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## Legal Updates & News

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#### Second Circuit Issues Ruling on Foreign Issuer Securities Case

October 2008

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On October 23, 2008, the Second Circuit Court of Appeals issued an important decision regarding the extraterritorial application of the U.S. securities laws that will have broad implications for non-U.S. public companies. *Morrison v. National Australia Bank, Ltd.*, No. 07-0583-cv (2d Cir. 2008). The *Morrison* decision is the first time that the Second Circuit has ever considered what is called a “foreign-cubed” case – a case in which foreign plaintiffs bought shares of a foreign company on a foreign exchange.

The *Morrison* plaintiffs, who had purchased ordinary shares of National Australia Bank (NAB) outside the U.S., sought to represent a class of non-U.S. purchasers of NAB ordinary shares in a securities class action in the U.S. for violation of U.S. securities laws based on allegations that NAB misstated its financial condition. The plaintiffs claimed that NAB’s misstatements, which related to the accounting of a U.S. subsidiary, amounted to securities fraud enforceable under U.S. securities laws. NAB is a public company, headquartered in Melbourne, and incorporated under Australian law. NAB’s ordinary stock trades on the Australian Securities Exchange, the London Stock Exchange, the Tokyo Stock Exchange, and the New Zealand Stock Exchange. NAB stock does not trade on any U.S. exchange, but it does have U.S.-listed American Depository Receipts. The District Court dismissed the claims of the foreign plaintiffs for lack of subject matter jurisdiction.

On appeal, the Second Circuit declined the defendant’s invitation to issue a bright line ruling that foreign defendants in this situation are never subject to the jurisdiction of the U.S. securities laws. The court instead affirmed its traditional jurisprudence that a court should look at the “conduct” and “effect” of the alleged fraud in determining whether it has jurisdiction. The key inquiry in that analysis, the Court explained, is whether the harm was conducted in the U.S. or abroad and whether it affected domestic markets and investors. Because the plaintiffs had not purchased any securities in the U.S. market, the court only analyzed the case under the “conduct” test (the court pointed out that even the plaintiffs didn’t allege that the fraud had “any meaningful effect on America’s investors or its capital markets”). Applying the conduct test, the Second Circuit rejected plaintiffs’ argument that because the false accounting occurred in the U.S., at NAB’s subsidiary, the conduct of the fraud was in the U.S. for the purposes of determining jurisdiction. Instead, the court held that the “heart of the fraudulent scheme,” i.e., the conduct, was in Australia because it was the statements of NAB that created the fraud, not the underlying accounting errors of the U.S. subsidiary.

Notably, the *Morrison* court left open the possibility of jurisdiction over cases involving foreign securities, issued by a foreign company, and bought by foreign investors abroad, because each case will have to be analyzed on its own particular facts.

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