Morrison at Four: A Survey of Its Impact on Securities Litigation[1]

"Perhaps no precedent has ever cut down so many claims of such great value so rapidly."[2] That is how one legal journalist aptly described the impact of the Supreme Court's landmark decision four years ago in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

Morrison is principally known for having categorically extinguished a costly and highly vexatious species of class action that had proliferated since the turn of the century—"foreign-cubed" or "f-cubed" lawsuits, so named because they involved foreign investors suing foreign companies under the federal securities laws to recover losses from trading those companies' securities on foreign exchanges.[3] But *Morrison* did more than merely scuttle these massive lawsuits; it overturned four decades of lower-court precedent, and, as reflected by the examples listed below, revolutionized the way the federal courts address the territorial scope of the federal securities laws.

The *Morrison* Decision

At issue in *Morrison* was how to interpret a statute's silence about its territorial scope. The statute was Section 10(b) of the Securities Exchange Act of 1934, the provision under which the catchall antifraud regulation, SEC Rule 10b–5, was promulgated. Section 10(b) says nothing about where it applies, and courts in the judicially freewheeling 1960s and 1970s took this silence as license to make what they acknowledged were naked "policy decision[s]" in favor of extraterritoriality.[4]

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The courts of appeals fashioned a "conduct test" for the extraterritorial application of Section 10(b), an expansive standard under which "conduct in the United States [that] was more than merely preparatory to [a foreign] fraud" was actionable, even if the deception and the losses occurred abroad.[5]

That amorphous test required judges to engage in a "dubious" effort to "discern[] a purely hypothetical legislative intent," to "divin[e] what 'Congress would have wished' if it had addressed the problem" by actually enacting a statute with extraterritorial reach.[6] This guesswork made the law largely indeterminate: even the conduct test's principal architect, Judge Henry Friendly, acknowledged that "the presence or absence of any single factor which was considered significant in other cases [was] not necessarily dispositive" in the next.[7] It also created a body of precedent that, as Judge Friendly also admitted, bore no relation to the statute: "[I]f 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."[8] The conduct test's "unpredictability" inexorably caused "the filing of foreign-cubed claims to increase," and inevitably "generate[d] excessive levels of conflict with other countries, as well as mounting uncertainty for litigants."[9]

The increasing confusion under the conduct test put the lower courts squarely on a collision course with the Supreme Court. For as the courts of appeals were expounding upon the securities law conduct test, the Supreme Court began increasingly cabining the territorial scope of federal law in cases addressing other statutes. In 1991, "to protect against unintended clashes between our laws and those of other nations," for example, the Court refused to give extraterritorial effect to Title VII of the Civil Rights Act of 1964.[10] In 2004, decrying the "legal imperialism" that extraterritorial application of the antitrust laws would bring about, a unanimous Court threw out what was in essence a foreign-cubed Sherman Act price-fixing case involving foreign plaintiffs suing foreign defendants for treble damages on foreign purchases.[11] And in 2007, declaring "that United States law governs domestically but does not rule the world," a lopsided 7-to-1 majority rejected an extraterritorial interpretation of the Patent Act.[12]

Morrison brought the Court's increased wariness of extraterritoriality face-to-face with a foreign-cubed case under the federal securities laws. Criticizing "the unpredictable and inconsistent … results of judicial-speculation-made law" under the conduct test, Justice Scalia's opinion for the Court attributed the confusion in the lower courts to their "disregard of the presumption against extraterritoriality," the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[13] "When a statute gives no clear indication of an extraterritorial application, it has none," explained the Court, and "[o]n its face, § 10(b) contains nothing to suggest it applies abroad."[14] Because "there is no affirmative indication in the [Securities] Exchange Act [of] 1934 that § 10(b) applies extraterritorially," the Court held, "we therefore conclude that it does not."[15]

The Court rejected the foreign plaintiffs' plea that they had alleged sufficient domestic conduct to warrant the application of Section 10(b). Even though they, their trading, and the corporate defendants were all foreign, the plaintiffs stressed that the defendants' allegedly deceptive conduct had originated in the United States. That did not matter: "[I]t is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States," the Court answered, as "the presumption against extraterritoriality would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."[16] The Court concluded that, at the very least, a domestic securities transaction had to take place before Section 10(b) could apply: "[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[17] Under the Exchange Act, the Court explained, "it is the foreign location of the transaction that establishes (or reflects the presumption of) the Act's inapplicability."[18] As a result, the Court held that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only 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."[19] Because "all aspects of the purchases complained of by [the foreign plaintiffs] occurred outside the United States," the Court held that the plaintiffs had failed to state a claim.[20]

"F=0": Foreign-Cubed and Foreign-Squared Securities Litigation After *Morrison*

By thus abandoning the conduct test in favor of a "clear," bright-line "transactional test" that turned on the existence of "purchases and sales of securities in the United States,"[21] *Morrison* became the Roberts Court decision that "most restrict[ed] the reach of the securities law from the status quo ante."[22] The Court's location-of-the-transaction test sounded the death knell for all foreign-cubed class actions. Indeed, in fairly short order, district judges dismissed all the remaining foreign-cubed securities class actions that had been pending in the federal courts—including the foreign-purchaser claims in the *Vivendi* case, in which a jury had awarded a verdict that plaintiffs' counsel had estimated to be worth more than $9 billion.[23] One commentator summed *Morrison* up with an equation: "F-cubed=0."[24] But *Morrison* went even further than that. Its categorical holding that foreign securities transactions fell beyond the scope of Section 10(b) meant that even claims involving domestic plaintiffs or domestic defendants would be barred if the transactions at issue took place abroad. "In other words, F=0."[25]

