could proceed under Section 10(b) because the underlying fraudulent conduct giving rise to the claim occurred in the United States.\textsuperscript{36} Because the court reasoned that the allegedly fraudulent conduct occurred in the U.S., it held that jurisdiction was proper because it would essentially be applying Section 10(b) domestically, rather than extra-

\textsuperscript{28} \textit{Id.} It was later discovered that the Canadian venture contained significant amounts of oil, and subsequently, Banff’s share price skyrocketed from $1.35 at the time of the treasury sale to $18 less than two years later.

\textsuperscript{29} \textit{Id.} at 208-09. Note that the Second Circuit always framed the reach of Section 10(b) in terms of a subject matter jurisdictional issue. In \textit{Morrison}, however, the Supreme Court noted that the extraterritorial application of Section 10(b) is actually a merits issue, but the distinction does not affect the analysis. For the remainder of this Part, to be consistent with the courts’ analyses, I will continue to refer to the issue as one of subject matter jurisdiction.

\textsuperscript{30} Schoenbaum, 405 F.2d at 206.

\textsuperscript{31} Buxbaum, supra note 21, at 22.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} 468 F.2d 1326, 1337 (2d Cir. 1972).

\textsuperscript{34} \textit{Id.} at 1330.

\textsuperscript{35} \textit{Id.} at 1332.

\textsuperscript{36} \textit{Id.} at 1333-39.
territorially. And therefore, the conduct test was not inconsistent with the presumption against extraterritoriality.

Based only on these limited holdings, the rationale behind the conduct test in Leasco was quite similar to the rationale behind the effects test in Schoenbaum—protecting American investors (whether they purchased securities at home or abroad). But the Second Circuit markedly shifted from this policy rationale just several years later resulting in a significant expansion of the reach of Section 10(b). In IIT v. Vencap, Ltd., the Second Circuit upheld jurisdiction based on the conduct test even when virtually no American investors were affected by the fraud. In fact, Vencap marked the first time that the Second Circuit upheld jurisdiction in an f-cubed case. In finding jurisdiction, the court provided a greatly expanded policy rationale than in Schoenbaum and Leasco by stating that the Exchange Act should prevent the United States from becoming a safe-haven for fraudsters.

On the same day that the Second Circuit upheld jurisdiction in Vencap, it limited the conduct test in Bersch v. Drexel Firestone, Inc. by holding that “merely preparatory” conduct in the U.S. is not sufficient to confer jurisdiction. Bersch involved a Canadian mutual fund that offered foreign shares outside the U.S. by means of an allegedly misleading prospectus. While the court acknowledged that the misleading prospectus was prepared in the U.S., it ultimately was more concerned that the prospectus was distributed in Canada. The court concluded that the conduct in the U.S. was merely preparatory and insignificant compared to the amount of conduct occurring in Canada.

Then, in Itoba Ltd. v. LEP Group PLC, the Second Circuit for the first time combined the two tests because it would better indicate whether the

37. Id. at 1335.
38. Id. at 1337. The presumption against extraterritoriality is a canon of statutory construction, which posits that a statute is presumed to apply only within the territorial jurisdiction of the U.S., unless a clear contrary indication appears within the statute. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 247 (1991). For further discussion, see generally William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 BERKELEY J. INT’L L. 85 (1998).
39. Buxbaum, supra note 21, at 23.
40. Id.
41. 519 F.2d 1001, 1016 (2d Cir. 1975) (noting only 300 out of 150,000 investors were Americans).
42. Buxbaum, supra note 21, at 24.
43. Id. (citing Vencap, 519 F.2d at 1016).
45. Id. at 978–80.
46. Id. at 992.
47. Id. at 987.
United States was sufficiently involved to justify application of Section 10(b). Presumably, the court combined the two tests because neither the conduct test nor the effects test would have been sufficient to invoke Section 10(b), but using the tests together, the court found jurisdiction. Itoba involved a plaintiff U.S. company which purchased a significant amount of foreign shares of the defendant foreign company in connection with an anticipated joint venture. Subsequently, the defendant revealed substantial financial misstatements resulting in significant losses to the value of the plaintiff’s stock. The defendant had ADRs traded on the NASDAQ; and as a result, it issued SEC filings related to these ADRs which contained the allegedly fraudulent statements. Itoba established the newly formalized two-part conduct test: (1) the wrongful conduct occurring within the United States was more than “merely preparatory” to the securities fraud in another jurisdiction; and (2) the conduct directly caused the losses. Significantly, the court held that a Rule 10b-5 action was not barred simply because the SEC filing containing the allegedly misleading statement was not the security purchased by the plaintiff. In determining that Itoba’s conduct was more than merely preparatory, the court borrowed from the effects test when it considered the detrimental effect that Itoba’s misleading statements had on thousands of U.S. shareholders.

Notably, most of the other Circuits have embraced the Second Circuit’s conduct and effects test, although to somewhat varying degrees. While most districts apply the effects test in substantially the same manner, a significant difference arises between the Circuits in the degree to which American-based conduct must be causally related to the securities fraud. At one end of the spectrum is the D.C. Circuit, which required that the domestic conduct itself amount to a securities violation. At the other end is the Third Circuit, which required only “some activity designed to further a fraudulent scheme.” The Eighth and Ninth Circuits adopted similar, although somewhat stricter positions, requiring that the conduct be “signif-

48. Itoba Ltd. v. LEP Grp. PLC, 54 F.3d 118, 122 (2d Cir. 1995).
49. Id. at 124.
50. Id. at 120-21.
51. Id. at 121.
52. Id. at 120. ADRs are essentially stocks issued by U.S. depository banks and then usually listed on a U.S. exchange. ADRs are discussed in greater detail in Part II.
53. Id. at 122 (citations omitted).
54. Id. at 123.
55. Id. at 124.
56. Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 665 (7th Cir. 1998).
57. Id.
58. Id. at 666 (quoting SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977)).
icant" with respect to the fraud. Finally, the Fifth Circuit adopted the Second Circuit's somewhat middle of the road approach requiring that the conduct be more than "merely preparatory" and a direct cause for the plaintiff's loss.

Commentators, and the Second Circuit itself, have acknowledged that the conduct and effects test was an intensive, fact-specific inquiry. The Second Circuit seemed to be intentionally foregoing a predictable legal test in favor of a test that was more malleable on purpose. That way, courts could find jurisdiction when they thought it was appropriate to do so and not find jurisdiction when they believed that the transaction was a little too foreign. While this presents obvious advantages to investors and government seeking to hold fraudsters liable, it results in significantly unpredictable outcomes for corporations, domestic and abroad, not knowing whether they could be subject to costly litigation in the United States.

