



U.S. CHAMBER
Institute for Legal Reform

Federal Cases from Foreign Places

*How the Supreme Court Has Limited
Foreign Disputes from Flooding U.S. Courts*

.....
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U.S. CHAMBER
Institute for Legal Reform

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Introduction

Over the past several decades, American companies have faced a tidal wave of lawsuits attempting to import foreign controversies into U.S. courts. Overseas plaintiffs seek out U.S. courts to take advantage of distinctively permissive features of the American judicial system, including liberal discovery rules, punitive damages, class action contingency fee arrangements, jury trials, and the absence of “loser pays” fee-shifting.

To that end, foreign plaintiffs have married expansive theories of personal jurisdiction with aggressive interpretations of substantive laws such as the Alien Tort Statute, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act (RICO)—all in an attempt to have American courts adjudicate disputes that arose overseas.

The tide, however, might finally be receding. Recent decisions by the United States Supreme Court in cases such as *Morrison*,¹ *Kiobel*,² *Goodyear*,³ *McIntyre*,⁴ and *Bauman*⁵ have cut back attempts to involve U.S. courts in controversies with minimal, if any, connection to the United States. These decisions restrict the extraterritorial reach of U.S. laws and impose more rigorous standards for demonstrating personal jurisdiction over defendants. The plaintiffs’ bar has reacted to these setbacks with creative attempts to circumvent these rulings in additional lawsuits against U.S. and foreign companies.

This collection of essays, written by esteemed legal experts in a variety of fields, examines the current and swiftly shifting legal landscape of federal claims by foreign plaintiffs in the federal courts. The essays focus on some of the most common statutes invoked by foreign plaintiffs, as well as the threshold issues of personal jurisdiction and pleading standards that govern such suits:

- In “*Morrison* at Four: A Survey of Its Impact on Securities Litigation,” securities law expert George T. Conway III analyzes the ongoing impact of the Supreme Court’s decision four years ago in *Morrison v. National Australia Bank*, holding that Section 10(b) of the Securities Exchange Act of 1934 does not apply extraterritorially to claims by foreign investors who purchased securities of foreign issuers on foreign exchanges. Conway, who argued *Morrison* before the Supreme Court, also discusses the continued efforts of the securities plaintiffs’ bar to evade *Morrison*.

“ [R]ecent decisions have given American companies new tools to oppose the importation of foreign disputes into U.S. courts. ”

- In “Whither to ‘Touch and Concern’: The Battle to Construe the Supreme Court’s Holding in *Kiobel v. Royal Dutch Petroleum*,” international law experts John B. Bellinger, III and R. Reeves Anderson discuss how lower courts have applied the Supreme Court’s landmark decision in *Kiobel v. Royal Dutch Petroleum*, which cited *Morrison* in support of its holding that the Alien Tort Statute generally does not reach alleged misconduct that took place outside of the United States.
- In “RICO and the Plaintiffs’ Bar: Pushing the Boundaries of Extraterritoriality,” leading litigator James L. Stengel reports on the latest attempts by the plaintiffs’ bar to use civil RICO to reach extraterritorial conduct. Stengel takes a close look at some of the most significant recent decisions that shed light on the plaintiffs’ strategies in these “foreign RICO” cases—and how lower courts have been responding.

Following these essays, the U.S. Chamber Institute for Legal Reform examines the Supreme Court’s recent civil procedure decisions that affect the ability of plaintiffs to bring, and keep, transnational litigation in American courts, focusing on the impact of procedural principles such as personal jurisdiction and pleading standards on global forum shopping. As this collection of essays demonstrates, recent decisions have given American companies new tools to oppose the importation of foreign disputes into U.S. courts. Nevertheless, litigation over the extraterritorial reach of U.S. statutes and the proper application of personal jurisdiction shows no signs of going away any time soon.

Endnotes

- 1 *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).
- 2 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).
- 3 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).
- 4 *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).
- 5 *Daimler, AG v. Bauman*, 134 S. Ct. 746 (2014).

Morrison at Four: A Survey of Its Impact on Securities Litigation¹

“Perhaps no precedent has ever cut down so many claims of such great value so rapidly.”² That is how one legal journalist aptly described the impact of the Supreme Court’s landmark decision four years ago in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

Morrison is principally known for having categorically extinguished a costly and highly vexatious species of class action that had proliferated since the turn of the century—“foreign-cubed” or “f-cubed” lawsuits, so named because they involved foreign investors suing foreign companies under the federal securities laws to recover losses from trading those companies’ securities on foreign exchanges.³ But *Morrison* did more than merely scuttle these massive lawsuits; it overturned four decades of lower-court precedent, and, as reflected by the examples listed below, revolutionized the way the federal courts address the territorial scope of the federal securities laws.

The *Morrison* Decision

At issue in *Morrison* was how to interpret a statute’s silence about its territorial scope. The statute was Section 10(b) of the Securities Exchange Act of 1934, the provision under which the catchall antifraud regulation, SEC Rule 10b–5, was

promulgated. Section 10(b) says nothing about where it applies, and courts in the judicially freewheeling 1960s and 1970s took this silence as license to make what they acknowledged were naked “policy decision[s]” in favor of extraterritoriality.⁴

“ *Morrison did more than merely scuttle these massive lawsuits; it overturned four decades of lower-court precedent, and...revolutionized the way the federal courts address the territorial scope of the federal securities laws.* ”

The courts of appeals fashioned a “conduct test” for the extraterritorial application of Section 10(b), an expansive standard under which “conduct in the United States [that] was more than merely preparatory to [a foreign] fraud” was actionable, even if the deception and the losses occurred abroad.⁵

That amorphous test required judges to engage in a “dubious” effort to “discern[] a purely hypothetical legislative intent,” to “divin[e] what ‘Congress would have wished’ if it had addressed the problem” by actually enacting a statute with extraterritorial reach.⁶ This guesswork made the law largely indeterminate: even the conduct test’s principal architect, Judge Henry Friendly, acknowledged that “the presence or absence of any single factor which was considered significant in other cases [was] not necessarily dispositive” in the next.⁷ It also created a body of precedent that, as Judge Friendly also admitted, bore no relation to the statute: “[I]f we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.”⁸ The conduct test’s “unpredictability” inexorably caused “the filing of foreign-cubed claims to increase,” and inevitably “generate[d] excessive levels of conflict with other countries, as well as mounting uncertainty for litigants.”⁹

The increasing confusion under the conduct test put the lower courts squarely on a collision course with the Supreme Court. For as the courts of appeals were expounding upon the securities law conduct test, the Supreme Court began increasingly cabining the territorial scope of federal law in cases addressing other statutes. In 1991, “to protect against unintended clashes between our laws and

those of other nations,” for example, the Court refused to give extraterritorial effect to Title VII of the Civil Rights Act of 1964.¹⁰ In 2004, decrying the “legal imperialism” that extraterritorial application of the antitrust laws would bring about, a unanimous Court threw out what was in essence a foreign-cubed Sherman Act price-fixing case involving foreign plaintiffs suing foreign defendants for treble damages on foreign purchases.¹¹ And in 2007, declaring “that United States law governs domestically but does not rule the world,” a lopsided 7-to-1 majority rejected an extraterritorial interpretation of the Patent Act.¹²

Morrison brought the Court’s increased wariness of extraterritoriality face-to-face with a foreign-cubed case under the federal securities laws. Criticizing “the unpredictable and inconsistent ... results of judicial-speculation-made law” under the conduct test, Justice Scalia’s opinion for the Court attributed the confusion in the lower courts to their “disregard of the presumption against extraterritoriality,” the “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”¹³ “When a statute gives no clear indication of an extraterritorial application, it has none,” explained the Court, and “[o]n its face, § 10(b) contains nothing to suggest it applies abroad.”¹⁴ Because “there is no affirmative indication in the [Securities] Exchange Act [of] 1934 that § 10(b) applies extraterritorially,” the Court held, “we therefore conclude that it does not.”¹⁵

The Court rejected the foreign plaintiffs' plea that they had alleged sufficient domestic conduct to warrant the application of Section 10(b). Even though they, their trading, and the corporate defendants were all foreign, the plaintiffs stressed that the defendants' allegedly deceptive conduct had originated in the United States. That did not matter: "[I]t is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States," the Court answered, as "the presumption against extraterritoriality would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."¹⁶ The Court concluded that, at the very least, a domestic securities transaction had to take place before Section 10(b) could apply: "[W]e think 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."¹⁷ Under the Exchange Act, the Court explained, "it is the foreign location of the transaction that establishes (or reflects the presumption of) the Act's inapplicability."¹⁸ As a result, the Court held that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."¹⁹ Because "all aspects of the purchases complained of by [the foreign plaintiffs] occurred outside the United States," the Court held that the plaintiffs had failed to state a claim.²⁰

"F=0": Foreign-Cubed and Foreign-Squared Securities Litigation After *Morrison*

By thus abandoning the conduct test in favor of a "clear," bright-line "transactional test" that turned on the existence of "purchases and sales of securities in the United States,"²¹ *Morrison* became the Roberts Court decision that "most restrict[ed] the reach of the securities law from the status quo ante."²² The Court's location-of-the-transaction test sounded the death knell for all foreign-cubed class actions. Indeed, in fairly short order, district judges dismissed all the remaining foreign-cubed securities class actions that had been pending in the federal courts—including the foreign-purchaser claims in the *Vivendi* case, in which a jury had awarded a verdict that plaintiffs' counsel had estimated to be worth more than \$9 billion.²³ One commentator summed *Morrison* up with an equation: "F-cubed=0."²⁴ But *Morrison* went even further than that. Its categorical holding that foreign securities transactions fell beyond the scope of Section 10(b) meant that even claims involving domestic plaintiffs or domestic defendants would be barred if the transactions at issue took place abroad. "In other words, F=0."²⁵

“ *The Court’s location-of-the-transaction test sounded the death knell for all foreign-cubed class actions.* ”

DEFINING A DOMESTIC TRANSACTION

With so many massive cases on the line, securities class action plaintiffs and their counsel made two last-ditch attempts to get around *Morrison*. But district judges—and ultimately the U.S. Court of Appeals for the Second Circuit—“consistently” and “emphatically” rejected these efforts.²⁶ The first of plaintiffs’ theories focused on *Morrison*’s references to “domestic transactions,” “domestic purchases and sales,” and “purchase[s] and sale[s] ... in the United States,”²⁷ and was a theory designed to preserve so-called “foreign-squared” claims—claims brought by American plaintiffs who bought foreign companies’ stock on foreign exchanges. A purchase or sale of a security “qualifies as a ‘domestic transaction’ under *Morrison*,” argued the plaintiffs, “whenever the purchaser or seller resides in the United States, even if the transaction takes place entirely over a foreign exchange.”²⁸

District judges made short work of this contention. They swiftly recognized that “to permit Section 10(b) claims ‘based strictly on the American connection of the purchaser or seller ... simply amounts to a restoration of the core element of the conduct test.’”²⁹ They understood that, “[b]y asking the Court to look to the location of ‘the act of placing a buy order,’ ... [p]laintiffs are asking the Court to apply the conduct test specifically rejected in *Morrison*,”³⁰ that *Morrison*’s reference to “‘domestic transactions’ ... was intended to be a reference to the location of the transaction, not to the location of the purchaser,” and that “the Supreme Court clearly sought to bar claims based on purchases and sales of foreign securities on foreign exchanges, even though the purchasers were American.”³¹ As a result, the district courts

unanimously held that “[t]he mere act of electronically transmitting a purchase order from within the United States” is “insufficient to subject the purchase to the coverage of Section 10(b).”³²

The Second Circuit has since upheld this conclusion. In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), the court of appeals provided “guidance as to what constitutes a domestic purchase or sale.”³³ The court explained that because a purchase or sale involves the transfer of title to a security, it “can be understood to take place at the location in which title is transferred.”³⁴ The court observed, however, that the Exchange Act defines purchases and sales to include not only the execution of the transactions themselves, but also “the act of entering into a binding contract to purchase or sell securities.”³⁵ As a result, the court also concluded that the statutory “definitions suggest that [a] ‘purchase’ and ‘sale’ take place when the parties become bound to effectuate the transaction.”³⁶ “Accordingly, to sufficiently allege a domestic securities transaction” in the Second Circuit, “a plaintiff must allege facts suggesting that irrevocable liability was incurred or title was transferred in the United States.”³⁷

The Second Circuit recently applied *Absolute Activist* to affirm the dismissal of foreign-squared claims in *City of Pontiac Policemen’s and Firemen’s Retirement System v. UBS AG*, 752 F.3d 173 (2d Cir. 2014). In that case, the court of appeals addressed—“as an issue of first impression—whether the mere placement of a buy order in the United States for the purchase of foreign securities on a foreign exchange is sufficient to allege that a purchaser incurred irrevocable liability in the United States.”³⁸ The domestic plaintiff in

that case argued that “when a purchaser is a U.S. entity, ‘irrevocable liability’ is not incurred when the security is purchased on a foreign exchange; rather[,] it is incurred in the U.S. where the buy order is placed.”³⁹ The court of appeals rejected this contention. “As an initial matter,” the court noted, *Absolute Activist* “made clear that ‘a purchaser’s residency does not affect where a transaction occurs.’”⁴⁰ *Absolute Activist* also made clear, the court of appeals observed, that “‘a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States.’”⁴¹ The court thus concluded that “the allegation that [a domestic plaintiff] placed a buy order in the United States that was then executed on a foreign exchange, standing alone, [does not] establish that [the plaintiff] incurred irrevocable liability in the United States.”⁴²