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DEFINING A DOMESTIC TRANSACTION

With so many massive cases on the line, securities class action plaintiffs and their counsel made two last-ditch attempts to get around *Morrison*. But district judges—and ultimately the U.S. Court of Appeals for the Second Circuit—"consistently" and "emphatically" rejected these efforts.[26] The first of plaintiffs' theories focused on *Morrison's* references to "domestic transactions," "domestic purchases and sales," and "purchase[s] and sale[s] … in the United States,"[27] and was a theory designed to preserve so-called "foreign-squared" claims—claims brought by American plaintiffs who bought foreign companies' stock on foreign exchanges. A purchase or sale of a security "qualifies as a 'domestic transaction' under *Morrison*," argued the plaintiffs, "whenever the purchaser or seller resides in the United States, even if the transaction takes place entirely over a foreign exchange."[28]

District judges made short work of this contention. They swiftly recognized that "to permit Section 10(b) claims 'based strictly on the American connection of the purchaser or seller … simply amounts to a restoration of the core element of the conduct test.'"[29] They understood that, "[b]y asking the Court to look to the location of 'the act of placing a buy order,' … [p]laintiffs are asking the Court to apply the conduct test specifically rejected in *Morrison*,"[30] that *Morrison's* reference to "'domestic transactions' … was intended to be a reference to the location *of the transaction*, not to the location of the purchaser," and that "the Supreme Court clearly sought to bar claims based on purchases and sales of foreign securities on foreign exchanges, even though the purchasers were American."[31] As a result, the district courts unanimously held that "[t]he mere act of electronically transmitting a purchase order from within the United States" is "insufficient to subject the purchase to the coverage of Section 10(b)."[32]

The Second Circuit has since upheld this conclusion. In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), the court of appeals provided "guidance as to what constitutes a domestic purchase or sale."[33] The court explained that because a purchase or sale involves the transfer of title to a security, it "can be understood to take place at the location in which title is transferred."[34] The court observed, however, that the Exchange Act defines purchases and sales to include not only the execution of the transactions themselves, but also "the act of entering into a binding contract to purchase or sell securities."[35] As a result, the court also concluded that the statutory "definitions suggest that [a] 'purchase' and 'sale' take place when the parties become bound to effectuate the transaction."[36] "Accordingly, to sufficiently allege a domestic securities transaction" in the Second Circuit, "a plaintiff must allege facts suggesting that irrevocable liability was incurred or title was transferred in the United States."[37]

The Second Circuit recently applied *Absolute Activist* to affirm the dismissal of foreign-squared claims in *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*, 752 F.3d 173 (2d Cir. 2014). In that case, the court of appeals addressed—"as an issue of first impression—whether the mere placement of a buy order in the United States for the purchase of foreign securities on a foreign exchange is sufficient to allege that a purchaser incurred irrevocable liability in the United States."[38] The domestic plaintiff in

that case argued that "when a purchaser is a U.S. entity, 'irrevocable liability' is not incurred when the security is purchased on a foreign exchange; rather[,] it is incurred in the U.S. where the buy order is placed."[39] The court of appeals rejected this contention. "As an initial matter," the court noted, *Absolute Activist* "made clear that 'a purchaser's residency does not affect where a transaction occurs.'"[40] *Absolute Activist* also made clear, the court of appeals observed, that "'a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States.'"[41] The court thus concluded that "the allegation that [a domestic plaintiff] placed a buy order in the United States that was then executed on a foreign exchange, standing alone, [does not] establish that [the plaintiff] incurred irrevocable liability in the United States."[42]

THE EFFECT OF A DOMESTIC LISTING

In *Morrison's* wake, foreign plaintiffs and their counsel made an even more ambitious effort to evade the Supreme Court's decision—an effort that, had it succeeded, would have stood *Morrison* on its head. This argument hinged on the Court's use of the word "listed"—specifically, the statement in *Morrison* that Section 10(b) of the Securities Exchange Act of 1934 applied "only 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."[43]

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Plaintiffs' lawyers took this to mean that, whenever a foreign issuer "listed" its home-country securities on an American exchange, Section 10(b) would cover transactions *anywhere in the world* in those securities.[44] As the government of the United Kingdom explained to the Second Circuit in an *amicus curiae* brief, this was an utterly "breathtaking argument"—an argument that "would [have] reverse[d] *Morrison* for many foreign companies," and "would [have] result[ed] in the extraterritorial application of Section 10(b) to purchases and sales of billions of shares on foreign securities exchanges."[45] And "[t]hat is because hundreds of large foreign companies—particularly the larger, multinational ones—cross-list their home-country 'ordinary' shares on American stock exchanges."[46] In particular, many foreign companies issue and list ADRs, American Depositary Receipts, for trading on a U.S. stock exchange, and to do that, they must both cross-list their underlying ordinary shares on the American exchange and register them with the SEC under the Exchange Act.[47] Some foreign issuers even issue what are called GRSs, Global Registered Shares, which trade directly on both American and foreign exchanges and are simultaneously cross-listed on those exchanges.[48]

Had the foreign plaintiffs' so-called "listed securities" reading of *Morrison* been accepted, moreover, it would have meant, rather perversely, that *Morrison* had made it easier for foreign-cubed plaintiffs to sue

than ever before. Before *Morrison*, many courts had *dismissed* foreign-cubed claims under the conduct test, and had done so in cases in which the foreign issuer had issued ADRs or GRSs and had thus "listed" its home-country shares on a U.S. exchange.[49] If the plaintiffs' "listed securities" theory were correct, those cases would have come out the other way after *Morrison*—and thus "[a] Supreme Court decision intended to sharply *restrict* extraterritoriality would … greatly expand it."[50] Even more bizarrely, the plaintiffs' reading of *Morrison* would have meant that "the Supreme Court reached the wrong result."[51] For the corporate defendant in *Morrison*, National Australia Bank, had *itself* listed ADRs—and thus its ordinary shares—on the New York Stock Exchange.[52]

