The Application of *Morrison* in an Era of Electronic Trading and Increasingly Global Markets

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I. INTRODUCTION

Imagine a German investor who places an order to buy a German stock through his German broker. The stock in question is issued by a German corporation and registered on a German exchange. However, the German broker, influenced by payment-for-order-flow considerations, sends the order to an alternative trading system, rather than to the German exchange on which the stock is registered. The servers of the alternative trading system are located in Atlanta, Georgia. The investor’s offer is received and then filled on the servers in Atlanta. The investor receives a confirmation, which does not reveal the geographical location where the trade was executed.

Now suppose that a Chicago-based securities dealer structures a synthetic CDO and markets it to a hedge fund manager in Zurich. Employees of the Chicago dealer and the Swiss hedge fund communicate entirely by email, telephone, and fax from their respective offices in Chicago and Zurich. Among other things, employees of the Chicago dealer email to their Swiss counterparts an offering memorandum and other written communications. After numerous telephone conversations and email exchanges with employees of the Chicago dealer, and after studying the offering memorandum and other written materials supplied by the Chicago dealer, the responsible employees of the Swiss hedge fund decide to buy interests in the synthetic CDO. Drafts of the necessary agreements are exchanged by email between Chicago and Zurich. The final agreements are negotiated by email and telephone. Dual electronic signature pages of the final agreements are signed in Chicago and Zurich and then exchanged by email via PDF, all on the same day. The parties do not meet face to face at a closing. The agreements provide that Illinois law governs the agreements and that Illinois courts have jurisdiction over any disputes between the parties.

1 The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the authors and do not necessarily reflect the views of the Commission or of the authors’ colleagues upon the staff of the Commission.
Or, consider a U.S. investor who purchases shares of stock in the IPO of a Taiwanese computer manufacturer. The investor receives a prospectus by email from his U.S. broker. He places the order online from his home. The order is placed through a U.S. broker who buys the shares from a Hong Kong-based underwriter. The investor never leaves the U.S.; all he does is point and click. Likewise, the U.S. broker, the Hong Kong underwriter, and the issuer never leave their respective domiciles. Everyone involved communicates by email. The investor becomes committed to buy in the United States. The issuer becomes committed to sell in Taiwan. The stock begins to trade on a Hong Kong exchange, but not until after the investor commits to buy shares in the IPO.

Now consider a private investment in public equity (“PIPE”) offering by a Michigan-based manufacturer of computerized tooling used in the manufacture of auto parts. The company’s stock is registered on NASDAQ. The founder of the company, who owns a controlling interest, wants to raise additional capital through a PIPE. He negotiates the PIPE sale with a director of a Chicago-based private equity firm. The two reach an agreement in principle, and their lawyers prepare the necessary papers. But the papers are not finished until the director of the PE firm is leaving for a business trip to the U.K. He takes the contracts with him and signs them after he arrives at his hotel in London, where he has them sent back to counsel for the manufacturer.

Finally, consider a retiree in Houston who attends a financial planning program at a local suburban hotel. The so-called financial planner, based in Las Vegas, offers the attendees an investment, in which he will pool their money with that of other investors and use the money to generate profits from trading microcap stocks in the U.S. OTC market. The Houston retiree agrees to invest. The financial planner gives her a contract to sign. The contract is an offer to buy an interest in a Nevis-based limited partnership. The financial planner explains that he controls the limited partnership and uses it to pool the investors’ money for trading in the microcap stocks. He directs her to sign the offer and to send it to the office of the limited partnership in Nevis. He, also, instructs her to wire the purchase price to a bank account in Nauru. A few weeks later, after following his instructions, the retiree receives in the mail, from a Nevis address, a certificate evidencing her interest in the limited partnership.
Now imagine that in each of the foregoing scenarios the investor ultimately loses the investment due to fraud. Can any of these investors maintain a cause of action against their respective counterparties in U.S. courts?

In *Morrison v. National Australia Bank Limited*, (“Morrison”), the United States Supreme Court held that plaintiff-investors can only bring suits alleging fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder when the alleged fraud occurred (1) in connection with transactions in securities registered on a U.S. exchange or (2) in connection with domestic transactions in securities not registered on U.S. exchanges.\(^2\) In creating this narrow, transactional test, the Supreme Court rejected the more expansive tests established by pre-existing precedent. Until the Supreme Court’s decision in *Morrison*, lower courts had allowed suits alleging violations of Section 10(b) and Rule 10b-5 when the alleged fraud (1) took place within the United States (“the conduct test”), (2) took place outside U.S. borders, but had substantial effects on U.S. investors (“the effects test”), or (3) satisfied some combination of those two tests.\(^3\) As a result of *Morrison*, the so-called conduct and effects tests are no longer good law with respect to private actions. The determinative question now is the location of the transactions in dispute.

The purpose of this article is to survey the developing case law that has applied *Morrison* to private actions alleging violations of Section 10(b) and Rule 10b-5. Specifically, we will look at the questions that have been resolved, the principles that have been established, whether any new questions have arisen, and what questions remain unanswered. We will concentrate our survey on private actions under Section 10(b) and Rule 10b-5 because the Dodd-Frank Wall Street Reform and Consumer Protection Act reinstated the conduct and effects tests with respect to enforcement

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2 *Morrison*, 561 U.S. at 262, 273-74 (Breyer, J., concurring in part and in judgment).

3 *Id.* at 257-58; *See also* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) 405 F.2d 215 (2d Cir. 1968); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334-37 (2d Cir. 1972) *abrogated by Morrison*, 561 U.S. 247; Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) *abrogated by Morrison*, 561 U.S. 247.
actions brought by the SEC and the Department of Justice. We will, however, draw on recent judicial decisions issued in SEC actions when doing so helps in understanding the developing case law in private litigation.

II. BACKGROUND

*Morrison* involved a group of investors predominantly composed of foreign citizens who filed a class action suit alleging securities fraud against National Australia Bank (“National”), the common stock of which was listed on the Australian Stock Exchange. The case presented a scenario colloquially known as f-cubed: foreign plaintiffs suing foreign defendants over foreign stock transactions. The plaintiffs’ allegations concerned National’s 1998 purchase of a Florida-based mortgage company called HomeSide Lending. Three years after that acquisition, in 2001, National wrote down its HomeSide investment by approximately $2.2 billion; thus, causing National’s stock to plummet. Investors who purchased National’s common shares before the write down sued National, HomeSide, and several of their respective officers and directors, alleging violations of Section 10(b) and Rule 10b-5.

According to the plaintiffs’ allegations, HomeSide and its officers provided financial models, which were used to forecast future revenues from mortgage fees, in an effort to attract investors. The plaintiffs claimed that these models were false and misleading and that National and its executives had knowledge of this fraud. When the case reached the Supreme Court, all of the claims of the U.S. investors were dismissed. Only foreign investors remained.

Prior to *Morrison*, courts had frequently applied the conduct and effects tests in determining whether Section 10(b) reached cross-
border transactions. As applied by the lower courts, the conduct and effects tests were not mutually exclusive as courts often held that "an admixture or combination of the two . . . gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."

In deciding *Morrison*, the Supreme Court rejected the conduct and effects tests and instead established a narrower transactional test, which limits the application of Section 10(b) to alleged fraud occurring in connection with (1) purchases and sales of securities registered on U.S. exchanges and (2) domestic purchases and sales of other securities. The Court found that the foreign plaintiffs in *Morrison* had no cause of action under Section 10(b) and Rule 10b-5 against National and HomeSide because National’s stock was listed on a foreign exchange. The Court based its decision on the presumption against extraterritoriality, which it had enunciated in a 1949 decision in *Foley Bros., v. Filardo* and reaffirmed in a 1991 decision in *E.E.O.C. v. Arabian American Oil Co.* (“Aramco”): “th[e] legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” Thus, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” The Court held that in formulating the conduct and effects tests, the lower courts had neglected the presumption against extraterritoriality and over a period of many decades set what the Court considered to be a bad precedent.

Looking at Section 10(b), the Court found nothing in its language that either explicitly expanded its reach overseas or implicitly indicated Congress’s intent to have it apply extraterritorially. Indeed, in deconstructing Section 10(b), the Court

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13 Id. at 257-58.
14 Id. at 258 (quoting *Itoba* 54 F.3d at 122).
15 *Morrison*, 561 U.S. at 273-74.
16 Id. at 251.
18 *Morrison*, 561 U.S. at 255.
19 Id.
20 Id. at 262.
found that 10(b) applies only to deceptive conduct “‘in connection with the purchase or sale of any security registered on a national exchange or any security not so registered.’”21 The Court interpreted “national exchange” to mean an exchange within the United States because the Court could not find any evidence of congressional intent to regulate foreign exchanges, nor could it find any such congressional authority in the established principles of international law. 22 The Court interpreted the phrase “any security not so registered” to mean purchases and sales of securities that constitute domestic transactions in securities not registered on national exchanges.23 Because Morrison “involve[d] no securities listed on a domestic exchange, and all aspects of the purchases [of the securities] complained of by those petitioners who still have claims occurred outside [of] the United States,” the plaintiffs “failed to state a claim on which relief could be granted.”24

III. LOWER COURT DECISIONS APPLYING THE FIRST PRONG OF MORRISON’S TRANSACTIONAL TEST TO TRANSACTIONS IN SECURITIES REGISTERED ON EXCHANGES

Several lower courts have issued decisions subsequent to Morrison, applying the first prong of the new transactional test to cases involving securities registered on U.S. exchanges. But before we examine those cases, we will provide a brief description of the landscape in which those decisions arose.

In the past, conventional exchange trading involved an investor contacting a broker and placing an order to purchase or sell a specific quantity of stock.25 The broker, in turn, would relay the message to his firm’s traders on the floor or trading pit of the exchange, who would then walk over to the specialist who made the

21 Id. at 266.
22 Id. at 263-64 (quoting 15 U.S.C. 78j(b)).
23 Morrison, 561 U.S. at 266-68.
24 Id. at 273.
market in the relevant security and effect the trade.\textsuperscript{26} In this environment, the geolocation of every trade was clear—it took place at the physical location of the exchange.\textsuperscript{27}

Today, however, this classic floor-trading scenario has largely become obsolete.\textsuperscript{28} Most trades in exchange-listed securities now are executed through electronic venues known as Electronic Communications Networks (“ECNs”) and Alternative Trading Systems (“ATS”).\textsuperscript{29} ATSs employ computer software that automatically matches buy and sell orders.\textsuperscript{30} They provide and permit parties to trade “without regard to physical location,” they have reduced the cost of trading, and, by automating the processing and clearing of trades, they have “reduc[ed] the risk of clearing errors.”\textsuperscript{31} In the current electronic market environment, when a customer places an order with a broker concerning a security traded on a U.S. exchange, the exchange’s electronic trading platform searches out the trading venue that offers the best execution available in the market at that precise moment in time.\textsuperscript{32} That venue may be the exchange itself, or it may be an ATS located elsewhere.\textsuperscript{33} In addition, trading venues pay brokers for order flow; in other words, a trading venue will pay brokers to direct their customers’ orders to that trading venue.\textsuperscript{34} The trading venue offering the best execution

\begin{flushright}
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} GORHAM & SINGH, supra note 25, at 16-17; see also Courtney Comstock, It’s WAR: Day Traders And Floor Traders VS High-Frequency Traders, BUSINESS INSIDER (May 21, 2010, 1:23 PM), http://perma.cc/H3VN-9QJK.
\textsuperscript{30} Mizrach, supra note 29, at 527.
\textsuperscript{31} Id.
\textsuperscript{33} Id.
\end{flushright}
will normally be the venue through which the trade is effected.\textsuperscript{35} As a result, an order to buy or sell a security placed through any given exchange often will be executed through some other venue, at some other location, than the exchange through which the order was placed.

Moreover, to save money and to gain the benefit of superior technology, exchanges now outsource by using components from other exchanges and ATSs in other parts of the world.\textsuperscript{36} Indeed, given the increasing trend toward electronic trading—and cross-border outsourcing—it is quite possible that a trading venue and its computer systems will themselves be located in different countries.\textsuperscript{37} Thus, due to this growing global interdependence, a given trade in a security registered in a domestic exchange may actually “occur” outside the United States, even if the trade is between two investors located in the United States and involves a security registered on a U.S. exchange.\textsuperscript{38}

And remember, buy and sell orders may be cancelled at any time until they are taken by a counterparty.\textsuperscript{39} In other words, a party is not committed to a trade until its order is filled.

