

# Morrison v. NAB: Will U.S. Courts Be a Safe Haven for Fraud?



By Vincent Caracciolo and Tara Cummins

## A Surprising Twist to Securities Law

Over the past decade, more than 1,000 foreign issuers a year have registered shares on U.S. securities exchanges. The potential for large investment pools makes U.S. securities markets an attractive proposition for foreign issuers.

Once registered on a U.S. exchange, foreign issuers must comply with regulatory and legal mandates under U.S. law. This potential scrutiny may deter certain issuers from entering U.S. markets. However, foreign issuers may be surprised to learn that even if they avoid U.S. public markets, they still may face shareholder litigation in U.S. Courts if the Supreme Court sides with plaintiffs in the landmark case of *Morrison v. National Australia Bank* (“NAB”) (Supreme Court Docket No. 08-1191).

## The Viability of “F-Cubed” Jurisdiction

At issue in *NAB* is the viability of “F-cubed” jurisdiction—that is, whether or not a U.S. court will exercise jurisdiction over cases brought by **foreign** purchasers of **foreign** shares on **foreign** exchanges.

Briefly, *NAB* centers on alleged securities fraud against a foreign issuer and in particular the conveyance of false or misleading information. In this case, a Florida subsidiary reported artificially inflated figures for its mortgage servicing business to its Australian parent, National Australia Bank. These figures were then incorporated into the company’s public filings in Australia and disseminated to investors. When the fraud was discovered, National Australia Bank restated financials twice, taking a write-down each time. Plaintiffs, including three plaintiffs who purchased their shares abroad, sued.<sup>1</sup>

National Australia Bank moved to dismiss the claims of the foreign plaintiffs arguing principally that Section 10(b) of the 1934 Exchange Act (the provision that governs anti-fraud) does not apply to the case at hand. The crux of their argument is that the 1934 Securities Exchange Act does not specifically address long-arm jurisdiction in “F-cubed” scenarios and in no way should the statute be interpreted by a court to so do.

## Sovereign Authority vs. Deterring Fraud

At oral argument, the bank’s counsel explained to the justices that extending the Exchange Act to apply broadly to F-cubed scenarios threatens the fundamental sovereign authority of other nations. Indeed, nearly 20 “friend of the court” briefs were filed over the case, and notably three of them were

---

<sup>1</sup> The claims of domestic plaintiffs, who had purchased ADR’s on U.S. exchanges, were dismissed by the district court for failure to allege damages from the alleged fraud. The appellate decision focuses exclusively on the claims of the foreign plaintiffs. *In re Nat’l Austl. Bank Sec. Litig.*, 2006 U.S. Dist. LEXIS 94162.

from foreign governments arguing against the United States assertion of F-cubed jurisdiction. Opponents to F-cubed authority further assert that granting extraterritorial jurisdiction will have a “chilling effect” on foreign issuers listing on U.S. exchanges.

The plaintiffs, on the other hand, argued that it is in the best interest of the country to deter securities fraud and that a reasonable interpretation of the statute would include extraterritorial jurisdiction when circumstances merit it. To do otherwise might make the U.S. a safe haven for securities fraud consummated in a foreign country. Plaintiffs argued that the conduct in Florida was substantial enough to merit U.S. authority for the case, as the alleged fraud originated in a Floridian subsidiary.

At oral argument, the justices did not seem predisposed to granting F-cubed jurisdiction. Indeed, Justice Ginsburg remarked that the case “has Australia written all over it.” She asked, “Isn’t the most appropriate choice the law of Australia rather than the law of the United States?”

## **The Potential Impact of Long Arm Jurisdiction**

Should the justices embrace the extraterritoriality of U.S. securities law, it is likely that the presence of foreign plaintiffs in the U.S. will increase, as the potential for large awards is significant. Foreign companies with significant operations in the U.S. are watching the case with great interest. Depending on the outcome of the case and the adoption/expansion of jurisdiction, historically careful corporate and tax planning efforts by multinational corporations may have to be rethought. It is suggested that consideration of jurisdictional exposure to U.S. courts and securities laws may cause foreign corporations to consider restructure, divestiture or abandonment of the U.S. as a place to hold assets.

Another potential consequence of such an adoption or expansion of jurisdiction is the retaliatory treatment of foreign jurisdictions against U.S.-based multinational corporations. The growing need for a well-tailored D&O policy with global coverage grants, as well as consideration of where local policies should fit into corporate risk management decisions likely will be affected if *NAB* expands long arm jurisdiction.

Integro Insurance Brokers is happy to discuss the *NAB* matter with you and its potential implications on your D&O program needs.

---

**Vincent Caracciolo** is a Managing Principal with the Management Risk Practice operating from Integro’s New York Office. An attorney by background, as an insurance broker he specializes in D&O and related professional liability issues.

**Tara Cummins** is a Senior Associate with Integro’s Management Risk Practice operating from Integro’s New York office. An attorney by background, she specializes in professional liability issues and knowledge management.

### **About Integro**

Integro is an insurance brokerage and risk management firm dedicated to serving the insurance and risk management needs of complex institutional risks. Integro has offices across North America, as well as in Bermuda and London. Its headquarter office is located at 1 State Street Plaza, 9th Floor, New York, NY 10004. 1-877-688-8701. [www.integrogroup.com](http://www.integrogroup.com). © Integro USA Inc. 2010