Not surprisingly, district courts uniformly rejected the foreign plaintiffs' "listed securities" construction of *Morrison*. As one court put it, the plaintiffs' argument "present[ed] a selective and overly technical reading of *Morrison* that ignores the larger point of the decision," which, when "read in total context compel[s] the opposite result."[53] "The idea that a foreign company is subject to U.S. securities law everywhere [in the world] merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*," and is premised upon plaintiffs' "seiz[ing] on specific language [in *Morrison*] without at all considering, or properly presenting, the context," wrote another court.[54] One judge observed that, under the plaintiffs' reading of *Morrison*, "the extraterritorial reach of the Exchange Act would be even broader than it had been under the 'conduct' and 'effects' tests."[55] As the *Vivendi* court, in overturning the multibillion-dollar verdict rendered there, summed it up: the isolated language in *Morrison* "cannot carry the freight that plaintiffs ask it to bear."[56]

The Second Circuit agreed. In *City of Pontiac*, the court of appeals "addressed the viability of the so-called 'listing theory'" to foreign-squared and foreign-cubed claims in which the issuer, UBS, had issued GRSs; the company's ordinary shares were listed for trading both on foreign exchanges and the New York Stock Exchange.[57] The court concluded that, although some language in *Morrison*, "taken in isolation, supports plaintiffs' view, the 'listing theory' is irreconcilable with *Morrison* read as a whole."[58] The court relied on the fact that "*Morrison* emphasized that 'the focus of the Exchange Act is … upon *purchases and sales* of securities in the United States,'"[59] and that the Supreme Court thus "evince[d] a concern with 'the location of the securities transaction and not the location where the security may be dually listed.'"[60] The court of appeals also noted that, in *Morrison*, National Australia Bank had itself issued ADRs, and, "most tellingly," that the Supreme Court had expressly rejected the Second Circuit's "prior holding [under the

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effects test] that 'the Exchange Act applies to transactions regarding stocks traded in the United States which are effected outside the United States.'"[61] As a result, the Second Circuit concluded that "*Morrison* does not support the application of § 10(b) of the Exchange Act to claims by a foreign purchaser of foreign-issued shares on a foreign exchange simply because those shares are also listed on a domestic exchange."[62]

Derivative Securities: Is a Domestic Transaction Sufficient, or Merely Necessary, for Liability?

In a very recent decision, *Parkcentral Global Hub Ltd. v. Porsche Automobil Holdings SE*, No. 11–397–cv (2d Cir. Aug. 15, 2014), the Second Circuit addressed a factually unusual claim that had significant theoretical ramifications for how *Morrison* and the presumption against extraterritoriality apply to Section 10(b). The case involved whether issuers could be held liable for transactions in derivative securities they did not create. The ultimate doctrinal question was whether or not, under *Morrison*, a domestic transaction was sufficient, as opposed to simply necessary, for liability to be imposed.[63] The answer was no—that "a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable."[64]

At issue was the notorious short squeeze in the ordinary shares of Volkswagen that took place in 2008. VW's ordinary shares traded only on the Frankfurt Stock Exchange and other foreign exchanges;[65] the company had also issued ADRs over the counter in the United States.[66] The plaintiffs were various American and foreign hedge funds that had taken massive synthetic short positions in VW stock. By entering into swap agreements referencing that stock, they bet billions that the stock would drop, and lost billions when, instead, it skyrocketed to unprecedented levels in the squeeze.[67] The hedge funds claimed that Porsche had engineered the squeeze by issuing allegedly fraudulent statements that circulated throughout the world, and by making surreptitious purchases of VW call options.[68] And they claimed that Porsche's conduct was actionable under Section 10(b) and Rule 10b–5 because "they signed confirmations for securities-based swap agreements in New York, and therefore engaged in 'domestic transactions in other securities'" under *Morrison*.[69] The district court rejected this argument. It held that the "swaps were the functional equivalent of trading the underlying VW shares on a German exchange," were in "economic reality … 'transactions conducted upon foreign exchanges and markets,'" and thus could not serve as the basis for a Section 10(b) claim under *Morrison*.[70]

The Second Circuit affirmed, "although on the basis of different reasoning"[71]—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."[72] To the contrary, the court held,

> *"Questions of territorial scope do not simply 'drop away' whenever a domestic securities transaction is at issue."*

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."[73]

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."[74] "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."[75] 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*."[76] 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."[77]

Applications of *Morrison* to Other Provisions of the Federal Securities Laws

THE SECURITIES ACT OF 1933

Morrison's extensive progeny includes decisions applying the presumption against extraterritoriality to provisions of the federal securities laws other than Section 10(b) and Rule 10b–5. Most notably, district courts have consistently held that various liability provisions of the Securities Act of 1933 do not apply extraterritorially.[78] In so holding, the courts have relied on a passage in *Morrison* itself that observed that "[t]he same focus on domestic transactions is evident in the Securities Act of 1933, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading."[79] As a result, the courts have held that *Morrison's* location-of-the-transaction test applies with full force to the Securities Act's principal private civil liability provisions, Sections 11 and 12(a)(2), which authorize damages for false or misleading statements in registration statements and prospectuses.[80] In addition, the court in one case has applied *Morrison* to Section 17(a) of the Securities Act, an SEC-enforced provision prohibiting fraud in "'the offer or