THE EFFECT OF A DOMESTIC LISTING

In *Morrison*’s wake, foreign plaintiffs and their counsel made an even more ambitious effort to evade the Supreme Court’s decision—an effort that, had it succeeded, would have stood *Morrison* on its head. This argument hinged on the Court’s use of the word “listed”—specifically, the statement

“In *Morrison*’s wake, foreign plaintiffs and their counsel made an even more ambitious effort to evade the Supreme Court’s decision.”

in *Morrison* that Section 10(b) of the Securities Exchange Act of 1934 applied “only in connection with the purchase or sale of a security *listed* on an American stock exchange, and the purchase or sale of any other security in the United States.”⁴³

Plaintiffs’ lawyers took this to mean that, whenever a foreign issuer “listed” its home-country securities on an American exchange, Section 10(b) would cover transactions *anywhere in the world* in those securities.⁴⁴ As the government of the United Kingdom explained to the Second Circuit in an *amicus curiae* brief, this was an utterly “breathtaking argument”—an argument that “would [have] reverse[d] *Morrison* for many foreign companies,” and “would [have] result[ed] in the extraterritorial application of Section 10(b) to purchases and sales of billions of shares on foreign securities exchanges.”⁴⁵ And “[t]hat is because hundreds of large foreign companies—particularly the larger, multinational ones—cross-list their home-country ‘ordinary’ shares on American stock exchanges.”⁴⁶ In particular, many foreign companies issue and list ADRs, American Depositary Receipts, for trading on a U.S. stock exchange, and to do that, they must both cross-list their underlying ordinary shares on the American exchange and register them with the SEC under the Exchange Act.⁴⁷ Some foreign issuers even issue what are called GRSs, Global Registered Shares, which trade directly on both American and foreign exchanges and are simultaneously cross-listed on those exchanges.⁴⁸

Had the foreign plaintiffs’ so-called “listed securities” reading of *Morrison* been accepted, moreover, it would have meant, rather perversely, that *Morrison* had made it easier for foreign-cubed plaintiffs to sue

than ever before. Before *Morrison*, many courts had *dismissed* foreign-cubed claims under the conduct test, and had done so in cases in which the foreign issuer had issued ADRs or GRSs and had thus “listed” its home-country shares on a U.S. exchange.⁴⁹ If the plaintiffs’ “listed securities” theory were correct, those cases would have come out the other way after *Morrison*—and thus “[a] Supreme Court decision intended to sharply *restrict* extraterritoriality would ... greatly expand it.”⁵⁰ Even more bizarrely, the plaintiffs’ reading of *Morrison* would have meant that “the Supreme Court reached the wrong result.”⁵¹ For the corporate defendant in *Morrison*, National Australia Bank, had *itself* listed ADRs—and thus its ordinary shares—on the New York Stock Exchange.⁵²

Not surprisingly, district courts uniformly rejected the foreign plaintiffs’ “listed securities” construction of *Morrison*. As one court put it, the plaintiffs’ argument “present[ed] a selective and overly technical reading of *Morrison* that ignores the larger point of the decision,” which, when “read in total context compel[s] the opposite result.”⁵³ “The idea that a foreign company is subject to U.S. securities law everywhere [in the world] merely because it has ‘listed’ some securities in the United States is simply contrary to the spirit of *Morrison*,” and is premised upon plaintiffs’ “seiz[ing] on specific language [in *Morrison*] without at all considering, or properly presenting, the

context,” wrote another court.⁵⁴ One judge observed that, under the plaintiffs’ reading of *Morrison*, “the extraterritorial reach of the Exchange Act would be even broader than it had been under the ‘conduct’ and ‘effects’ tests.”⁵⁵ As the *Vivendi* court, in overturning the multibillion-dollar verdict rendered there, summed it up: the isolated language in *Morrison* “cannot carry the freight that plaintiffs ask it to bear.”⁵⁶

The Second Circuit agreed. In *City of Pontiac*, the court of appeals “addressed the viability of the so-called ‘listing theory’” to foreign-squared and foreign-cubed claims in which the issuer, UBS, had issued GRSs; the company’s ordinary shares were listed for trading both on foreign exchanges and the New York Stock Exchange.⁵⁷ The court concluded that, although some language in *Morrison*, “taken in isolation, supports plaintiffs’ view, the ‘listing theory’ is irreconcilable with *Morrison* read as a whole.”⁵⁸ The court relied on the fact that “*Morrison* emphasized that ‘the focus of the Exchange Act is ... upon *purchases and sales* of securities in the United States,’”⁵⁹ and that the Supreme Court thus “evinced a concern with ‘the location of the securities transaction and not the location where the security may be dually listed.’”⁶⁰ The court of appeals also noted that, in *Morrison*, National Australia Bank had itself issued ADRs, and, “most tellingly,” that the Supreme Court had expressly rejected the Second Circuit’s “prior holding [under the

“ Plaintiffs’ argument ‘present[ed] a selective and overly technical reading of *Morrison* that ignores the larger point of the decision.’ ”

effects test] that ‘the Exchange Act applies to transactions regarding stocks traded in the United States which are effected outside the United States.’”⁶¹ As a result, the Second Circuit concluded that “*Morrison* does not support the application of § 10(b) of the Exchange Act to claims by a foreign purchaser of foreign-issued shares on a foreign exchange simply because those shares are also listed on a domestic exchange.”⁶²

Derivative Securities: Is a Domestic Transaction Sufficient, or Merely Necessary, for Liability?

In a very recent decision, *Parkcentral Global Hub Ltd. v. Porsche Automobil Holdings SE*, No. 11–397–cv (2d Cir. Aug. 15, 2014), the Second Circuit addressed a factually unusual claim that had significant theoretical ramifications for how *Morrison* and the presumption against extraterritoriality apply to Section 10(b). The case involved whether issuers could be held liable for transactions in derivative securities they did not create. The ultimate doctrinal question was whether or not, under *Morrison*, a domestic transaction was sufficient, as opposed to simply necessary, for liability to be imposed.⁶³ The answer was no—that “a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable.”⁶⁴

At issue was the notorious short squeeze in the ordinary shares of Volkswagen that took place in 2008. VW’s ordinary shares traded only on the Frankfurt Stock Exchange and other foreign exchanges;⁶⁵ the company had also issued ADRs over the counter in the United States.⁶⁶ The plaintiffs were various American and foreign hedge funds that had

taken massive synthetic short positions in VW stock. By entering into swap agreements referencing that stock, they bet billions that the stock would drop, and lost billions when, instead, it skyrocketed to unprecedented levels in the squeeze.⁶⁷ The hedge funds claimed that Porsche had engineered the squeeze by issuing allegedly fraudulent statements that circulated throughout the world, and by making surreptitious purchases of VW call options.⁶⁸ And they claimed that Porsche’s conduct was actionable under Section 10(b) and Rule 10b–5 because “they signed confirmations for securities-based swap agreements in New York, and therefore engaged in ‘domestic transactions in other securities’” under *Morrison*.⁶⁹ The district court rejected this argument. It held that the “swaps were the functional equivalent of trading the underlying VW shares on a German exchange,” were in “economic reality ... ‘transactions conducted upon foreign exchanges and markets,’” and thus could not serve as the basis for a Section 10(b) claim under *Morrison*.⁷⁰

The Second Circuit affirmed, “although on the basis of different reasoning”⁷¹—reasoning arguably broader than that of the district court. As the court of appeals found, it made no difference whether the hedge funds had entered into their swap transactions in the United States; even if their transactions were domestic, they did not state a claim. Questions of territorial scope do not simply “drop away” whenever a domestic securities transaction is at issue, explained the court; *Morrison* did not hold that the mere existence of “a domestic transaction would make § 10(b) applicable to allegedly fraudulent conduct anywhere in the world.”⁷² To the contrary, the court held,

“ Questions of territorial scope do not simply ‘drop away’ whenever a domestic securities transaction is at issue.” ”

Morrison makes clear that, although a domestic transaction was “a necessary element of a domestic § 10(b) claim,” “such a transaction is not alone sufficient to state a properly domestic claim under the statute.”⁷³

The court of appeals went on to conclude that, whether or not the swaps were domestic, it was “clear that the claims in this case are so predominantly foreign as to be impermissibly extraterritorial.”⁷⁴ “Were this suit allowed to proceed as pleaded,” the court explained, “it would permit the plaintiffs, by virtue of an agreement independent from the reference securities, to hale the European participants in the market for German stocks into U.S. courts and subject them to U.S. securities laws.”⁷⁵ As a result, the claims triggered an important consideration under *Morrison*: “the application of § 10(b) to the defendants would so obviously implicate the incompatibility of U.S. and foreign laws that Congress could not have intended it *sub silentio*.”⁷⁶ The court thus held that “the relevant actions in this case are so predominantly German as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality.”⁷⁷

Applications of *Morrison* to Other Provisions of the Federal Securities Laws

THE SECURITIES ACT OF 1933

Morrison’s extensive progeny includes decisions applying the presumption against extraterritoriality to provisions of the federal securities laws other than Section 10(b) and Rule 10b–5. Most notably, district courts have consistently held that various liability provisions of the Securities Act of 1933 do not apply extraterritorially.⁷⁸ In so holding, the courts have relied on a passage in *Morrison* itself that observed that “[t]he same focus on domestic transactions is evident in the Securities Act of 1933, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading.”⁷⁹ As a result, the courts have held that *Morrison*’s location-of-the-transaction test applies with full force to the Securities Act’s principal private civil liability provisions, Sections 11 and 12(a)(2), which authorize damages for false or misleading statements in registration statements and prospectuses.⁸⁰ In addition, the court in one case has applied *Morrison* to Section 17(a) of the Securities Act, an SEC-enforced provision prohibiting fraud in “the offer or

“ District courts have consistently held that various liability provisions of the Securities Act of 1933 do not apply extraterritorially. ”

sale of any security,'" and has concluded that Section 17(a) applies only when either an offer or a sale occurs in the United States.⁸¹

WHISTLEBLOWER ANTI-RETALIATION PROVISIONS

Morrison has also been held to bar the extraterritorial application of the broad whistleblower anti-retaliation provisions of the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

In *Villanueva v. Core Laboratories NV*, No. 09–108 (Dep't of Labor Admin. Rev. Bd. Dec. 22, 2011), an administrative appellate panel of the U.S. Department of Labor applied *Morrison* to Section 806 of Sarbanes-Oxley, a provision that broadly prohibits companies from retaliating against employee whistleblowers who report, among other things, possible securities fraud, and gives such employees the right to file administrative complaints.⁸² Reaching a result that accorded with pre-*Morrison* precedent,⁸³ the administrative review board in *Villanueva* concluded that, under *Morrison*, "there is certainly no indication" that Section 806 was intended to apply extraterritorially.⁸⁴ The board accordingly dismissed the claim, which had been filed by a Colombian manager who asserted that he had been fired for uncovering an alleged scheme by his employer, a Colombian subsidiary of a Dutch company, to evade Colombian taxes.⁸⁵ It made no difference that the Dutch parent company's shares were listed and traded on the New York Stock Exchange and were registered with the SEC.⁸⁶

To similar effect is the Second Circuit's recent decision in *Liu v. Siemens AG*, No. 13–4385–cv (2d Cir. Aug. 14, 2014). In that

case, the court of appeals rejected the extraterritorial application of the whistleblower anti-retaliation provision of the Dodd-Frank Act, which prohibits employers from retaliating against employees who make disclosures that are required or protected by Sarbanes-Oxley, the Exchange Act, or the SEC's rules.⁸⁷

The plaintiff in *Liu* was a Taiwanese resident employed by a Chinese subsidiary of Siemens, the German conglomerate. He claimed that his superiors in China and Germany had fired him after he complained about allegedly corrupt corporate activities that took place in Asia.⁸⁸ He asserted that he was protected by the Dodd-Frank whistleblower provision because Siemens had issued ADRs that are listed and traded on the New York Stock Exchange. By having "voluntarily elected" to list ADRs on a U.S. exchange, Liu argued, Siemens had "thereby voluntarily subjected itself to—and undertook to comply with—United States securities laws," including the Dodd-Frank whistleblower provision.⁸⁹

The Second Circuit emphatically rejected this argument. It concluded that "this case is extraterritorial by any reasonable definition."⁹⁰ It observed that "the whistleblower, his employer, and the other entities involved in the alleged wrongdoing are all foreigners based abroad, and the whistleblowing, the alleged corrupt activity, and the retaliation all occurred abroad."⁹¹ And the court held that it made no difference that Siemens had issued ADRs for trading in the United States. That was merely "one slim connection to the United States," explained the court—"the sort of 'fleeting' connection that 'cannot overcome the presumption against extraterritoriality.'"⁹² Indeed, the court added that, because the Australian

corporate defendant in *Morrison* had itself issued ADRs, “*Morrison* thus decisively refutes Liu’s contention that the United States securities laws apply extraterritorially to the actions abroad of any company that has issued United States-listed securities.”⁹³