The over-the-counter (“OTC”) market is even more ethereal, and even more divorced from a physical trading location, than are exchanges.\textsuperscript{40} The OTC market is a dealer market, in which a dealer quotes the prices at which it is willing to buy and sell specified securities.\textsuperscript{41} During the latter half of the twentieth century, OTC transactions have evolved from a system of phone calls between dealers to a national quotation system, to screen trading, and

\begin{itemize}
\item \textsuperscript{35} McAndrews, \textit{supra} note 32, at 3.
\item \textsuperscript{36} GORHAM \& SINGH, \textit{supra} note 25, at 20-21.
\item \textsuperscript{37} \textit{Id.} at 14-21.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{40} Randall Dodd, \textit{Markets: Exchange or Over-the-Counter}, INT’L MONETARY FUND FIN. AND DEV., (March 28, 2012), available at \textit{http://perma.cc/46MA-QD67}.
\item \textsuperscript{41} \textit{Id.}
\end{itemize}
ultimately to trading from one’s computer terminal. The communication of bids and asks that occurs by means of electronic communications between market participants has indeed spread out among different locations across different countries. Dealers often convey “their bid and ask quotes and negotiate execution prices over such venues as the telephone, mass e-mail messages, and, increasingly, instant messaging.” It is common for dealers to “initiate contact . . . through high-volume electronic messages called ‘dealer-runs’ that list various securities and derivatives and the prices at which they are willing to buy or sell them.” Not surprisingly, OTC trades often involve market participants located—and securities listed and traded—in multiple countries. Thus, OTC transactions—executed over the internet by parties located around the globe—involve no single physical location. Now, let us turn to the lower courts’ decisions applying Morrison to cases involving securities registered on exchanges.

The opinion in Stackhouse v. Toyota was issued less than a month after the Supreme Court decided Morrison. The plaintiff class consisted of U.S. investors who had purchased shares of Toyota stock and Toyota American Depositary Shares (“ADS”). Although the fact is not explicitly stated in the decision, it is implied that the Toyota shares in question were listed only on a foreign exchange. In contrast to the shares of Toyota stock, an ADS is a U.S. dollar-denominated equity share of a foreign-based company available for purchase on an American stock exchange. ADSs are issued by depository banks in the United States under agreement with the issuing foreign company; the entire issuance is called an American Depositary Receipt (“ADR”), while the individual shares are referred

42 GORHAM & SINGH, supra note 25, at 10-13.
43 Dodd, supra note 40.
44 Id.
45 Id.
The court concluded that the relevant Toyota ADSs were purchased in U.S. transactions. (The decision does not indicate the trading venue(s) on which the transactions were executed, as distinguished from venues in which the securities were listed or orders were placed.) The court stated its view that *Morrison* likely precluded claims based on purchases of Toyota stock. Based on this conclusion, the Court announced its inclination to appoint as lead plaintiff the plaintiff that had suffered the largest losses through investments in Toyota ADSs.

Just eleven days after *Stackhouse*, on July 27, 2010, the Southern District of New York rendered its first post-*Morrison* opinion concerning securities transactions on exchanges in *Cornwell v. Credit Suisse Group*. This case involved plaintiffs that filed a class action lawsuit against an investment bank and some of its officers alleging violations of Section 10(b) of the Exchange Act and Rule 10b-5. The gist of the plaintiffs’ allegations was that the defendants “made material misrepresentations and omissions concerning the robustness of Credit Suisse’s risk management practices” (which the Court noted were actually very poor). Some of the plaintiffs purchased ADSs “on the NYSE,” while others purchased shares of Credit Suisse stock “trading on the SWX,” or Swiss Stock Exchange.

As soon as *Morrison* was decided, the defendants moved for a partial judgment on the pleadings to dismiss any plaintiff who purchased the Credit Suisse shares on the SWX. The affected plaintiffs opposed the motion to dismiss arguing (1) that *Morrison* was limited to its facts and should apply only to so-called “f-cubed cases,” in which foreign plaintiffs bought foreign stock on a foreign exchange. The plaintiffs pointed out that they had bought the Credit Suisse stock from the United States and argued that “the real

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51 Id. at *4-6.
52 729 F. Supp. 2d 620 (S.D.N.Y. 2010).
53 Id. at 621.
54 Id. at 622.
55 Id.
56 Id. at 621.
57 Id. at 622.
question left open by Morrison . . . is what factors control when a purchase or sale has some foreign and some domestic “aspects.” 

Finally, the plaintiffs also argued that choice of law principles from the First Restatement of Conflicts should inform the interpretation of Morrison. The district court disagreed with all of these arguments. In the district court’s view, Morrison made it clear that Section 10(b) does not reach any transactions on a foreign exchange. In the words of the district court, the conduct and effect analysis “is now dead letter,” and the plaintiffs’ “cosmetic touch-ups will not give the corpse a new life.” The court concluded that under Morrison the focus under Section 10(b) should be on the place of the transaction, not the location of the conduct regardless of whether there is some domestic activity or some connection to the United States. The court granted the defendant’s motion and dismissed the claims of those plaintiffs who had purchased Credit Suisse shares “on the SWX.”

The dismissed plaintiffs subsequently moved for reconsideration and argued that because Credit Suisse securities “are listed on the [NYSE],” purchases of those securities “on the SWX” are indistinguishable from those that occurred on domestic exchanges. The court denied the motion for reconsideration, ruling, “whatever the merits of this argument may be, it is inappropriately raised for the first time on a motion for reconsideration.”

The district court also reached a similar result in In re Alstom SA Securities Litigation, decided on September 10, 2010. But this decision addressed a twist with respect to the claims of plaintiffs who purchased securities “on foreign exchanges.” The plaintiffs in this

58 Id.
59 Id.
60 Id.
61 Id. at 622-23.
62 Id. at 622.
63 Id.
64 Id. at 623-24.
65 Id. at 627-28.
66 Id. at 628-29.
67 Id. at 629.
69 Id. at 471.
case alleged fraud by a French company, Alstom, SA, two of its subsidiaries and several individuals. Alstom securities were registered on the NYSE as well as on Euronext Paris.  

(At the time of this decision, although probably not at the time of the conduct in question, Euronext Paris was a component of NYSE Euronext, a global stock market headquartered in New York.) The plaintiffs argued that because Alstom securities were registered on the NYSE, Section 10(b) reached purchases of those securities made on Euronext Paris. This argument rested on the language of Section 10(b) itself and on the Supreme Court’s holding in *Morrison* that Section 10(b) prohibited fraud in connection with the purchase or sale of any security registered on a national exchange. The district court dismissed the plaintiffs’ argument as presenting “a selective and overly-technical reading of *Morrison,*” which ignored the overall context and focus of the Morrison decision concerning “the territorial location where the purchase or sale was executed and the securities exchange laws that governed the transaction.” The court then dismissed the claims of plaintiffs who purchased securities “on foreign exchanges.”

In the autumn of 2010, the Southern District of New York also applied the *Morrison* transactional test to American Depositary Receipts, which are negotiable financial instruments that serve as vehicles for foreign securities to be traded in the United States. The underlying shares of ADRs are held by foreign depositary banks and are issued by U.S. custodian banks. In *In re Societe Generale Securities Litigation*, plaintiffs alleged that defendants had violated

70 *Id.*  
72 *Alstom*, 741 F. Supp. 2d at 472-73.  
73 *Id.* at 472.  
74 *Id.* at 472-73.  
75 *Id.* at 473.  
77 *See International Investing, U.S. SEC. & EXCH. COMM’N,* HTTP://PERMA.CC/9QN5-DVPP.  
Section 10(b) and Rule 10b-5 by misleading investors about the internal risk controls of Societe Generale ("SocGen") and about SocGen’s exposure to the U.S. subprime mortgage market.\(^{79}\) Two of the plaintiffs, Vermont Pension Investment Committee and Boilermaker–Blacksmith National Pension Fund owned SocGen ordinary shares, which were “traded on” Euronext Paris “under the symbol GLE” while another plaintiff, United Food and Commercial Workers Union Local 880 Retail Food Employers Joint Pension Fundowned SocGen ADRs, which were traded “on the OTC market in New York under the symbol SCGLY.”\(^{80}\) Relying on \textit{Morrison}, the defendants moved to dismiss the claims of plaintiffs who purchased SocGen shares through Euronext Paris.\(^{81}\)

The court went further and found that all of the plaintiffs’ claims were barred under \textit{Morrison}.\(^{82}\) With respect to the investors who bought shares through Euronext Paris, the court stated that because the SocGen shares were traded on a foreign market, any argument which focused on the location of the purchase order would be “asking the [district] [c]ourt to look to the location of ‘the act of placing a buy order,’ and to ‘the place of the wrong.’”\(^{83}\) In the court’s view, accepting the plaintiff’s argument would effectively return the analysis to the conduct and effects tests.\(^{84}\)

Regarding the investors who purchased the SocGen ADRs in the U.S. OTC markets, the court found the plaintiffs’ trades were “predominantly foreign securities transactions” under \textit{Morrison}.\(^{85}\) Specifically, the court noted that ADRs represent interests in shares of a foreign stock and that the SocGen ADRs were not traded on an official U.S. securities exchange, but instead were traded in a less formal market with lower exposure to U.S.-resident buyers.\(^{86}\)

\(^{79}\) \textit{Societe Generale}, 2010 WL 3910286, at *1-3.
\(^{80}\) Id. at *1.
\(^{81}\) Id. at *1, *6.
\(^{82}\) Id. at *6-7.
\(^{83}\) Id. at *6.
\(^{84}\) Id.
\(^{85}\) Id.
Less than a week after the decision in *In re Societe Generale*, a different judge in the Southern District of New York issued an opinion in *Plumber’s Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.* That case involved a class action on behalf of plaintiffs who had purchased the stock of a foreign issuer, Swiss Re, which was listed on the SWX exchange in Switzerland. Swiss Re, the world’s largest reinsurer, had sustained heavy losses as a result of the U.S. sub-prime mortgage crisis, including $1.2 billion on two credit default swaps it had sold. The plaintiffs sued under Section 10(b), alleging that Swiss Re had made false and misleading disclosures about its risk management and its exposure to mortgage-related securities.

The lead plaintiff’s portfolio managers placed orders electronically through brokers who routed the orders to the virt-x cross-border trading platform. The orders were initiated in Chicago and executed, cleared, and settled on the virt-x cross-border trading platform, which was a London-based subsidiary of SWX and the only stock exchange on which Swiss Re common stock was listed was the SWX in Switzerland.

Since the purchase of the Swiss Re stock was consummated abroad, the defendants moved to dismiss arguing that *Morrison* precluded Plumber’s Union’s claims. The plaintiffs, however, argued that its claims passed the *Morrison* transactional test because 1) Plumber’s Union resided in the United States; 2) Plumber’s Union decided to invest while located in the United States; 3) Plumber’s Union was adversely affected in the United States; 4) the stock orders were placed in Chicago; and 5) the traders who executed the trades were located in Chicago. The district court was not persuaded, noting that all of the plaintiff’s arguments were irrelevant to the *Morrison* analysis. According to the district court, “nothing
in *Morrison* or the Exchange Act allows for any identity-based inquiry in determining the location of a transaction."96 The residence of the plaintiff, the location of the plaintiff-investor when that investor decided to purchase the securities, the location of where the securities transaction was initiated as well as the location of the trader executed the purchase orders were held to be irrelevant or immaterial.97 As for the argument the Plumber’s Union suffered harm in the United States, the court noted that this would simply restore a core element of the effects test.98 Considering the Swiss Re stock was traded on an exchange, the focus should be on the specific exchange on which the transaction took place or the stock was traded; and in this case Swiss Re’s stock was traded on a foreign exchange.99 Echoing the logic of *Stackhouse v. Toyota*, the court decided that since “the actual transaction took place on the foreign exchange, the purchaser or seller has figuratively traveled to that foreign exchange . . . to complete that transaction.”100

In particular, the district court rejected the argument that the lead plaintiff’s purchases had occurred in Chicago, because it was there that its portfolio manager had placed orders on its behalf, thus irrevocably committing the lead plaintiff to make the purchases.101 The district court ruled that the plaintiffs’ argument “would require a fact-bound, case-by-case inquiry into when exactly an investor's purchase order became irrevocable” and “produce the regulatory multiplicity that the Supreme Court has directed courts to avoid.”102

In *Elliot Assocs. v. Porsche Automobil Holding*, thirty-five hedge funds (half of which “were organized under the laws of foreign jurisdictions,” (“the Elliot plaintiffs”) as well as an additional four hedge funds, organized under the laws of the Cayman Islands (“the Black Diamond plaintiffs”), brought a 10(b) action against the defendants, Porsche Automobil (“Porsche”) and two of its executive officers alleging that the defendants “caused a dramatic rise in Volkswagen stock prices by buying nearly all the freely-traded

96 *Id.* at 178.
97 *Id.* at 178-79.
98 *Id.* at 178.
99 *Id.* at 177-79.
100 *Id.* at 179 (*See* *Stackhouse*, 2010 WL 3377409, at *1).
101 *Id.*
102 *Id.* at 178.
voting shares of Volkswagen as part of a secret plan to take over that company.”