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sale of any security,'" and has concluded that Section 17(a) applies only when either an offer or a sale occurs in the United States.[81]

WHISTLEBLOWER ANTI-RETALIATION PROVISIONS

Morrison has also been held to bar the extraterritorial application of the broad whistleblower anti-retaliation provisions of the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

In *Villanueva v. Core Laboratories NV*, No. 09–108 (Dep't of Labor Admin. Rev. Bd. Dec. 22, 2011), an administrative appellate panel of the U.S. Department of Labor applied *Morrison* to Section 806 of Sarbanes-Oxley, a provision that broadly prohibits companies from retaliating against employee whistleblowers who report, among other things, possible securities fraud, and gives such employees the right to file administrative complaints.[82] Reaching a result that accorded with pre-*Morrison* precedent,[83] the administrative review board in *Villanueva* concluded that, under *Morrison*, "there is certainly no indication" that Section 806 was intended to apply extraterritorially.[84] The board accordingly dismissed the claim, which had been filed by a Colombian manager who asserted that he had been fired for uncovering an alleged scheme by his employer, a Colombian subsidiary of a Dutch company, to evade Colombian taxes.[85] It made no difference that the Dutch parent company's shares were listed and traded on the New York Stock Exchange and were registered with the SEC.[86]

To similar effect is the Second Circuit's recent decision in *Liu v. Siemens AG*, No. 13–4385–cv (2d Cir. Aug. 14, 2014). In that case, the court of appeals rejected the extraterritorial application of the whistleblower anti-retaliation provision of the Dodd-Frank Act, which prohibits employers from retaliating against employees who make disclosures that are required or protected by Sarbanes-Oxley, the Exchange Act, or the SEC's rules.[87]

The plaintiff in *Liu* was 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.[88] He asserted that he was protected by the Dodd-Frank whistleblower provision 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.[89]

The Second Circuit emphatically rejected this argument. It concluded that "this case is extraterritorial by any reasonable definition."[90] It 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."[91] 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—"the sort of 'fleeting' connection that 'cannot overcome the presumption against extraterritoriality.'"[92] 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."[93]

Morrison's Applicability to Criminal and SEC Enforcement Cases

THE PRESUMPTION'S APPLICABILITY IN CRIMINAL CASES

Finally, *Morrison* has generated some interesting litigation about its applicability in the criminal and SEC enforcement context. In *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013), a criminal prosecution under Section 10(b) and Rule 10b–5, federal prosecutors took the surprising position that *Morrison* did not apply, even though *Morrison* addressed the substantive reach of those regulatory prohibitions, and did not constrain merely the scope of implied civil remedy under those provisions. The government sweepingly argued in *Vilar* that, under *United States v. Bowman*, 260 U.S. 94 (1922), the presumption against extraterritoriality, and *Morrison's* domestic-transaction requirement, applied only in civil cases.[94]

> *"Finally,* Morrison *has generated some interesting litigation about its applicability in the criminal and SEC enforcement context."*

The Second Circuit resoundingly rejected the government's argument—and found it to be essentially frivolous. The court of appeals held that "no plausible interpretation of *Bowman* supports [the government's] broad proposition," and that, indeed, "fairly read, *Bowman* stands for quite the opposite."[95] *Bowman* made clear, the Second Circuit explained, that "the presumption against extraterritoriality *does* apply to criminal statutes," as the Supreme Court's 1922 decision had expressly stated that, in addressing "'[c]rimes against private individuals or their property, … it is natural for Congress to say … in the statute'" whether "'punishment of [such crimes] is to be extended to include those committed outside of the strict territorial jurisdiction,'" and that Congress's "'failure to do so will negative the purpose of Congress in this regard.'"[96] The only exception recognized in *Bowman* to the presumption against extraterritoriality was "in situations where the law at issue is aimed at protecting 'the right of the government to defend *itself*.'"[97] Because Section 10(b)'s "purpose is to prohibit '[c]rimes against private individuals or their property,' which *Bowman* teaches is exactly the sort of statutory provision for which the presumption against extraterritoriality does apply," the court of appeals held that *Morrison* controlled.[98]

The court of appeals also found the government's position to be untenable for another reason that was quite "simple: The presumption against extraterritoriality is a method of interpreting a statute, which has the same meaning in every case," and "is not a rule to be applied to the specific facts of each case."[99] In other words, a statute "either applies extraterritorially or it does not."[100] "[T]o permit the government to

punish extraterritorial conduct when bringing criminal charges under Section 10(b)," the court observed, "'would establish … the dangerous principle that judges can give the same statutory text different meanings in different cases.'"[101]

THE MISDRAFTED DODD-FRANK EXTRATERRITORIALITY AMENDMENT

Another important question on *Morrison's* applicability beyond private civil litigation is raised by an ineptly and inaptly drafted provision in the Dodd-Frank Act, a statute enacted less than a month after *Morrison* came down. As one of the law's principal drafters explained on the House floor, that provision, Section 929P(b),[102] seemingly sought to "make clear that in actions and proceedings brought by the SEC or the Justice Department, [the anti-fraud] provisions of the Securities Act, the Exchange Act, and the Investment Advisers Act may have extraterritorial application."[103]

But as numerous commentators began pointing out within hours of the statute's enactment, the provision's text does no such thing.[104] As actually worded, Section 929P(b) merely amended the *subject-matter jurisdiction* provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940, to state that "the district courts of the United States … *shall have jurisdiction of an action or proceeding* brought or instituted by the [Securities and Exchange] Commission or the United States" in cases alleging certain violations involving sufficient domestic conduct or effects.[105] The amendment does not expand the territorial scope of any substantive regulatory provision.