II. SUPREME COURT DECIDES MORRISON v. NATIONAL AUSTRALIA BANK: THE DISTRICT COURTS REACT AND CONGRESS RESPONDS

A. Morrison v. National Australia Bank

In Morrison the Supreme Court rejected forty years of the Second Circuit's jurisprudence on the extraterritoriality of Section 10(b) of the Exchange Act when it rejected the conduct and effects test. The Court, instead, adopted a bright-line transactional test. Morrison involved, unsurprisingly, the subprime mortgage meltdown. National Australia Bank ("NAB"), Australia's largest bank, purchased HomeSide Lending ("HomeSide"), an American mortgage servicing company based in Florida, in 1998. From 1998 to 2001, NAB issued annual reports, and its top executives made public statements touting HomeSide's success in both Australia and the U.S. However, in July 2001, NAB announced that it was writing down HomeSide's assets by $450 million. Then, in September

59. Id. (citing Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) and Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983)).
60. Id. (citing Robinson v. TCI/US West Commc'ns Inc., 117 F.3d 900, 905-06 (5th Cir. 1997)).
63. Id. at 2884-86.
64. Id. at 2875-76.
65. Id. at 2875.
66. Id.
67. Id. at 2875-76.
2001, NAB announced that it was writing down HomeSide’s assets again—this time by $1.75 billion.\textsuperscript{68} NAB explained that HomeSide’s September write-down resulted from mistaken assumptions in its financial models valuing the mortgage servicing rights, the impairment of goodwill, and incorrect interest rate assumptions.\textsuperscript{69}

Two different types of plaintiffs brought suit in \textit{Morrison}: (1) foreign investors who purchased NAB shares on the Australian Stock Exchange ("f-cubed" plaintiffs); and (2) Robert Morrison, who purchased shares in NAB American Depository Receipts ("ADRs") on the New York Stock Exchange.\textsuperscript{70} The Southern District of New York dismissed Morrison’s claims because he failed to allege any pecuniary damage, which is an essential element under Rule 10b-5.\textsuperscript{71} Despite that the class of plaintiffs with the best chance of succeeding on the extraterritoriality issue was no longer in the case, the f-cubed plaintiffs proceeded on with their much more tenuous claims—perplexing some commentators.\textsuperscript{72} Unfortunately, the dismissal of Morrison’s ADR claim enabled the court to sidestep addressing the issue of whether over-the-counter ADRs would pass the transactional test.

Beginning with the effects test, the district court easily concluded that the alleged fraud had very little demonstrable effect on the United States markets.\textsuperscript{73} Specifically, the court held that the effects test was not met because NAB had only a minimal amount of its shares traded in the United States.\textsuperscript{74} The court concluded that the effects test was not met because NAB’s ADRs represented only 1.1\% of NAB’s total market capitalization.\textsuperscript{75} Logically, it is puzzling why the district courts even analyze the value of domestic shares when assessing the claims of investors who purchased shares on foreign markets. Presumably, this argument means that if

\begin{itemize}
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{71} Id. at *8 (internal citations omitted). Even though Morrison alleged that the price of NAB ADRs dropped by over $10 on NAB’s announcement of the $1.75 billion write-down, the court held that he did not sufficiently allege damages because the median price of NAB was $75 over the 90 day period following the announcement, and he purchased his shares for $74. The court held that a $1 difference was not sufficient damages. Notably, NAB ADRs traded as high as $97 during the class period; thus, had investors joined in the class action who purchased their shares at a higher price, the ADR claims could have proceeded. See 15 U.S.C. § 78u-4(e)(1).
  \item \textsuperscript{72} Commentators are puzzled by why the plaintiffs’ lawyers brought this case to the Supreme Court instead of waiting for a much more favorable factual situation to do so. See Stephen M. Davidoff, \textit{How Porsche May Outmaneuver a Securities Suit}, DEALBOOK (Oct. 22, 2010), http://dealbook.nytimes.com/2010/10/22/how-porsche-may-outmaneuver-a-securities-suit ("You really had to wonder what {the plaintiffs’ lawyers} were thinking.").
  \item \textsuperscript{73} In re Nat’l Austl. Bank Sec. Litig., 2006 WL 3844465, at *4.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} Id. (citing In re Bayer AG Secur. Litig., 423 F. Supp. 2d 105 (S.D.N.Y. 2005)).
\end{itemize}
NAB had a significant amount of shares traded in the United States either through ADRs or a dual listing, then Section 10(b) would reach NAB’s alleged fraud even when these shares essentially bear no relation to the cause of action.

Moving to the conduct test, the district court tackled one of the major difficulties in applying the conducts test—what is the relevant conduct? The plaintiffs contended that the relevant conduct was the HomeSide fraud occurring in the United States that resulted in NAB’s misstatements in Australia. NAB, however, argued that the relevant conduct is the dissemination of the allegedly misleading statements in Australia, which would mean that the underlying conduct in the U.S. did not “directly cause” the plaintiff’s loss. To be sure, Morrison is not the first time that a district court struggled applying the conduct test because it had to make the difficult distinction of whether the relevant conduct was the underlying transaction or whether it was the dissemination of the misleading statements. As a result, courts have come to inconsistent conclusions, with some holding that the relevant conduct is the publication of the misleading statements and some courts holding that it is the underlying actions behind the misleading statements. The district court sided with the former and held that the relevant conduct was the misleading statements made in Australia, and therefore, the conduct occurring in the U.S. did not directly cause the foreign plaintiffs' losses.

The Second Circuit affirmed the district court decision, agreeing that Section 10(b) did not reach the defendant’s alleged misstatements under the conduct test. In rejecting NAB’s argument for a bright-line rule against f-cubed claims, the court dismissed conflict of law concerns by noting that “[t]he primary interest of [a foreign state] is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than [a foreign state’s], that country will surely not be offended by their application.” It further noted that a bright-line rule against f-cubed claims could create a safe haven for securities cheaters. Accordingly, the Second Circuit reaffirmed its previous decision. The court concluded that the relevant conduct for purposes of Section 10(b) was the misleading statements made in Australia, and therefore, the conduct occurring in the U.S. did not directly cause the foreign plaintiffs' losses.

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81. Id. at 175 (quoting IT v. Comfeld, 619 F.2d 909, 921 (2d Cir. 1980)).
82. Id.
firmed the conduct test in addressing these issues. It then concluded that the relevant conduct that directly caused the foreign plaintiffs’ loss was the dissemination of the allegedly misleading statements in Australia, and therefore, Section 10(b) did not reach NAB’s conduct.

It is difficult to reconcile the Second Circuit’s different applications of the conduct test in Berger and Morrison. Both cases involved the domestic preparation of misleading statements, which were then sent overseas and disseminated by a related company. Yet, in Berger, the Second Circuit held that the relevant conduct occurred in the U.S., and in Morrison, it held that the relevant conduct occurred overseas. It is exactly this sort of unpredictability in the Second Circuit’s jurisprudence which prompted the Supreme Court to weigh in on the issue.

Justice Scalia, joined by seven Justices, wrote the unanimous opinion of the Court. In doing so, he stuck to his guns—a purely textualist theory of statutory interpretation and canons of construction, both of which proved to be sufficiently dispositive for the Court to determine the extraterritorial application of Section 10(b). The Court began, as a threshold matter, to correct the Second Circuit’s treatment of the issue as one of subject-matter jurisdiction, when the extraterritorial reach of Section 10(b) is actually a merits issue. Noting that this error does not affect the substantive analysis, the Court next addressed whether Section 10(b) applies extraterritorially, concluding that it does not. Finally, the Court dismissed the plaintiffs’ argument that NAB’s relevant conduct was domestic, and therefore, within reach of section 10(b), regardless of how the Court decided the first issue. Instead, the Court held that the relevant conduct was NAB making the allegedly misleading statements in Australia, not the underlying mortgage problems in the U.S. Thus, the Court held that NAB’s conduct was not domestic, and Section 10(b) did not reach its conduct.

