

Applying U.S. Supreme Court Decision Rejecting “Foreign Cubed” Class Actions, Federal District Court Dismisses “Foreign Squared” Securities Fraud Claims

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In the first significant opinion applying the United States Supreme Court’s decision in *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (U.S. June 24, 2010), the United States District Court for the Southern District of New York ruled yesterday¹ that Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 do *not* apply to “foreign squared” claims—claims asserted by American investors who have purchased securities of foreign issuers on foreign exchanges. *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (S.D.N.Y. July 27, 2010).

As we reported in our memo of June 24, the Supreme Court in *National Australia Bank* swept away four decades of lower-court case law—the so-called “conduct” and “effects” tests—and categorically held that Section 10(b) and Rule 10b-5 do not apply extraterritorially. Despite the breadth of the Supreme Court’s reasoning, plaintiffs’ lawyers, in the few short weeks since the decision came down, have urged district judges to construe it narrowly. In particular, noting that *National Australia Bank* involved “foreign cubed” claims—those of *foreign* investors against a foreign issuer to recover losses from purchases on a foreign securities exchange—plaintiffs’ lawyers have contended that *National Australia Bank* does not bar claims of *American* investors who similarly purchase securities abroad.

In his strong and cogent opinion yesterday in *Credit Suisse*, Judge Victor Marrero decisively rejected this contention, and made clear that Section 10(b) and Rule 10b-5 do not apply to transactions on foreign exchanges, regardless of where the plaintiff hails from. The district court observed that *National Australia Bank* cannot “be squeezed, as in spandex, only into the factual straightjacket of its holding,” and concluded that the plaintiffs’ argument was simply a meritless effort to “exhume and revive” the “dead letter” doctrine abrogated in *National Australia Bank*, an effort that involved “cosmetic touch-ups [that] will not give the corpse

¹ This memo was originally released July 28, 2010.

a new life.” In the district court’s view, *National Australia Bank* left open no “back doors, loopholes or wiggle room” and “manifested an intent to weed the [former] doctrine at its roots and replace it with a new bright-line transactional rule” that categorically bars claims based upon transactions executed abroad. “Read as a whole,” the district court concluded, the majority and concurring opinions in *National Australia Bank* make clear that under the Supreme Court’s “new test §10(b) would not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the transaction occurred in the United States.”

The district court’s holding in *Credit Suisse* follows inexorably from the Supreme Court’s clear determination that Congress did not expose foreign companies to the threat of global securities litigation under U.S. laws and rules. *Credit Suisse* should dispel any notion that the equivocal, expansive, and expensive “conduct” and “effects” tests have survived even in the slightest way. As Judge Marrero put it, in *National Australia Bank* “the Second Circuit’s conduct and effects doctrine took a great fall. And neither the Plaintiffs’ law horses nor this Court’s pen can put the pieces together again.”

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