As a result, if the drafters' intent was to overturn *Morrison* in criminal and enforcement cases, then they made a serious, and probably fatal, error. In *Morrison*, the Supreme Court reiterated the well-established principle that the territorial scope of a federal law presents not a question of a court's "subject-matter jurisdiction," of a "tribunal's power to hear a case," but rather "an issue quite separate"—the substantive "merits question" of "what conduct [the law] reaches [and] prohibits," and "whether the allegations the plaintiff makes entitle him to relief."[106] In fact, the Supreme Court held that the Exchange Act's broad jurisdictional provision already conferred jurisdiction on the district court "to adjudicate the question whether § 10(b) applie[d] to [the defendants'] conduct" in *Morrison*.[107] Accordingly, as the Second Circuit very recently observed in a brief footnote dictum in *Parkcentral*, the Dodd-Frank provision's reference to jurisdiction means that "the import of this [provision] is unclear, … because *Morrison* itself explicitly held that the [c]ourt there had jurisdiction to decide the case under the [jurisdictional grant] then in force, even if the presumption against

> *"If the drafters' intent was to overturn* Morrison *in criminal and enforcement cases, then they made a serious, and probably fatal, error."*

extraterritoriality meant that the plaintiffs failed on the merits."[108] In short, if taken by its express terms, Section 929P(b) does nothing at all.

Only one decision has thus far examined Section 929P(b) in any depth, and it makes clear that, indeed, the provision is unlikely to have any practical effect. In *SEC v. A Chicago Convention Center, LLC*, 961 F. Supp. 2d 905 (N.D. Ill. 2013), the court addressed various arguments made by the SEC in favor of conferring substantive effect upon Section 929P(b). The court cast serious doubt as to each of those arguments. The court first explained that the "plain language of Section 929P(b) seems clear on its face," and that the text's "plain meaning" indicated that "Section 929P(b) is a jurisdictional rather than substantive provision."[109] The court thus observed that there was a "conflict between th[is] language as drafted and Congress's possible intent" to partially overturn *Morrison*.[110]

The SEC argued that the court should not "interpret[] Section 929P(b) as purely jurisdictional based on its plain language," because that "may render the entire provision superfluous."[111] But the district court questioned the propriety of disregarding statutory language that "appears unambiguous on its face" merely "to avoid superfluity," and noted that the Supreme Court has stated "that the 'canon against surplusage is not an absolute rule.'"[112] The court also noted that the SEC's argument "may render meaningless Congress's use of the word 'jurisdiction' in Section 929P(b)," in violation of the rule that "the 'canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute.'"[113] Nor did the court find convincing the SEC's reliance on legislative history. The court observed that judges are not permitted to "ignore the unambiguous language of the statute in order to further Congress's expressed purpose in enacting the statute."[114] "It is clear," the court observed, "that legislative history 'does not permit a judge to turn a clear text on its head,'"[115]—and that, as "[t]he Supreme Court has stated," "'it is beyond [the judiciary's] province to rescue Congress from its drafting errors.'"[116]

In the end, the court managed to avoid ruling definitively on the effect of Section 929P(b): it found that, under *Absolute Activist*, the SEC sufficiently alleged that the defendants had engaged in securities transactions in the United States.[117] Nonetheless, the thoughtful and thorough opinion in *Chicago Convention Center* underscores the serious difficulties that the SEC and the DOJ face in trying to use Section 929P(b) to get around *Morrison*.[118]

Conclusion

As this survey of the post-*Morrison* securities litigation landscape illustrates, the Supreme Court's decision four years ago transformed the way the courts look at transnational securities litigation. Judges no longer "disregard … the presumption against extraterritoriality," or seek to "resolv[e] matters of policy" by conferring extraterritorial reach upon provisions whose text provides none. "Rather than guess[ing] anew in each case" about "what Congress would have wanted," they now "apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[119] As a result, cases that the courts found

"vexing"[120]—ones involving clearly extraterritorial claims, such as the once-burgeoning foreign-cubed and foreign-squared claims that constituted the bulk of transnational securities cases before *Morrison*—have become easy. They must be dismissed, and, indeed, for that reason, they are no longer even brought.

Now that the foreign-cubed and foreign-squared cases are gone, the courts must face the harder cases, the marginal cases, cases in which the question of whether the proposed application of law is extraterritorial "is not self-evidently dispositive,"[121] like the *Parkcentral* case, and cases that turn on factual disputes about where particular events occurred, like *Absolute Activist*.

Those cases will pose interesting and difficult questions of line-drawing and fact-finding, but their difficulty should not call into question what the Supreme Court called "the wisdom of the presumption against extraterritoriality."[122] For the point of *Morrison* was not to adopt a "bright-line rule[]"[123] for the sake of having a bright-line rule,[124] but rather to reestablish the traditional understanding that "Congress ordinarily legislates with respect to domestic, not foreign, matters,"[125] and to fashion a "test that will avoid" the "interference with foreign … regulation that application of [U.S. law] would produce."[126] That *Morrison* surely accomplished.

Endnotes

1 George T. Conway III is a partner at Wachtell, Lipton, Rosen & Katz. He briefed and argued *Morrison* v. *National Australia Bank* for the respondents in the Supreme Court.

2 Michael D. Goldhaber, *The Short Arm of the (U.S.) Law*, Corp. Couns., Mar. 2012, at 28.

3 *See Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010); *see also*, *e.g.*, Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 62, 66–67 (2007); Andrew Longstreth, *Coming to America*, Am. Law., Nov. 2006, at S53; Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, Wall St. J., Sept. 2, 2005, at A1.