Elliot Assocs. concerned securities-based swap agreements, which are “swaps based on a single security, or loan, or a narrow-based group, or index of securities (including any interest therein or the value thereof), or events relating to a single issuer, or issuers of securities in a narrow-based security index.” Both sets of plaintiffs had entered into swap agreements, which the district court referred to as “privately negotiated contracts that are not traded on any exchanges” which “fluctuated in value as the price of [the Volkswagen] shares rose or fell.” Specifically, the court noted that the swap agreements referenced the share price of the German car company, Volkswagen “generat[ing] gains for Plaintiffs as the price of [Volkswagen’s] shares declined and generat[ing] losses as the price of [Volkswagen’s] shares rose.” These security-based swap agreements were structured between the hedge funds and their respective counterparties so that the plaintiffs would benefit if the price of Volkswagen’s stock dropped and their respective counterparties would benefit if the price of the Volkswagen stock rose.

The Black Diamond plaintiffs alleged that “all steps necessary to transact the security-based swap agreements at issue in that action were carried out in Dallas, Texas, with counterparties acting on behalf of financial institutions located in New York.” However, neither set of plaintiffs “spell[ed] out the identity of a counterparty” in their respective complaints and the district court

104 Id.
106 Id. at 471 (citing Pl. Mem. Opp’n Mot. Dismiss, Elliot Assocs., v. Porcsche Automobil Holding, SE, No. 10 cv 5310 (S.D. N.Y. filed Sept. 29, 2010)).
107 Id. at 471.
108 Id. at 472-73.
109 Id. at 471.
noted these undisclosed counterparties “may well have been located
outside of the United States.” 110

According to the allegations, Porsche engaged in a series of
manipulative derivative trades with the intent to secretly engage in a
hostile takeover of Volkswagen by purchasing 75% of Volkswagen’s
shares of common stock. 111 The plaintiff hedge funds alleged that
Porsche’s holdings in Volkswagen “increased continually from 2005
through 2007,” and that “[b]y the end of 2007, Porsche was
[Volkswagen]’s largest shareholder with approximately 31% of
[Volkswagen]’s shares.” 112 The plaintiffs further alleged that the
defendants publicly denied that they sought to take over Volkswagen
throughout the first three quarters of 2008 but privately met “with an
officer of the State of Lower Saxony” in Berlin, informed that officer
of its intention “to acquire at least 75% of [Volkswagen]’s shares,”
and kept purchasing Volkswagen stock with intention of obtaining
75% of Volkswagen’s shares. 113 Finally, according to the allegations,
when Porsche ultimately did reveal that it had “accumulated a total
of 74.1% of [Volkswagen]’s shares” in October of 2008, the price of
Volkswagen stock rose precipitously, thus causing heavy losses to
the plaintiffs. 114

The plaintiffs argued, “whether § 10(b) applies to a
transaction depends only on where the transaction occurs, and
therefore, the antifraud provision applies whenever a transaction
occurs in the United States.” 115 Moreover, the plaintiffs argued “all
[the] steps necessary to transact the swap agreements were carried
out in the United States.” 116 Porsche responded that the first prong of
Morrison transactional test applied because the swap agreements
were effectively traded on a foreign exchange when the plaintiffs
took the short position referencing the foreign traded shares. 117

110 Id. at 471, 476.
111 Id. at 472.
112 Id.
113 Id.
114 Id. at 472-73.
115 Id. at 474.
116 Id. at 471.
117 Id. at 475.
The district court agreed with Porsche. Using the economic reality approach emphasized by the Supreme Court in *Reves v. Ernst & Young*, the district court found that the swap agreements were economically equivalent to that of a short sale because they “generated gains as the price of [Volkswagen] shares declined and generated losses as the price of [Volkswagen] shares rose, achieving an economic result similar to a short sale.” And, since the value of the swap agreement is “intrinsically tied to the value of the referenced security” (the Volkswagen shares), the character of the underlying referenced security plays an intricate role in the determination of whether a party to the agreement may seek a cause of action under 10(b). What mattered, according to the court, was not where the plaintiffs executed their swap agreement, but rather where the underlying security referenced by the swap agreements was traded. In this case, the swap transaction was “the functional equivalent of trading the underlying [Volkswagen] shares on a German exchange.” Thus, the swap transactions for all intents and purposes were deemed to have taken place on a foreign exchange regardless of where the agreement concerning the transaction occurred.

Meanwhile, the district court in the Southern District of New York addressed more challenges in applying *Morrison* in the context of ADRs that are themselves listed on a U.S. exchange in *In re: Vivendi Universal Securities Litigation*, (“Vivendi”). In *Vivendi*, U.S. and foreign shareholders sued a French public company, Vivendi Universal, S.A. (“Vivendi”) and alleged that the prices at which they had purchased ordinary shares and ADRs had been fraudulently inflated. The Vivendi shares traded primarily on the Paris Bourse Exchange, but the ADRs were listed on the NYSE. Complicating matters, Vivendi had also registered its ordinary shares under Section

118 *Id.* at 475-76.
119 *Id.* at 476.
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
125 *Id.* at 521, 527.
12(b) of the Exchange Act even though those shares were not listed on a U.S. exchange.\textsuperscript{126}

A jury found for the plaintiffs, and Vivendi sought a judgment as a matter of law, or alternatively a new trial, based in part on the \textit{Morrison} argument that because the underlying Vivendi stock was listed on a foreign exchange the plaintiffs’ purchases were foreign transactions.\textsuperscript{127} Plaintiffs responded that because at least some of the Vivendi shares and its ADRs (the two types of securities covered by the jury verdict) were listed on the NYSE, and because the ordinary shares were registered with the SEC pursuant to Section 12(b) of the Exchange Act, the plaintiffs' purchases fell within the first prong of the \textit{Morrison} test.\textsuperscript{128}

The court rejected the plaintiffs’ arguments, holding that registering a class of stock with the SEC under Section 12(b) of the Exchange Act is not the same as listing the stock on an exchange.\textsuperscript{129} The court further held that \textit{Morrison} requires that the purchases of the ordinary shares be treated as a foreign transaction since the shares were not actually traded on the NYSE. The court concluded that recovery would be limited to those plaintiffs who had purchased Vivendi ADRs on the NYSE.\textsuperscript{130}

By the start of 2011, district courts began deciding a barrage of cases requiring \textit{Morrison}’s transactional test analysis. In January 11, 2011, a district court in the Southern District of New York issued an opinion in a class action, \textit{In Re Royal Bank of Scotland Group PLC Securities Litigation}.\textsuperscript{131} This case involved a putative class action on behalf of persons who purchased ordinary and preferred shares of the Royal Bank of Scotland (“RBS”) through several public offerings and on the open market.\textsuperscript{132} The plaintiffs sought relief under Section 10(b) and Rule 10b–5, among other claims, alleging that they “suffered massive losses in shareholder value as a result of a series of write-downs that occurred at RBS due to RBS substantial

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} at 528.
  \item \textsuperscript{127} \textit{Id.} at 521, 524-25.
  \item \textsuperscript{128} \textit{Id.} at 527.
  \item \textsuperscript{129} \textit{Id.} at 529.
  \item \textsuperscript{130} \textit{Id.} at 529-32.
  \item \textsuperscript{131} 765 F. Supp. 2d 327 (S.D.N.Y. 2011).
  \item \textsuperscript{132} \textit{Id.} at 329.
\end{itemize}
holdings in subprime and other mortgage related assets.\textsuperscript{133} The ordinary shares of RBS were listed on the London Stock Exchange and EuroNext Amsterdam.\textsuperscript{134}

The defendants moved to dismiss, arguing in reliance on \textit{Morrison}, that the relevant shares were not purchased or sold on a U.S. exchange and were not acquired in domestic transactions.\textsuperscript{135} The plaintiffs countered by arguing that because RBS had registered and listed its ordinary shares on the NYSE in connection with ADRs, which were registered on that exchange, the first prong of \textit{Morrison} was satisfied.\textsuperscript{136} The district court, however, disagreed. The complaint did not allege purchases of RBS ADRs.\textsuperscript{137} Moreover, the court found the plaintiffs’ reading of Section 10(b) too broad.\textsuperscript{138} The plaintiffs, in the court’s view, ignored the context of the \textit{Morrison} decision, which clearly focused on what the court called “the true territorial location” where the transaction occurred.\textsuperscript{139} The court believed that location to be outside the U.S., although the decision is silent as to the trading venues where the plaintiffs’ trades were actually executed.

The court rejected the plaintiffs’ attempts to distinguish their facts from those of \textit{Morrison}. The plaintiffs pointed out that \textit{Morrison} involved foreign investors who bought foreign stock on a foreign exchange whereas the facts of the instant case involved American residents who decided to purchase and initiate their purchases of the RBS ordinary shares in the United States.\textsuperscript{140} The court in the \textit{RBS} saw these arguments as an effort to revive the conduct and effects tests.\textsuperscript{141}

In February 2011, a district court in the Northern District of California issued its opinion in \textit{Infineon Techs. AG Sec. Litigation}.\textsuperscript{142} \textit{Infineon Technologies} was a class action, in which plaintiffs sued an issuer—Infineon—and several of its officers and directors, alleging

\begin{itemize}
  \item \textsuperscript{133} \textit{Id.} at 330.
  \item \textsuperscript{134} \textit{Id.} at 329-30.
  \item \textsuperscript{135} \textit{Id.} at 331, 335-36.
  \item \textsuperscript{136} \textit{Id.} at 336-38.
  \item \textsuperscript{137} \textit{Id.} at 338-39.
  \item \textsuperscript{138} \textit{Id.} at 335-37.
  \item \textsuperscript{139} \textit{Id.} at 336.
  \item \textsuperscript{140} \textit{Id.} at 336-37.
  \item \textsuperscript{141} \textit{Id.} at 337.
  \item \textsuperscript{142} 2011 WL 7121006 (N.D. Cal. 2011).
\end{itemize}
The plaintiffs alleged the defendants engaged in securities fraud by participating in an illegal price-fixing conspiracy concerning one of Infineon’s products called Dynamic Random Access Memory and then manipulating the price of Infineon stock by making misrepresentations about the impact of the artificially inflated prices of Dynamic Random Access Memory on Infineon's corporate value. Relying on *Morrison*, the defendants moved to dismiss all claims asserted on behalf of purchasers of Infineon ordinary shares traded on the Frankfurt Stock Exchange. The defendants pointed to the fact that the shares of Infineon were traded only on the Frankfurt Stock Exchange. The plaintiffs, relying on the plain language of *Morrison* and Section 10(b), responded that the ordinary shares of Infineon were also listed on the NYSE and the ADRs of Infineon were listed and traded on the NYSE. The court, citing *Alstom* and *Stackhouse*, sided with the defendants. “Given *Morrison’s* holding that § 10(b) only applies to securities transactions that take place on domestic exchanges,” the district court dismissed the claims of plaintiffs who had purchased Infineon ordinary shares on the Frankfurt Stock Exchange.

