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The Second Circuit Issues Decision of First Impression With Respect to Morrison and Extraterritoriality

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Earlier today, the United States Court of Appeals for the Second Circuit issued the following decision in the

City of Pontiac Policemen's & Firemen's Ret. Sys. et al. v. UBS AG et al.

, No. 12-4355 (2d Cir. May 6, 2014). The decision is one of first impression in the Second Circuit with respect to two questions arising out of the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). First, does *Morrison* bar Exchange Act Section 10(b) claims with respect to the purchase or sale of securities on foreign exchanges when those same securities are cross-listed on a U.S. exchange? The Second Circuit answered with a "yes." Second, is the mere placement of a buy order in the United States for the purchase of foreign securities on a foreign exchange sufficient to allege that a purchaser incurred irrevocable liability in the United States, such that the U.S. securities laws govern the purchase of those securities under the Second Circuit's decision in *Absolute Activist Value Master Fund Ltd v. Ficeto*, 677 F.3d 60 (2d Cir. 2012)? The Second Circuit answered with a "no."

The Listing Theory

Since the issuance of the *Morrison* opinion by the Supreme Court, plaintiffs have attempted to argue that certain language in the Supreme Court's opinion (i.e., Section 10(b) reaches "transactions in securities listed on domestic exchanges") means that the extraterritorial bar announced in *Morrison* has no application in situations where, although the relevant purchases or sales occurred on a foreign exchange, the securities in question were cross-listed on a U.S. exchange. A number of district courts have previously confronted that argument and, overwhelmingly, have rejected it. The Second Circuit decision today endorses that same reading of *Morrison*. According to the Second Circuit, *Morrison* focused on where the relevant securities transaction occurred, not whether securities of the same type are also listed in the United States. Thus, the Second Circuit today rejects the so-called "listing theory" that has been offered by plaintiffs since *Morrison* as a work-around of the presumption against extraterritorial application of Section 10(b).

The (In)Significance of the Locus of a Buy Order

The Second Circuit was also confronted with the question of whether a domestic plaintiff's placement of a buy order in the United States is sufficient to overcome *Morrison*'s presumption against extraterritorial application of Section 10(b). This issue arises out the Second Circuit's ruling in the *Absolute Activist* case, in which the Court determined that Section 10(b) is applicable under *Morrison's* second prong with respect to transactions where title is passed within the United States or the parties incur irrevocable liability to carry out the transaction within the United States. The question answered today by the Second Circuit is whether the purchaser incurred irrevocable liability to carry out the transaction within the United States by placing a buy order in the United States for the purchase of foreign securities on a foreign exchange. The Second Circuit held that neither the status of the purchaser as a U.S. entity nor the fact that the buy order was placed in the United States, standing alone, establishes that the purchaser incurred irrevocable liability in the United States.

Other Aspects of the Decision

Separate from the *Morrison*-related rulings, the Second Circuit also affirmed dismissal of Securities Act Sections 11 and 12(a)(2) claims by certain plaintiffs on the ground that they had not sufficiently alleged material misrepresentations in the offering materials. According to the Second Circuit, certain of the alleged misrepresentations about UBS' compliance, reputation and integrity were too general and aspirational to be actionable. Other alleged misrepresentations about an ongoing governmental tax investigation, said the Court, were also not actionable under Section 11, Section 12(a)(2), or Exchange Act Section 10(b), because, contrary to plaintiffs' theory, companies are not required to disclose uncharged, unadjudicated wrongdoing where they have disclosed the existence of an investigation and the potential risks associated with such investigation. Finally, the Second Circuit affirmed dismissal of Section 10(b) claims based on alleged misrepresentations regarding concentration and valuation of certain assets. With respect to such claims, the Second Circuit determined that UBS' statements regarding asset concentration were too open-ended and subjective to be actionable and also that plaintiffs had not sufficiently alleged scienter with respect to such statements or with respect to the valuation of certain RMBS/CDO assets.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Charles S. Duggan
+1 212 450 4785
charles.duggan@davispolk.com

Michael S. Flynn
+1 212 450 4766
michael.flynn@davispolk.com

Edmund Polubinski
+1 212 450 4695
edmund.polubinski@davispolk.com

Lawrence Portnoy
+1 212 450 4874
lawrence.portnoy@davispolk.com

Neal Potischman
+1 650 752 2021
neal.potischman@davispolk.com

James P. Rouhandeh
+1 212 450 4835
rouhandeh@davispolk.com

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