4 *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) ("[T]his case … calls for a policy decision …. By finding jurisdiction here, we may encourage other nations to take … reciprocal action against fraudulent schemes aimed at the United States from foreign sources."); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (similar); *see also* George T. Conway III, *U.S. Supreme Court Rejects "Foreign Cubed" Class Actions*, Harv. L. Sch. Forum on Corporate Governance & Fin. Regulation (June 25, 2010, 9:23 am), http://bit.ly/1pfPlPv.

5 *Morrison*, 547 F.3d at 172 (internal quotation marks and citation omitted).

6 *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30, 32 (D.C. Cir. 1987) (Bork, J.; quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975)).

7 *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980) (internal quotation marks and citation omitted); *see also*, *e.g.*, *In re Alstom Sec. Litig.*, 406 F. Supp. 2d 346, 373 (S.D.N.Y. 2005) (describing conduct test as "a Hydra of sorts," not a "cohesive doctrine," but rather a set of "potentially incompatible statements of applicable rules").

8 *Bersch*, 519 F.2d at 993.

9 Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 67 (2007).

10 *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248–49 (1991) ("*Aramco*").

11 *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 161–75 (2004).

12 *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 447–59 (2007).

13 *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255, 260–61 (2010) (quoting *Aramco*, 499 U.S. at 248 (internal quotation marks and citation omitted)).

14 *Id.* at 255, 262.

15 *Id.* at 265.

16 *Id.* at 266.

17 *Id.*

18 *Id.* at 268.

19 *Id.* at 273.

20 *Id.*

21 *Id.* at 266, 269.

22 John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, at 7 (July 21, 2014), 57 Ariz. L. Rev. (forthcoming), *available at* http://bit.ly/1qynUwB.

23 *In re Vivendi Univ., S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 525–34 (S.D.N.Y. 2011); *see* Nathan Koppel, *Viva Vivendi! New York Plaintiffs' Firms Score Huge Verdict*, Wall St. J. (Jan. 29, 2010, 5:31 pm), http://on.wsj.com/VMJAfU.

24 Sarah L. Cave, *F–Cubed=0: Supreme Court's Decision in Morrison v. National Australia Bank*, N.Y.L.J., July 7, 2010, http://bit.ly/Feq0.

25 George T. Conway III, *Postscript to* Morrison v. National Australia Bank, N.Y.L.J., Oct. 14, 2010, http://bit.ly/1q5Pkwk.

26 George T. Conway III, *Courts Repudiate Attempts to Find Loopholes in Supreme Court Foreign Cubed Decision*, Harv. L. Sch. Forum on Corp. Governance & Fin. Reg. (Mar. 10, 2011, 9:09 am), http://bit.ly/1p0hdYE.

27 *Morrison*, 561 U.S. at 266, 267, 268, 273; *see also id.* at 269–70 ("purchase or sale … made in the United States").

28 *Vivendi*, 765 F. Supp. 2d at 532.

29 *Id.* (quoting *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 624 (S.D.N.Y. 2010)).

30 *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6 (Sept. 29, 2010).

31 *Vivendi*, 765 F. Supp. 2d at 532.

32 *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010); *see also, e.g., In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 473–74 (S.D.N.Y. 2013); *Phelps v. Stomber*, 883 F. Supp. 2d 188, 206–07 (D.D.C. 2012); *In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 794–95 (S.D. Tex. 2012); *In re Royal Bank of Scotland Group plc Sec. Litig.*, 765 F. Supp. 2d 327, 337 (S.D.N.Y. 2011); *In re UBS Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2011 WL 4059356, at *7–*8 (S.D.N.Y. Sept. 13, 2011), *aff'd sub nom. City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*, 752 F.3d 173 (2d Cir. 2014); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472 (2010); *Stackhouse v. Toyota Motor Co.*, No. CV 10–0922 DSF (AJWx), 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010).

33 *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012).

34 *Id.* at 68.

35 *Id.* at 67; *see* 15 U.S.C. § 78c(a)(13), (a)(14).

36 677 F.3d at 67.

37 *Id.* at 68.

38 *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*, 752 F.3d 173, 181 (2d Cir. 2014).

39 *Id.* (internal quotation marks and alterations omitted).

40 *Id.* (quoting *Absolute Activist*, 677 F.3d at 69).

41 *Id.* at 181 n.32 (quoting *Absolute Activist*, 677 F.3d at 69).

42 *Id.* at 181.

43 *Morrison*, 561 U.S. at 273 (emphasis added); *see also id.* at 267 ("transactions in securities listed on domestic exchanges"), 270 ("a security listed on a domestic exchange").

44 *See* Conway, *Courts Repudiate Attempts to Find Loopholes in Supreme Court Foreign Cubed Decision*, *supra* note 25.

45 Brief for the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Defendants-Appellees and Affirmance at 4–5, *City of Pontiac* (No. 12–4335–cv), 2013 WL 2167229, at *4–*5 ("U.K. *Amicus* Br."), *available at* http://bit.ly/1vxBiW9.

46 *Id.* at 5.

47 *Id.*; *see, e.g., Vivendi*, 765 F. Supp. 2d at 528–29; NYSE Amex Sample Listing Application for American Depositary Receipts, http://bit.ly/12QFaRX; Edward F. Greene, *et al.*, U.S. Regulation of the Int'l Secs. and Derivatives Mkts. § 2.03[2][b][i], at 2–33 n.87 (10th ed. 2012) (issuers "required to list the shares underlying listed ADRs"); American Depositary Receipts, Securities Act Release No. 33–6894, 1991 WL 294145, at *11 n.66 (May 23, 1991) ("both the ADRs and the deposited securities are required to be registered under Section 12(b) of the Exchange Act").