Questions under *Morrison* concerning exchange-traded transactions have also arisen in connection with the type of derivative called a contract for difference (CFD). Dodd-Frank essentially divided regulatory authority over swap agreements between the Commodity Futures Trading Commission (“CFTC”) and the SEC thus giving the CFTC regulatory authority over swaps and the SEC regulatory authority over securities-based swap agreements. After Dodd-Frank was passed into law, the SEC and the CFTC issued a joint release concerning the interpretation and definition of a CFD, which is a type of swap described as “an agreement to exchange the difference in value of an underlying asset between the time at which a CFD position is established and the time

143 Id. at *1.
145 Id. at *4.
146 Id.
147 Id. at *13.
148 See *Derivatives*, U.S. SEC. & EXCH. COMM’N, HTTP://PERMA.CC/BW4B-9NUF.
at which it is terminated.” 149 “If the value increases, the seller pays the buyer the difference; if the value decreases, the buyer pays the seller the difference.” 150 District courts have, also sought to describe CFDs. For instance, a district court in the Southern District of New York, in *Freudenberg v E*Trade Financial Corp.*, described a CFD transaction as involving “purchasers acquiring the future price movement of the underlying company’s common stock (positive or negative) without taking formal ownership of the underlying shares.” 151 Looking at the *Freudenberg* decision, the price of the CFD is the same as the price quoted for the underlying shares of the referenced security. 152 According to that court, since the “identical matched transactions occur in shares of the actual common stock immediately before the purchase or sale of the CFDs, any influence on the public market price of the underlying securities is also reflected in the price of the CFDs.” 153 The application of *Morrison* to CFDs arose in *SEC v. Compania Internacional Financiera*. 154 In that case, the SEC sought a preliminary injunction against a Swiss money management firm named Chartwell Asset Management Services (“Chartwell”) and two of its affiliates, Compania Internacional Financiera S.A. and Coudree Capital Gestion S.A. 155 The SEC alleged that the defendants had illegally traded on inside information when they purchased CFDs in the United Kingdom with respect to the shares of Arch Chemicals (“Arch”), a U.S. company based in Norwalk, Connecticut. 156 Arch’s stock was listed on the NYSE. 157

The defendants opposed the injunction, arguing, among other things, that the SEC’s action could not be maintained under

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150 Id.


152 Id.

153 Id.


155 Id.

156 Id.

157 Id.
Morrison because the defendants bought CFDs not through a U.S. exchange or in domestic transactions, but rather through an exchange in London. The court rejected the defendants’ argument because the defendants misread Morrison to mean that the defendant itself must “trade in securities listed on domestic exchanges or engage in other domestic transactions.” The court found that Morrison focuses on the plain language of Section 10(b) which “punishes ‘only deceptive conduct in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.’” Given this language, the court found the determinative fact to be that the defendants’ deceptive trading activities “were tied to the transactions on the NYSE in Arch’s domestic securities” and thus fell within the scope of Section 10(b). The fact that Chartwell acquired CFDs in London “does not negate the fact that its alleged deceptive conduct involved securities listed on a domestic exchange.” Chartwell’s deceptive practices abroad were therefore “in connection with” Arch’s shares traded on the NYSE.

Sometimes publicly held stock that is predominately traded on one exchange is also listed on another exchange in another country. A case illustrative of this point is In re UBS Securities Litigation. In that case, foreign and domestic institutional investors filed a class action suit against the Swiss banking firm UBS and certain of its employees, officers and directors. The plaintiffs alleged that the defendants violated Section 10(b) by issuing fraudulent statements with respect to UBS’s positions and losses in United States mortgage-related securities. UBS's positions and losses in auction-rate securities and compliance with United States tax and securities laws by UBS's Swiss-based private wealth management business for United States clients. UBS’s stock was listed on the

158 Id. at *6.
159 Id.
160 Id. (quoting Morrison, 561 U.S. at 266).
161 Id.
162 Id.
163 Id.
165 Id. at *1.
166 Id.
Swiss Exchange, the Toronto Exchange, and the NYSE.\textsuperscript{167} Despite this multiplicity of listings, the decision implicitly assumed that the transactions in question were executed on the trading venues where the orders were placed.\textsuperscript{168}

In the wake of \textit{Morrison}, the defendants moved to dismiss all claims based on purchases of UBS shares outside the United States.\textsuperscript{169} The district court addressed the arguments of the foreign investors separately from those of the domestic investors. With respect to the foreign investors, the court noted that the plaintiffs opposed the defendants’ motion arguing that the foreign investors’ claims were distinguishable from the claims in \textit{Morrison} because the securities of UBS were also listed on the NYSE.\textsuperscript{170} The district court was not persuaded. Quoting the \textit{Morrison} opinion, the district court emphasized “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.”\textsuperscript{171} The district court found that \textit{Morrison} clarified that Section 10(b) squarely applied to ‘‘purchases and sales transactions’’ that are executed ‘‘in the United States,’’ and not to all securities that happen to be cross-listed on an American exchange.”\textsuperscript{172}

Moreover, the district court found that if it were to apply the Plaintiffs’ listing theory, then \textit{a fortiori} a Section 10(b) claim could be brought by any plaintiff who purchased stock on any securities exchange against any issuer, as long as the stock at issue was registered on an American exchange.\textsuperscript{173} Accordingly, the district court dismissed the foreign investors’ claims based on purchases of UBS shares outside the United States.\textsuperscript{174} Regarding the domestic investors’ claims, the court reiterated that \textit{Morrison}’s focus is on the location of the transaction itself (not the location of the purchaser).\textsuperscript{175} Furthermore, any “mere allegation of an injury that the plaintiffs

\textsuperscript{167} Id. at *1, *4.
\textsuperscript{168} Id. at *4-5.
\textsuperscript{169} Id. at *2.
\textsuperscript{170} Id. at *4.
\textsuperscript{171} Id. (quoting \textit{Morrison}, 561 U.S. at 266).
\textsuperscript{172} Id. at *5 (referencing \textit{Morrison}, 561 U.S. at 266-67).
\textsuperscript{173} Id. at *5.
\textsuperscript{174} Id. at *7.
\textsuperscript{175} Id.
suffered in the United States would have been ‘in essence a re-articulation of the “effects” test—was squarely rejected by the Morrison Court.’”176 Consequently, the district court dismissed the domestic plaintiffs’ claims as well.177

The Second Circuit affirmed the district court’s decision in City of Pontiac Policemen’s and Firemen’s Retirement System v. UBS, AG, holding that Morrison precludes any foreign claims under Section 10(b) despite the fact that the securities in question are listed on a U.S. exchange.178 The Second Circuit provided two reasons for its decision. First, the Second Circuit looked to the facts of Morrison and found that the record stated that the ordinary shares of NAB were listed on the NYSE.179 However, the Supreme Court did not enunciate an exception for the listing as this fact “did not affect the Court’s analysis of the shares that were purchased on foreign exchanges.”180 Second, the Second Circuit noted that when the Supreme Court rejected the conduct and effects tests in Morrison it also rejected the Second Circuit’s prior holding that Section 10(b) can be applied to securities purchases which were placed within U.S. borders but were effected outside of the United States.181 Accordingly, the fact that a security is listed on a U.S. exchange is insufficient to survive Morrison when foreign plaintiffs purchase the securities “on a foreign exchange.”182 As for the domestic plaintiffs, the Second Circuit found that the amended complaint pled insufficient facts to support the conclusion that those plaintiffs’ purchases were domestic transactions.183

In Phelps v. Stomber, the plaintiff-investors filed Section 10(b) claims against CCC, a Guernsey limited company, its CEO, and several of its officers and directors.184 CCC was a highly leveraged, closed-end investment fund, which purchased residential

176 Id. at *8.
177 Id.
178 City of Pontiac Policemen’s and Firemen’s Retirement System v. UBS, AG, 752 F.3d 173, 180-81 (2d Cir. 2014)
179 Id. at 180.
180 Id.
181 Id.
182 Id. 180-81.
183 Id. 181-82.
mortgage-backed securities on margin. The claims were brought on behalf of two proposed classes: the “Offering Class,” which was composed of all persons who had purchased Class B shares or Restricted Depositary Shares (“RDS”) of CCC in a public offering and the “Aftermarket Class,” which consisted of all persons who had purchased Class B Shares of CCC in market purchases.

The public offering consisted of Class B shares and RDSs. The public offering consisted of Class B shares of CCC which were issued and sold in Guernsey to investors outside of the United States. The Class B shares were then listed and traded on the Euronext Exchange in the Netherlands. The RDSs, by contrast, “were issued by the Bank of New York and sold” to both U.S. and foreign investors.

Subsequent to the Public Offering, the value of CCC’s investments began to decline. Due to the financial crisis, beginning in late 2007, CCC faced a barrage of large margin calls, which reduced its liquidity cushion to nil and eventually rendered CCC insolvent with “approximately $16.6 billion of indebtedness.” CCC entered liquidation in March 2008. The district court ultimately dismissed the plaintiffs’ Class B share claims. Before reaching that decision, the district court analyzed the plaintiffs’ claims under Morrison.

The plaintiffs conceded that neither the Class B shares nor the RDSs were listed on a U.S. exchange but the plaintiffs insisted that the purchases of both types of securities were domestic transactions under Morrison. Looking first at the purchases of the Class B shares, the district court found that those purchases were

185 Id. at 196.
186 Id. at 194-95.
187 Id. at 197.
188 Id.
189 Id. at 197, 207.
190 Id. at 197.
191 Id. at 200.
192 Id. at 201-02.
193 Id. at 202.
194 Id. at 209.
195 Id. at 207.
196 Id. at 206.
foreign transactions.\textsuperscript{197} The public offering of Class B shares was expressly limited to sales outside the United States to foreign purchasers, while purchases in the secondary market were made on Euronext Amsterdam,\textsuperscript{198} which at the time was a unit of the global stock exchange NYSE Euronext.\textsuperscript{199} The plaintiffs argued that Euronext was in fact a U.S. exchange.\textsuperscript{200} The court, however, rejected that argument by pointing out that “\textit{Morrison} specifically direct[s] courts to focus on the geographic location of the transaction.”\textsuperscript{201} The decision is silent as to whether the orders placed through Euronext Amsterdam were executed there or routed to some other trading venue.

Regarding the RDS, the district court found that they were indeed purchased within the United States. Looking at the allegations in the complaint, the court found that “the RDSs were sold to U.S. Investors in the Offering under Regulation D;” that “the RDS were issued by the Bank of New York, which described them as ‘U.S. securities’ on their website;” that “the subscription documents were transmitted to Citigroup Global Markets, U.S. brokerage-dealer in New York;” that “CCC hired six New York-based broker-dealers for ‘solicitation of purchasers’ throughout the United States;” and that “U.S. investors were only permitted to purchase RDSs in the Offering because they were not eligible to buy Class B shares.”\textsuperscript{202} Finally, the district court also noted that the allegations in the complaint stated that the plaintiffs resided within U.S. borders and that they invested after they were solicited by U.S. registered broker-dealers.\textsuperscript{203}

\textsuperscript{197} \textit{Id.} at 206-07.
\textsuperscript{198} \textit{Id.} at 207.
\textsuperscript{200} \textit{Phelps}, 883 F. Supp. 2d at 207 (referencing \textit{Morrison}, 561 U.S. at 266).
\textsuperscript{201} \textit{Id.} (referencing \textit{Morrison}, 561 U.S. at 266).
\textsuperscript{202} \textit{Id.} at 208.
\textsuperscript{203} \textit{Id.} at 209.
IV. LOWER COURT DECISIONS APPLYING MORRISON’S TRANSACTIONAL TEST TO TRANSACTIONS IN SECURITIES NOT REGISTERED ON EXCHANGES

So far, two circuit courts have created their own sub-tests tailored to apply Morrison’s second prong to private rights of action: the Eleventh Circuit developed the passage of title test in Quail Cruises Management v. Agencia De Viagens CVC Tur Limitada, and the Second Circuit established the irrevocable liability standard in Absolute Activist Value Master Fund Ltd. v. Ficeto.204

Quail Cruises involved a Bahamian cruise ship operator, who had purchased a defective vessel through the purchase of stock of another Bahamian corporation, sued the vessel’s prior owner, a Brazilian corporation, and other defendants, alleging, among other things, securities fraud.205 The plaintiff had purchased a vessel named the M/V Pacific—the Love Boat from the 1970s television show.206 The plaintiff acquired the vessel by purchasing all the stock of a corporation, which owned the vessel.207 The stock in question was not listed on a U.S. exchange.208 The plaintiff alleged that the defendants had made misrepresentations to conceal the deteriorating condition of the vessel, and the defendants’ misrepresentations had induced the plaintiff to purchase the stock of the corporation that owned the vessel.209

