MORRISON HELD TO PRECLUDE SECURITIES ACT CLAIMS

Applying the "underlying logic" of the Supreme Court's ruling in *Morrison v. National Australia Bank Ltd.*, the district court overseeing the now almost-decade old *Vivendi* securities litigation dismissed claims brought under the Securities Act of 1933 by foreign investors in Vivendi stock. In *Morrison*, the Supreme Court held that foreign investors who purchased foreign issuer securities on foreign exchanges could not bring securities fraud claims under the Securities Exchange Act of 1934 in the U.S. courts. The *Vivendi* court held that negligence-based foreign investor claims under the Securities Act of 1933 are similarly barred, continuing a strong trend among courts to interpret *Morrison's* presumption against extraterritoriality broadly.

The *Vivendi* Case

In *Vivendi*, plaintiffs alleged that the company and its former CEO and CFO misled the public about Vivendi's cash flow starting with efforts to promote a three-way merger among Vivendi, Seagram's entertainment businesses, and Canal Plus S.A. in December 2000. According to plaintiffs, the company then orchestrated a scheme to conceal the severity of liquidity problems stemming from the debt load incurred as a result of that three-way merger and other transactions. Investors from France, England, the Netherlands, Germany, Austria, and the United States brought individual and securities class actions against Vivendi and its officers in the United States claiming, among other things, that defendants violated sections 10(b) and 20(a) of the Securities Exchange Act and sections 11, 12(a)(2) and 15 of the Securities Act by making 57 materially false and misleading statements between October 2000 and July 2002 that caused Vivendi's securities to trade at artificially inflated prices on European exchanges and the New York Stock Exchange.

Prior to trial, the district court rejected defendants' argument that the U.S. district court did not have subject matter jurisdiction over the claims asserted by foreign investors who acquired shares of Vivendi, a foreign corporation, on foreign stock exchanges. Viewing the allegations in the complaint as a whole, the *Vivendi* court held that the alleged fraudulent conduct was sufficiently centralized in the United States to warrant U.S. jurisdiction. After a three-month trial that concluded in early 2010, the jury found that Vivendi, but not its CEO or CFO, had violated the securities laws and had acted "recklessly" in disseminating materially misleading information to the public. The amount of damages that Vivendi would have to pay was uncertain at the time of the verdict but was expected to be in the billions of dollars.

However, several months after the jury's verdict was issued in *Vivendi*, the Supreme Court issued its decision in *Morrison v. National Australia Bank Ltd.* foreclosing so-called "foreign-cubed" securities fraud class actions (like *Vivendi*) under section 10(b) of the Securities Exchange Act. These are suits brought by foreign investors in foreign securities who purchased on foreign exchanges. The Supreme Court held that section 10(b) reaches a manipulative or deceptive device or contrivance *only* when "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange."

On February 17, 2011, the *Vivendi* court applied *Morrison* to significantly reduce the size of the class by dismissing the Securities Exchange Act claims asserted by investors who had purchased their Vivendi shares on foreign stock exchanges. Citing *Morrison*, defendants then moved to seek partial judgment on the pleadings of the claims asserted under the Securities Act by plaintiffs who purchased Vivendi shares on the Paris Bourse. In response, plaintiffs argued, among other things, that *Morrison* involved only claims under the Exchange Act and had no applicability to Securities Act claims.

Last week, the district court ruled on defendants' motion, holding that "*Morrison's* underlying logic counsels extending its holding to cover the Securities Act" claims. By doing so, the court followed two recent district court decisions that had reached the same conclusion (*In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011) and *S.E.C. v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147 (S.D.N.Y. 2011)). In *RBS*, the court relied on *Morrison*'s statement that the Securities Act has the "same focus on domestic transactions" as the Securities Exchange Act to conclude that "the Securities Act, like the Exchange Act, does not have extraterritorial reach." Likewise, in *SEC v. Goldman*, the court found that *Morrison* applies to the Securities Act, specifically noting that "the definition of 'sale' under the Securities Act is virtually identical to the definition of 'sale' under the Exchange Act."

Potential Impact of the Decision

The *Vivendi* decision has important ramifications for foreign issuers with U.S. operations. The decision demonstrates the breadth of *Morrison* and district courts' willingness to employ the Supreme Court's decision to dismiss securities claims brought against foreign issuers. More than that, the application of *Morrison* to Securities Act claims makes clear that foreign companies' potential liability under the U.S. securities laws is limited not just when fraud claims are asserted under the Securities Exchange Act but also when negligence-based Securities Act claims are asserted. Having said that, it is important to keep in mind that (as the *Vivendi* court itself noted) *Morrison* has no impact on either Securities Exchange Act or Securities Act claims premised on American Depository Shares "traded solely on the New York Stock Exchange—a domestic exchange falling outside the *Morrison* analysis."

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