Morrison’s Applicability to Criminal and SEC Enforcement Cases

THE PRESUMPTION’S APPLICABILITY IN CRIMINAL CASES

Finally, *Morrison* has generated some interesting litigation about its applicability in the criminal and SEC enforcement context. In *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013), a criminal prosecution under Section 10(b) and Rule 10b–5, federal prosecutors took the surprising position that *Morrison* did not apply, even though *Morrison* addressed the substantive reach of those regulatory prohibitions, and did not constrain merely the scope of implied civil remedy under those provisions. The government sweepingly argued in *Vilar* that, under *United States v. Bowman*, 260 U.S. 94 (1922), the presumption against extraterritoriality, and *Morrison’s* domestic-transaction requirement, applied only in civil cases.⁹⁴

“ Finally, *Morrison* has generated some interesting litigation about its applicability in the criminal and SEC enforcement context. ”

The Second Circuit resoundingly rejected the government’s argument—and found it to be essentially frivolous. The court of appeals held that “no plausible interpretation of *Bowman* supports [the government’s] broad proposition,” and that, indeed, “fairly read, *Bowman* stands for quite the opposite.”⁹⁵ *Bowman* made clear, the Second Circuit explained, that “the presumption against extraterritoriality *does* apply to criminal statutes,” as the Supreme Court’s 1922 decision had expressly stated that, in addressing “[c]rimes against private individuals or their property, ... it is natural for Congress to say ... in the statute” whether “punishment of [such crimes] is to be extended to include those committed outside of the strict territorial jurisdiction,” and that Congress’s “failure to do so will negative the purpose of Congress in this regard.”⁹⁶ The only exception recognized in *Bowman* to the presumption against extraterritoriality was “in situations where the law at issue is aimed at protecting ‘the right of the government to defend *itself*.’”⁹⁷ Because Section 10(b)’s “purpose is to prohibit ‘[c]rimes against private individuals or their property,’ which *Bowman* teaches is exactly the sort of statutory provision for which the presumption against extraterritoriality does apply,” the court of appeals held that *Morrison* controlled.⁹⁸

The court of appeals also found the government’s position to be untenable for another reason that was quite “simple: The presumption against extraterritoriality is a method of interpreting a statute, which has the same meaning in every case,” and “is not a rule to be applied to the specific facts of each case.”⁹⁹ In other words, a statute “either applies extraterritorially or it does not.”¹⁰⁰ “[T]o permit the government to

punish extraterritorial conduct when bringing criminal charges under Section 10(b)," the court observed, "'would establish ... the dangerous principle that judges can give the same statutory text different meanings in different cases.'"¹⁰¹

THE MISDRAFTED DODD-FRANK EXTRATERRITORIALITY AMENDMENT

Another important question on *Morrison*'s applicability beyond private civil litigation is raised by an ineptly and inaptly drafted provision in the Dodd-Frank Act, a statute enacted less than a month after *Morrison* came down. As one of the law's principal drafters explained on the House floor, that provision, Section 929P(b),¹⁰² seemingly sought to "make clear that in actions and proceedings brought by the SEC or the Justice Department, [the anti-fraud] provisions of the Securities Act, the Exchange Act, and the Investment Advisers Act may have extraterritorial application."¹⁰³

But as numerous commentators began pointing out within hours of the statute's enactment, the provision's text does no such thing.¹⁰⁴ As actually worded, Section 929P(b) merely amended the *subject-matter jurisdiction* provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940, to state that "the district courts of the United States ... shall have jurisdiction of an action or proceeding brought or instituted by the [Securities and Exchange] Commission or the United States" in cases alleging certain violations involving sufficient domestic conduct or effects.¹⁰⁵ The amendment does not expand the territorial scope of any substantive regulatory provision.

As a result, if the drafters' intent was to overturn *Morrison* in criminal and enforcement cases, then they made a serious, and probably fatal, error. In *Morrison*, the Supreme Court reiterated the well-established principle that the territorial scope of a federal law presents not a question of a court's "subject-matter jurisdiction," of a "tribunal's power to hear a case," but rather "an issue quite separate"—the substantive "merits question" of "what conduct [the law] reaches [and] prohibits," and "whether the allegations the plaintiff makes entitle him to relief."¹⁰⁶ In fact, the Supreme Court held that the Exchange Act's broad jurisdictional provision already conferred jurisdiction on the district court "to adjudicate the question whether § 10(b) applie[d] to [the defendants'] conduct" in *Morrison*.¹⁰⁷ Accordingly, as the Second Circuit very recently observed in a brief footnote dictum in *Parkcentral*, the Dodd-Frank provision's reference to jurisdiction means that "the import of this [provision] is unclear, ... because *Morrison* itself explicitly held that the [c]ourt there had jurisdiction to decide the case under the [jurisdictional grant] then in force, even if the presumption against

“ If the drafters’ intent was to overturn *Morrison* in criminal and enforcement cases, then they made a serious, and probably fatal, error. ”

extraterritoriality meant that the plaintiffs failed on the merits.”¹⁰⁸ In short, if taken by its express terms, Section 929P(b) does nothing at all.

Only one decision has thus far examined Section 929P(b) in any depth, and it makes clear that, indeed, the provision is unlikely to have any practical effect. In *SEC v. A Chicago Convention Center, LLC*, 961 F. Supp. 2d 905 (N.D. Ill. 2013), the court addressed various arguments made by the SEC in favor of conferring substantive effect upon Section 929P(b). The court cast serious doubt as to each of those arguments. The court first explained that the “plain language of Section 929P(b) seems clear on its face,” and that the text’s “plain meaning” indicated that “Section 929P(b) is a jurisdictional rather than substantive provision.”¹⁰⁹ The court thus observed that there was a “conflict between th[is] language as drafted and Congress’s possible intent” to partially overturn *Morrison*.¹¹⁰

The SEC argued that the court should not “interpret[] Section 929P(b) as purely jurisdictional based on its plain language,” because that “may render the entire provision superfluous.”¹¹¹ But the district court questioned the propriety of disregarding statutory language that “appears unambiguous on its face” merely “to avoid superfluity,” and noted that the Supreme Court has stated “that the ‘canon against surplusage is not an absolute rule.’”¹¹² The court also noted that the SEC’s argument “may render meaningless Congress’s use of the word ‘jurisdiction’ in Section 929P(b),” in violation of the rule that “the ‘canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a

statute.’”¹¹³ Nor did the court find convincing the SEC’s reliance on legislative history. The court observed that judges are not permitted to “ignore the unambiguous language of the statute in order to further Congress’s expressed purpose in enacting the statute.”¹¹⁴ “It is clear,” the court observed, “that legislative history ‘does not permit a judge to turn a clear text on its head,’”¹¹⁵—and that, as “[t]he Supreme Court has stated,” “‘it is beyond [the judiciary’s] province to rescue Congress from its drafting errors.’”¹¹⁶

In the end, the court managed to avoid ruling definitively on the effect of Section 929P(b): it found that, under *Absolute Activist*, the SEC sufficiently alleged that the defendants had engaged in securities transactions in the United States.¹¹⁷ Nonetheless, the thoughtful and thorough opinion in *Chicago Convention Center* underscores the serious difficulties that the SEC and the DOJ face in trying to use Section 929P(b) to get around *Morrison*.¹¹⁸

Conclusion

As this survey of the post-*Morrison* securities litigation landscape illustrates, the Supreme Court’s decision four years ago transformed the way the courts look at transnational securities litigation. Judges no longer “disregard ... the presumption against extraterritoriality,” or seek to “resolv[e] matters of policy” by conferring extraterritorial reach upon provisions whose text provides none. “Rather than guess[ing] anew in each case” about “what Congress would have wanted,” they now “apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”¹¹⁹ As a result, cases that the courts found

“vexing”¹²⁰—ones involving clearly extraterritorial claims, such as the once-burgeoning foreign-cubed and foreign-squared claims that constituted the bulk of transnational securities cases before *Morrison*—have become easy. They must be dismissed, and, indeed, for that reason, they are no longer even brought.

Now that the foreign-cubed and foreign-squared cases are gone, the courts must face the harder cases, the marginal cases, cases in which the question of whether the proposed application of law is extraterritorial “is not self-evidently dispositive,”¹²¹ like the *Parkcentral* case, and cases that turn on factual disputes about where particular events occurred, like *Absolute Activist*.

Those cases will pose interesting and difficult questions of line-drawing and fact-finding, but their difficulty should not call into question what the Supreme Court called “the wisdom of the presumption against extraterritoriality.”¹²² For the point of *Morrison* was not to adopt a “bright-line rule[]”¹²³ for the sake of having a bright-line rule,¹²⁴ but rather to reestablish the traditional understanding that “Congress ordinarily legislates with respect to domestic, not foreign, matters,”¹²⁵ and to fashion a “test that will avoid” the “interference with foreign ... regulation that application of [U.S. law] would produce.”¹²⁶ That *Morrison* surely accomplished.

“ The Supreme Court’s decision four years ago transformed the way the courts look at transnational securities litigation. ”

Endnotes

- 1 George T. Conway III is a partner at Wachtell, Lipton, Rosen & Katz. He briefed and argued *Morrison v. National Australia Bank* for the respondents in the Supreme Court.
- 2 Michael D. Goldhaber, *The Short Arm of the (U.S.) Law*, Corp. Couns., Mar. 2012, at 28.
- 3 See *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010); see also, e.g., Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 62, 66–67 (2007); Andrew Longstreth, *Coming to America*, Am. Law., Nov. 2006, at S53; Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, Wall St. J., Sept. 2, 2005, at A1.
- 4 *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) (“[T]his case ... calls for a policy decision By finding jurisdiction here, we may encourage other nations to take ... reciprocal action against fraudulent schemes aimed at the United States from foreign sources.”); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (similar); see also George T. Conway III, *U.S. Supreme Court Rejects “Foreign Cubed” Class Actions*, Harv. L. Sch. Forum on Corporate Governance & Fin. Regulation (June 25, 2010, 9:23 am), <http://bit.ly/1pfPIPv>.
- 5 *Morrison*, 547 F.3d at 172 (internal quotation marks and citation omitted).
- 6 *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30, 32 (D.C. Cir. 1987) (Bork, J.; quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975)).
- 7 *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980) (internal quotation marks and citation omitted); see also, e.g., *In re Alstom Sec. Litig.*, 406 F. Supp. 2d 346, 373 (S.D.N.Y. 2005) (describing conduct test as “a Hydra of sorts,” not a “cohesive doctrine,” but rather a set of “potentially incompatible statements of applicable rules”).
- 8 *Bersch*, 519 F.2d at 993.
- 9 Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 67 (2007).
- 10 *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248–49 (1991) (“*Aramco*”).
- 11 *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 161–75 (2004).
- 12 *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 447–59 (2007).
- 13 *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255, 260–61 (2010) (quoting *Aramco*, 499 U.S. at 248 (internal quotation marks and citation omitted)).
- 14 *Id.* at 255, 262.
- 15 *Id.* at 265.
- 16 *Id.* at 266.
- 17 *Id.*
- 18 *Id.* at 268.
- 19 *Id.* at 273.
- 20 *Id.*
- 21 *Id.* at 266, 269.
- 22 John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, at 7 (July 21, 2014), 57 Ariz. L. Rev. (forthcoming), available at <http://bit.ly/1qynUwB>.
- 23 *In re Vivendi Univ., S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 525–34 (S.D.N.Y. 2011); see Nathan Koppel, *Viva Vivendi! New York Plaintiffs’ Firms Score Huge Verdict*, Wall St. J. (Jan. 29, 2010, 5:31 pm), <http://on.wsj.com/VMJAfU>.
- 24 Sarah L. Cave, *F–Cubed=0: Supreme Court’s Decision in Morrison v. National Australia Bank*, N.Y.L.J., July 7, 2010, <http://bit.ly/Feq0>.
- 25 George T. Conway III, *Postscript to Morrison v. National Australia Bank*, N.Y.L.J., Oct. 14, 2010, <http://bit.ly/1q5Pkwk>.