The district court granted the defendants’ motion to dismiss for lack of subject matter jurisdiction, and the plaintiff appealed.210 The district court found that the plaintiff “failed to allege that the purchase or sale of the . . . stock took place within the United

204 Quail Cruises Mgmt v. Agencia De Viagens CVC Tur Limitada, 645 F.3d 1307 (11th Cir. 2011); Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012).
205 Quail Cruises, 645 F.3d at 1309.
206 Id.
207 Id.
208 Id.
209 Id.
210 Id. at 1309-10.
On appeal, the Eleventh Circuit reversed, finding that the plaintiff had alleged sufficient facts to sustain a cause of action.\(^{212}\)

In examining the *Morrison* decision, the Eleventh Circuit looked at the Supreme Court’s second prong of the transactional test: purchases and sales of securities constituting domestic transactions.\(^{213}\) The Eleventh Circuit noted that the Supreme Court held “that, regardless of whether the underlying fraudulent conduct occurs in or affects the United States, Section 10(b) applies . . . where the security at issue is listed on a domestic stock exchange or, if not so listed, where ‘its purchase or sale is made in the United States.’”\(^{214}\) Looking at the allegations in *Quail*, the plaintiff alleged that its acquisition of the stock in question was consummated in Miami, Florida “by means of the parties submitting the stock transfer documents by express courier.”\(^{215}\) The Eleventh Circuit found that the title was physically transferred within the state of Florida.\(^{216}\) Since, under the purchase and sale agreement, “it was not until this domestic closing that title to the shares was transferred to [the plaintiff],” the sale of the stock occurred within U.S. boundaries.\(^{217}\) The sale was therefore domestic, and the Eleventh Circuit decided that the transaction was within reach of Section 10(b).\(^{218}\)

*Absolute Activist* and two related cases, *Cascade Fund, LLLP v. Absolute Capital Mgmt. Holdings, et al.*, and *SEC v. Ficeto*, dealt with misrepresentations to investors coupled with manipulation in the OTC market.\(^{219}\) In *Cascade Fund*, plaintiff-investors advanced a single claim of securities fraud under Section 10(b) alleging that a Cayman Islands private fund manager, Absolute Capital Management Holdings, Inc. (“ACM”) invested in unregulated penny stocks, which was contrary to the investment strategy described in

\(^{211}\) *Id.* at 1309.
\(^{212}\) *Id.* at 1310-11.
\(^{213}\) *Id.* at 1310.
\(^{214}\) *Id.*
\(^{215}\) *Id.*
\(^{216}\) *Id.* at 1310-11.
\(^{217}\) *Id.* at 1310.
\(^{218}\) *Id.* at 1310-11.
funds’ prospectuses. Additionally, the funds’ prospectuses and other offering materials had failed to disclose material facts relating to a fund director’s conflict of interest. The plaintiffs alleged that ACM solicited U.S. plaintiffs to buy interests in private funds organized under the laws of the Cayman Islands. The shares of those private funds were listed on foreign exchanges, and none of the funds’ shares were listed on a U.S. exchange. Although the funds’ shares were listed on foreign exchanges, the parties and the court focused on private purchases of fund shares away from any exchanges and analyzed the case under the second prong of Morrison.

The plaintiffs invested by signing a subscription agreement in the United States and sending it to the Cayman Islands for acceptance. The agreements provided that the fund manager could reject the application for investment “for any reason.” Without warning, after plaintiffs had invested, the funds’ manager disclosed that substantial portions of the funds’ capital had been invested in illiquid, U.S. penny stocks. These investments were contrary to the funds’ prospectuses, and after the announcement the prices of the funds’ shares dropped materially.

The defendants moved to dismiss arguing that the funds’ shares were not listed on a U.S. exchange and that the plaintiffs’ investments occurred in the Cayman Islands. The plaintiffs argued that their claims satisfied Morrison’s requirements because the subscription agreements and other offering materials were distributed in the United States, defendants’ employees periodically traveled to the United States to meet with prospective investors, plaintiffs decided to invest in the United States, and plaintiffs wired their investment money to a bank in New York.

221 Id. at *4.
222 Id. at *2.
223 Id. at *3.
224 Id at *3-4.
225 Id. at *4-5.
226 Id. at *5.
227 Id. at *14.
228 Id. at *20.
Looking to Morrison, the district court found that the Supreme Court had “stressed that it was the location of the transaction that determined whether the matter was subject to Section 10(b).”\textsuperscript{229} In particular, the district court noted that “Morrison rejects tests that focus on the locus of the fraud or the effects that it has on domestic investors and instead sets forth a ‘transactional test’ that determines the scope of Section 10(b) ‘whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange.’”\textsuperscript{230}

Thus, the distribution of the offering documents, the defendants’ employees’ periodic trips to the United States, and the location where Cascade decided to invest were all irrelevant.\textsuperscript{231} Additionally, as for wiring investment funds to a bank in New York, the district court indicated that this was just a mere step in the investment process; the subscription agreements made clear that wiring money was insufficient to complete the transaction.\textsuperscript{232} The completion of the transaction according to the agreement, and according to the district court as well, could come about only by the fund manager’s acceptance in the Caymans.\textsuperscript{233} Citing to Morrison’s holding 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,’” the court granted the defendants’ motion to dismiss.\textsuperscript{234}

SEC v. Ficeto was an SEC enforcement action arising from the alleged fraud at issue in Cascade Funds and Absolute Activist.\textsuperscript{235} The SEC charged several defendants with violations of Section 10(b) and Rule 10b-5 based on the defendants’ alleged manipulation of domestic OTC stocks through the use of the Absolute Funds’ capital.\textsuperscript{236} (The violations alleged in this SEC enforcement action occurred prior to the enactment of Dodd Frank, which reinstated the

\textsuperscript{229} Id. at *13.
\textsuperscript{230} Id. at *13-14.
\textsuperscript{231} Id. at * 22.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id. at *21 (quoting Morrison, 561 U.S. at 266).
\textsuperscript{236} Id. at 1103-04.
conducts and effects tests for SEC enforcement actions.\textsuperscript{237} The defendants moved to dismiss, arguing that under \textit{Morrison} the SEC’s complaint failed to state a claim on which relief could be granted.\textsuperscript{238} The court rejected the defendants’ argument.\textsuperscript{239} The court in \textit{Ficeto}, however, reached its conclusion by an entirely different analytical path than that followed by the court in \textit{Cascade Funds}.

Based on its extensive analysis of the legislative history of the Exchange Act, the court concluded that domestic OTC transactions, such as trading on Pink Sheets or OTCBB, should be treated the same as transactions on national exchanges in determining the scope of Section 10(b)’s territoriality.\textsuperscript{240} The fact that a party traded in a domestic OTC market, such as OTCBB or Pink Sheets, is sufficient to treat the transaction as domestic without further proof being offered of the transaction’s location.\textsuperscript{241} In other words, the court in \textit{Ficeto} found that transactions in the U.S. OTC market passed muster under the first prong of \textit{Morrison}.\textsuperscript{242}

The district court found that the \textit{Morrison} Court had tackled the issue of whether Section 10(b) provides a foreign plaintiff with a cause of action against foreign and domestic defendants “for misconduct in connection with securities traded on foreign exchanges,” but that the Supreme Court was silent as to whether a cause of action could exist with similar parties concerning securities fraud in the domestic OTC market.\textsuperscript{243} The bright line transaction test, then according to the district court, differentiates between foreign and domestic exchanges, and “not between domestic exchanges and the domestic over-the-counter market.”\textsuperscript{244} Specifically, “transactions on the domestic over-the-counter market are as inherently imbued with our national interest as trades on national exchanges.”\textsuperscript{245}

The court in \textit{Ficeto} pointed to the language of the Exchange Act, which makes clear that the goal of the Act was ““to provide for

\begin{itemize}
\item \textsuperscript{237} See supra note 4.
\item \textsuperscript{238} \textit{Id.} at 1106.
\item \textsuperscript{239} \textit{Id.} at 1108.
\item \textsuperscript{240} \textit{Id.} at 1109-10. (citing S. Rep. No. 73-792, at 6 (1934)).
\item \textsuperscript{241} \textit{Id.} at 1110.
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{243} \textit{Id.} at 1108-09.
\item \textsuperscript{244} \textit{Id.} at 1109.
\item \textsuperscript{245} \textit{Id.} at 1108.
\end{itemize}
the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes." The court also drew on the Exchange Act’s accompanying Senate Report which addressed “the ‘unorganized “over-the-counter” markets’” emphasizing that it is “vital to provide the Commission with authority ‘to subject [over-the-counter markets] to regulation similar to that prescribed for transactions on organized exchanges.’” The court concluded that, “the textually grounded purpose of the Act is to treat securities on the domestic over-the-counter market . . . similar to securities traded on national exchanges, having drawn no distinction in articulating the need to regulate both.”

The court further noted that market manipulation of OTC securities is a type of securities fraud that Section 10(b) was meant to address. Indeed, in looking at the Exchange Act, “Congress specifically and explicitly designated some provisions to be applied only to securities traded on national exchanges, other provisions to be applied only to securities traded on the over-the-counter market, and still others to cover both national exchanges and the over-the-counter market.”

In doing so, Congress qualified and restricted the purposes of some of the sections of the Act (e.g. Section 9(a)(1) prohibits any person from manipulating trading “in any security registered on a national securities exchange.”) Section 10(b), however, contains no such restriction as it provides for “any security registered on a national securities exchange or any security not so registered.”

246 Id. at 1109 (citing Securities Exchange Act of 1934, 48 Stat. 881 (1934)).
247 Id. at 1109-10 (citing S. Rep No. 73-792, at 6 (1934).
248 Id. at 1110.
249 Id.
250 Id.
251 Id.
252 Id.

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The court also looked at the judicial history of Section 10(b)’s application to fraud in the OTC markets. The court found that there was broad acknowledgement among the courts of a congressional intent to treat transactions on a national exchange and transactions on over-the-counter market similarly in enacting this legislation. To further support this position, the district court specifically referred to the Supreme Court’s decision in *Ernst & Ernst v. Hochfelder*: “The 1934 Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.”

Finally, the district court in *Ficeto* also emphasized that courts from multiple jurisdictions “have consistently cited specific textual provisions in holding that the Exchange Act applies to market manipulation on the over-the-counter market.”

*Absolute Activist Value Master Fund Ltd. v. Ficeto* involved the same Cayman Islands hedge funds that were at the center of the *Cascade Fund* case litigated in the district court in Colorado as discussed above. The Second Circuit issued its opinion nearly fourteen months after the Colorado district court’s decision in *Cascade Fund*, and more than three months after the California district court issued its *SEC v. Ficeto* decision. In *Absolute Activist*, the hedge funds themselves were the plaintiffs. They sued several defendants, including a U.S. resident and a U.S.-based, SEC-registered broker-dealer. Rather than alleging fraud in the offer and sale of interests in the *Absolute Activist* funds themselves, as in *Cascade Fund*, the plaintiff-hedge funds in *Absolute Activist* alleged fraud in connection with the use of the investor hedge funds’ capital to buy and sell stocks in the U.S. OTC markets. The case

253 *Id.* at 1111 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976)).
254 *Id.*
255 *Id.* at 1111.
256 *Id.*
257 *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012)
258 *Id.* at 64-65.
259 *Id.* at 63.
required the court “to determine whether foreign funds' purchases and sales of securities issued by U.S. companies brokered through a U.S. broker-dealer constitute ‘domestic transactions’” pursuant to \textit{Morrison.}\footnote{Id. at 62.}

The complaint alleged that the defendants selected the stocks of several thinly-capitalized companies which were traded in the U.S. OTC markets, and used the hedge funds’ capital to buy “billions of shares of these thinly capitalized U.S.-based companies (the ‘U.S. Penny Stock Companies’) directly from those companies.”\footnote{Id. at 63.} About the same time that the defendants acquired these thinly capitalized shares, “the U.S. Penny Stock Companies registered their shares with the SEC.”\footnote{Id. at 64.} The defendants then “artificially inflated the prices of their stocks by trading and re-trading the stocks, often between and among the plaintiff hedge funds, each time trading the stocks at a higher price to create the illusion of trading volume.”\footnote{Id. at 65.} Subsequently, when the prices of the stocks reached the levels desired by the defendants, the defendants sold the shares.\footnote{Id. at 67.}

