Insurance

# CaseNote

**July 2010**

## The not so long arm of the US law

In our May 2010 Case Note[1], we discussed the significant implications of the potential application of US securities laws outside of the US. At that time, a decision was awaited from the US Supreme Court in the case of ***Morrison v National Australia Bank***[2]. The US Supreme Court delivered its decision on 24 June 2010.

### The decision

The Court ruled that Section 10(b) of the *Securities and Exchange Act of 1934* (***Securities Exchange Act***) does not provide "…a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."

There is a presumption against extraterritoriality: a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to only apply only within the territorial jurisdiction of the United States.'"

Nothing in the relevant sections of the *Securities Exchange Act* suggests extraterritorial application. If Congress had intended such application "it would have addressed the subject of conflicts with foreign laws and procedures" as the "probability of incompatibility with the applicable laws of other countries is so obvious."

The focus of the *Securities Exchange Act* is not on the place where the deception originated (in this case, the alleged deceptive conduct and some misleading public statements were made in Florida) but on purchases and sale of securities in the US.

The Court affirmed the Second Circuit Court of Appeal's earlier dismissal of the case, but rejected the "conduct and effect test", one of the grounds upon which the Second Circuit relied in dismissing the case. The Court instead adopted a " transactional test" namely "…whether the purchase or sale is made in the United States, or involves a security listed on a domestic [US] exchange..."

1 http://www.cbp.com.au/Portals/0/Long%20arm%20of%20the%20law1.pdf
2 Morrison et al v. National Australia Bank Ltd. et al 561 U.S. _ (2010)

## The Impact

The Court's decision should mean the end of "foreign-cubed" or "F-cubed" litigation. Some commentators in the US have suggested that resourceful plaintiffs' lawyers will find ways to circumvent the decision and this remains to be seen.

The decision will not, however, put an end to all securities class action litigation in the US by foreign investors against foreign companies. Foreign investors who purchase securities of a foreign company on a US stock exchange will still be able to commence proceedings under the *Securities Exchange Ac*t. Foreign companies with ADRs traded in the US will also still have exposure to the *Securities Exchange Act*.

The Court's decision does not relieve directors of foreign companies with operations in the US from exposure to anti-trust, product liability, employment practices and other sources of liability. They will continue to face significant exposure from litigation driven by US regulators and plaintiff class action lawyers.

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