Given the extensive history of the Second Circuit’s jurisprudence and other circuits’ general acceptance of that jurisprudence, the Morrison deci-

83. Id.
84. Id. at 176–77.
85. Justice Sotomayor took no part in the decision.
88. Id. at 2876–77. The Court noted that asking, “what conduct section 10(b) reaches is to ask what conduct section 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, ‘refers to a tribunal’s power to hear a case’.” Id. at 2877.
89. Id. at 2883.
90. Id. at 2888.
91. Id. at 2883–84.
92. Id. at 2888.
sion was somewhat unique in that the Court does not seem to swiftly reject such widely developed judicial doctrine with such ease. Yet, it did so in *Morrison*. Justice Scalia began his analysis noting that a “longstanding principle of American law” is that legislation applies only within the territorial jurisdiction of the United States, unless that legislation clearly expresses an extraterritorial application.\(^{93}\) Justifying this principle, the Court cited to precedent noting that it presumes that Congress is “primarily concerned with domestic conditions[,]” and therefore, “legislates with respect to domestic, not foreign matters.”\(^{94}\) The Court reprimanded the Second Circuit, which, instead of following the Court’s previous decisions announcing the presumption against extraterritoriality, attempted to discern Congress’ intent through a collection of “complex” and “unpredictable” tests.\(^{95}\) Given the fact that the Court believed that the lower courts were flat wrong, the Court could have stopped there. The additional analysis did not provide much more support besides noting that the lower courts have conceded that the language of Section 10(b) does not support their position.\(^{96}\) Most significant of these admissions is when the Second Circuit “confessed that ‘if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.’”\(^{97}\) Such an admission is all the ammunition Scalia needed to rely on the presumption against extraterritoriality.

In disposing of the first issue, the Court looked to whether the Exchange Act, and specifically Section 10(b), indicates a clear intent to overcome the presumption against extraterritoriality. The plaintiffs raised several issues in support of their argument that the statute does apply abroad. First, plaintiffs argued that the definition of “interstate commerce” includes “trade, commerce, transportation, or communication . . . between any foreign country and any State”; which Justice Scalia quickly dismissed by stating that “[t]he general reference to foreign commerce in the definition of ‘interstate commerce’ does not defeat the presumption against extraterritoriality.”\(^{98}\) Unfortunately, Justice Scalia did not provide a reason why a reference to foreign commerce does not actually mean the statute relates to foreign commerce. Justice Scalia generally places great emphasis on the words of the statute, yet he provides no explanation for why the text of the statute should be ignored in the case of “interstate commerce.”

\(^{93}\) *Id.* at 2877.
\(^{94}\) *Id.* (internal citations omitted).
\(^{95}\) *Id.* at 2878.
\(^{96}\) *Id.* at 2877–81.
\(^{97}\) *Id.* at 2879.
\(^{98}\) *Id.* at 2882 (footnote omitted).
Second, the Court addressed Section 30(b) of the Exchange Act, which contains the only explicit mention of the extraterritorial application of the Act.\textsuperscript{99} Section 30(b) provides, in relevant part: "The provisions of [the Act] or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States" unless he does so "to prevent . . . evasion of this [Act]."\textsuperscript{100} At the very least, this language suggests that the Act and the antifraud provision were intended to apply to at least some transactions beyond the jurisdiction of the United States.\textsuperscript{101} The Solicitor General, as an amicus curiae, argued that this exemption would be meaningless if the Act did not apply abroad in the first place.\textsuperscript{102} Scalia was not convinced, and concluded that this provision is merely intended to extend the reach of the Act when a person disguises a domestic violation to enable it to escape on a technicality.\textsuperscript{103} Scalia did not elaborate on what constitutes disguising a domestic violation. Would an offshore investment fund domiciled in the Virgin Islands but operating predominately out of the U.S. fall under this exception? Probably not because issuers typically set-up investment funds offshore for tax advantages, not necessarily to evade application of Section 10(b), even though the Morrison decision provides greater incentives for issuers to do so.

Next, the Court dismissed the plaintiffs' argument that even if Section 10(b) does not apply extraterritorially, it still reaches their claims because the fraud occurred \textit{domestically}.\textsuperscript{104} Consistent with the decisive manner in which the Court dismissed the plaintiffs' first argument, the Court made quick work of the plaintiffs' alternative argument. Here, the Court took the opportunity to adopt a sweeping new legal test that would reach far beyond the facts in Morrison. Few commentators expected the Court to hold that Section 10(b) reached the conduct in Morrison with respect to an "f-cubed" plaintiff. In fact, some were critical of the plaintiffs for proceeding with such a bad fact scenario.\textsuperscript{105} The Court noted that the focus of the Exchange Act "is not upon the place where the deception originated, but upon pur-
chases and sales of securities in the United States." One reason for this interpretation is that Section 10(b) does not punish merely any deceptive conduct; rather, it punishes "deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" And it is the parties to those transactions that the statute seeks to regulate.

It is overwhelmingly clear that the Court's focus in the opinion is whether the security is listed on a national exchange or otherwise traded here. The Court does not attempt to distinguish whatsoever between foreign parties and American parties so long as they are a party to a transaction of a stock traded in the U.S. In hindsight, it seems ridiculous that the Second Circuit has concluded for so many years that U.S. securities laws would apply to securities traded on foreign exchanges—foreign exchanges which already have their own regulatory framework put forth by their own jurisdiction. To resolve this problem, the Court put forth its transactional test: Section 10(b) applies when "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." Interestingly, this is essentially the exact language of Section 10(b).

B. Morrison Immediately Impacts the District Courts

1. "F-squared" and "F-cubed" plaintiffs

While the Court intended the transactional test to be clear, plaintiffs in the district courts have put forth several arguments attempting to circumvent the sweeping nature of the test. For example, the first clause in the transactional test—whether the "purchase or sale is made in the U.S."—by its plain language would include f-cubed plaintiffs as long as they had purchased a foreign security from within the United States. In other words, the transactional test would seem to apply as long as one party was physically within the U.S. However, based upon other language in the opinion indicating that the transactional test will rectify U.S. interference with foreign securities laws, the Court clearly intended for Section 10(b) not to reach such claims. Since Morrison, nearly every plaintiff that purchased foreign securities has raised this argument and lost. The district courts have

106. Morrison, 130 S. Ct. at 2884.
107. Id. (quoting 15 U.S.C. § 78j(b)).
108. Id.
109. Id. at 2886.
110. See id. at 2885–86.
essentially concluded that this was a drafting error by the Court, and as a result, have read the transactional test in the context of the overall intent of the opinion.\textsuperscript{112} Ironically, Justice Scalia would almost certainly disapprove of overlooking the plain language of the transactional test and looking to the intent of the Court’s opinion to determine the appropriate legal test. This new transactional test has put an end to or substantially decreased the size of litigation for many high profile class actions, potentially leading to savings in the billions of dollars for some companies.\textsuperscript{113} As George Conway, the attorney who argued before the Court for NAB, put it: “It’s hard to imagine a case that will have as much direct and immediate impact on large existing litigations. . . . It wipes out an entire species of class-action litigation.”\textsuperscript{114}

2. Investors in ADRs

A question that seems to be somewhat unresolved by \textit{Morrison} is the ability of investors in American Depository Receipts to bring claims in the United States.\textsuperscript{115} Notably, Robert Morrison, the lead plaintiff in \textit{Morrison}, was an American investor in NAB ADRs; however, the district court dismissed his claims because he failed to allege damages.\textsuperscript{116} Thus, because the Court was deciding only the \textit{f-cubed} plaintiffs’ claims, eight Justices unanimously concluded that Section \textit{10(b)} does not reach their claims. Had Morrison remained in the case, it is almost certain that Justices Stevens and Breyer, the concurring Justices, would have decided that he was entitled to bring his suit in the United States because he purchased his ADR on an American stock exchange. In fact, it is likely that even Justice Scalia and the majority would have allowed Morrison to proceed in the United States.

