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Securities Law—First Circuit Adopts Irrevocable Liability as Both Necessary and Sufficient Condition for Domestic Securities Test—SEC v. Morrone, 997 F.3d 52 (1st Cir. 2021)

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**SECURITIES LAW—FIRST CIRCUIT ADOPTS
IRREVOCABLE LIABILITY AS BOTH
NECESSARY AND SUFFICIENT CONDITION FOR
DOMESTIC SECURITIES TEST—*SEC V.*
MORRONE, 997 F.3D 52 (1ST CIR. 2021)**

United States federal securities laws, in part, protect investors from fraudulent and deceptive practices affecting domestic securities markets.¹ Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder prohibit fraud in connection with the purchase or sale of securities.² The extraterritorial reach of Section 10(b) is an area of longstanding judicial uncertainty and courts were previously inconsistent in their application of federal securities laws to foreign transactions.³ The United States Supreme Court responded to this widespread confusion in *Morrison v. Nat’l Austl. Bank*, where it held that Section 10(b)’s application is limited to securities listed on domestic exchanges and domestic transactions in other securities, establishing what is coined as the transactional test.⁴ Despite the Court’s attempt to clarify the law, the meaning of the phrase “domestic transactions in other securities,” has created additional confusion

¹ See U.S. Securities and Exchange Commission, *What We Do*, ABOUT THE SEC (Dec. 18, 2020), <https://perma.cc/6TB7-JGYD> (stating mission of SEC); Raphael G. Toman, Note, *The Extraterritorial Reach of the U.S. Securities Laws and Non-Conventional Securities: Recent Developments after Morrison and Dodd-Frank*, 14 N.Y.U. J.L. & BUS. 657, 658 (2018) (describing aim of securities law).

² 15 U.S.C. § 78j (making it unlawful to commit fraud in “connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered”); 17 CFR 240.10b-5 (adopting rule to enforce Section 10(b) protections). Administrative agencies’ ability to promulgate rules comes from the authority conferred onto them by Congress. See U.S. Securities and Exchange Commission, *An Introduction to the U.S. Securities and Exchange Commission – Rulemaking and Laws*, INVESTOR BULLETIN (Aug. 20, 2015), <https://perma.cc/N9ZN-YZRT> (explaining SEC rulemaking process). Although Section 10(b) does not specify who has standing to bring action under the provision, there has been an implied private right of action since the mid-1940s. See American Bar Association, *Section 10(b) Litigation: The Current Landscape*, AMERICAN BAR ASSOCIATION (October 20, 2014), <https://perma.cc/8VYL-DRQR>.

³ See *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 255-56 (2010) (discussing uncertainty among courts and variety of tests to determine whether federal securities laws apply).

⁴ See *id.* at 267-68 (discussing extraterritorial scope of Exchange Act); 15 U.S.C. § 78j (stating Section 10(b) of Exchange Act is limited to interstate commerce and national exchanges); 17 CFR 240.10b-5 (limiting Section 10(b) to domestic transactions); see generally Jacob True, Note, *What Counts as a Domestic Transaction Anymore: The Second Circuit and Other Lower Courts’ Struggles in Interpreting the Supreme Court’s Intent in Morrison v. National Australia Bank When Dealing with Derivative Securities Transactions*, 10 HASTINGS BUS. L.J. 513, 516 (2014) (explaining effect of Exchange Act granting SEC broad enforcement authority).

and resulted in a circuit split.⁵ In *SEC v. Morrone*,⁶ the First Circuit, joining two sister circuits, adopted the “irrevocable liability” test for purposes of determining which domestic securities transactions satisfy the second prong of the *Morrison* transactional test, subjecting them to federal securities laws.⁷