- 26 George T. Conway III, *Courts Repudiate Attempts to Find Loopholes in Supreme Court Foreign Cubed Decision*, Harv. L. Sch. Forum on Corp. Governance & Fin. Reg. (Mar. 10, 2011, 9:09 am), <http://bit.ly/1p0hdYE>.
- 27 *Morrison*, 561 U.S. at 266, 267, 268, 273; see also *id.* at 269–70 (“purchase or sale ... made in the United States”).
- 28 *Vivendi*, 765 F. Supp. 2d at 532.
- 29 *Id.* (quoting *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 624 (S.D.N.Y. 2010)).
- 30 *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6 (Sept. 29, 2010).
- 31 *Vivendi*, 765 F. Supp. 2d at 532.
- 32 *Plumbers’ Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010); see also, e.g., *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 473–74 (S.D.N.Y. 2013); *Phelps v. Stomber*, 883 F. Supp. 2d 188, 206–07 (D.D.C. 2012); *In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 794–95 (S.D. Tex. 2012); *In re Royal Bank of Scotland Group plc Sec. Litig.*, 765 F. Supp. 2d 327, 337 (S.D.N.Y. 2011); *In re UBS Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2011 WL 4059356, at *7–*8 (S.D.N.Y. Sept. 13, 2011), *aff’d sub nom. City of Pontiac Policemen’s and Firemen’s Retirement System v. UBS AG*, 752 F.3d 173 (2d Cir. 2014); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472 (2010); *Stackhouse v. Toyota Motor Co.*, No. CV 10–0922 DSF (AJWx), 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010).
- 33 *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012).
- 34 *Id.* at 68.
- 35 *Id.* at 67; see 15 U.S.C. § 78c(a)(13), (a)(14).
- 36 677 F.3d at 67.
- 37 *Id.* at 68.
- 38 *City of Pontiac Policemen’s and Firemen’s Retirement System v. UBS AG*, 752 F.3d 173, 181 (2d Cir. 2014).
- 39 *Id.* (internal quotation marks and alterations omitted).
- 40 *Id.* (quoting *Absolute Activist*, 677 F.3d at 69).
- 41 *Id.* at 181 n.32 (quoting *Absolute Activist*, 677 F.3d at 69).
- 42 *Id.* at 181.
- 43 *Morrison*, 561 U.S. at 273 (emphasis added); see also *id.* at 267 (“transactions in securities listed on domestic exchanges”), 270 (“a security listed on a domestic exchange”).
- 44 See Conway, *Courts Repudiate Attempts to Find Loopholes in Supreme Court Foreign Cubed Decision*, *supra* note 25.
- 45 Brief for the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Defendants-Appellees and Affirmance at 4–5, *City of Pontiac* (No. 12–4335–cv), 2013 WL 2167229, at *4–*5 (“U.K. *Amicus Br.*”), available at <http://bit.ly/1vxBiW9>.
- 46 *Id.* at 5.
- 47 *Id.*; see, e.g., *Vivendi*, 765 F. Supp. 2d at 528–29; NYSE Amex Sample Listing Application for American Depositary Receipts, <http://bit.ly/12QFaRX>; Edward F. Greene, *et al.*, U.S. Regulation of the Int’l Secs. and Derivatives Mkts. § 2.03[2][b][i], at 2–33 n.87 (10th ed. 2012) (issuers “required to list the shares underlying listed ADRs”); American Depositary Receipts, Securities Act Release No. 33–6894, 1991 WL 294145, at *11 n.66 (May 23, 1991) (“both the ADRs and the deposited securities are required to be registered under Section 12(b) of the Exchange Act”).
- 48 U.K. *Amicus Br.* 5; see, e.g., Kenneth B. Davis, Jr., *The SEC and Foreign Companies—A Balance of Competing Interests*, 71 U. Pitt. L. Rev. 457, 469 (2010).
- 49 See U.K. *Amicus Br.* 6–7 & Appendix A.
- 50 *Id.* at 8.
- 51 *Id.* (emphasis omitted).
- 52 See *Morrison*, 561 U.S. at 251 (“There are listed on the New York Stock Exchange ... National’s American Depositary Receipts (ADRs), which represent the right to receive a specified number of National’s Ordinary Shares”); Supplemental Joint Appendix at 58, *Morrison* (No. 08–1191), reproduced in U.K. *Amicus Br.*, Appendix B.
- 53 *Alstom*, 741 F. Supp. 2d at 472.
- 54 *Royal Bank of Scotland*, 765 F. Supp. 2d at 336.

- 55 *UBS*, 2011 WL 4059356, at *5.
- 56 *Vivendi*, 765 F. Supp. 2d at 531; see also, e.g., *In re Smart Techs. S'holder Litig.*, 295 F.R.D. 50, 57 n.11 (2013); *Satyam*, 915 F. Supp. 2d at 475; *BP*, 843 F. Supp. 2d at 795–96; *In re Infineon Tech. AG Sec. Litig.*, No. C 04–04156 JW, 2011 WL 7121006, at *3 (N.D. Cal. Mar. 17, 2011); *Société Générale*, 2010 WL 3910286, at *5–*6.
- 57 *City of Pontiac*, 752 F.3d at 177, 179–80 & n.21.
- 58 *Id.* at 180.
- 59 *Id.* (quoting *Morrison*, 561 U.S. at 266).
- 60 *Id.* (quoting *UBS*, 2011 WL 4059356, at *5).
- 61 *Id.* (quoting *Morrison*, 561 U.S. at 256 (quoting *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), modified on other grounds en banc, 405 F.2d 215 (2d Cir. 1968)); internal quotation marks omitted).
- 62 *Id.* at 181.
- 63 *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, No. 11–397–cv, 2014 WL 3973877, at *1, *14 (2d Cir. Aug. 15, 2014) (per curiam). The discussion of this case is taken from John F. Savarese & George T. Conway III, *Back-to-Back Court of Appeals Decisions Apply Morrison*, Harv. L. Sch. Forum on Corp. Governance & Fin. Reg. (Aug. 19, 2014, 4:08 pm), <http://bit.ly/1tlnW8m>.
- 64 *Parkcentral*, 2014 WL 3973877, at *15.
- 65 *Id.* at *7.
- 66 *Elliott Assocs. v. Porsche Auto. Holding SE*, 759 F. Supp. 2d 469, 472 (S.D.N.Y. 2010), *aff'd sub nom. Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, No. 11–397–cv, 2014 WL 3973877 (2d Cir. Aug. 15, 2014).
- 67 *Parkcentral*, 2014 WL 3973877, at *5.
- 68 *Id.* at *3–*4.
- 69 *Elliott*, 759 F. Supp. 2d at 474 (quoting *Morrison*, 561 U.S. at 267).
- 70 *Id.* at 475–76.
- 71 *Parkcentral*, 2014 WL 3973877, at *2.
- 72 *Id.* at *14.
- 73 *Id.* (emphasis added in part).
- 74 *Id.* at *15.
- 75 *Id.*
- 76 *Id.* (citing *Morrison*, 561 U.S. at 269).
- 77 *Id.*
- 78 See, e.g., *Smart Techs.*, 295 F.R.D. at 55–57; *Satyam*, 915 F. Supp. 2d at 473 n.14, 485; *SEC v. ICP Asset Mgmt., LLC*, No. 10 Civ. 4791, 2012 WL 2359830, at *2 (S.D.N.Y. June 21, 2012); *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164–65 (S.D.N.Y. 2011); *In re Vivendi Universal, S.A. Sec. Litig.*, 842 F. Supp. 2d 522, 528–29 (S.D.N.Y. 2012); *Royal Bank of Scotland*, 765 F. Supp. 2d at 338–39.
- 79 561 U.S. at 268 (citation omitted), quoted in *Smart Techs.*, 295 F.R.D. at 55; see *Vivendi*, 842 F. Supp. 2d at 529; *Goldman Sachs*, 790 F. Supp. 2d at 164; *Royal Bank of Scotland*, 765 F. Supp. 2d at 338 n.11.
- 80 See, e.g., *Smart Techs.*, 295 F.R.D. at 55–57 (Sections 11 and 12(a)(2)); *Vivendi*, 842 F. Supp. 2d at 528–29 (same); *Royal Bank of Scotland*, 765 F. Supp. 2d at 338–39 (Section 11).
- 81 *SEC v. Toure*, No. 10 Civ. 3229 (KBF), 2013 WL 2407172, at *6–*10 (S.D.N.Y. June 4, 2013) (quoting 15 U.S.C. § 77q(a)); *Goldman Sachs*, 790 F. Supp. 2d at 164–65.
- 82 *Villanueva v. Core Labs. NV*, No. 09–108, 2011 WL 7021145 (Dep't of Labor Admin. Rev. Bd. Dec. 22, 2011), *aff'd on other grounds sub nom. Villanueva v. United States Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014). For a more extensive discussion of this case, see John F. Savarese & George T. Conway III, *Applying Extraterritoriality: Morrison and Sarbanes-Oxley Civil Whistleblower Claims*, Sec. Litig. Rep., May 2012, at 1.
- 83 See *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7–18 (1st Cir. 2006).
- 84 *Villanueva*, 2011 WL 7021145, at *8.
- 85 *Id.* at *2–*3.
- 86 *Id.*
- 87 *Liu v. Siemens AG*, No. 13–4385–cv, 2014 WL 3953672 (2d Cir. Aug. 14, 2014). The discussion of this case is adopted from Savarese & Conway, *Back-to-Back Court of Appeals Decisions Apply Morrison*, *supra* note 62.
- 88 *Liu*, 2014 WL 3953672, at *1.
- 89 *Id.* at *3.
- 90 *Id.*

- 91 *Id.*
- 92 *Id.* at *3, *4 (quoting *Morrison*, 561 U.S. at 263).
- 93 *Id.* at *3.
- 94 See *United States v. Vilar*, 729 F.3d 62, 72–76 (2d Cir. 2013).
- 95 *Id.* at 72.
- 96 *Id.* at 72–73 (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922)).
- 97 *Id.* at 73 (emphasis added; quoting *Bowman*, 260 U.S. at 98).
- 98 *Id.* at 74 (quoting *Bowman*, 260 U.S. at 98).
- 99 *Id.*
- 100 *Id.*
- 101 *Id.* at 74–75 (quoting *Clark v. Martinez*, 543 U.S. 371, 386 (2005)).
- 102 Pub. L. 111–203, § 929P(b), 124 Stat. 1376, 1864–66 (2010).
- 103 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).
- 104 Wachtell, Lipton, Rosen & Katz, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged* (July 21, 2010, 1:24 pm), <http://bit.ly/929PbM1>; Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 Harv. Bus. L. Rev. 195, 207–08 (2011); A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. Corp. L. 105, 142 (2011); Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 Ohio St. L.J. 537, 571 (2011); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 Rev. Litig. 313, 346–47 (2012); Milosz Morgut, *Extraterritorial Application of U.S. Securities Law*, 2012 Eur. Bus. L. Rev. 547, 552–53 (2012); Wolf-Georg Ringe & Alexander Hellgardt, *The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective*, 31 Oxford J. Leg. Stud. 23, 41 (2011); Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. Rev. 535, 546 & n.74 (2012); Andrew Rocks, *Whoops! The Imminent Reconciliation of U.S. Securities Laws with International Comity after Morrison v. National Australia Bank and the Drafting Error in the Dodd-Frank Act*, 56 Vill. L. Rev. 163, 188–95 (2011); Meny Elgadeh, *Morrison v. National Australia Bank: Life After Dodd-Frank*, 16 Fordham J. Corp. & Fin. L. 573, 593–96 (2011); John Chambers, Note, *Extraterritorial Private Rights of Action: Redefining the Transactional Test in Morrison v. National Australia Bank*, 31 Rev. Banking & Fin. L. 411, 429 (Fall 2011); Nidhi M. Geevarghese, *A Shocking Loss of Investor Protection: the Implications of Morrison v. National Australia Bank*, 6 Brook. J. Corp. Fin. & Com. L. 235, 250 (Fall 2011); Richard A. Grossman, *The Trouble with Dicta: Morrison v. National Australia Bank and the Securities Act*, 41 Sec. Reg. L.J., no. 4, 2013, at 381 n.66; Paul R. Berger *et al.*, *The Vilar Decision: Second Circuit Curtails the Territorial Reach of Criminal Liability Under Section 10(b)*, 17 Wallstreetlawyer.com: Securities in the Electronic Age, no. 10, 2013, at 15; Milson C. Yu, *LIBOR Integrity and Holistic Domestic Enforcement*, 98 Cornell L. Rev. 1271, 1298–99 (2013); Aaron J. Schindel & Daniel L. Saperstein, *The Multinational Employer in the Age of the Whistleblower*, 24 Int'l Law Practicum 132, 135–36 (2011).
- 105 Pub. L. 111–203, § 929P(b) (emphasis added).
- 106 *Morrison*, 561 U.S. at 253, 254.
- 107 *Id.* at 254.
- 108 *Parkcentral*, 2014 WL 3973877, at *10 n.11.
- 109 *SEC v. A Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 912–13 (N.D. Ill. 2013).
- 110 *Id.* at 912.
- 111 *Id.* at 913.
- 112 *Id.* at 913 (quoting *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013)).
- 113 *Id.* at 914 (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011)).
- 114 *Id.* at 915 (internal quotation marks and citation omitted).
- 115 *Id.* at 915 (internal quotation marks and citation omitted).
- 116 *Id.* at 916 (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004)).

- 117 *Id.* at 917–18 (citing *Absolute Activist*, 677 F.3d at 67, 68).
- 118 The Section 929P(b) drafting blunder makes little practical difference to the DOJ, however, because the offenses of mail and wire fraud require only a domestic mailing or wiring made with fraudulent intent. If a domestic mailing or wiring occurs, it does not matter whether a related fraudulent securities transaction is domestic or foreign (or even occurs); the deed, the domestic crime, is done. *See, e.g., United States v. Mandell*, 752 F.3d 544, 549–50 (2d Cir. 2014) (discussing *Pasquantino v. United States*, 544 U.S. 349, 356–57 (2005)).
- 119 *Morrison*, 561 U.S. at 261.
- 120 *Morrison*, 547 F.3d at 168.
- 121 *Morrison*, 561 U.S. at 266.
- 122 *Id.* at 261.
- 123 *Id.* at 285 (Stevens, J., concurring in judgment).
- 124 “Indeed, reading *Morrison* to permit only bright-line rules would likely undermine its principal holding that § 10(b) has no extraterritorial application” *Parkcentral*, 2014 WL 3973877, at *17 (Leval, J., concurring).
- 125 *Id.* at 255.
- 126 *Id.* at 269.