\begin{enumerate}
\item \textsuperscript{112} See, e.g., \textit{Cornwell}, 729 F. Supp. 2d at 625–26.
\item \textsuperscript{113} Greg Stohr, \textit{BP, Vivendi Among Companies That May Save Billions From Ruling, Bloomberg} (July 27, 2010), http://www.bloomberg.com/news/2010-07-28/bp-vivendi-among-companies-that-may-save-billions-after-high-court-ruling.html (“The Morrison decision ‘will likely reduce potential damages by at least 80 percent and may reduce them significantly more,’ Vivendi argued.”).
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} A brief primer on ADRs: U.S. depositors purchase a large portion of stock in the foreign issuer and then issue these like stock. Each ADR represents a certain amount of the foreign issuer’s stock. The price of the ADR corresponds to the price of the foreign issuer’s stock adjusted for the ratio of ADRs to foreign stock. Thus, if the price of the foreign issuer’s stock drops in its home jurisdiction, the ADR will drop the same amount. \textit{American Depository Receipts}, SEC, http://www.sec.gov/answers/adrs.htm (last modified Jan. 1, 2007).
\item \textsuperscript{116} Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2876 n.1 (2010). Inexplicably, Morrison’s name was never dropped from the court docket, which is why his name remained in the case even though he was no longer a plaintiff when it reached the Supreme Court.
\end{enumerate}
because he presumably would have passed the transactional test by purchasing ADRs—"securit[jes] listed on a domestic exchange."117

Yet, the district courts have demonstrated already that there is some confusion regarding investors in ADRs. In Société Générale, supra, the District Court for the Southern District of New York curiously dismissed a plaintiff’s claim who bought Société Générale ADRs in the United States, even when Société Générale did not even argue that the court should dismiss these claims.118 There, the court concluded that Section 10(b) was inapplicable because "[t]rade in ADRs is considered to be a predominately foreign securities transaction."119 In doing so, the court predominately relied on a pre-Morrison district court case that determined a substantial effect does not occur in the United States when a company has only a small percentage of its total equity in ADRs.120 Thus, the court in Société Générale essentially reverted back to the effects test rejected by Morrison and used the ambiguous language in Morrison to eviscerate the overall purpose of the opinion.

Morrison held that Section 10(b) covers fraud “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.”121 The court in Société Générale plainly ignored the second clause of the Morrison transactional test by failing to address the fact that the plaintiff purchased a domestic security in the United States. The court relied on an SEC publication to note that ADRs represent an interest in a foreign security, but it failed to note that the same SEC publication goes on to say that "[w]hen you buy and sell ADRs you are trading in the U.S. market."122 The court also emphasized that the Société Générale ADRs were traded over-the-counter rather than listed on a national exchange, which means they are "less formal . . . with lower exposure to U.S.-resident buyers."123 However, this inquiry reverts back to whether the fraud had a substantial effect in the United States rather than the indisputable fact that the plaintiff purchased an ADR being sold domestically.124 Based upon the language of the trans-

117. Id. at 2886.
119. Id. (quoting Copeland v. Fortis, 685 F. Supp. 2d 498, 506 (S.D.N.Y 2010) (internal quotations omitted)).
124. What is even more puzzling about the Société Générale decision is that the Southern District of New York inexplicably departed from its earlier post-Morrison jurisprudence on ADR plaintiffs.
actional test and the justification for that test given in *Morrison*, Section 10(b) should reach both exchange-traded ADRs and over-the-counter ADRs. Regardless of whether *Société Générale* correctly followed *Morrison* or not, the case presents an interesting issue post-*Morrison*: How will courts deal with ADRs?

Unsponsored ADRs create a particularly difficult problem in the wake of *Morrison*. An unsponsored ADR is established by a depository bank without any participation of the foreign issuer of the underlying security. To further complicate matters, the SEC passed a rule in 2008 that enables depository banks to issue ADRs without even obtaining consent from the foreign issuer, resulting in an explosion of the number of unsponsored ADRs. The depository bank, not the foreign issuer, must file a registration statement with the SEC, but it is not required to file periodic financial data. Depository banks may issue unsponsored ADRs, however, for foreign issuers if they meet the Rule 12g3-2(b) requirements to be exempt from the application and reporting process with the SEC. Rule 12g3-2(b) has several conditions, the most important of which is that the foreign issuer publishes financial statements in English on its website. In short, many large foreign companies inadvertently, and perhaps unknowingly, qualify for this exemption, thereby enabling depository banks to cross-list them in the U.S. via unsponsored ADRs.

The issue of Section 10(b) liability for companies with unsponsored ADR programs may seem merely theoretical, as this precise issue has not yet arisen before the courts. However, the explosion of unsponsored ADRs occurred only recently, in 2008, and it is likely this issue will arise in the future as long as the rules governing foreign issuers are left unchanged. Illustrating the prevalence of unsponsored ADRs in the U.S., the CEO of

Footnote five of the opinion states: "[c]ourts have also held that Section 10(b) is inapplicable to transactions in which a plaintiff purchases ADRs on a U.S. exchange. . . . Here, ADRs were purchased 'on the over-the-counter market.'" *Id.* (citing Cornwell v. Credit Suisse Group., No. 08 Civ. 3758, 2010 WL 3069597, at *8–10 (S.D.N.Y. July 27, 2010)). However, contrary to the district court's statement, *Cornwell* very clearly dismissed only the plaintiffs who purchased their shares on foreign exchanges, and it allowed the claims of investors who purchased ADRs on an American exchange to continue.


128. Ziegler, *supra* note 126, at 4. Prior to the 2008 rule changes, foreign issuers had to formally apply to be exempt from reporting requirements. *Id.*

129. 17 C.F.R. § 240.12g3-2(b) (2011).
Pink OTC Markets stated that $100 billion of the total trading in "Pink Sheets" in 2008 was unsponsored ADRs, or two-thirds of the total trading activity on the "Pink Sheets." Moreover, a recent study shows that 40% of cross-listed firms in the U.S. are through unsponsored ADRs. How should the courts handle unsponsored ADRs? Using the Morrison transactional test, these securities almost certainly constitute a “purchase or sale [of a security] in the U.S.” However, imposing liability on companies that undertake no affirmative effort to be listed on a U.S. market seems to be unfair and would impose liability on foreign issuers—precisely the problem that Morrison attempted to redress.

C. Congress Responds to Morrison

As discussed earlier, the Court in Morrison never attempted to differentiate between private rights of action and actions brought by the SEC or the U.S. Department of Justice. Thus, presumably, Morrison would equally apply to the SEC and the United States, and therefore, they would not be able to bring Section 10(b) enforcement claims either. However, Congress partly overruled Morrison in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Section 929P(b) amended the Exchange Act by providing that the district courts have jurisdiction in actions brought by the SEC or the United States when conduct within the U.S. “constitutes significant steps in furtherance” of the fraud, “even if the securities transaction occurs outside the United States and involves only foreign investors;” or (2) conduct outside the U.S. that has a “foreseeable substantial effect within the United States.” Thus, the conduct and effects tests are not dead. In addition to extending Section 10(b) for actions initiated by the government, Congress mandated the SEC to study whether private rights of action should be extended to situations where the conduct or effects test is satisfied.