48 U.K. *Amicus* Br. 5; *see, e.g.*, Kenneth B. Davis, Jr., *The SEC and Foreign Companies—A Balance of Competing Interests*, 71 U. Pitt. L. Rev. 457, 469 (2010).

49 *See* U.K. *Amicus* Br. 6–7 & Appendix A.

50 *Id.* at 8.

51 *Id.* (emphasis omitted).

52 *See Morrison*, 561 U.S. at 251 ("There are listed on the New York Stock Exchange … National's American Depositary Receipts (ADRs), which represent the right to receive a specified number of National's Ordinary Shares"); Supplemental Joint Appendix at 58, *Morrison* (No. 08–1191), *reproduced in* U.K. *Amicus* Br., Appendix B.

53 *Alstom*, 741 F. Supp. 2d at 472.

54 *Royal Bank of Scotland*, 765 F. Supp. 2d at 336.

55 *UBS*, 2011 WL 4059356, at *5.

56 *Vivendi*, 765 F. Supp. 2d at 531; *see also*, *e.g.*, *In re Smart Techs. S'holder Litig.*, 295 F.R.D. 50, 57 n.11 (2013); *Satyam*, 915 F. Supp. 2d at 475; *BP*, 843 F. Supp. 2d at 795–96; *In re Infineon Tech. AG Sec. Litig.*, No. C 04–04156 JW, 2011 WL 7121006, at *3 (N.D. Cal. Mar. 17, 2011); *Société Générale*, 2010 WL 3910286, at *5–*6.

57 *City of Pontiac*, 752 F.3d at 177, 179–80 & n.21.

58 *Id.* at 180.

59 *Id.* (quoting *Morrison*, 561 U.S. at 266).

60 *Id.* (quoting *UBS*, 2011 WL 4059356, at *5).

61 *Id.* (quoting *Morrison*, 561 U.S. at 256 (quoting *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *modified on other grounds en banc*, 405 F.2d 215 (2d Cir. 1968)); internal quotation marks omitted).

62 *Id.* at 181.

63 *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, No. 11–397–cv, 2014 WL 3973877, at *1, *14 (2d Cir. Aug. 15, 2014) (per curiam). The discussion of this case is taken from John F. Savarese & George T. Conway III, *Back-to-Back Court of Appeals Decisions Apply* Morrison, Harv. L. Sch. Forum on Corp. Governance & Fin. Reg. (Aug. 19, 2014, 4:08 pm), http://bit.ly/1tInW8m.

64 *Parkcentral*, 2014 WL 3973877, at *15.

65 *Id.* at *7.

66 *Elliott Assocs. v. Porsche Auto. Holding SE*, 759 F. Supp. 2d 469, 472 (S.D.N.Y. 2010), *aff'd sub nom. Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, No. 11–397–cv, 2014 WL 3973877 (2d Cir. Aug. 15, 2014).

67 *Parkcentral*, 2014 WL 3973877, at *5.

68 *Id.* at *3–*4.

69 *Elliott*, 759 F. Supp. 2d at 474 (quoting *Morrison*, 561 U.S. at 267).

70 *Id.* at 475–76.

71 *Parkcentral*, 2014 WL 3973877, at *2.

72 *Id.* at *14.

73 *Id.* (emphasis added in part).

74 *Id.* at *15.

75 *Id.*

76 *Id.* (citing *Morrison*, 561 U.S. at 269).

77 *Id.*

78 *See*, *e.g.*, *Smart Techs.*, 295 F.R.D. at 55–57; *Satyam*, 915 F. Supp. 2d at 473 n.14, 485; *SEC v. ICP Asset Mgmt., LLC*, No. 10 Civ. 4791, 2012 WL 2359830, at *2 (S.D.N.Y. June 21, 2012); *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164–65 (S.D.N.Y. 2011); *In re Vivendi Universal, S.A. Sec. Litig.*, 842 F. Supp. 2d 522, 528–29 (S.D.N.Y. 2012); *Royal Bank of Scotland*, 765 F. Supp. 2d at 338–39.

79 561 U.S. at 268 (citation omitted), *quoted in Smart Techs.*, 295 F.R.D. at 55; *see Vivendi*, 842 F. Supp. 2d at 529; *Goldman Sachs*, 790 F. Supp. 2d at 164; *Royal Bank of Scotland*, 765 F. Supp. 2d at 338 n.11.

80 *See*, *e.g.*, *Smart Techs.*, 295 F.R.D. at 55–57 (Sections 11 and 12(a)(2)); *Vivendi*, 842 F. Supp. 2d at 528–29 (same); *Royal Bank of Scotland*, 765 F. Supp. 2d at 338–39 (Section 11).

81 *SEC v. Tourre*, No. 10 Civ. 3229 (KBF), 2013 WL 2407172, at *6–*10 (S.D.N.Y. June 4, 2013) (quoting 15 U.S.C. § 77q(a)); *Goldman Sachs*, 790 F. Supp. 2d at 164–65.

82 *Villanueva v. Core Labs. NV*, No. 09–108, 2011 WL 7021145 (Dep't of Labor Admin. Rev. Bd. Dec. 22, 2011), *aff'd on other grounds sub nom. Villanueva v. United States Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014). For a more extensive discussion of this case, see John F. Savarese & George T. Conway III, *Applying Extraterritoriality:* Morrison *and Sarbanes-Oxley Civil Whistleblower Claims*, Sec. Litig. Rep., May 2012, at 1.

83 *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7–18 (1st Cir. 2006).