Whither to “Touch and Concern”: The Battle to Construe the Supreme Court’s Holding in *Kiobel v. Royal Dutch Petroleum*¹

Consensus, especially in Supreme Court decisions, can be deceiving. In order to achieve unanimity or cobble together a plurality, the justices sometimes tolerate ambiguity in their opinions, forcing litigants and lower courts to work out the details in future cases.

This tack likely explains the Supreme Court’s cryptic conclusion in *Kiobel v. Royal Dutch Petroleum*,² a 2013 decision on the scope of the Alien Tort Statute (ATS)—the opaque law that grants federal courts jurisdiction to hear certain claims brought by non-U.S. nationals for violations of international law. The ATS has served for two decades as the fountainhead of litigation against multinational companies for human rights violations allegedly committed outside the United States. The majority opinion in *Kiobel*, authored by Chief Justice Roberts, held that the ATS is presumed not to apply to conduct that occurs in other countries but included a caveat that the law might apply where the claims sufficiently “touch and concern the territory of the United States.”³ To highlight the deliberate

ambiguity in the Court’s opinion, Justice Kennedy (the majority’s putative fifth vote) wrote separately to observe that “the

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proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation” in future cases.⁴

As Justice Kennedy predicted, what it means to “touch and concern” the United States has been hotly debated in *Kiobel*'s aftermath, and the implications of *Kiobel* for ATS lawsuits against U.S. companies are still unclear. Many lower courts have tightened the reins on the ATS over the past sixteen months, interpreting *Kiobel* to mandate dismissal of ATS cases whenever the wrongful conduct occurred predominantly overseas. But some courts have allowed existing suits to move forward against U.S. defendants if plaintiffs can allege some additional, plausible nexus to the United States. Courts have disagreed, however, on what types of contacts with the United States are now relevant in the ATS analysis. This division and uncertainty among the lower courts might set the stage for yet another Supreme Court showdown on the scope of the ATS.

A Debatable Statute

Controversy over the meaning of the Alien Tort Statute is nothing new. Enacted in 1789 as part of the Judiciary Act, the ATS gives federal courts jurisdiction over actions brought by aliens for torts “committed in violation of the law of nations or a treaty of the United States.”⁵ The law was intended to give federal courts of the new nation the power to resolve disputes arising from certain violations of international law, such as piracy or assaults on ambassadors, that might have caused diplomatic tension if left unaddressed by state courts. But with a text of only 33 words and no known legislative history, the parameters of the ATS have been ripe for debate.

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The statute lay virtually dormant until the 1980s, when human rights advocates rediscovered the ATS and began to invoke it as a basis for lawsuits over human rights violations committed in third countries. Plaintiffs initially brought these suits against former foreign government officials, but more recently have charged multinational corporations with aiding and abetting human rights abuses by the governments of the countries in which they operate. Over the last two decades, more than 150 ATS suits have been filed against companies in practically every industry sector for business activities in over sixty countries—from Unocal in Burma,⁶ to Pfizer in Nigeria,⁷ Coca-Cola in Colombia,⁸ and Yahoo! in China.⁹ The largest ATS suit to date was filed in 2002 against more than fifty companies, including Ford and IBM, for business dealings in South Africa during the apartheid era.¹⁰

During the ATS's recent renaissance, plaintiffs and defendants have engaged in a heated debate regarding the statute's scope. Disputes have included whether the ATS provides a substantive cause of action (it doesn't);¹¹ which claims are actionable as

violations of customary international law (not many);¹² whether the ATS supports aiding and abetting liability (probably);¹³ whether legal entities like corporations are subject to liability (maybe);¹⁴ and whether the ATS extends to conduct and claims that occur exclusively or predominantly outside the United States (keep reading).

This last question—the geographic reach of the ATS—has generated especially strong opinions. One judge opined that if the ATS grants jurisdiction to resolve international law violations committed by foreign defendants in foreign countries, then U.S. courts effectively “exercise jurisdiction over all the earth, on whatever matters we decide are so important that all civilized people should agree with us.”¹⁵ The geographic scope of the ATS had become such a critical issue by 2012 that the Supreme Court took the unusual step in *Kiobel* of ordering the parties to brief and argue the case twice—the second time to expressly address the ATS’s geographic reach.¹⁶

Reining in the ATS

On April 17, 2013, the Supreme Court announced its decision in *Kiobel*, holding that the ATS does not ordinarily supply jurisdiction when “all the relevant conduct took place outside the United States.”¹⁷ The opinion of the Court, on behalf of five justices, explained that federal statutes are generally presumed not to apply to conduct outside the United States absent a clear statement by Congress, and that this “presumption against extraterritoriality” also applies to the ATS. Based on these principles, *Kiobel* was an easy case to decide. The claims in *Kiobel* were brought by Nigerian nationals against British, Dutch, and Nigerian corporations for allegedly

aiding and abetting human rights violations committed by the Nigerian government in Nigeria. The case thus had no nexus to the United States, and all nine justices agreed that the lawsuit should be dismissed.

The Court appeared to leave the door open, however, to ATS cases that have a greater connection to the United States. At the end of the Court’s opinion, Chief Justice Roberts stated that “where the claims *touch and concern* the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”¹⁸ Although “mere corporate presence” in the United States is an insufficient basis upon which to predicate ATS jurisdiction, the Court did not explain what claims will “touch and concern” U.S. territory with sufficient force to overcome the presumption.

Justice Breyer, in a concurring opinion joined by Justices Ginsburg, Sotomayor, and Kagan, would have gone further, stating that the ATS should apply whenever the defendant is an American national or the defendant’s conduct affects an “important American national interest.”¹⁹ Although Justice Kennedy did not join Justice

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Breyer’s concurrence, Justice Kennedy’s separate and inscrutable concurring opinion leaves it unclear when he might conclude that a future ATS claim against a U.S. corporation or other defendant might “touch and concern” the territory of the United States.

Kiobel in Practice

When the Court issued its opinion in *Kiobel*, commentators predicted the decision would significantly curtail ATS litigation against businesses in the United States—in particular, limiting suits against multinational companies that operate in developing countries. But there also was concern that the decision might encourage plaintiffs to continue to file ATS suits, especially against U.S. companies, relating to acts in other countries if plaintiffs could allege a sufficient nexus with the United States.

As expected, litigants have hotly debated the meaning of *Kiobel*’s “touch and concern” caveat over the past sixteen months, with plaintiffs offering various theories on why their cases might have a sufficient nexus to the United States.

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Overall, lower courts generally have adhered to the Supreme Court’s directive to dismiss cases in which plaintiffs could not plausibly plead allegations involving *substantial* unlawful activity on U.S. soil.²⁰ For example, courts have held that the following U.S. contacts do not alone sufficiently “touch and concern” the United States for ATS jurisdiction: where plaintiffs are U.S. residents; where defendants have a substantial U.S. presence; or where the case implicates important U.S. foreign policies.

In contrast, three courts have permitted ATS claims to proceed on the merits based on significant U.S. contacts. One case involved the bombing of an American embassy and included overt acts within the United States allegedly in furtherance of the attack.²¹ Another case similarly involved substantial conduct within the United States, in which the defendant allegedly worked for over a decade from Massachusetts to support the oppression of gays and lesbians in Uganda, including drafting legislation imposing the death penalty for homosexuality.²²

The most significant decision for U.S. companies, however, is the Fourth Circuit’s opinion in *Al Shimari v. CACI Premier Technology, Inc.*, which allowed Iraqi nationals to pursue their ATS claims against an American military contractor for alleged abuse and torture at Abu Ghraib prison in Iraq.²³ Reversing the district court, a panel of the Fourth Circuit unanimously held that the ATS claims sufficiently touched and concerned the territory of the United States where “extensive relevant conduct” was based on:

(1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; [and] (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.²⁴

The court concluded that these U.S. factors, collectively, were sufficient to displace the presumption against extraterritoriality. To date, this is the only case post-*Kiobel* in which a court has found a sufficient U.S. nexus to permit ATS claims to proceed against a U.S. company.²⁵

In the remaining cases, plaintiffs have alleged that defendants engaged in some limited U.S. activity related to international law violations abroad. The Second Circuit held in *Balintulo v. Daimler AG* that the supply of automotive equipment and computer systems to the former apartheid government in South Africa by Ford and IBM, respectively, was insufficient to invoke ATS jurisdiction because the actual alleged human rights violations occurred in South Africa.²⁶ Similarly, a federal court in Alabama dismissed an ATS suit against U.S.-based Drummond Company for allegedly directing a paramilitary group in Colombia to commit war crimes to protect the company's

Colombian operations. The court held that the ATS was "focus[ed]" on "violations of the law of nations," such as war crimes, and that the torts in the case occurred in Colombia, even though plaintiffs alleged that the defendant's decisions to provide support to the paramilitary group were made in the United States.²⁷

Most recently, a divided panel of the Eleventh Circuit dismissed a long-running ATS suit against Chiquita, in which plaintiffs alleged that the U.S. company aided and abetted violent acts by paramilitary forces in Colombia. The majority again focused on the locus of the tort abroad rather than on plaintiffs' allegations of U.S.-based conduct to support or condone the wrongful acts: "There is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force."²⁸

There is some tension between the holdings in *CACI* and *Chiquita*, which might be attributed to the fact that in *CACI* the primary perpetrators were American citizens and there may have been a sense that the United States bears more responsibility for torture in Iraq than the atrocities in Colombia. (Recall that the original purpose of the ATS was to provide a judicial remedy for international law violations that could be attributed to the United States.) Looking at the post-*Kiobel* case law as a whole, however, these cases suggest that plaintiffs must allege, at a minimum, that U.S. defendants took substantial steps within the United States to execute the unlawful conduct overseas; mere U.S.-based activity that does not itself violate international law likely is insufficient absent truly extraordinary circumstances.

These cases also demonstrate that courts are divided on whether a defendant's American citizenship is relevant in determining whether ATS claims "touch and concern" the United States. The Second Circuit in *Balintulo* directed the trial court to dismiss claims against the four remaining corporate defendants—Daimler AG, Rheinmetall, Ford, and IBM—for allegedly aiding and abetting crimes of the former apartheid government in South Africa. The Second Circuit rejected the plaintiffs' argument that the ATS claims against Ford and IBM should survive *Kiobel* on the ground that those defendants are U.S. companies. The panel held that the defendants' nationalities were "irrelevant" because "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*."²⁹ The Eleventh Circuit concurred in *Chiquita*, concluding that a "distinction between the [nationality of] corporations does not lead us to any indication of a congressional intent to make the statute apply to extraterritorial torts."³⁰

In contrast, other courts have held that a defendant's U.S. nationality is a relevant, but not necessarily a sufficient, consideration. In *CACI*, the Fourth Circuit noted that *Kiobel*'s "touch and concern" analysis applies to "'claims,' rather than the alleged tortious conduct"; accordingly, the court decided to consider all "facts that give

rise to ATS claims, including the parties' identities and their relationship to the causes of action."³¹ Two district courts have reached the same conclusion, each listing the defendant's American citizenship as a relevant factor supporting ATS jurisdiction.³²

Either way, U.S. companies may still have to continue defending ATS suits, at least for the time-being. Some courts have allowed plaintiffs an opportunity to amend their pleadings to attempt to allege a sufficient U.S. nexus. For example, the Ninth Circuit permitted plaintiffs to amend their complaint against a U.S. subsidiary of Nestlé to substantiate a U.S. nexus to allegations of child trafficking in Côte d'Ivoire;³³ and a federal court in New York allowed the plaintiffs in *Balintulo* to propose amended pleadings against Ford and IBM for the same purpose, although the court ultimately found the new allegations insufficient.³⁴ The upshot is that plaintiffs face a high hurdle to keep their ATS claims alive, but the defendants in these cases will have to keep litigating through at least one more round of pleadings.

The Sound of Silence

While recent dismissals of high-profile ATS cases have grabbed headlines, *Kiobel*'s immediate impact on corporate ATS litigation has been subtler: it appears that only one new ATS case has been filed

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against a U.S. company during the sixteen months since *Kiobel*, and that case involves allegations of human trafficking and forced labor within the United States.³⁵ In that same period, plaintiffs have filed amended claims against U.S. companies only four times in cases that preceded *Kiobel*,³⁶ one of which already has been dismissed.³⁷ The relative scarcity of new filings perhaps indicates that plaintiffs' lawyers are discouraged by the Supreme Court's decisions limiting the scope of the ATS and may be focusing their litigation strategies elsewhere.