The same day that President Obama signed Dodd-Frank into law, George Conway, the attorney that argued and won Morrison for NAB, released a memo to his law firm stating that Dodd-Frank did not overturn Morrison at all and that it should not “extend the substantive reach of the

131. Id. at 15.
134. Dodd-Frank Wall Street Reform and Consumer Protection Act § 929Y.
securities laws extraterritorially at all." As discussed in this Part, the Court in Morrison held that the extraterritorial reach of Section 10(b) is a merits question—not a jurisdictional question. Mr. Conway notes that the provision in Dodd-Frank “unambiguously addresses only the ‘jurisdiction’ of the ‘district courts of the United States’ to hear cases involving extraterritorial elements; its language clearly does not expand the geographic scope of any substantive regulatory provision.” Morrison reiterated the principle that the territorial scope of a federal statute is a question of substance—what conduct does the law prohibit?—not whether the court has the power to hear the case.

III. SURVEY OF FOREIGN SECURITIES LAW

In the wake of the Morrison decision, the district courts have repeatedly shut down U.S. courts to foreign and domestic investors who purchased foreign securities. These plaintiffs essentially have one other option—pursue their claims in the jurisdiction where the securities originated. It is unclear at this point if plaintiffs will do this. Part of that determination will likely rest upon the jurisdiction in which the plaintiff would have to pursue their claims. Each country has its own regulatory framework governing securities fraud, and perhaps more importantly, each country has its own rules governing group litigation. While most modern countries with developed securities markets have some sort of private right of action for securities fraud, the degree to which such actions actually occur varies significantly. Each country has its own statutory framework making it a unique challenge in each jurisdiction. But the more important issues arise in a jurisdiction’s rules governing group litigation. Securities litigation in itself does not involve group litigation. But very few individual investors have the financial capability or incentive to bring a securities claim themselves. This is known as the collective action problem: absent any sort of mechanism for group litigation, individuals will not bring securities actions because the potential reward is generally not worth the costly expense of litigation. Accordingly, when analyzing a jurisdiction’s environment for private securities litigation, it is important to examine the group litigation rules within each jurisdiction. Most of the determinants of whether private

136. Id.
securities litigation thrives or not are centered around cost-shifting within the group litigation rules. The United States, for example, is somewhat unique in that it requires each side to pay its own litigation costs, instead of requiring the loser to pay, as is customary in most other jurisdictions.

The remainder of this comment will explore these rules in various jurisdictions and determine the practicability of bringing private securities actions in the wake of *Morrison*.

This Part is not intended to provide a detailed analysis of each country's securities regulations, but merely summarizes the material issues in each jurisdiction that may affect a practitioner's decision to pursue a securities claim there. In particular, this Part will attempt to provide a more holistic analysis for each jurisdiction that will evaluate both the statutory framework and the group litigation mechanisms together, rather than piecemeal as much of the literature presently does.

A. Australia

A survey of international securities law in the wake of the *Morrison* decision should begin with Australia, the country in which the *Morrison* plaintiffs will now have to pursue their fraud claims. Australia has an extensive regulatory framework primarily governed by the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001. Within this framework, Australia has two main causes of action that arise in securities class actions. The first of these relates to the continuous disclosure rules, which require issuers to promptly disclose any material information affecting the value of their shares. Second, the Corporations Act proscribes misleading or deceptive conduct in connection with a financial product or service. Ironically, though, the Australian Securities and Investments Commission, Australia's SEC equivalent, issued public statements shortly after NAB's second write-down praising the company for promptly disclosing HomeSide's financial position to the market.

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138. Part III of this comment is merely intended to provide a brief comparative analysis for practitioners and academics interested in foreign securities litigation in the wake of the *Morrison* decision. For a much more detailed analysis of the group litigation environment in over twenty countries around the world, see conference reports from *The Globalization of Class Actions Conference, Stanford Law School*, available at http://www.law.stanford.edu/calendar/details/1066; and conference reports from *Debates over Group Litigation in Comparative Perspectives, Duke University School of Law and the Faculty of Law of the University of Geneva* (July 2000), available at http://www.law.duke.edu/journals/journtoc?journal=dcjil&toc=djcltoc11n2.htm.


141. *Corporations Act 2001* § 12DA.
One of the greatest impediments to commencing a class action lawsuit is the prohibitively high expense of such lawsuits and the plaintiff's possibility of incurring the loss on the lawsuit. In Australia, external funding for class action lawsuits is particularly important because of two rules, both of which are different from the United States. First, Australian courts typically require the losing party to pay court costs. Second, Australia does not allow attorneys to charge contingency fees. Thus, a class action becomes a significant gamble for investors. If they lose, not only are they stuck paying their own legal fees because contingency arrangements are unavailable, but they may also be stuck paying for the opposing parties attorneys' fees if the court decides that the loser pays. This burden stands in stark contrast to the United States where investors typically have no skin in the game. In the United States, investors have to pay their own costs only and attorneys work on a contingency basis, meaning that if the investors lose, the attorneys will not charge the investors a fee.

In 2006, however, the Australian High Court changed the dynamics of group litigation in Australia by allowing the use of commercial litigation funding. Commercial litigation funding is a somewhat unique Australian mechanism. Commercial litigation funding allows an unrelated third party to fund all or part of the plaintiffs' litigation costs in return for a percentage of the settlement. Since the adoption of litigation funding, securities class actions in Australia have substantially increased. If investors can persuade a litigation funder of the merits of their case, they can now bring a lawsuit even when they did not have the financial wherewithal to do so themselves. Litigation funding arrangements have put Australia on much more equal footing with the United States. Why, then, did NAB bring their lawsuit in the United States and not Australia? Several key advantages remain for plaintiffs in the United States.

Like the United States, Australia once had a plaintiff-friendly opt-out model for class actions, but due to a recent High Court decision, Australia has a de facto opt-in model. Under an opt-out model, class actions proceed

144. Houston, *supra* note 142, at 2. Contingency fees are fees that are calculated generally as a percentage of damages.
146. Houston, *supra* note 142, at 3.
147. *Id.*
148. Ironically, U.S. based companies are entering the Australian litigation funding business, evidencing the fact that Australia and U.S. securities class actions are becoming very similar.
on behalf of all persons within the represented class except those that affirmatively provide notice that they wish to opt-out of the lawsuit. Opt-out models are generally more plaintiff-friendly because they enable plaintiffs’ lawyers to secure judgments for members of the class who did not actively participate and, as a result, significantly increase the size of class action judgments. Australia’s opt-out model was significantly undermined by a recent court decision, however, requiring plaintiffs to define the class based on who affirmatively signs the funding agreement with the litigation funder. Defining the class based on who signs the funding agreement, in essence, creates an opt-in model.

Furthermore, two significant differences arise between the United States’ and Australia’s statutory framework proscribing manipulative and deceptive practices. First, the Corporations Act and the ASIC Act do not have antifraud provisions per se because those statutes proscribing deceptive and manipulative conduct do not require scienter, or intent. Australia merely requires a showing of negligence. Conversely, U.S. courts have held that Section 10(b) requires a showing of intent to deceive, defraud, or manipulate; and that showing must be “cogent and at least as compelling as any opposing inference of nonfraudulent intent.” Australia’s omission of a scienter requirement improves a plaintiff’s chances of successfully bringing a lawsuit in Australia, but a second more critical distinction in the pleading requirements more than offsets this statutory advantage. Currently in Australia, each and every plaintiff must demonstrate that they relied on the defendant’s misconduct—a significant procedural hurdle when hundreds or thousands of plaintiffs are participating. In contrast, the U.S. overcame this hurdle by recognizing a much more efficient manner of

149. Federal Court Act 1976 s 33j (Cth). Conversely, an opt-in model requires that each person of the class affirmatively elect to join the proceeding.