The defendants moved to dismiss on several grounds, chief among them the “failure to state a claim, lack of personal jurisdiction and improper venue.”\footnote{Id. at 69.} After oral arguments were heard, the district court dismissed the complaint due to lack of subject matter jurisdiction.\footnote{Id. at 62.} On appeal, the Second Circuit reversed the dismissal on subject matter jurisdiction grounds, but upheld the dismissal because the plaintiffs had failed to state a claim under Section 10(b) and Rule 10b-5 in light of the Supreme Court’s decision in \textit{Morrison.}\footnote{Id. at 62.}

The defendants contended that \textit{Morrison} applied because the plaintiffs and defendants were foreign.\footnote{Id. at 62.} The plaintiffs countered that \textit{Morrison} was not applicable because some of the defendants, such as the broker-dealer, were located in the United States and the

\begin{itemize}
\item 260 Id. at 62.
\item 261 Id. at 63.
\item 262 Id.
\item 263 Id.
\item 264 Id. at 63-64.
\item 265 Id. at 65.
\item 266 Id. at 67.
\item 267 Id.
\item 268 Id. at 69.
\end{itemize}
OTC securities that were purchased by the defendants were domestic.\textsuperscript{269} The Second Circuit thus had to consider whether the allegations of the complaint were “sufficient to allege the existence of domestic transactions.”\textsuperscript{270}

The Second Circuit first sought to determine what is a domestic transaction under \textit{Morrison}. Noting that \textit{Morrison} “provides little guidance as to what constitutes a domestic purchase or sale,” the Second Circuit examined how the terms purchase and sale were defined in the Exchange Act.\textsuperscript{271} Looking at Section 3 of the Exchange Act, the Second Circuit noted that “the terms ‘buy’ and ‘purchase’ each included any contract to buy or purchase or otherwise acquire” and “the terms ‘sale’ and ‘sell’ each include any contract to sell or otherwise dispose of.”\textsuperscript{272} Looking at prior decisions by the Supreme Court and the Second Circuit, the Second Circuit found that these definitions “suggest the act of purchasing or selling securities is the act of entering into a binding contract to purchase or sell securities.”\textsuperscript{273}

In a previous decision, \textit{Radiation Dynamics, Inc. v. Goldmuntz},\textsuperscript{274} the Second Circuit held that “the time of a ‘purchase’ or ‘sale’ of securities within the meaning of Rule 10b-5 is to be determined as the time when the parties to the transaction are committed to one another,” or in other words, when there is a “meeting of the minds.”\textsuperscript{275} Building on this precedent, the Second Circuit elaborated that such a commitment “marks the point at which parties are obligated . . . to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time.”\textsuperscript{276} And, since “the point at which the parties become irrevocably bound is used to determine the timing of a purchase and sale,” the Second Circuit similarly found that this point “can be used

\begin{itemize}
\item \textsuperscript{269} Id. at 70-71.
\item \textsuperscript{270} Id. at 67.
\item \textsuperscript{271} Id.
\item \textsuperscript{272} Id. (citing 15 U.S.C. § 78c(a)(13) (2012)).
\item \textsuperscript{273} Id.
\item \textsuperscript{274} Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 891 (2d Cir. 1972).
\item \textsuperscript{275} \textit{Absolute Activist}, 677 F.3d at 67-68 (citing Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 891 (2d Cir. 1972)).
\item \textsuperscript{276} Id. at 68.
\end{itemize}
to determine the locus of a securities purchase or sale.”

Transactions are thus domestic when “the purchaser incurs irrevocable liability within the United States to take and pay for a security, or . . . the seller incurs irrevocable liability within the United States to deliver a security.”

After ruling that the geo location of a security transaction is determined by the locations at which the parties become irrevocably bound to the transaction, the Second Circuit addressed several of the arguments raised by the plaintiffs and defendants. With respect to the defendants’ arguments concerning the foreign residency of the plaintiffs, the Second Circuit held that:

[W]hile it may be more likely for domestic transactions to involve parties residing in the United States, “a purchaser’s citizenship or residency does not affect where a transaction occurs; a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States.”

Regarding the plaintiffs’ arguments concerning the location of the broker-dealer, the Second Circuit found that while the location of the broker-dealer may be important in determining whether a transaction was domestic, the location of a broker-dealer by itself does not determine where the parties became irrevocably bound to the transaction. Moreover, the Second Circuit could not conclude whether “the identity of the security necessarily had any bearing on whether a purchase or sale was domestic within the meaning of Morrison.”

In the end, the Second Circuit concluded that the plaintiffs’ complaint did not adequately allege a domestic transaction. Not surprisingly, since the plaintiffs had sued before Morrison, the

277 Id.
279 Absolute Activist, 677 F.3d at 69 (citing Plumber’s Union Local No. 12 Pension Fund, 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010)).
280 Id. at 68.
281 Id. at 68-69.
282 Id. at 69-70.
complaint contained only a few allegations that “mentioned or even hinted at the locations of the securities transactions” in dispute.\footnote{Id. at 71.} The only allegation that “affirmatively stated that the transactions took place in the United States only did so in conclusory fashion.”\footnote{Id.} The Second Circuit also noted that:

\[\text{[A]}\text{bsent factual allegations suggesting that the Funds became irrevocably bound within the United States or that title was transferred within the United States, including, but not limited to, facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money, the mere assertion that transactions “took place in the United States” is insufficient to adequately plead the existence of domestic transactions.}\footnote{Id. at 70.}

The court held “that to sufficiently allege the existence of a ‘domestic transaction in other securities,’ plaintiffs must allege facts indicating that irrevocable liability was incurred or that title was transferred within the United States.”\footnote{Id. at 62.} But since there was “significant ambiguity as to what constituted a ‘domestic transaction in other securities,’” the Second Circuit gave the plaintiffs leave to amend their complaint “to assert additional facts leading to the plausible inference that either irrevocable liability was incurred or that title passed in the United States.”\footnote{Id. at 62, 71.} The plaintiffs subsequently did amend their complaint and, on remand, the district court found that the plaintiffs’ allegations were sufficient to meet the second prong of \textit{Morrison} because the penny stocks in question were bought and sold through, Hunter World Markets, an SEC registered broker dealer who was based in California.\footnote{Absolute Activist Master Value Fund, Ltd. v. Ficeto, 2013 WL 1286170, at *17 (S.D.N.Y. Mar. 28, 2013).}
In *In re Optimal Litigation*, plaintiffs were foreign investors in the Optimal Strategic U.S. Equity Fund ("Optimal U.S."), which in turn invested one hundred percent of its assets with Bernard Madoff. The plaintiffs alleged, among other things, securities fraud under Section 10(b). In an earlier decision, the district court had ruled that under *Morrison* the plaintiffs had "adequately pled application of the Exchange Act by alleging that ‘the purchases and sales of the shares of Optimal U.S. by Plaintiffs and the Class took place in the United States.’” However, after the Second Circuit issued its decision in *Absolute Activist*, the district court in *Optimal* dismissed *In re U.S. Optimal Litigation*. Noting that the parties in the *Optimal* case did not incur irrevocable liability, and that title to the shares in Optimal U.S. was not physically transferred, within the United States, the *Optimal* court dismissed the plaintiffs’ 10(b) claims.

The plaintiffs argued that Section 10(b) extended to their claims because their purchases of Optimal U.S. shares were “in connection with the purchase of a sale of a security listed on an American Stock Exchange,” specifically, Bernard Madoff’s purported trading in securities listed on the N.Y.S.E. The district court found the plaintiffs’ “in connection with” argument too attenuated because the plaintiffs relied “on opinions construing ‘in connection with’ outside of the *Morrison* context, which thereby ignored the presumption against applying securities law extraterritorially.”

In *United States v. Vilar*, the Second Circuit held that the presumption against extraterritoriality also precludes a defendant from being criminally liable for securities fraud committed in connection with the purchase or sale of securities outside of U.S. borders. In other words, a criminal defendant can only be convicted for violating Section 10(b) and Rule 10b-5 if the alleged fraud occurred in connection with transactions in securities listed on

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291 *Id.* at 453.
292 *Id.* at 454.
293 *United States v. Vilar*, 729 F.3d 62, 67 (2d Cir. 2013)
APPLICATION OF MORRISON

a U.S. exchange or domestic transactions in other securities. In *Vilar*, the Second Circuit applied the *Morrison* transactional test and affirmed the convictions of the two defendants, Alberto Vilar and Gary Tanaka. The violations alleged by the *Vilar* prosecution occurred prior to the enactment of Dodd-Frank, which reinstated the conducts and effects tests for prosecutions under the securities acts.

In 1986, Vilar and Tanaka formed investment advisory firms in the United States, Panama and in the United Kingdom. Amerindo Investment Advisors Inc., (“Amerindo U.S.”) was a California corporation registered with the SEC. Amerindo Investment Advisors, Inc., (Panama) (“Amerindo Panama”) was an entity organized under Panamanian law and was used primarily as an offshore fund offered to U.S. investors. Amerindo Investors (U.K.) Ltd., (Amerindo U.K.) acted as portfolio manager for emerging growth stocks for clients based in the U.K. Vilar and Tanaka provided securities related products and services to clients from mid-1986 until May of 2005 and managed approximately 9 billion dollars in investments for their clients.

Vilar and Tanaka’s primary investment program was called “Guaranteed Fixed Rate Deposit Accounts” or (“GFRDA’s”). Essentially, the program offered investors the opportunity to invest in a high, fixed rate of interest over a specific period. The GFRDA program purported to invest the majority of the investors’ funds in safe securities that were “high quality, short term deposits, including U.S. Treasury bills.”

In reality, Vilar and Tanaka invested almost all of the investors’ money in volatile technology and biotechnology stocks. When the tech stock bubble burst in the late 1990’s, and they could

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294 *Id.*
295 *Id.* at 70, 74-76.
296 See *supra* note 4.
297 See *Vilar*, 729 F.3d at 68.
298 *Id.*
299 *Id.*
300 *Id.*
301 *Id.*
302 *Id.*
303 *Id.*
304 *Id.*
not deliver the promised rates of return, Vilar and Tanaka devised a scheme to make up the difference. 305 They sought out a wealthy client named Lily Cates, convinced her to invest in a small business investment company (“SBIC”) and assured her that they had an SBIC license and would receive matching funds from the Small Business Administration.306 In fact, Vilar and Tanaka did not have a SBIC and had been denied an SBIC license on multiple occasions.307

After Cates made a $5 million investment in the SBIC program offered by Amerindo U.S., Vilar and Tanaka promptly deposited the money in a Bear & Stearns & Co. bank account in the name of a Panamanian affiliate named “Amerindo Management Inc.” (“AMI”) and used the funds to pay off their debts and to pay their personal expenses.308 After making numerous inquiries over a two-and-half-year period, Cates asked Vilar to refund her money.309 Vilar replied that Cates would have to take this matter up with Amerindo Panama.310 Cates reported Vilar and Tanaka to the SEC.311

The Department of Justice subsequently obtained indictments against Vilar and Tanaka, charging them with, among other counts, conspiracy to commit securities fraud, investment adviser fraud, mail fraud, wire fraud, and securities fraud.312 The SEC concurrently brought a civil action against Vilar and Tanaka for violations of the antifraud provisions of the federal securities laws.313 Vilar and Tanaka stood trial on the criminal charges and were both convicted.314

After the convictions, the SEC moved for summary judgment in its case based on collateral estoppel in S.E.C. v. Amerindo Investors Advisors Inc.315 The court partially granted the

305 Id.
306 Id. at 68-69.
307 Id. at 68.
308 Id. at 69.
309 Id.
310 Id.
311 Id.
312 Id.
313 Id. at 69 n.4.
314 Id. at 69.
SEC’s motion. In so doing, the court applied the irrevocable liability test of *Absolute Activist* and determined that the defendants’ misconduct had occurred in connection with domestic transactions. In order to reach this conclusion, the court divided the investors into two categories: a) the GFRDA investors and b) Lily Cates.