On the other hand, lawyers who regularly represent ATS plaintiffs might simply be probing the limits of *Kiobel*'s "touch and concern" requirement in pending suits, waiting to bring new cases that will survive a motion to dismiss. Should plaintiffs regroup and begin filing new ATS suits, they would still be required to articulate specific factual allegations of U.S.-based conduct sufficient to state a plausible claim for relief under the Supreme Court's decisions in *Ashcroft v. Iqbal*³⁸ and *Bell Atlantic Corp. v. Twombly*.³⁹ As the Court explained in *Iqbal*, bald allegations of wrongdoing "do[] not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."⁴⁰

Corporate Liability

The Supreme Court originally agreed to hear the *Kiobel* case to resolve a split among lower courts on the question whether corporations can be sued under the ATS. The Second Circuit had held that the ATS does not apply to corporations,⁴¹ whereas the Seventh, Ninth, Eleventh, and D.C. Circuits had held that corporations may be the subject of ATS suits.⁴² Because the

Supreme Court decided the case without reaching the question of corporate liability—none of the justices' opinions even mentioned the issue—the law should remain unchanged in the circuit courts. Indeed, a Ninth Circuit panel in the Nestlé case recently reaffirmed circuit precedent that corporations may be held liable under the ATS.⁴³

However, dicta in the *Kiobel* decision has influenced lower courts' views on corporate liability. In applying the presumption against extraterritoriality, the Supreme Court observed that "corporations are often present in many countries," but that "mere corporate presence" is insufficient to "displace the presumption against extraterritorial application" of the ATS.⁴⁴ Citing that statement (and its implicit assumption that corporations might not be excluded *per se* from ATS liability), a panel of the Second Circuit directed the parties to submit additional briefs on the question of corporate liability, indicating a willingness to reconsider the issue.⁴⁵ However, other panels of the Second Circuit have rejected the notion that *Kiobel* implicitly overruled Circuit precedent, stating that binding law in the circuit foreclosed suing a corporation under the ATS.⁴⁶

In April 2014, a federal judge in New York seized upon this uncertainty and held in the *Apartheid Litigation* that corporations can be sued under the ATS, notwithstanding the Second Circuit's explicit statement to the contrary in *Balintulo*, which should have been binding both as Circuit precedent and as law of the case.⁴⁷ The district court stated that the Supreme Court's decision to affirm *Kiobel* on the ground that the case was an improper exercise of extraterritorial jurisdiction "directly undermine[d]" the

Second Circuit's prior holding that corporations were not proper defendants in ATS cases.⁴⁸ Nevertheless, the court ultimately dismissed the claims against Ford and IBM because the plaintiffs could not plausibly allege that the defendants had engaged in relevant conduct within the United States.⁴⁹

Aftershocks

Kiobel has been described as "an earthquake that has shaken the very foundation" of the ATS, effecting a "seismic shift . . . on the legal landscape."⁵⁰ Many

prominent ATS cases have since been dismissed based on *Kiobel*'s territoriality requirements. However, the aftershocks of *Kiobel* are not yet finished, and it remains to be seen whether other courts will continue to accord *Kiobel* broad breadth. Key cases are pending within the D.C. Circuit (against Exxon) and the Ninth Circuit (against Nestlé USA), and those courts will soon have to decide what level of domestic activity could be sufficient to "touch and concern" the United States under the ATS. The outcome of those cases may be bellwethers for the direction of ATS litigation in future years.

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Endnotes

- 1 John Bellinger, III is a partner and R. Reeves Anderson is an associate at Arnold & Porter LLP. Mr. Bellinger served as the Legal Adviser to the Department of State from 2005 to 2009.
- 2 133 S. Ct. 1659 (2013).
- 3 *Id.* at 1669.
- 4 *Id.* (Kennedy, J., concurring). Justice Alito observed that the question of whether claims “touch and concern the territory of the United States” was a “formulation [that] obviously leaves much unanswered.” *Id.* One court called the Court’s “touch and concern” framework “textually curious,” *Al Shimari v. CACI Int’l, Inc.*, 951 F. Supp. 2d 857, 867 (E.D. Va. 2013), while another observed, “What then is ‘enough’ such that the conduct in Colombia touches and concerns the United States with sufficient force? *Kiobel* has not given courts a road map for answering this question.” *Giraldo v. Drummond Co., Inc.*, 09-cv-1041, 2013 WL 3873960, at *5 (N.D. Ala. July 25, 2013).
- 5 The ATS provides in full, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.
- 6 *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).
- 7 *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).
- 8 *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).
- 9 Second Amended Complaint for Tort Damages, *Xiaoning v. Yahoo!, Inc.*, No. C07-02151 (N.D. Cal. July 30, 2007).
- 10 *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013).
- 11 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–14 (2004).
- 12 *Id.* at 724 (“The jurisdictional grant [in the ATS] is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).
- 13 See, e.g., *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 396 (4th Cir. 2011) (“Following the lead of our sister circuits, we conclude that ‘aiding and abetting liability is well established under the ATS’”) (citation omitted); *Khulumani Grp. v. Barclay Nat’l Bank*, 504 F.3d 254, 260 (2d Cir. 2007) (“in this Circuit, a plaintiff may plead a theory of aiding and abetting liability” under the ATS); see also *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (same).
- 14 The Supreme Court initially granted certiorari in *Kiobel* to resolve a split among the circuits on the question of corporate liability. Compare *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111, 145 (2d Cir. 2010) (no corporate liability), with *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) (corporations are subject to suit under the ATS); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011) (same); *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 748 (9th Cir. 2011) (en banc) (same).
- 15 *Sarei*, 671 F.3d at 797-98 (Kleinfeld, J., dissenting).
- 16 *Kiobel v. Royal Dutch Petro. Co.*, 132 S. Ct. 1738 (2012) (restoring case to oral argument calendar and directing the parties to address: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”).
- 17 133 S. Ct. at 1669.
- 18 *Id.*
- 19 *Id.* at 1671 (Breyer, J. concurring in the judgment).

- 20 Courts have unanimously agreed that *Kiobel* prevents plaintiffs from bringing so-called “foreign-cubed” cases in which *foreign* plaintiffs sue *foreign* defendants for torts committed in a *foreign* country. See, e.g., *Ben-Haim v. Neeman*, 543 F. App’x 152, 155 (3d Cir. 2013) (dismissing ATS claims against Israeli defendants where “the conduct that formed the basis of the ATS claims took place in Israel”); *Kaplan v. Central Bank of Islamic Rep. of Iran*, 961 F. Supp. 2d 185, 205 (D.D.C. 2013) (dismissing claims under *Kiobel* because “the attacks were allegedly funded by Iran, launched from Lebanon, and targeted Israel”).
- 21 *Mwani v. Bin Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013).
- 22 *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013).
- 23 ___ F.3d ___, 2014 WL 2922840 (4th Cir. June 30, 2014).
- 24 *Id.* at *12.
- 25 One other court has stated in dicta that an ATS claim “arguably” may proceed where a U.S. corporation develops a product “predominantly, if not entirely, within the United States” with the specific intent that it will be used to commit violations of international law. *Du Daobin v. Cisco Sys., Inc.*, No. 11-cv-1538, 2014 WL 769095, at *9 (D. Md. Feb. 24, 2014). However, the court ultimately dismissed the case on other grounds.
- 26 727 F.3d 174 (2d Cir. 2013).
- 27 *Giraldo*, 2013 WL 3873960, at *8.
- 28 *Cardona v. Chiquita Brands Int’l, Inc.*, ___ F.3d ___, 2014 WL 3638854, at *4 (11th Cir. July 24, 2014).
- 29 *Balintulo*, 727 F.3d at 190; *id.* at 190 n.24 (“Nothing in the Court’s reasoning in *Kiobel* suggests that the rule of law it applied somehow depends on a defendant’s citizenship.”).
- 30 *Chiquita*, 2014 WL 3638854, at *3; accord *William v. AES Corp.*, 14-cv-343, 2014 WL 2896012 (E.D. Va. June 26, 2014) (dismissing claims against Virginia corporation for the actions of its subsidiary in Cameroon).
- 31 *CACI*, 2014 WL 2922840, at *8.
- 32 *Lively*, 2013 WL 4130756, at *13 (citing U.S. citizenship as one factor supporting ATS jurisdiction); *Cisco Sys.*, 2014 WL 769095, at *9 (same, in dicta).
- 33 *Doe v. Nestlé USA, Inc.*, ___F.3d___, 2014 WL 4358453, at *12–14 (9th Cir. Sept. 4, 2014).
- 34 *In re South African Apartheid Litig.*, No. 02 MDL 1499, 2014 WL 1569423 (S.D.N.Y. Apr. 17, 2014) (granting leave to move to amend); *In re South African Apartheid Litig.*, No. 02 MDL 1499, 2014 WL 4290444 (S.D.N.Y. Aug. 28, 2014) (dismissing case under *Kiobel II*).
- 35 Complaint, *Doe v. Pure Forest LLC*, No. 14-cv-879 (E.D. Cal. Apr. 8, 2014).
- 36 See First Am. Complaint, *Peñaloza v. Drummond Co.*, No. 13-cv-393 (N.D. Ala. Apr. 26, 2013) (stayed); Third Am. Complaint, *Jovic v. L-3 Servs., Inc.*, No. 10-cv-5197 (N.D. Ill. May 30, 2013) (decision pending on motion to dismiss); Status Report, *Abbass v. CACI Premier Tech., Inc.*, No. 13-cv-1186 (E.D. Va. Aug. 12, 2014) (recommending staying dispositive motions on Amended Complaint filed October 28, 2013, pending scheduling in related *Al-Shimari* case).
- 37 *Cisco*, 2014 WL 769095.
- 38 556 U.S. 662 (2009).
- 39 550 U.S. 544 (2007).
- 40 556 U.S. at 678–79.
- 41 *Kiobel*, 621 F.3d at 145.
- 42 See *Flomo*, 643 F.3d at 1021; *Sarei v. Rio Tinto PLC*, 671 F.3d at 748; *Romero*, 552 F.3d at 1315; *Exxon Mobil*, 654 F.3d at 57.
- 43 *Nestle USA*, 2014 WL 4358453, at *5–8.
- 44 *Kiobel*, 133 S. Ct. at 1669.
- 45 *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013).
- 46 *Balintulo*, 727 F.3d at 191 n.26; *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014).
- 47 *In re South African Apartheid Litig.*, 2014 WL 1569423, at *6.
- 48 *Id.* at *5.
- 49 *In re South African Apartheid Litig.*, 2014 WL 4290444.
- 50 *Giraldo*, 2013 WL 3873960, at *1.

RICO and the Plaintiffs' Bar: Pushing the Boundaries of Extraterritoriality¹

The Racketeer Influenced and Corrupt Organizations Act (RICO)² has long been used by plaintiffs in transnational litigation. Although the Supreme Court's recent seminal decision in *Morrison v. Australia National Bank Ltd.*³ concerned the U.S. securities laws, there was hope that courts would aggressively apply its unequivocal reaffirmation of the presumption against the extraterritorial reach of U.S. federal statutes to RICO actions to minimize the statute's misuse as a vehicle for transnational litigation.

While courts after *Morrison* are using the case to analyze RICO matters, no uniform standard to assess the extraterritoriality of a given matter has emerged. Indeed, plaintiffs' lawyers have sought to undermine the Supreme Court's admonition against their extraterritorial application by bringing cases designed to sow confusion over how much domestic conduct must be alleged.⁴ The current state of the law may be further clarified over time, but at the moment, RICO claims still present challenges for defendants.

The RICO statute, originally enacted as a mechanism to fight organized crime,⁵ has been deployed in a broad range of civil contexts and has become a powerful tool for plaintiffs asserting claims against

corporate defendants.⁶ The RICO statute is directed at "racketeering activity" which affects interstate or foreign commerce.

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Although structurally complex, the statute requires two necessary components: an “enterprise” and a “pattern of racketeering activity.”⁷ In brief, RICO prohibits (1) the investment of proceeds of racketeering activity in any enterprise; (2) acquisition of an interest in an enterprise via a pattern of racketeering activity; (3) participation in the conduct of an enterprise through a pattern of racketeering activity; and (4) a conspiracy to engage in any prohibited activity.⁸

What flows from these criteria has been an extensive history of litigation focused on the definition and context of the necessary elements of “enterprise” and “pattern of racketeering activity.” “Enterprise” has been defined quite broadly and can be anything from formal corporate structures to associations in fact.⁹ “Racketeering activity” is specifically defined in the statute and includes a wide range of criminal and illegal activity, including mail and wire fraud.¹⁰ The statute also requires that there be a “pattern” of racketeering activity, involving at least two acts within a ten year period.¹¹ The definition of “pattern” has received substantial attention from the courts.¹²

Courts typically conclude that Congress intended RICO to be interpreted and applied flexibly, and they have encouraged the development of a variety of fact-driven, multiple factor tests to assess the validity of a particular set of claims under the statute.¹³ This approach has significant consequences in assessing RICO’s application to transnational disputes.

The Supreme Court itself has not specifically addressed the issue of the extraterritorial application of RICO. The lower courts that have done so, however, have until quite recently—with one notable

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exception¹⁴—consistently found that Congress did not intend the statute to apply extraterritorially.¹⁵ However, plaintiffs’ continued characterization of their claims as having some nexus to the United States suggests that efforts to assert transnational claims under RICO will persist.