151. Houston, supra note 142, at 9.

152. Id. Litigation funders prefer to define the class narrowly because it prevents free-riders—members of the class who do not sign the funding agreement but are included in the class due to the opt-out model—from sharing in the judgment but not agreeing to the pay a percentage of their share of the judgment to the litigation funder. Accordingly, litigation funders have an incentive to fund only those actions that define the class by who signs the funding agreement. Id.


155. Legg, supra note 153, at 681 (citing Guglielmin v Trescothick (No 2) (2005) 220 ALR 515). In addition, reliance is sometimes referred to as transaction causation in the U.S.
proving reliance—the "fraud on the market" theory.\textsuperscript{156} The fraud on the market theory is premised on the efficient market hypothesis, which posits that the price of a security will reflect all publicly available information, including misstatements or omissions.\textsuperscript{157} This theory further presumes that all investors rely on the integrity of the market price when making investment decisions, meaning that as a matter of law, every shareholder relied on the misstatement or omission whether they actually did or not.\textsuperscript{158} Thus, investors only have to sufficiently plead that the security’s price dropped as a result of the fraud.

Australia has removed many of the obstacles that were preventing shareholders from initiating group litigation in securities fraud cases. Most significant of these is the introduction of commercial litigation funding to shift the cost burden from the investors to third parties with bigger risk appetites. Yet, the absence of the “fraud on the market” theory in Australian law is a difficult hurdle to overcome for many plaintiffs and will likely continue to limit the number of collective actions in Australia. However, plaintiffs are working towards introducing the theory into Australian law and may be successful soon.\textsuperscript{159} At the time of writing this comment, the Morrison plaintiffs have filed a complaint against NAB in the Supreme Court of Victoria regarding the HomeSide allegations with a commercial litigation funder financing the costs.\textsuperscript{160}

\textbf{B. United Kingdom}

The primary statutory authority governing securities regulation is The Financial Services and Markets Act 2000 ("FMSA"). Prior to 2007, the U.K. surprisingly did not have a statutory remedy for violations of its continuous disclosure rules; the FMSA only provided for liability for a misstatement or omission in connection with the sale of a prospectus.\textsuperscript{161} In 2007, the FMSA was amended to include Section 90a, which provides for

\begin{thebibliography}{99}
\bibitem{156} Basic Inc. v. Levinson, 485 U.S. 224, 244–47 (1988).
\bibitem{157} Legg, supra note 153, at 682.
\bibitem{158} \textit{Id.}
\bibitem{159} \textit{Id.} at 681–83.
\bibitem{160} \textbf{NAB Class Action, MAURICE BLACKBURN LAWYERS,}
\bibitem{161} Paul Davies QC, \textit{Davies Review of Issuer Liability: A Discussion Paper}, HER MAJESTY’S TREASURY, 17–18 (Mar. 2007), \url{available at http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/E/C/davies_discussionpaper_260307.pdf}. Investors did have the option of the common law tort of deceit or negligence but the courts generally found that these remedies were not available for false disclosures in periodic reports. \textit{Id.}
\end{thebibliography}
civil liability on an issuer for a material misstatement or omission in connection with any report filed under the continuous disclosure rules.\textsuperscript{162} Investors do not need to prove individual reliance on false disclosures in relation to a \textit{prospectus}.\textsuperscript{163} But, for an investor to make a claim related to violations of the continuous disclosure rules, each investor must individually prove reliance due to a higher fraud-based standard of liability imposed to avoid unmeritorious claims.\textsuperscript{164} Thus, the U.S. fraud on the market theory is not available in most instances, thereby significantly increasing the difficulty of proceeding with these lawsuits.

The group litigation mechanism in the United Kingdom is primarily the Group Litigation Order ("GLO"). The GLO is an opt-in mechanism, thereby decreasing the size of classes and decreasing the potential size of judgments.\textsuperscript{165} Further impeding securities class actions, England, of course, adopts the "English Rule" when it comes to paying court costs, which means that the loser pays.\textsuperscript{166} Moreover, contingency fees are not allowed.\textsuperscript{167} One trend in the U.K. law that actually may improve the class action environment is the emergence of third party litigation funding to facilitate group litigation, although its use is coming under higher scrutiny and may be regulated soon.\textsuperscript{168} If allowed to continue, commercial litigation funding could have the same effect as it had in Australia.

Surprisingly, even though the U.S. and U.K. are usually considered to have very similar legal systems, the U.K. has a highly unfavorable environment to a private securities class action. In addition to an unfavorable statutory scheme, group litigation rules are not favorable to plaintiffs. Securities class actions are almost non-existent. Using an example from recent news, investors in BP London shares will likely not pursue their claims in England, while U.S. investors in ADRs will likely reach a settlement worth hundreds of millions of dollars, at least.\textsuperscript{169}

\textsuperscript{162} \textit{Id.} at 24.
\textsuperscript{163} \textit{Id.} at 26.
\textsuperscript{165} \textit{Id.} at 10.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} Miriam, \textit{Third Party Litigation Funding to be Regulated}, CONTACT LAW (Dec. 20, 2010), http://solicitors.contactlaw.co.uk/civil-litigation/third-party-litigation-funding-to-be-regulated-99810.html.
C. Canada

In Canada, like most other jurisdictions around the world, the practical existence of class actions is a relatively new development. Similar to Australia, class action rules and securities regulation are performed at the provincial level, thereby creating different regulatory rules depending on which province the security originates from. Beginning in 2005, most Canadian provinces have drastically amended their securities laws to include civil liability for violations of continuous disclosure rules—equivalents to the Section 10(b) private right of action. Ontario was the first to do so when it amended its Securities Act, and most of the other provinces followed suit in the following years. Prior to the provincial amendments in 2005, most class action securities plaintiffs had to rely on the common law tort of fraudulent misrepresentation, where plaintiffs were required to individually establish reliance. This onerous requirement changed, however, and now most Canadian provinces do not require that the plaintiffs prove reliance whatsoever; there is deemed reliance. In this way, Canada is actually more favorable than the U.S., which has the fraud on the market rebuttable presumption of reliance, requiring plaintiffs to establish that the security was trading on an efficient market. Another distinction from American securities law is that in cases involving certain "core documents," such as registration statements, prospectuses, and annual reports, plaintiffs do not have to prove that the responsible party knew of the misrepresentation, known as scienter in American law. Generally, plaintiffs in Canada only have to prove scienter in cases involving non-core documents and oral statements.