84 *Villanueva*, 2011 WL 7021145, at *8.

85 *Id.* at *2–*3.

86 *Id.*

87 *Liu v. Siemens AG*, No. 13–4385–cv, 2014 WL 3953672 (2d Cir. Aug. 14, 2014). The discussion of this case is adopted from Savarese & Conway, *Back-to-Back Court of Appeals Decisions Apply* Morrison, *supra* note 62.

88 *Liu*, 2014 WL 3953672, at *1.

89 *Id.* at *3.

90 *Id.*

91 *Id.*

92 *Id.* at *3, *4 (quoting *Morrison*, 561 U.S. at 263).

93 *Id.* at *3.

94 *See United States v. Vilar*, 729 F.3d 62, 72–76 (2d Cir. 2013).

95 *Id.* at 72.

96 *Id.* at 72–73 (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922)).

97 *Id.* at 73 (emphasis added; quoting *Bowman*, 260 U.S. at 98).

98 *Id.* at 74 (quoting *Bowman*, 260 U.S. at 98).

99 *Id.*

100 *Id.*

101 *Id.* at 74–75 (quoting *Clark v. Martinez*, 543 U.S. 371, 386 (2005)).

102 Pub. L. 111–203, § 929P(b), 124 Stat. 1376, 1864–66 (2010).

103 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

104 Wachtell, Lipton, Rosen & Katz, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged* (July 21, 2010, 1:24 pm), http://bit.ly/929PbM1; Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 Harv. Bus. L. Rev. 195, 207–08 (2011); A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. Corp. L. 105, 142 (2011); Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 Ohio St. L.J. 537, 571 (2011); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 Rev. Litig. 313, 346–47 (2012); Milosz Morgut, *Extraterritorial Application of U.S. Securities Law*, 2012 Eur. Bus. L. Rev. 547, 552–53 (2012); Wolf-Georg Ringe & Alexander Hellgardt, *The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective*, 31 Oxford J. Leg. Stud. 23, 41 (2011); Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. Rev. 535, 546 & n.74 (2012); Andrew Rocks, *Whoops! The Imminent Reconciliation of U.S. Securities Laws with International Comity after* Morrison v. National Australia Bank *and the Drafting Error in the Dodd-Frank Act*, 56 Vill. L. Rev. 163, 188–95 (2011); Meny Elgadeh, Morrison v. National Australia Bank: *Life After Dodd-Frank*, 16 Fordham J. Corp. & Fin. L. 573, 593–96 (2011); John Chambers, Note, *Extraterritorial Private Rights of Action: Redefining the Transactional Test in* Morrison v. National Australia Bank, 31 Rev. Banking & Fin. L. 411, 429 (Fall 2011); Nidhi M. Geevarghese, *A Shocking Loss of Investor Protection: the Implications of* Morrison v. National Australia Bank, 6 Brook. J. Corp. Fin. & Com. L. 235, 250 (Fall 2011); Richard A. Grossman, *The Trouble with Dicta*: Morrison v. National Australia Bank *and the Securities Act*, 41 Sec. Reg. L.J., no. 4, 2013, at 381 n.66; Paul R. Berger *et al.*, *The* Vilar *Decision: Second Circuit Curtails the Territorial Reach of Criminal Liability Under Section 10(b)*, 17 Wallstreetlawyer.com: Securities in the Electronic Age, no. 10, 2013, at 15; Milson C. Yu, *LIBOR Integrity and Holistic Domestic Enforcement*, 98 Cornell L. Rev. 1271, 1298–99 (2013); Aaron J. Schindel & Daniel L. Saperstein, *The Multinational Employer in the Age of the Whistleblower*, 24 Int'l Law Practicum 132, 135–36 (2011).

105 Pub. L. 111–203, § 929P(b) (emphasis added).

106 *Morrison*, 561 U.S. at 253, 254.

107 *Id.* at 254.

108 *Parkcentral*, 2014 WL 3973877, at *10 n.11.

109 *SEC v. A Chicago Convention Ctr.*, LLC, 961 F. Supp. 2d 905, 912–13 (N.D. Ill. 2013).

110 *Id.* at 912.

111 *Id.* at 913.

112 *Id.* at 913 (quoting *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013)).

113 *Id.* at 914 (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011)).

114 *Id.* at 915 (internal quotation marks and citation omitted).

115 *Id.* at 915 (internal quotation marks and citation omitted).

116 *Id.* at 916 (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004)).

117 *Id.* at 917–18 (citing *Absolute Activist*, 677 F.3d at 67, 68).

118 The Section 929P(b) drafting blunder makes little practical difference to the DOJ, however, because the offenses of mail and wire fraud require only a domestic mailing or wiring made with fraudulent intent. If a domestic mailing or wiring occurs, it does not matter whether a related fraudulent securities transaction is domestic or foreign (or even occurs); the deed, the domestic crime, is done. *See*, *e.g.*, *United States* v. *Mandell*, 752 F.3d 544, 549–50 (2d Cir. 2014) (discussing *Pasquantino* v. *United States*, 544 U.S. 349, 356–57 (2005)).

119 *Morrison*, 561 U.S. at 261.

120 *Morrison*, 547 F.3d at 168.

121 *Morrison*, 561 U.S. at 266.

122 *Id.* at 261.

123 *Id.* at 285 (Stevens, J., concurring in judgment).

124 "Indeed, reading *Morrison* to permit only bright-line rules would likely undermine its principal holding that § 10(b) has no extraterritorial application …." *Parkcentral*, 2014 WL 3973877, at *17 (Leval, J., concurring).

125 *Id.* at 255.

126 *Id.* at 269.