Under the strictures of *Morrison*, the RICO statutes can have no extraterritorial application because the statute is silent as to its extraterritorial application.¹⁶ With *Morrison*’s clear admonition that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,”¹⁷ coupled with RICO’s equally clear absence of any textual reference to extraterritorial application, the issue would seem to be decided. Determining that the RICO statute has no extraterritorial application is a necessary but not sufficient predicate for disposing of RICO claims involving foreign actors and activity. Plaintiffs have attempted to plead contacts with the United States sufficient to take their cases outside the forbidden extraterritorial zone. The resulting battle over whether particular RICO claims are, on balance, extraterritorial or domestic has led once again to a fact-specific assessment by the courts,¹⁸ where a consistent test or uniform paradigm for decision has yet to emerge.

Pre-*Morrison*, the federal courts assessing extraterritoriality under RICO had applied variations of the “conduct” and/or “effects” tests that had been employed in the securities law context.¹⁹ Although RICO claims may implicate a broad range of conduct, the courts clearly believed that federal securities laws provided the most immediately relevant guardian as to assessment of extraterritoriality.²⁰ There remains, however, the question of what is extraterritorial in the broader context of RICO. In *Morrison*, the Supreme Court was able to devise a fairly clear and straightforward test of extraterritoriality. By focusing on the location of purchases and sales of securities at issue, the Court was able to conclude that 10b-5 claims are available only as to domestic transactions or securities listed on domestic exchanges.²¹

Until very recently, there had been a clear consensus that, despite the RICO statute’s repeated references to interstate and foreign commerce, there was no statement of Congressional intent to have the statute apply extraterritorially; therefore, it would not.²² Virtually all courts had reached the same conclusion.²³ However, in *European Community v. RJR Nabisco, Inc.*,²⁴ a panel of the Second Circuit reached a very different conclusion. [Distinguishing the unequivocal holding of *Norex*,²⁵ that as the RICO statute was silent as to extraterritorial application, it had none, the *European Community* panel held:]

We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate. Thus, when a RICO claim depends on violations of a predicate statute that manifests an unmistakable Congressional intent to

apply extraterritoriality, RICO will apply to the extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not overcome *Morrison’s* presumption against extraterritoriality, RICO will not apply extraterritoriality either.²⁶

The Court attempted, somewhat unconvincingly, to reconcile this decision with the prior ruling of the Second Circuit in *Norex*.²⁷ This decision is contradictory to that of *Norex* and virtually all the courts addressing this issue. The suggestion that courts look through RICO to the predicate acts and ignore RICO’s silence as to extraterritoriality has been made before, and rejected. In *Cedeño v. Intech, Inc.*, Judge Rakoff was presented with the identical argument as regarded the predicate racketeering act of money laundering. The Court rejected this approach, determining that RICO was not “... a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts,”²⁸ and that the focus of RICO was on matters

“ The suggestion that courts look through RICO to the predicate acts and ignore RICO’s silence as to extraterritoriality has been made before, and rejected. ”

distinct from the predicate acts themselves. Therefore, the Court reasoned, RICO's silence as to extraterritoriality was dispositive.²⁹

Rejecting this reasoning, the *European Community* panel went on to assess the extraterritoriality of each of the alleged predicate acts. It is important to note that the approach adopted by the *European Community* court requires a two-step analysis. First, the predicate acts are parsed to determine whether they evince a Congressional intent to be applied extraterritorially. If so, the claims may proceed on that basis. Even as to those predicate acts without independent extraterritorial application, there remains the necessary assessment of whether by reference to whether the conduct is sufficiently domestic to allow continued prosecution of the claims. In *European Community*, the conclusion of this analysis was that claims related to money laundering and material support of terrorism were extraterritorial and that while money and wire fraud claims as well as those under the Travel Act were not, the allegation that these claims had been completed in the United States or while crossing its borders were sufficient to allow them to be considered domestic in nature.³⁰

Without a direct parallel to the domestic exchange or transaction measure or guidance specific to RICO from the Supreme Court there is unfortunately no clear and unequivocal standard of what constitutes an extraterritorial RICO claim, and the courts have devolved upon a fact-intensive assessment, that from certain perspectives bears more than a little resemblance to the "effect" and "conduct" cases. In assessing extraterritoriality under

“ *There is unfortunately no clear and unequivocal standard of what constitutes an extraterritorial RICO claim.* ”

RICO, post-*Morrison* and *Kiobel* cases have focused on the site of either or both of the "enterprise" and the "racketeering activity" or "predicate acts." Examination of the location of the enterprise is complicated by the fact that the enterprise can operate in multiple locations requiring a second order consideration of where the "brains" of the enterprise may be located.³¹ The alternative is to look to the places where the enterprise acted, or the "brawn" of the enterprise.³² In either case, courts and defendants need to be vigilant about the inclusion of modest domestic activity in a complaint to mask the truly extraterritorial nature and activity of the enterprise.

Other courts have proceeded from the premise that the focus of RICO is instead racketeering activity. The Ninth Circuit has held that, in order to state a valid domestic RICO claim, a plaintiff must sufficiently allege that the "brains" of the enterprise was domestic, or that the "brawn" of the enterprise—the pattern of racketeering conduct—was domestic.³³ Cases alleging conduct which was clearly being directed from outside the United States fail to satisfy the "brains" test for a domestic RICO enterprise, as other courts have found under similar circumstances.³⁴ The location

of the “brawn” can be equally determinative. RICO simply does not apply to such extraterritorial conduct.³⁵ Plaintiffs will seek to evade a designation as extraterritorial by inclusion of some level of domestic conduct. But “isolated domestic conduct does not permit RICO to apply to what is essentially foreign activity.”³⁶ This only makes sense. As the Supreme Court has explained, “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.”³⁷ Accordingly, it is plaintiffs’ burden to allege domestic conduct that “establish[es] a connection between the United States and the alleged racketeering activity that is sufficient to support a RICO claim.”³⁸

Notably, cases with a substantial nexus to the United States have been found to be extraterritorial. For instance, in *Norex Petroleum Ltd. v. Access Indus., Inc.*, the plaintiff alleged a massive racketeering and money-laundering scheme pursuant to which the defendants consolidated the Russian oil industry and illegally seized plaintiff’s business.³⁹ Several United States business entities and citizens were named as defendants, and Norex alleged that the scheme was directed from the United States and through U.S. banks, which were used to conceal diverted oil revenues from Russian companies and wire bribes to Russian officials. Additionally, the Norex board chair was allegedly threatened by enterprise members while he was in San Francisco. Looking at the entire pattern of relevant conduct, the Second Circuit held that “the *slim contacts* with the United States alleged by [plaintiffs] are insufficient” to support a valid RICO claim.⁴⁰

Similarly, in *Republic of Iraq v. ABB AG*, the Iraqi government brought RICO claims against participants in the United Nations Oil for Food program, alleging widespread corruption and kickbacks.⁴¹ Among the domestic conduct alleged was the membership of U.S. defendant corporations in the enterprise, kickbacks paid in the United States by domestic companies, and the facilitation of the fraudulent scheme by a New York bank serving as trustee of the program funds.⁴² Even in the face of these substantial domestic allegations, the court reasoned that “the key aspects of the alleged scheme were focused abroad,⁴³ and the scheme itself was not “directed at New York.”⁴⁴ Therefore, the plaintiff failed to state a claim under RICO.⁴⁵

There are, of course, RICO cases which, while arising in the broader context of transnational disputes, are of a clearly domestic nature not implicating the concerns about extraterritoriality. Chevron’s RICO claims against the lead plaintiff’s counsel and others involved in attempts to force collection or settlement in litigation involving a \$9 billion Ecuador judgment are a prime example. While the overarching dispute is transnational, the RICO claims are not. As the federal district court observed, the scheme at issue there “(1) allegedly was conceived and orchestrated in and from the United States (2) in order wrongfully to obtain money from a company organized under the laws of and headquartered in the United States, and to cover up unlawful and improper activities, and (3) acts in its furtherance were committed here by Americans and in Ecuador by both Americans and Ecuadorians... [A]pplying the statute to that pattern would not be extraterritorial.”⁴⁶

Obviously, to the extent that the approach of the Second Circuit in *European Community* gains further acceptance, defendants will likely see substantially increased extraterritorial application attempts from plaintiffs. Even if they do not, the complex assessment of whether the “enterprise” or the pattern of “racketeering activity” is sufficiently domestic to allow RICO claims to proceed despite a conclusion that RICO has no extraterritorial application, may preserve some level of transnational RICO litigation. Some of that risk may be ameliorated by appropriate enforcement of the *Twombly/Iqbal*⁴⁷ pleading standards. Plaintiffs should not be allowed to advance claims based upon

vague or implausible allegations of domestic content and contact in their complaints. It may also be the case that further intervention by the Supreme Court may be required to make clear (1) that absent any statement of Congressional intent in the RICO statute itself, the presumption applies with full force and (2) whether the “focus” of the RICO statute for purposes of assessing domestic contact should be the enterprise, the racketeering activity or some combination of them both. Until such time, courts should be cautious in allowing RICO claims alleging mixed foreign and domestic activity to escape the effect of the presumption against territorial application.

“ Until such time, courts should be cautious in allowing RICO claims alleging mixed foreign and domestic activity to escape the effect of the presumption against territorial application. ”

Endnotes

- 1 James Stengel is a partner at Orrick, Herrington & Sutcliffe LLP.
- 2 18 U.S.C. § 1962.
- 3 564 U.S. 247 (2010).
- 4 *See, e.g., European Community v. RJR Nabisco, Inc.*, No. 11-2475-cv, 2014 WL 4085863 (2d Cir. Apr. 23, 2014); *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 8-299, 2012 WL 2093997 (W.D. Pa. 2012). *See generally Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 938-39 (N.D. Cal. 2012) (discussing the confusion).
- 5 *United States v. Capetto*, 502 F.2d 1351, 1358 (7th Cir. 1974).
- 6 *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).
- 7 18 U.S.C. § 1962.
- 8 18 U.S.C. §§ 1962(a-d).
- 9 *See, e.g., U.S. v. Turkette*, 452 U.S. 576, 580-81 (1981).
- 10 180 U.S.C. § 1961(1).
- 11 18 U.S.C. § 1961(5).
- 12 *See, e.g., Sedima* at 483-84.
- 13 *See, H. J. Inc. v. New Bell Tel. Co.*, 648 F. Supp. 419 (D. Minn. 1986), *aff'd* 829 F.2d 648 (8th Cir. 1987), *rev'd*, 429 U.S. 229; Gregory M. Wasson, "Patterns of Racketeering Activity," 10 Am. Ju. Proof of Fact §§ 12-14 (2010).
- 14 *European Community v. RJR Nabisco, Inc.*, No. 11-2475-cv, WL 4085863, (2d Cir., April 23, 2014).
- 15 *See, e.g., Tymoshenko*, 2013 U.S. Dist. LEXIS 42754 at *38.
- 16 *See United States v. Chao Fan Xu*, 706 F.3d 965, 974-75 (9th Cir. 2013).
- 17 As in other contexts addressed here, the primacy of the factual allegations made by plaintiffs to establish domestic context and avoid forbidden extraterritorial application requires that those allegations be subject to the rigorous pleading standards established in *Twombly* and *Iqbal*. (*See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Wrote allegations of domestic presence and impact should never suffice.
- 18 *See, e.g., United States v. Phillip Morris USA, Inc.*, 566 F.3d 1095, 1130-31 (D.C. Cir. 2009).
- 19 *Morrison, id.* at 2877.
- 20 *See Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004); *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046 (2d Cir. 1996); *see also Note, "Life After Morrison: Extraterritoriality and RICO," 44 Vanderbilt Journal of Transnational Law 1385, 1393-98 (2011).*
- 21 *Morrison, id.*
- 22 As the Second Circuit observed in *Norex*, "As RICO is silent as to any extraterritorial application [citing *North South Finance Corp. v. Al-Turki*, 100 F. 3d 1046, 1051 (2d Cir. 1986)] we affirm the district court's dismissal of plaintiff's complaint . . ." *Norex Petroleum Ltd. v. Access Ind., Inc.*, 631 F.3d 29, 31 (2d Cir 2010).
- 23 *See e.g., Sorota*, 842 F. Supp. 2d at 1349; *Norex*, 631 F.3d at 32-33; *CGC Holding Co. LLC v. Hutchens*, 824 F. Supp. 2d 1193, 1207-1210 (D. Col. 2011); *In re Toyota Motor Corp.*, 785 F. Supp 2d 883, 913 (C.D. Cal. 2011); *Philip Morris*, 783 F. Supp. 2d at 27-28; *The European Cmty v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 WL 843957, at *4 (E.D.N.Y. Mar. 8, 2011) *Cedeño*, 733 F. Supp. 2d at 473; *In re Libor-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 731-733 (S.D.N.Y. 2013).
- 24 No. 11-2475-cv (2d Cir. Aug. 20, 2014).
- 25 *Norex, id.*
- 26 *European Community v. RJR Nabisco, Inc.*, *id.* at 4.