Despite these favorable statutory provisions in the Canada statutory law, private securities litigation has not taken off in Canada because most provinces have implemented rules in regards to group litigation to prevent


171. Id.


173. Id.

174. Id. at 2.


176. Id. at 892.

177. Id.

178. Id. at 892–93.
the types of litigation abuses perceived as occurring in the United States. For example, most of the Canadian provinces have adopted the English Rule—adopted by most countries around the world—requiring the loser to pay the winner’s court costs.\textsuperscript{179} Contingency fees are allowed, including the existence of multipliers of attorney fees due to the additional risk the law firm takes on because it may get stuck bearing the costs of the lawsuit.\textsuperscript{180} Moreover, most jurisdictions within Canada have adopted opt-out regimes, promoting participation among passive investors and thereby increasing class sizes and judgments.\textsuperscript{181}

Perhaps the most significant characteristic of Canadian securities law, and the most detrimental to Canadian investors however, is the liability damage cap in place in most Canadian provinces since the recent amendments to the securities laws. Damages are capped for each type of defendant: issuers and other non-individuals are capped at the greater of 5% of market capitalization or $1,000,000; directors and officers are capped at the greater of $25,000 or 50% of their compensation for the past twelve months.\textsuperscript{182} Significantly, however, damage caps are waived if the plaintiff can prove intentional misconduct or fraud.\textsuperscript{183}

Damage caps, along with the “loser pays” rule, significantly alter the cost-benefit analysis a plaintiff will undertake prior to commencing a securities lawsuit. Canada also employs a gatekeeping function to prevent frivolous lawsuits; a class action may only proceed with “leave to proceed” from the court.\textsuperscript{184} A court will grant leave only if it determines that (1) the action is being brought in good faith; and (2) there is a reasonable possibility that the action will be resolved at trial in favor of the plaintiff.\textsuperscript{185}

\textbf{D. China}

Engaging in a comparative analysis on any modern legal issue these days should not go without discussing China. While the regulatory environment in the People’s Republic of China (China) is considerably more opaque than most other countries, it is nevertheless important to discuss the

\begin{flushleft}
\textsuperscript{179} Id. at 890.
\textsuperscript{180} Id. at 886.
\textsuperscript{181} W.A. Bogart et al., \textit{Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?} in \textit{THE GLOBALIZATION OF CLASS ACTIONS CONF., OXFORD UNIV.} 10 (Dec. 2007), available at http://www.law.stanford.edu/display/images/dynamic/events_media/Canada_National_Report.pdf (noting British Columbia is the only province to not have adopted opt out).
\textsuperscript{182} Ontario Securities Act, R.S.O. 1990, c. S.138.1, 6.
\textsuperscript{183} Id. at S. 138.7(2).
\textsuperscript{184} Pritchard, supra note 175, at 886.
\textsuperscript{185} Id at 893.
\end{flushleft}
securities litigation environment in China as its economy continues to outpace most developed countries and is beginning to overtake the U.S. as the global capital markets leader. China, like the United States, does have a piece of comprehensive securities regulation, entitled The Securities Law of China. Article 63 of the Chinese Securities Law provides that an issuer will be liable for any losses that any investor incurs as a result of a public report containing any "falsehood, misleading statement or major omission." China’s statutory securities remedy provides for a private right of action for misstatements or omissions, much like most modern countries. In fact, China allows for an inference of reliance—similar to the fraud on the market theory—eliminating the need to show individual reliance. But, in practice, it is very difficult for investors to bring private securities actions for the reasons explained further below.

Structural problems in the broader Chinese legal system present more challenges to private securities litigants. Chinese courts, considered substantially less independent and considerably more political than the U.S. judiciary, encounter significant political pressure when resolving group securities litigation because, for example, the defendant may be a politically connected company or even a state-owned enterprise. The local courts have original jurisdiction over private securities cases, and the local courts are generally overseen and controlled by the local legislature. That same legislature may represent the majority shareholder in the defendant (in the case of state-owned enterprises) or at least may have significant connections with the defendant’s shareholders. On the other side of the lawsuit


188. Walter Hutchens, Private Securities Litigation in China: Material Disclosure about China’s Legal System?, 24 U. PA. J. INT’L ECON. L. 599, 656–57 n. 222 (2003) (citing Supreme People’s Court Rules). Note that the inferred reliance is significantly undercut by the same rules, which provide that no causation will be found where an investor sells the securities prior to the date of when the false representation is exposed. Id.

189. Id. at 647–48.

190. Id. at 646; see also Michael Palmer & Chao Xi, Collective and Representative Actions in China, in THE GLOBALIZATION OF CLASS ACTIONS CONF., STANFORD LAW SCH. 18 (Dec. 2007), available at http://www.law.stanford.edu/display/images/dynamic/events_media/China_National_Report.pdf. Note that the prevalence of state-owned enterprises in the PRC is likely a reason why the government is interested in keeping private securities litigation down and instead chooses to regulate itself.

191. Hutchens, supra note 188, at 646.

192. Palmer, supra note 190, at 18.
may be a large number of angry shareholders who may take to the streets in the face of an adverse judgment. Some Chinese courts have acknowledged that they attempt to avoid resolving such disputes due to their highly emotional nature—an unreasonable justification in the United States.

Moreover, in 2002, the Supreme People's Court of China ("SPC") issued a notice that temporarily banned courts from hearing all private securities actions in response to a meltdown of a major PRC listed company. The SPC cited lack of judicial resources and inexperience as to why the courts could no longer hear such cases. After harsh criticism by investors and academics, the SPC issued a second notice four months later allowing courts to hear private securities cases involving false disclosures—but still not cases related to market manipulation and insider trading. Remarkably, this notice remains in effect, and investors still have no private right of action for insider trading and market manipulation—a significant departure from U.S. law.

A year after the SPC issued the second notice allowing false disclosures securities cases, the SPC issued a third important notice containing a set of rules to govern when and how lower courts should hear such cases. Most significant of these rules is the requirement that a private securities lawsuit may proceed only after the Chinese Securities Regulatory Commission has found a company liable of the same violations in an administrative proceeding. Unquestionably, this diminishes the ability of private investors to police the capital markets themselves—one of the major advantages of a private right of action—as governments may not always have the resources to police every market participant. This rule essentially nullifies the private right of action in China. As a result, it could leave Chinese

193. Id.
194. Id. at 18.
195. Id. at 6 n.33 (citing Guanyu She Zhengquan Minshi Peichang Anjian Zan Buyu Shouli de Tongzhī [The Notice on Temporarily Not to Accept Securities Related Civil Compensation Cases], issued by the SPC on September 21, 2001, http://www.people.com.cn/GB/jinji/35/159/20030110/905268.html (Chinese)).
196. Id.
197. Id. at 6 n.34 (citing Guanyu Shouli Zhengquan Shichang yin Xujia Chenshu Yinfa de Minshi Qingquan Jujen Anjian Youguan Wenti de Tongzhī [The Notice on Relevant Issues Concerning Accepting Civil Tort Dispute Cases Caused by False Statement on the Securities Market], issued by the SPC on January 15, 2002).
198. Id. at 6.
199. Id.
200. Id. at 6 n.35 (citing Guanyu Shenli Zhengquan Shichang yin Xujia Chenshu Yinfa de Minshi Peichang Anjian de Ruogan Guiding [Several Provisions on Hearing Civil Compensation Cases Caused by False Statements on the Securities Market], issued by the SPC on December 26, 2002).
201. Hutchens, supra note 188, at 601. Or, as an alternative to administrative liability, in the case of a director or officer of an issuer, a criminal finding of guilt, see GUO Li & Allan V.Y. Ong, The Fledgling Securities Fraud Litigation in China, 7-8, available at http://ssrn.com/abstract=1601210.
investors without any judicial remedy. In addition to the SPC limiting investor claims by requiring a public enforcement action first, the SPC notice requires that investors opt-in to the litigation prior to the commencement of the suit. Moreover, contingency fees, once allowed, have been banned for collective actions.

One additional structural factor that has compounded the collective action problem in China is that a majority of Chinese investors are individual retail investors compared with the United States comprised of predominately institutional investors. Predominately individual investors, coupled with the remaining extremely high percentage of ownership by state-owned enterprises, results in a very low percentage of investors that have any financial incentive to bring a securities fraud claim.