With respect to the GFRDA plaintiffs, the court sub-divided the group into four parties: a) Lecube-Chavez; b) Colburn; c) Cox; and d) the Mayer family, employing principles of contract law to determine where each person had incurred irrevocable liability. Regarding Lecube-Chavez, the court found that she was a New York City resident who “invested $74,000 with Amerindo U.S. by sending the funds to either Amerindo’s New York or California office.” Likewise, the district court found that “Colburn, a California resident, made her investment by having an agent in Illinois send a $1 million payment to Bear Stearns & Co. account in New York.” Cox, who also resided in California, sought “to invest in a GFRDA while in California.” Looking at prior case law, the court found that where a person elects to purchase, or places an order and exchanges money for the security, it is indicative of irrevocable liability for both parties to the transaction. Thus, in looking at the evidentiary record and applying the irrevocable liability standard concerning the transactions, the court found there was no genuine issue of material fact, which would preclude summary judgment.

However, when the court looked at the record concerning the Mayer family’s transactions, it found that while the Mayer family had accepted an offer to renew their GFRDA investment at their residence in Puerto Rico, the offer had been made in the U.K. The district court found that these facts created a “genuine issue of material fact because Puerto Rican law—unlike New York or

316 *Id.* at *14.
317 *Id.* at *7-8.
318 *Id.* at *5-8.
319 *Id.* at *5-7.
320 *Id.* at *6.
321 *Id.*
322 *Id.*
323 *Id.*
324 *Id.* at *7.
California law—appears to presume a contract to have been executed at the place where the offer was made.” 325 The court, therefore, denied the SEC summary judgment as to the fraud against the Mayer family. 326

Regarding Lily Cates, the court noted that “Vilar solicited Cates’s $5 million investment in his New York City apartment and that, approximately seven to ten days later, in her own New York City apartment, Cates executed the documents obligating her to make the investment and handed them over to a messenger.” 327 Since the defendants did not dispute these facts, the court found them to be sufficient “to establish as a matter of law that Cates became irrevocably bound in New York.” 328 Employing contracts analysis, the court noted that New York law holds that a contract is valid where there is offer, acceptance, mutual assent, consideration as well as intent to be bound. 329 Moreover, the contract is formed where the “last act necessary for its formulation is done, and at the place where that final act is done.” 330

The defendants argued that the transaction occurred abroad because Cates transferred her funds to “an account controlled by an Amerindo Panamanian entity” subject to the Panamanian law. The court, however, rejected this argument because under Morrison the determinative fact is the location of the transaction, not the residence or domicile of the parties. 331 The court granted the SEC summary judgment with respect to its claims that Vilar and Tanaka violated Section 17(a), Section 10(b), and Rule 10b-5 concerning three of the four GFRDA investors (excluding the Mayer Family) and as to these claims against Vilar concerning Lily Cates. 332

325 Id.
326 Id.
327 Id.
328 Id.
330 Id. (referencing McNamara, 464 F. Supp. 2d at 237 (internal citations omitted)).
331 Id. at *8.
332 Id. at *14.
Meanwhile in the criminal proceeding, Vilar and Tanaka appealed to the Second Circuit.\textsuperscript{333} They argued that their convictions could not stand under \textit{Morrison} because their conduct took place outside of the United States.\textsuperscript{334} The Second Circuit agreed with the defense that \textit{Morrison} applied to criminal prosecutions for violations of Section 10(b) and Rule 10b-5.\textsuperscript{335} But the court disagreed with defendants about the location where the fraudulent transactions had occurred.\textsuperscript{336}

Applying \textit{Absolute Activist}, the Second Circuit found that Vilar’s and Tanaka’s customers incurred irrevocable liability in the United States.\textsuperscript{337} The investors incurred irrevocable liability when they signed their commitment forms for investing in the GRFDA program and handed over their money to Vilar and Tanaka while they, and Vilar and Tanaka, were in the United States.\textsuperscript{338} There were, also, sufficient facts showing that Cates committed herself to the SBIC program by signing the requisite documents and submitting her investments when she met with Vilar and Tanaka in New York.\textsuperscript{339}

In deciding \textit{Absolute Activist}, the Second Circuit had referred to “meeting of the minds,” “contract to sell,” and “contract to buy.”\textsuperscript{340} The court also had stated that “the act of purchasing or selling securities is the act of entering into a binding contract to purchase or sell securities.”\textsuperscript{341} In deciding \textit{Vilar}, however, the court ruled that state contract law does not answer the question of where irrevocable liability attaches.\textsuperscript{342} According to the Second Circuit in \textit{Vilar}, this question turns on “where, physically, the purchaser or seller committed him or herself, not where, as a matter of law, a contract is said to have been executed.”\textsuperscript{343}

\textsuperscript{333} \textit{Vilar}, 729 F.3d at 69.
\textsuperscript{334} \textit{Id.} at 70.
\textsuperscript{335} \textit{Id.}
\textsuperscript{336} \textit{Id.}
\textsuperscript{337} \textit{Id.} at 76.
\textsuperscript{338} \textit{Id.} at 76-77.
\textsuperscript{339} \textit{Id.} at 77.
\textsuperscript{340} \textit{Absolute Activist Value Master Fund Ltd. v. Ficeto}, 677 F.3d 60, 67-68 (2d Cir. 2012).
\textsuperscript{341} \textit{Id.} at 67.
\textsuperscript{342} 729 F.3d at 78 n.11.
\textsuperscript{343} \textit{Id.}
After the Second Circuit rendered its decision in *Vilar*, the defendants moved for reconsideration in the civil SEC proceeding.344 In an opinion issued on February 2, 2014 in *SEC v. Amerindo Inv. Advisors Inc.*, the district court noted that the Second Circuit’s *Vilar* opinion rejected a contracts analysis and instead called for an analysis of the physical location of the purchaser or seller when they committed to the transaction.345 With this test in mind, the district court revisited each of the victims’ transactions and decided to grant the SEC summary judgment as to all of its claims, including those based on the fraud against the Mayer family.346 In reaching its decision, the district court held that “evidence that a person lived in the United States can be, on its own, sufficient to prove by a preponderance of the evidence that a person was in the United States on a particular day.”347 This is so because “evidence of domestic residency . . . makes it more likely that a person” is within U.S. borders.348 The court cautioned, however, that it was “not holding that a transaction is domestic merely because a party was a United States resident . . . but rather that the fact of residency may be highly probative of physical location and can adequately prove physical location by a preponderance when there is no contrary evidence.”349

The district court reiterated the point that *Morrison* focuses not on whether a security was issued by a foreign or domestic company, but rather on the location of the securities transaction itself.350

A district court in the Southern District of New York also served as the forum for a private right of action concerning collateralized debt obligations (“CDOs”) in *Arco Cap. Corps. Ltd., v. Deutsche Bank, AG*.351 A CDO is a type of asset backed security, the

345 Id. at *2.
346 Id. at *4-6.
347 Id. at *7.
348 Id. (referencing United States v. Rizzo, 349 F.3d 94, 98 (2d Cir. 2003) (internal citations omitted)).
349 Id.
350 Id. at 7 n.6.
value of which is derived from a small and illiquid underlying asset such as a mortgage note.\footnote{See Collateralized Debt Obligation-CDO, INVESTOPEDIA, http://perma.cc/ER6T-BPGC (last visited July 26, 2014).}

*Arco* involved a Puerto Rican based investment adviser named Arco Capital Corporation, Ltd. (“Arco”), which purchased debt securities in the form of notes tied to a reference portfolio involving derivative transactions in the form of collateralized loan obligation (“CLOs”).\footnote{Arco Capital Corps., 949 F. Supp. 2d at 535.} The notes in dispute were offered by a German bank, Deutsche Bank AG (“Deutsche”), and were tied to transactions effected through a Cayman Island company called CRAFT EM CLO (“Craft”), which had also entered into a series of credit default swap transactions (“CDS Agreements”) with Deutsche that “applied to the Reference Portfolio, which started at $ 500 million in size.”\footnote{Id. at 537.} The size of the Reference Portfolio doubled to $ 1 billion as the Swap Confirmations were amended.\footnote{Id. at 536-36.}

A company called Gramercy Emerging Markets Fund (“Gramercy”) (which was affiliated with Arco) purchased the notes which were issued in tranches with varying levels of seniority on two different occasions, in June of 2006 and in January of 2007.\footnote{Id. at 535-36.} Gramercy purchased the notes via Subscription Agreements, and “on or before the closing date of each issuance, each Note Subscription Agreement was agreed to and accepted in the Cayman Islands by a director of the CLO employed by the CLO’s ‘Administrator,’ Maples & Calder, a Cayman Islands law firm.”\footnote{Id. at 536.} According to the allegations, Gramercy then transferred the notes to Arco in May, 2007.\footnote{Id.}

Arco suffered losses on the Notes and subsequently filed claims under Section 10(b) and Rule 10b-5 of the Exchange Act against Deutsche alleging among other claims, material omissions and misrepresentations as to the Reference Obligations and the CDS Agreements, together with material deficiencies in the certifications

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353 Arco Capital Corps., 949 F. Supp. 2d at 535.
354 Id. at 537.
355 Id.
356 Id. at 535-36.
357 Id. at 536.
358 Id.
Deutsche sought to dismiss the Section 10(b) claims under the second prong of Morrison’s transactional test as well as Absolute Activist’s irrevocable liability test, arguing that “irrevocable liability attached to the transaction when the Issuer accepted each of the executed agreements in the Cayman Islands.”

Thus, under Deutsche’s argument the Note transaction occurred abroad because the Notes were offered by a German entity (Deutsche), issued by a Cayman Island’s entity (Craft EM CLO), and purchased by a Cayman Islands purchaser (Gramercy). Arco responded that Craft EM CLO really entered into a legal contract in New York with HSBC Bank USA (“HSBC”), an agreement that obligated Arco to purchase the notes. Arco also argued that it was Deutsche, according to Arco who “controlled the transactions from its offices in New York.”

In addition, the terms of the subscription agreement required the investors to deliver their investment funds to HSBC in New York by closing; the funds had to be delivered to a specified account; receipt of the funds was a condition precedent to Craft EM CLO’s selling the notes; Craft EM CLO could rescind the Subscription Agreements at its discretion any time prior to closing; and, finally, delivery of the funds at purchase price constituted completion of the Subscription Agreement.

Looking at Arco’s allegations, the district court first noted that courts held repeatedly that Morrison’s second prong is not satisfied when investors wire money to a bank located in the United States. More was needed according to the district court in order to satisfy Morrison’s requirements. The court, also, looked to Cascade in which the district court found that investors’ wiring money to a bank located in the United States was but one step in “applying to invest in the funds” and, thus, did not complete the

359 Id. at 537-38.
360 Id. at 540, 542.
361 Id. at 542.
362 Id. at 536, 542.
363 Id. at 541.
364 Id. at 542.
365 Id.
transaction. But the district court in Arco contrasted the facts of that case with the facts in Cascade. In contrast to the facts in Cascade, in Arco the terms of the subscription agreement stipulated that “the delivery of the funds to HSBC automatically terminated or ‘consumated’ the transaction because that act made the contract irrevocably binding.” Looking at the principles of contract law, the district court then found that the Subscription Agreement did not constitute a contract, but rather “an offer to contract . . . which when acted upon by incurring liability, becomes a binding obligation.” Here, Gramercy “acted upon” the Subscription Agreements when it transmitted the funds to HSBC at which point, according to the terms of the agreement, Craft EM CLO could not exercise its discretion “to revoke acceptance.” Thus, the court denied Deutsche’s motion to dismiss Arco’s 10(b) claims on Morrison grounds.

In Atlantica Holdings Inc. v. Sovereign Wealth Fund Samruk Kazyna foreign and domestic investors bought subordinated debt securities issued by BTA Bank JSC (“BTA”), a bank in Kazakhstan as part of a debt restructuring plan in 2010. The subordinated notes “were listed on the Kazakhstan and Luxembourg Stock Exchanges but they were never traded on any U.S. exchange.” The restructuring plan proved unsuccessful and BTA Bank’s financial position began to deteriorate. After subsequent efforts to restructure proved to be futile, BTA “filed a bankruptcy petition, pursuant to Chapter 15 of the Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of New York.” The investor plaintiffs subsequently filed suit against the Samruk-Kazyna Fund (“S-K Fund”), “a sovereign wealth fund owned and operated by” BTA, as well as BTA’s majority shareholder. The investors

366 Id. at 542-43 (referencing Cascade, 2011 U.S. Dist. LEXIS 34748 at *21-22).
367 Id. at 543.
368 Id. (referencing Note Subscription Agreements § 7, and 1 Williston On Contracts, 1936 Ed., § 116).
369 Id.
370 Id.
372 Id. at *2.
373 Id. at *2-3.
374 Id. at *3.
alleged, among other claims, that the S-K Fund, through its officers and directors, made false and misleading statements concerning BTA’s financial position, in violation of Section 10(b) and Rule 10b-5.375

The plaintiffs argued that they incurred irrevocable liability in the United States because they purchased the subordinated notes when they placed their orders with the Miami broker UBS, who in turn forwarded these orders to its broker dealer in New York City, “‘where the funds from Plaintiff’s account . . . maintained with UBS were transferred internally to UBS’s back office.’”376 Moreover, the investors claimed that under their subscription agreements, they had to send an Electronic Instruction Form back to BTA acknowledging that their purchases were irrevocable.377 Thus, the plaintiffs argued, their allegations were sufficient to survive the S-K Fund’s motion to dismiss.

