The Harvard Law School Forum on Corporate Governance and Financial Regulation
SUPPORTED BY: CSC CORPORATION SERVICE COMPANY

Back-to-Back Court of Appeals Decisions Apply *Morrison*

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In a one-two punch illustrating the continuing vigor of the presumption against extraterritoriality, the United States Court of Appeals for the Second Circuit, on consecutive days last week, issued important decisions applying *Morrison v. National Australia Bank* in two disparate but significant contexts under the federal securities laws. Last Thursday, in *Liu v. Siemens AG, No. 13-4385-cv (2d Cir. Aug. 14, 2014)*, the court rejected the extraterritorial application of the whistleblower anti-retaliation provision of the Dodd-Frank Act. And on the very next day, in *Parkcentral Global Hub Ltd. v. Porsche Automobil Holdings SE, No. 11-397-cv (2d Cir. Aug. 15, 2014)*, the court rejected the extraterritorial application of Rule 10b-5 to claims seeking recovery of losses on swap agreements that reference foreign securities.

Liu was brought by a Taiwanese resident employed by a Chinese subsidiary of Siemens, the German conglomerate. He claimed that his superiors in China and Germany had fired him after he complained about allegedly corrupt corporate activities that took place in Asia. He asserted that he was protected by the Dodd-Frank whistleblower anti-retaliation provision, 15 U.S.C. § 78u-6(h)(1), because Siemens had issued ADRs that are listed and traded on the New York Stock Exchange. By having "voluntarily elected" to list ADRs on a U.S. exchange, Liu argued, Siemens had "thereby voluntarily subjected itself to—and undertook to comply with—United States securities laws," including the Dodd-Frank whistleblower provision.

The Second Circuit emphatically rejected this argument. The court concluded that "this case is extraterritorial by any reasonable definition." The court observed that "the whistleblower, his employer, and the other entities involved in the alleged wrongdoing are all foreigners based abroad, and the whistleblowing, the alleged corrupt activity, and the retaliation all occurred abroad." And the court held that it made no difference that Siemens had issued ADRs for trading in the United States. That was merely "one slim connection to the United States," explained the

court—"a fleeting connection that cannot overcome the presumption against extraterritoriality." Indeed, the court added that, because the Australian corporate defendant in *Morrison* had itself issued ADRs, "*Morrison* thus decisively refutes Liu's contention that the United States securities laws apply extraterritorially to the actions abroad of any company that has issued United States-listed securities."

Parkcentral decided the appeal from a district court decision that we had previously written about here. The case involved the notorious 2008 short squeeze in shares of Volkswagen that traded on foreign exchanges. The plaintiffs were numerous American and foreign hedge funds that, through swap agreements, had taken massive synthetic short positions in VW stock. They bet billions that VW's stock would drop, and lost billions when VW's stock skyrocketed in the squeeze. The hedge funds claimed that Porsche had engineered the squeeze by issuing allegedly fraudulent statements disseminated worldwide and by making surreptitious purchases of VW call options. And they claimed that Porsche's conduct was actionable under Section 10(b) and Rule 10b-5 because their swap transactions were entered into in the United States, and thus were domestic transactions under *Morrison*. As our prior memo recounted, however, the district court dismissed the case on the ground that, because the "swaps were the functional equivalent of trading the underlying VW shares on a German exchange," they were in "economic reality … transactions conducted on foreign transactions and markets," and thus could not serve as the basis for a Section 10(b) claim under *Morrison*.

The Second Circuit affirmed, "although on the basis of different reasoning"—reasoning arguably broader than that of the district court. As the court of appeals found, it made no difference whether the hedge funds had entered into their swap transactions in the United States; even if their transactions were domestic, they did not state a claim. Questions of territorial scope do not simply "drop away" whenever a domestic securities transaction is at issue, explained the court; *Morrison* did not hold that the mere existence of "a domestic transaction would make § 10(b) applicable to allegedly fraudulent conduct anywhere in the world." To the contrary, the court held, *Morrison* makes clear that, although a domestic transaction was "a *necessary* element of a domestic § 10(b) claim," "such a transaction is not alone *sufficient* to state a properly domestic claim under the statute." (Emphasis added in part.)

The court of appeals went on to conclude that, whether or not the swaps were domestic, it was "clear that the claims in this case are so predominantly foreign as to be impermissibly extraterritorial." "Were this suit allowed to proceed as pleaded," the court explained, "it would permit the plaintiffs, by virtue of an agreement independent from the reference securities, to hale the European participants in the market for German stocks into U.S. courts and subject them to U.S. securities laws." As a result, the claims triggered an important consideration under *Morrison*:

"the application of § 10(b) to the defendants would so obviously implicate the incompatibility of U.S. and foreign laws that Congress could not have intended it *sub silentio*." The court thus held that "the relevant actions in this case are so predominantly German as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality."

This pair of decisions shows how powerful *Morrison* continues to be across a broad range of litigation under the federal securities laws. They make clear that claims do not necessarily survive *Morrison* just because a defendant company has issued domestic securities (*Liu*), or just because a plaintiff has engaged in a domestic securities transaction (*Parkcentral*).

These holdings will affect not only private civil litigation, but enforcement proceedings as well. As we have previously noted, the SEC's whistleblower program continues to be an important feature of the enforcement landscape. And despite *Morrison*, the SEC has recently brought insider-trading proceedings against foreign defendants who have extraterritorially traded foreign securities that track underlying domestic securities, proceedings premised on the theory that the foreign trading constituted fraud "in connection with" transactions in the domestic securities. Such defendants can be expected in the future to invoke *Liu* and *Parkcentral*, and to argue that that their conduct was so predominantly foreign that the attenuated domestic connections do not matter. Likewise unhelpful to the SEC is a footnote dictum in *Parkcentral* that casts further doubt on the efficacy of the erroneously drafted Dodd-Frank extraterritoriality enforcement amendment that we have discussed here and here. That provision, the court noted, only addresses the district courts' "jurisdiction to decide … case[s]," jurisdiction that *Morrison* held the courts already had—and does not address "the merits." As a result, the court observed, "[t]he import of the amendment is unclear."