Commentators seem to generally agree that the United States has significantly influenced the development of securities law in China. Indeed, China's statutory framework is remarkably similar to the U.S. statutory framework. Yet, significant obstacles exist that prevent many private securities claims from going forward. Structural problems such as a weak court system and few incentives for plaintiffs, as well as procedural rules requiring governmental action prior to private actions make it considerably more difficult for a private investor to commence a securities suit. Accordingly, foreign investors should be aware of their lack of remedies before entering in this relatively new and exciting market.

IV. ANALYSIS OF THE EFFECT OF MORRISON ON SHAREHOLDER CLAIMS

While the primary purpose of this comment is to provide analysis on the Morrison opinion and its resulting effect on shareholder claims abroad, it would be unwise to forego commenting on the efficacy of the United States class action securities scheme. This is particularly important as Congress has mandated the SEC to study the effect of overruling the Morrison decision. Morrison undoubtedly closed down a significant amount of securities litigation in the United States, and because of unfavorable securities laws in foreign jurisdictions, many shareholders will not be able to bring these claims in any jurisdiction. Thus, it is important to step back and analyze whether this is a favorable result from a policy standpoint.

202. Li, supra note 201, at 8.
203. Hutchens, supra note 188, at 643.
204. Palmer, supra note 190, at 17.
205. Hutchens, supra note 188, at 612 (using 2003 data noting that 99.47% of all brokerage accounts have been opened by individual investors—presumably this number is somewhat lower now).
206. Id. at 603; Li, supra note 201, at 1.
It is unquestioned that the United States is beginning to lose its place as the global leader of capital markets because of the perception of prohibitively high costs of listing here due to expansive regulatory regimes, such as Sarbanes-Oxley, and more importantly, the potentially high costs of litigation under the Section 10(b) private right of action. The United States should not engage in a "race to the bottom," however. Rafael La Porta, a prominent economist, studied the effect of a country’s legal environment—both rules and enforcement mechanisms—on the development of capital markets. La Porta concluded quite simply that law matters. In other words, the greater investor protections afforded by a legal system, the more robust its capital market will be.

The jurisdictions analyzed in Part III rely more heavily on the public enforcement action rather than the private right of action relied upon in the United States. The United States could adopt a similar model in order to reduce some of the perceived abuses in the current heavily relied upon private action. The fear of litigation arising from the private right of action in the U.S. is often cited as a foreign company’s biggest concern of listing in the U.S. A public enforcement regime, however, is premised on one important idea—that the enforcer is independent and can regulate free from special interest interference. Is the SEC this sort of public enforcer that could provide the independence needed in a public enforcement regime?

Yale Professor, Jonathan Macey, argues that the SEC is essentially an obsolete agency fighting to keep itself alive. As a result, the SEC’s interest in self-preservation causes it to be susceptible to something known as “agency capture.” Agency capture refers to when agencies become influenced and controlled by the constituencies that they are supposed to regulate. Macey argues that this type of behavior by the SEC is not “random or opportunistic, but has been a defining characteristic feature of the SEC.” With this in mind, the idea that the U.S can rely on a predominately public enforcement regime could be mistaken. China, for example, is a model of why the U.S. cannot rely on a predominately public enforce-
ment regime. Even though China has a private right of action, it is an essentially public enforcement regime because the government must commence an action prior to a private party doing so. China’s governmental institutions have been “captured” by the big corporations, although to a greater extent than in the U.S. The Chinese legislature seeks to appease big corporations that make up its constituency. This results in virtually no investor protection except in the most egregious cases. The SEC encounters similar difficulties.

Even assuming that the SEC is an entirely independent enforcer, relying on solely the SEC to protect investors is impractical because of its lack of resources and funding. Resources at the SEC are scarce, even with the current regulatory regime relying heavily on the private right of action to police the markets. Increasing the enforcement load on the SEC would require significant budgetary increases—an unlikely scenario given the fiscal state of the U.S. For these reasons, a U.S.-style predominately private regulatory regime is necessary to promote capital markets in the most efficient manner given the circumstances. Moreover, additional research by economist La Porta suggests that a private right of action protects investors far better than public enforcement actions, and securities markets are most benefited by a strict disclosure regime enforced by private litigants.214

Analyzing the Morrison decision with these policy considerations in mind, the Supreme Court likely would have been less inclined to weigh in on the extraterritoriality of Section 10(b) had the incentives for foreign plaintiffs to bring securities claims here not been so great. The disparity between the United States and the rest of the world is significant; foreign investors had enormous incentives to bring securities claims in the U.S. knowing that similar claims in their own jurisdiction would likely fail. Not only did the claims have a greater chance of success here, but the chances for a quick payday were high because issuers settle quickly in order to avoid the high costs of extensive U.S.-style discovery. The Court likely viewed this issue as problematic.

It is easy for critics to contend that overregulation is causing the United States to lose its dominance in the capital markets because a correlation seems to exist between the two. The U.S. has been slowly adding on layers of regulation to our capital markets, and the U.S. also has recently begun to

lose global market share. The United States has always had the most robust securities regulatory regime, ever since the adoption of the ‘33 and ‘34 Acts. It has also thrived as the most dominant capital market for seventy years. So it is puzzling that critics now argue that overregulation is killing our capital markets. Over-regulation is not killing the U.S. capital market; abuse of the regime is killing the markets.

Using other jurisdictions’ securities regimes as an analytical tool, it seems that one small tweak to U.S. class action rules could bring the U.S. into a better regulatory equilibrium, whereby private litigants adequately enforce securities violations and the capital markets are perceived as efficient by their corporate constituents: adopting the loser pays rule. The loser pays rule serves as an important gatekeeping function in most jurisdictions; it would certainly cut down on the number of “strike suits” in the U.S. At the same time, private enforcement would continue to flourish in the U.S. due to its robust statutory securities law and favorable class action litigation rules to obviate the collective action problem. The loser pays rule would merely force plaintiffs to put a little more skin in the game—a common regulatory approach to inherently require entities to restrain their own risk-taking behavior better. Currently, the U.S. regulatory regime is out of balance, with very high incentives for plaintiffs to bring lawsuits and very minimal costs. Adopting the loser pays rule would eliminate excessive plaintiffs’ benefits and raise costs to bring the cost-benefit analysis into greater equilibrium.

Critics may argue that adopting the loser pays rule would put us in the same position as other jurisdictions where plaintiffs have very few remedies. However, under a loser pays regime, commercial litigation funding could be introduced to shift some of the burden on parties with higher risk-reward appetites.

CONCLUSION

The Morrison decision has unequivocally shut down U.S. courts for any investor who purchases a security in a foreign market—whether or not that investor is American. The district courts have not hesitated to read the Morrison decision as broad as Justice Scalia intended it to be. Some open issues remain, however. In particular, unsponsored ADRs pose a difficult question because they will pass the Morrison test, but would result in the U.S. imposing liability on issuers even when they made no effort to issue securities in the U.S. The significance of the Morrison decision is that many of the investors shut out of U.S. courts will not have any equivalent claim in the issuer’s jurisdiction due to less reliance on the private right of
action and less favorable procedural mechanisms for group litigation. Many commentators justifiably criticize the American system as enabling plaintiffs’ lawyers to bring frivolous lawsuits in the hopes of getting a quick settlement. Most other countries are learning from the American model and adapting it to suit their own policy goals. The U.S. should not seek to replicate these jurisdictions’ models. It may be true that the United States is too friendly towards plaintiffs, but most other countries do not provide any sort of protection whatsoever. Remember, though, the SEC is currently studying the potential extraterritorial application of Section 10(b) for private rights of action, and *Morrison* may not be the last word. But, for now, BP and other large corporations stand to save potentially billions from this decision.