

Inside the Courts

An Update From Skadden Securities Litigators

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Four Times Square
New York, NY 10036
212.735.3000

Supreme Court Declines to Further Define *Morrison's* Domestic Transaction Requirement

The U.S. Supreme Court today denied the petition for *certiorari* in *Toshiba Corp. v. Automotive Industries Pension Trust Fund*, No. 18-486 (U.S. Oct. 15, 2018), leaving open the question of the appropriate scope of the “domestic transaction” requirement of the Securities Exchange Act that the Court established in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010). In *Morrison*, the Court held that Section 10(b) of the Exchange Act does not apply extraterritorially and instead applies only to (i) transactions in securities listed on domestic exchanges and (ii) “domestic transactions” in other securities. Since then, courts have struggled to define exactly what a domestic transaction entails. This difficulty was highlighted by the different approaches the U.S. Court of Appeals for the Second and Ninth circuits took. The Second Circuit previously refused to extend the second prong of *Morrison* to domestic securities transactions where “foreign elements” dominated. See *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014).¹ The Ninth Circuit disagreed with the Second Circuit in the decision upon which the petition was based, stating that *Parkcentral* “is contrary to Section 10(b) and *Morrison* itself.” See *Stoyas v. Toshiba Corporation*, 896 F.3d 933, 950 (9th Cir. 2018). Thus, it remains unclear whether the Exchange Act will apply to all domestic transactions or only those where foreign elements do not dominate.

Toshiba argued in its petition that the Ninth Circuit’s decision created an irreconcilable split with the Second Circuit, which posed a question of significant and immediate national importance. Toshiba claimed that the Second Circuit’s interpretation of *Morrison* more closely hued to the purposes of Section 10(b) and *Morrison* by eliminating impermissibly extraterritorial claims. On the other hand, the Ninth Circuit’s decision included otherwise extraterritorial claims, such as those based on unsponsored American depositary receipts (ADRs) where the issuer was foreign, made the allegedly fraudulent statements in a foreign country and played no role in bringing the ADRs to the U.S., simply because the ADRs were involved in a domestic transaction. Toshiba

¹ Skadden represented one of the defendants in *Parkcentral*.

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further argued that the Ninth Circuit's ruling interfered with foreign securities regulation and undermined the public policy of promoting the U.S. market through the use of unsponsored ADRs. The respondents countered that the decisions were not in conflict, that *Parkcentral* was not the law of the Second Circuit as it had not been otherwise followed and that furthermore, *Parkcentral* was wrongly decided. In an *amicus* brief filed at the request of the Court, the solicitor general advanced several of the same arguments as the respondents, claiming that the Ninth

Circuit had correctly applied *Morrison* and the review by the Supreme Court was not warranted, in part, because the Ninth Circuit's decision had limited significance.

Because the Second Circuit has not more fully adopted its holding in *Parkcentral*, the Supreme Court's denial of the petition likely means that it will be up to the Second Circuit (or another circuit) to more fully limit the scope of a domestic transaction before the Supreme Court will weigh in again.

Contacts

Jay B. Kasner

Partner / New York

212.735.2628

jay.kasner@skadden.com

Scott D. Musoff

Partner / New York

212.735.7852

scott.musoff@skadden.com