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2nd Circ. Closes Door On Morrison Debate, Or Does It?

By **Ed Beeson**

Law360, New York (May 08, 2014, 9:01 PM ET) -- A Second Circuit ruling this week to block a shareholder class action against UBS AG dealt a major blow to attempts at wiggling past a 2010 U.S. Supreme Court decision that closed American courts to many foreign securities claims, but attorneys and experts say important questions still remain.

Tuesday's ruling quashed an attempted end run around the landmark Morrison v. National Australia Bank Ltd. decision, in which the plaintiffs argued they were entitled to sue UBS because the Swiss bank's shares were cross-listed on the New York Stock Exchange. A district court earlier had knocked out the suit because the shareholders, a collection of U.S. and European pension funds and institutional investors, bought their shares on a foreign exchange, thus failing one of the prongs of Morrison.

And now that the circuit court has drawn the same conclusion, some defense attorneys say it is time to deliver the eulogy for the legal theory the plaintiffs' bar had hoped to pioneer.

"This is the final nail in the coffin of the listed securities theory," said George T. Conway III, a Wachtell Lipton Rosen & Katz partner who argued on behalf of National Australia Bank before the Supreme Court in the Morrison case. "Most people had recognized it wasn't going to succeed."

Attorneys said the Second Circuit took a holistic approach to interpreting Morrison when, instead of parsing its language, it said the right to file a securities fraud suit under U.S. law essentially ends at the border. In other words, those who invest outside of the U.S. are subject to laws of the jurisdictions of where they trade.

"It means what we thought Morrison meant," said Adam C. Pritchard, a securities and corporate law professor at the University of Michigan Law School. "If U.S. investors want to stray overseas they will take the law as they find it."

But not everyone thinks the ruling is airtight. Christopher Keller, a partner with Labaton Sucharow LLP, said that while the influential Second Circuit set a steep bar for plaintiffs attorneys to vault, other circuits have yet to weigh in.

Questions remain, he said, about how Morrison should apply in some cross-border transactions, such as when a broker acting on behalf of an institutional investor places an order for a New York-listed security but finds a better price for the same security in Canada. "Half of it can get filled in Toronto, half of it can get filled on the New York Stock Exchange, and you don't have control over that," he said.

He said that while the Supreme Court was clear when it said suits under the Exchange Act of 1934 should only be available to domestic transactions, “when you’re talking about capital flows, it almost becomes unworkable.”

It’s not yet known if the investors denied by Tuesday's ruling will seek a review by the Supreme Court. Attorneys representing the plaintiffs did not return calls, while a spokesman for one of the firms, Grant & Eisenhofer PA, declined to comment.

But some think a go at the high court is in order, or else pressure should be put on Congress to change the laws. "This is just another example of the erosion of our rights as institutional investors under federal securities laws," said Adam L. Franklin, general counsel of the Colorado Public Employees' Retirement Association. "I think this will be another trip to the Supreme Court."

Defense attorneys, however, said they would be surprised if the investors mounted a further appeal, given that they struck out on Morrison’s bright-line test of where they bought their securities.

“The cross-listed argument was creative and not very weighty,” David Kistenbroker, partner with Dechert LLP and co-leader of its securities litigation and white collar practice. “It just shows the strength of the Morrison opinion in the view of the lower court.”

The class action accused UBS of failing to disclose its $100 billion stockpile of mortgage-backed securities and collateralized debt obligations that it later had to severely write down. The investors also said UBS falsely stated the bank complied with U.S. tax laws, only to later admit to violating the law and pay a $780 million fine.

The circuit panel, however, said the district court was correct to ax these claims, as UBS statements about its tax compliance amounted to "inactionable 'puffery,'" among other things.

In addition to rejecting the claim that UBS’ New York stock listing made it fair game, the Second Circuit denied one plaintiff’s arguments that it had the right to sue the bank because its purchase order originated in the U.S., even though the transactions were executed on a Swiss exchange.

Such a decision further cements the deference U.S. courts have granted foreign regulators and other authorities following the Morrison decision, attorneys said. “In a global world, U.S. law has to have limits,” said Andrew Pincus, a Mayer Brown LLP partner who submitted an amicus brief on behalf of European and U.S. business and financial groups in the appeal.

But he and other defense attorneys say some aspects of Morrison still need to be fleshed out. For example, courts have yet settle how to apply the ruling to securities transactions that take place off-exchange. As it stands, courts must dig through the facts and circumstances of a transaction to determine where it took place, for example, when it concerns a private placement of securities negotiated over the phone or online, experts say.

“The law is not very good at sorting out those questions in the age of the Internet,” Pritchard said.

As the Morrison decision continues to close avenues for shareholder class actions, attorneys expect litigants will increasingly look to friendlier courts overseas.

“I do think that over time, with the confluence of Morrison and its consistent application coupled with the changing laws and legal cultures in countries outside of the U.S., we’ll see more cases filed abroad,” Kistenbroker said.

Dimitri Lascaris, who heads the securities class action practice at the Ontario-based Siskinds LLP, said he has seen a sea change in Canada since Morrison was handed down. Once frosty ties between U.S. plaintiffs attorneys and their Canadian counterparts have warmed, while major European institutional investors who previously used the U.S. courts to litigate claims have brought their disputes to Canada instead, according to Lascaris.

Part of what they are attracted to is the openness of the country's legal system, he said.

"What Canadian courts say is you can only pursue claims under our law if the company has a real and substantial connection to Canada," he said.

But that has turned out to apply even to a company that does most of its business in China, is listed in New York and yet happens to be headquartered in Canada, according to Lascaris. That said, there are limits to the system, Lascaris added.

“I don’t think you’ll ever see a foreign-cubed case,” he said.

The plaintiffs are represented by Gregory M. Castaldo, Andrew L. Zivitz, Sharan Nirmul, Richard A. Russo Jr. and Jennifer L. Joost of Kessler Topaz Meltzer & Check LLP; Geoffrey C. Jarvis, Jay W. Eisenhofer, Charles T. Caliendo and Brenda F. Szydlo of Grant & Eisenhofer PA; Samuel H. Rudman and Robert M. Rothman of Robbins Geller Rudman & Dowd LLP;and Gregg S. Levin and William H. Narwold of Motley Rice LLC.

UBS is represented by Robert J. Giuffra Jr., Matthew A. Schwartz, Justin J. DeCamp and Thomas C. White of Sullivan & Cromwell LLP.

The case is City of Pontiac Policemen’s and Firemen’s Retirement System et al. v. UBS AG et al., case number 12-4355, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Edrienne Su.