The district court agreed with the plaintiffs, finding that “to purchase the Notes in 2010 Restructuring, Atlantica and Baltica had to send an ‘Electronic Instruction Form’ . . . .”378 That Form indicated that the plaintiffs incurred irrevocable liability when they purchased the subordinated notes; however, the Form did allow for a two business day revocation period if BTA amended, terminated or withdrew the 2010 debt restructuring plan to the material detriment of the investors.379

The S-K Fund attempted to use the language of the subscription agreement to its advantage to dismiss the plaintiff’s claims under the Absolute Activist irrevocable liability standard.380 The S-K Fund argued that the investors’ purchases could be revoked if “BTA Bank took certain actions deemed adverse to affected holders of the Notes.”381 This meant that the investors “did not incur irrevocable liability until the 2010 Restructuring was approved by creditors and by the Kazakhstani court in Almaty.”382 Essentially,

375 Id. at *1, 3.
376 Id. at *8 (internal citations omitted).
377 Id. at *8-9.
378 Id. at *8.
379 Id. at *8.
380 Id. at *9.
381 Id.
382 Id.
the district court noted, the S-K Fund argued that the investors had incurred irrevocable liability only after certain condition precedents were met.\textsuperscript{383}

The district court rejected this argument, finding first that “district courts have held that the existence of conditions precedent to the closing of a deal do not render the transaction non-domestic.”\textsuperscript{384} Moreover, the district court also found that since the plaintiffs alleged that the Electronic Instruction Form included language which did irrevocably bind the investors, this was “sufficient to satisfy the \textit{Absolute Activist} test,” which necessitated that either “purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security.”\textsuperscript{385}

Finally, also of note is the court’s second prong analysis in the \textit{UBS} case discussed in Part I. That case also included a U.S. plaintiff, the Oregon Public Employees Board (“OPEB”), which argued that its claims met \textit{Morrison}’s second prong.\textsuperscript{386} The OPEB argued that even though the district court had dismissed the foreign plaintiffs’ claims, its claims were still valid because it had placed buy orders in the United States and those buy orders constituted “the ‘purchase . . . of any other security in the United States.’”\textsuperscript{387} The district court rejected this argument reasoning that the mere placement of a buy order in the United States does not constitute a domestic transaction for purposes of satisfying Section 10(b) as the focus of the bright line transactional test in \textit{Morrison} is not on the location of the purchaser, but on the location of the transaction itself.\textsuperscript{388} And although the domestic entity did allege that it suffered injuries, “an investor’s mere allegation that he suffered injury in the United States is insufficient to bring the investor’s claim within the

\begin{itemize}
\item \textsuperscript{383} \textit{Id.}
\item \textsuperscript{384} \textit{Id.} (referencing Arco Capital Corp. Ltd. v. Deutsche Bank AG, 949 F. Supp. 2d 532, 542–43 (S.D.N.Y.2013); Liberty Media Corp. v. Vivendi Universal, S.A., 861 F. Supp. 2d 262, 269 (S.D.N.Y.2012)).
\item \textsuperscript{385} \textit{Id.} (referencing \textit{Absolute Activist}, 677 F.3d at 68).
\item \textsuperscript{386} \textit{In re UBS Sec. Litig.}, 2011 WL 4059356, at *7 (S.D.N.Y. Sept. 13, 2011).
\item \textsuperscript{387} \textit{Id.} (referencing Complaint, \textit{UBS Sec. Litig.}, No. 07 Civ. 11225 (S.D. N.Y. Dec. 13, 2007) (internal citations omitted)).
\item \textsuperscript{388} \textit{Id.} (referencing \textit{Morrison}, 561 U.S. at 266-67).
\end{itemize}
Consequently, the district court dismissed the OPEB’s claims as well.\(^{389}\)

On appeal, the Second Circuit affirmed the district court’s decision in *City of Pontiac Policemen’s and Firemen’s Retirement System, et al. v. UBS, AG, et al.*, holding a U.S. plaintiff’s buy order placed within U.S. borders as insufficient to meet *Morrison*’s second prong because the plaintiff does not incur irrevocable liability as indicated in *Absolute Activist*.\(^{391}\) The Second Circuit noted that whether a mere buy order placed within the United States provides grounds for the purpose of buying securities traded on a foreign exchange is sufficient to establish irrevocable liability as set forth in *Absolute Activist* is “an issue of first impression” for the Second Circuit.\(^{392}\) Noting that *Absolute Activist* found that “a purchaser’s citizenship or residency does not affect where a transaction occurs,” the Second Circuit found that the allegation that OPEB was based in the United States bore no relevance to its transaction; neither did the allegation that OPEB placed a buy order in the United States, where the securities were foreign and were traded on a foreign exchange.\(^{393}\) Thus, OPEB’s buy order, according to the Second Circuit, did not establish irrevocable liability.\(^{394}\)

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389 *Id.* at *8.
390 *Id.*
392 *Id.* at 181.
393 *Id.*
394 *Id.*
V. SUMMARY OF THE DEVELOPING LAW AFTER MORRISON

Under Morrison, Section 10(b) applies to fraud in connection with the purchase or sale of any security registered on a national exchange regarding Morrison’s first prong and to domestic transactions involving any security not so registered for Morrison’s second prong.\(^{395}\) The focus of the Morrison bright line test is the location of the transaction itself, and not the conduct or any activity related to the conduct.\(^{396}\) In other words, in order to have a viable claim under Section 10(b), investors must show that their securities were registered on a U.S. exchange or that the purchase or sale of their securities was consummated within the United States.\(^{397}\)

To date, lower courts applying Morrison have dealt with fact patterns involving securities listed on foreign exchanges; securities cross-listed on multiple exchanges; American Depository Shares; American Depository Receipts; Contracts for Difference; securities-based swap agreements; credit default swaps; collateralized debt obligations; collateralized liability obligations; foreign private funds; and domestic over-the-counter securities such as trading on Pink Sheets or OTCBB. Among the Courts of Appeal, only the Second and Eleventh Circuits have issued decisions under Morrison.

Courts have announced several principles in decisions issued after Morrison, including: A transaction is domestic when title to the disputed securities passed within the United States.\(^{398}\) The only question is, where did the transaction take place?\(^{399}\) The location of conduct attendant to the transaction is irrelevant.\(^{400}\)

A transaction is domestic when the purchaser or the seller becomes irrevocably committed to the transaction within the United States.\(^{401}\) Irrevocable liability attaches when the parties achieve a

\(^{396}\) Id. at 269-71.
\(^{397}\) Id.
\(^{398}\) Quail Cruises Mgmt v. Agencia De Viagens CVC Tur Limitada, 645 F.3d 1310 (11th Cir. 2011).
\(^{399}\) Absolute Activist, 677 F.3d at 66-67.
\(^{400}\) Morrison, 561 U.S. at 269-71.
\(^{401}\) Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 68 (2d Cir. 2012).
meeting of the minds. Nonetheless, state contract law has no bearing on the question of where irrevocable liability attaches; rather, the focus should be on “where, physically, the purchaser or seller committed him or herself, not where, as a matter of law, a contract is said to have been executed.”

In transactions involving ADRs, swap agreements, and CDSs, the determination of where the transaction took place turns on the location where the underlying reference securities are traded.

When a security is cross-listed on U.S. and foreign exchanges, the location of the transaction is the exchange on which the security has its primary listing. Thus, if the stock is primarily traded on a foreign exchange, but is cross-listed on a U.S. exchange, the transaction is presumed to have occurred abroad; conversely, if the stock is primarily traded on a U.S. exchange but is also cross-listed on a foreign exchange, the transaction is presumed to have taken place within the United States. The purchaser or seller need not be physically present at an exchange.

Transactions in domestic OTC markets are treated the same as transactions executed through domestic exchanges.

In applying Morrison to transactions occurring away from exchanges, courts have been quick to accept the Absolute Activist irrevocable liability test, but they have looked to contract law in reaching their decisions. Decisions issued to date point to the last

402 Id. at 67-68 (citing Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 176, 891 (2d Cir. 1972)).
403 United States v. Vilar, 729 F.3d 62, 78 (2d Cir. 2013).
407 See e.g. Elliot Assocs., 759 F. Supp. 2d at 474-75.
408 UBS Sec. Litig., 2011 WL 4059356, at *5-6; See also Stackhouse, 2010 WL 3377409, at * 1.
409 Id. at *5-6.
411 Ficeto, 839 F. Supp. 2d at 1111.
act in the formation of the contract to determine where the transaction occurred.\footnote{See supra note 330.} Courts have looked at the terms of subscription agreements to identify the acts that, under the agreements, constitute the last acts necessary to form a contract.\footnote{Arco Cap. Corps., 949 F. Supp. 2d at 542-43; Cascade Fund, LLLP v. Absolute Capital Mgmt. Holdings, et al., 2011 U.S. Dist. LEXIS 34748 *21-22 (D. Colo. 2011).}

Courts have also considered the physical location of the purchaser, the seller, the issuer, the broker, and the seller’s bank as factors in their analysis under \textit{Morrison}’s second prong.\footnote{See Cascade, 2011 U.S. Dist. LEXIS 34748, at *22; \textit{See also Absolute Activist}, 2013 WL 1286170, at *17 (S.D.N.Y. Mar. 28, 2013); \textit{Atlantica Holdings Inc.}, 2014 WL 917055, at *8.}

In the authors’ views, several important questions have been raised by the decisions issued to date, including: In light of the \textit{Vilar} court’s rejection of contract law as a basis for determining when and where irrevocable liability attaches, if contract law does not supply the answer to the question, then what body of law does? What if the purchaser and seller commit to a transaction at different times? What if the purchaser and seller are located in different countries when each, or both, become committed to the trade? If courts and litigants should not look to contract law for guidance, then why did the \textit{Absolute Activist} court refer to the key moment as “the point at which, in the classic contract sense, there was a meeting of the minds of the parties?”

If an order to buy an exchange-listed security is placed through one trading venue but then routed to and executed through another venue located in another country, where is the transaction said to take place? Is it the location of the venue through which the order was placed? Or is it the location of the venue where the trade was executed?

What happens if the computer servers of a trading venue, through which a trade is executed, are located elsewhere from the offices of the trading venue?

Where is a trade said to occur if the order to buy and the order to sell are placed through two different trading venues located in two different countries?
In the case of transactions in foreign securities cross-listed on U.S. exchanges, should trades always be said to have occurred through the primary, foreign exchange even when the trades are executed through the U.S. exchange?

The language of Section 10(b) prescribes, and the Court in *Morrison* held, that Section 10(b) reaches fraud in connection with transactions in securities registered on national exchanges. Does the breadth of that language indicate congressional intent to submit to the primary antifraud provision of the Exchange Act all trading in securities listed on national exchanges—that is, exchanges regulated under the Exchange Act—including transactions that occur away from the exchange? Do transactions in securities listed on U.S. exchanges impact the trading on those exchanges, even when executed away from the U.S. exchanges?

VI. CONCLUSION

*Morrison* completely upended the law regarding the reach of Section 10(b) and Rule 10b-5 in private actions involving foreign conduct and effects. Since *Morrison* was issued, the lower courts have begun the process of answering the detailed questions not raised by the facts of that case. In the authors’ view, the overarching question is how will the courts develop the law after *Morrison* in an era when electronic trading and increasingly global markets are rendering the idea of a single geographic location for a transaction ever more problematic, if not all together indeterminable?