- 27 The *EU* court stated that “We think it far more reasonable to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statute. This interpretation at once recognizes that ‘RICO is silent as to any extraterritorial application’ and thus has not extraterritorial application independent of its predicate statute.” See, *Norex* 631 F.3d at 33 (quoting *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)). At the same time, it gives full effect to the unmistakable instructions Congress provided in the various statutes incorporated by reference into RICO.” *EU v. RJR*, *id.* at 6.
- 28 *Cedeño v. Intech Group, Inc.*, 773 F. Supp. 2d 471, 473 (S.D.N.Y. 2010).
- 29 *Id.*
- 30 *EU*, *id.* at 6.
- 31 See, e.g., *U.S. v. Chao Fan Xu*, 706 F.3d at 965; *The European Cmty.*, 2011 WL 843957.
- 32 *In re Libor-based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d. 666, 733 (S.D.N.Y. 2013).
- 33 *Id.* at 976-77.
- 34 See *Tymoshenko*, 2013 U.S. Dist. LEXIS 42754, at *38 (enterprise was foreign where it “was conceived and orchestrated by Ukrainian officials in Ukraine” to “wrongfully bribe Ukrainian officials” and “engage in politically-motivated trials and incarceration of Plaintiffs”); *European Cmty. v. RJR Nabisco, Inc.*, No. 02-cv-5771, 2011 U.S. Dist. LEXIS 23538, at *22 (E.D.N.Y. Mar. 7, 2011) (enterprise was foreign where the “overall corporate policy” in furtherance of the alleged drug smuggling enterprise “originates with organized criminal organizations in Europe and South America”).
- 35 See *Cedeño v. Castillo*, 457 Fed. App’x. 35, 37-38 (2d Cir. 2012) (dismissing RICO claim where the alleged conduct was “almost exclusively Venezuelan”); *PetrOleos Mexicanos v. SK Eng’g & Constr. Co.*, No. 12-cv-9070, 2013 WL 3936191, at *3 (S.D.N.Y. July 29, 2013) (dismissing RICO claims that “alleged a foreign conspiracy against a foreign victim conducted by foreign defendants participating in foreign enterprises.”)
- 36 *United States v. Phillip Morris, USA, Inc.*, 783 F. Supp. 2d 23, 29 (D. Col. 2011); see also *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 546 (S.D.N.Y. 2013) (“the presence of domestic predicate acts does not necessarily mean a given application of the RICO statute is territorial”).
- 37 *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884, 177 L. Ed. 2d 535 (2010).
- 38 *Hourani v. Mirtchev*, No. 10-cv-1618, 2013 WL 1901013, at *5 (D. Col. May 7, 2013), and “proximately caused [plaintiff’s] injuries.” *Cedeño*, 457 Fed. App’x at 38.
- 39 631 F.3d 29, 30-31 (2d Cir. 2010).
- 40 *Id.* at 33 (emphasis added).
- 41 920 F. Supp. 2d at 524.
- 42 *Id.* at 544-46.
- 43 *Id.* at 545.
- 44 *Id.* at 546.
- 45 *Id.*
- 46 *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012).
- 47 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcraft v. Iqbal*, 556 U.S. 662 (2009).

Afterword: Procedural Restraints on Global Forum Shopping

Cutting across the above-described fields of federal substantive law, procedural law represents another area where plaintiffs' lawyers pursue a strategy of global forum shopping.

Here, as elsewhere, there have been some salutary developments, although the boundaries of the doctrine remain under attack. This afterword considers two areas of procedural law—personal jurisdiction and federal pleading.

Personal Jurisdiction

In several respects, the law governing personal jurisdiction has important implications for forum shopping, both foreign and domestic. First, plaintiffs' lawyers often try to hale foreign companies into American courts in cases based on conduct taking place abroad.¹ Second, they attempt to attribute to foreign companies the American "contacts" of the company's local business partners, whether subsidiaries, independent distributors, or some other corporate form.² Third, domestic companies may be swept up in the mix, as plaintiffs exploit theories developed in global forum shopping decisions to engage in domestic forum shopping. For example, plaintiffs' lawyers might try to invoke the so-called stream-of-commerce theory to drag a small manufacturer of component parts into another state where the finished

product has been sold.³ In all of these circumstances, capacious jurisdictional doctrines, particularly where they are out of step with the mainstream, threaten to undermine interstate and international commerce, to the detriment of American and foreign companies alike.

These manifold risks of forum shopping are especially acute when plaintiffs attempt to

“Capacious jurisdictional doctrines, particularly where they are out of step with the mainstream, threaten to undermine interstate and international commerce, to the detriment of American and foreign companies alike.”

combine extraordinary theories of personal jurisdiction with certain federal statutes. Some statutes such as federal antitrust laws have “nationwide” or “worldwide” service of process provisions.⁴ Many federal courts have read these provisions to define the entire United States (and not merely a single constituent State) as the relevant “forum” for purposes of counting contacts and, thereby, potentially expand the range of forums available to plaintiffs’ lawyers.⁵ Though never squarely endorsed by the Supreme Court, this theory (if correct) only enhances the importance of ensuring proper constitutional limits on personal jurisdiction.

Fortunately, the Supreme Court’s recent (and often unanimous) jurisprudence reflects an awareness about the importance of such limits. For example, the Court has substantially limited general jurisdiction (that is, jurisdiction based on contacts unrelated to the plaintiff’s claims) to forums where the defendant is “essentially at home.” In so doing, the Court rejected general jurisdiction based either on a company’s flow of products into the forum state or on a company’s affiliations with a direct or indirect subsidiary.⁶ The Court has also trimmed theories of specific jurisdiction (that is, jurisdiction based upon contacts related to the claims). Here, it has reaffirmed that a defendant’s “purposeful availment” of the forum State remains an irreducible requirement of specific jurisdiction and has repelled attempts to dilute this requirement through “metaphors” like “stream of commerce” or “effects.”⁷

Despite these salutary developments, challenges remain. The Supreme Court’s decision in *J. McIntyre Machinery, Ltd. v. Nicastro* concerned a claim of personal jurisdiction based upon the sale of goods in

international commerce through a domestic distributor. Though a clear majority agreed that the necessary “purposeful availment” was lacking, five justices did not sign onto a single opinion. Since *Nicastro*, plaintiffs’ attorneys are attempting to exploit this unfortunate uncertainty and to assert, successfully in a few cases, that personal jurisdiction can be supported based on the volume of goods sold into the forum state.⁸ Similarly, notwithstanding the Supreme Court’s sensible restrictions on general jurisdiction, plaintiffs’ attorneys continue to try to drag nonresident companies into their favorite forums based on their corporate affiliations or, in a few cases, their sales.⁹ Finally, in all of these unresolved areas, plaintiffs’ counsel routinely propound costly and burdensome jurisdictional discovery.¹⁰

Federal Pleading

Just as does personal jurisdiction, federal pleading law cuts across substantive areas. Compared to many countries’ procedural systems, American pleading rules make it relatively easy to commence a lawsuit. While these rules may facilitate access to courts, they also enhance the risks of abusive litigation designed to extract quick settlements in meritless suits (especially when coupled with party-driven discovery).

“*Conclusory allegations, shotgun complaints and other techniques all invite counsel to try to bring lawsuits having nothing to do with the United States into American courts.*”

Conclusory allegations, shotgun complaints and other techniques all invite counsel to try to bring lawsuits having nothing to do with the United States into American courts.

Here too, federal courts have helped reduce the risk of abuse. Critical have been the twin decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* that raised the bar from mere notice to a more robust requirement of plausibility pleading.¹¹ Following the Supreme Court’s lead in those domestic decisions, lower federal courts have applied this plausibility requirement to “foreign” cases and dismissed claims that failed to allege unlawful conduct or failed to allege a territorial nexus with the United States.¹²

As in the field of personal jurisdiction, though, opportunities for global forum shopping endure. Despite the tightening of pleading standards in *Twombly* and *Iqbal*, some ATS claims have survived motions to dismiss on the basis of flimsy allegations about the defendant’s conduct.¹³ Even when their current complaints are deficient, plaintiffs’ lawyers have exploited liberal amendment rules to try to revive or to replead cases in light of intervening Supreme Court decisions like *Kiobel* or, remarkably, the decisions of international tribunals.¹⁴ With respect to other federal statutes, such as RICO, plaintiffs’ lawyers have sought to undermine the Supreme Court’s admonition against their extraterritorial application by bringing cases designed to sow confusion over how much domestic conduct must be alleged.¹⁵

American businesses have welcomed the Supreme Court’s recent decisions reining in the exercise of personal jurisdiction and requiring greater specificity in pleading federal claims. These precedents provide much-needed clarity on threshold issues that arise in many transnational litigation disputes, where the claims often have little, if any, connection to the United States. Although these procedural rules will not stop foreign disputes from finding their way to U.S. courts altogether, these hurdles—combined with the substantive limitations on extraterritorial application of U.S. laws discussed in the earlier essays—should help courts and defendants more efficiently weed out international lawsuits that never should have been imported into the United States in the first place.

“ *These precedents provide much-needed clarity on threshold issues that arise in many transnational litigation disputes, where the claims often have little, if any, connection to the United States.* ”

Endnotes

- 1 See, e.g., *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).
- 2 See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).
- 3 See, e.g., *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81 (1st Cir. 1997).
- 4 See, e.g., 15 U.S.C. § 22.
- 5 See, e.g., *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3d Cir. 2004).
- 6 See *Daimler AG*, 134 S. Ct at 760 (“Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA’s contacts are imputable to Daimler, there still would be no basis to subject Daimler to general jurisdiction in California, for Daimler’s slim contacts with the State hardly render it at home there.”); *Goodyear*, 131 S. Ct at 2855 (“Flow of a manufacturer’s product into the forum ... do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.”).
- 7 See *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788-90 (2011) (plurality opinion); *id.* at 2792 (Breyer, J., concurring in the judgment and joined by Alito, J.); *Walden v. Fiore*, 134 S. Ct. 1115 (2014).
- 8 Compare, e.g., *Dow Chemical Canada ULC v. Superior Court*, 202 Cal. App. 4th 470 (Cal. Ct. App. 2011) (unsuccessful assertion of personal jurisdiction based on stream of commerce), with *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Ore. 2012) (successful assertion of personal jurisdiction based on stream of commerce).
- 9 See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, No. A140035, 2014 WL 3747250 (Cal. Ct. App. 2014) (rejecting trial court’s assertion of personal jurisdiction based on general jurisdiction theory but ultimately upholding personal jurisdiction based on specific jurisdiction theory); *Barriere v. Juluca*, No. 12-23510-CV, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014) (upholding personal jurisdiction over foreign company on general jurisdiction theory based on its alleged affiliations with co-defendant in forum state); *George v. Uponor Corp.*, 988 F. Supp. 2d 1056 (D. Minn. 2013) (upholding personal jurisdiction over foreign parent company based on its alleged control over its domestic subsidiary).
- 10 See generally S.I. Strong, *Jurisdictional Discovery in Federal Courts*, 67 Wash. & Lee L. Rev. 489 (2010).
- 11 *Bell Atlantic Corp. v. Twombly*, 549 U.S. 1018 (2006); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- 12 For decisions under the Alien Tort Statute, see, e.g., *Aziz v. Alcolac, Inc.*, 658 F. 3d 388, 398, 401 (4th Cir. 2011); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009); *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 740 (9th Cir. 2008); *Weisskopf v. United Jewish Appeal-Federation of Jewish Philanthropies of New York, Inc.*, 889 F. Supp. 2d. 912, 922 (S.D. Tex. 2012); *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 655 (S.D. Tex. 2010); *In re XE Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E. D. Va. 2009). For decisions under RICO, see, e.g., *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam); *In re Libor-Based Financial Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 731-34 (S.D.N.Y. 2013); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517 (S.D.N.Y. 2013); *Borich v. BP Products North America, Inc.*, No. 12 C 2367, 2013 WL 2357528 (N.D. Ill. 2013); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011).

- 13 *See, e.g., Al Shimari v. CACI Premier Technology, Inc.*, No. 13-1937 *et al.*, 2014 WL 2922840 (4th Cir. June 30, 2014); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009).
- 14 *Doe v. Nestlé USA, Inc.*, F.3d, 2014 WL 4358453, at *11–14 (9th Cir. Sept. 4, 2014) (granting leave to amend complaint in light of *Kiobel* and decisions by international criminal tribunals); *In re South African Apartheid Litig.*, Nos. 02 MDL 1499 (SAS) *et al.*, 2014 WL 1569423 (S.D.N.Y. Apr. 17, 2014) (same); *Doe VIII v. Exxon Mobil Corp.*, 527 Fed. Appx. 7 (D.C. Cir. 2013) (remanding dismissal of ATS claims for reconsideration in light of *Kiobel*).
- 15 *See, e.g., European Community v. RJR Nabisco, Inc.*, No. 11-2475-cv, 2014 WL 4085863 (2d Cir. Apr. 23, 2014); *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 8-299, 2012 WL 2093997 (W.D. Pa. 2012). *See generally Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 938-39 (N.D. Cal. 2012) (discussing the confusion).

Notes

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