The defendants, Jonathan Morrone (“Morrone”), Paul Jurberg (“Jurberg”), Brett Hamburger (“Hamburger”), and Anthony Orth (“Orth”), were executives of Bio Defense, a U.S. corporation that manufactured machines to detect letters containing anthrax.⁸ In 2008, Hamburger introduced Bio Defense to Agile Consulting (“Agile”), a Cyprus-based company that targeted investors in Europe and charged high fees for investor funds it raised.⁹ Bio Defense began working with Agile without disclosing Agile’s fees to its investors.¹⁰ If Agile’s efforts in targeting investors proved fruitful and an investor agreed to purchase stock, Morrone would send a cover letter and stock subscription agreement to Hamburger in Spain.¹¹ Hamburger would forward the stock subscription agreement to the investor, who would then return the executed agreement.¹² However, the agreement itself became

⁵ Compare *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 215 (2d Cir. 2014) (holding irrevocable liability is necessary, but alone insufficient for federal security laws to apply), and *Cavello Bay Reinsurance v. Stein*, 986 F.3d 161, 165-66 (2d Cir. 2021) (concluding presence of domestic transaction alone is insufficient for domestic securities laws to apply, but “claims must not be ‘so predominantly foreign as to be impermissibly extraterritorial.’”), with *United States v. Georgiou*, 777 F.3d 125, 135-37 (3rd Cir. 2015) (concluding irrevocable liability is appropriate for determining locus of sale), and *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 947-49 (9th Cir. 2018) (adopting irrevocable liability test as determinative of whether securities were subject of domestic transaction), and *Absolute Activist Value Master Fund v. Ficeto*, 677 F.3d 60, 67-68 (2d Cir. 2012) (ruling “irrevocable liability” incurred in United States satisfied “domestic transaction” test).

⁶ 997 F.3d 52 (1st Cir. 2021).

⁷ See *id.* at 59-60 (reaffirming circuit precedent holding irrevocable liability is sufficient to meet domestic transaction standard).

⁸ See *id.* at 55 (describing defendants’ roles in Bio Defense). Hamburger, who was previously convicted of conspiracy to commit securities fraud for unrelated activities, was hired shortly after Morrone and Jurberg to generate investor leads. *Id.* Subsequently, Orth joined Bio Defense to assist with sales and marketing, and eventually became the company’s vice president. *Id.*

⁹ See *id.* at 56 (examining discussion between defendants and Agile). Shortly after being introduced to Agile, Lu, Morrone, and Jurberg met with Bio Defense outside counsel, who told them that the cost of Agile’s services were “exorbitantly high” and the fact that Bio Defense would receive such a small portion of any investment was an “absolutely critical disclosure that would need to be made to any potential investor.” *Id.*

¹⁰ See *id.* at 57 (describing ways Bio Defense hid Agile service fees). For example, Orth emailed Morrone and Jurberg a call script for soliciting investors to send to Hamburger and then Agile. *Id.* The call script did not mention the 75% fee Bio Defense had agreed to pay to Agile. *Id.*

¹¹ See *Morrone*, 997 F.3d at 57 (explaining method of operation).

¹² See *id.* (explaining method of operation).

binding only after Bio Defense counter-signed the investor-executed stock subscription agreement.¹³

In the course of this business venture, Bio Defense raised around \$3.3 million, of which almost \$2.5 million was paid to Agile, and received numerous complaints from investors about Bio Defense's solicitation practices.¹⁴ The SEC filed a complaint against Bio Defense, Morrone, Jurberg, Hamburger, and Orth, alleging violations of the SEC's Rule 10b-5.¹⁵ Morrone and Jurberg were alleged to have violated Rule 10b-5 by substantially participating in a scheme to defraud investors and making materially false and misleading statements in the offer or sale of securities.¹⁶ At trial, the United States District Court of Massachusetts granted summary judgment in favor of the SEC.¹⁷

The defendants appealed, arguing that the federal securities laws should not apply to their conduct targeting international investors and urged the court to follow the Second Circuit's application of the *Morrison* transactional test.¹⁸ The First Circuit declined to extend its inquiry further than its

¹³ See *id.* at 57 (explaining method of operation). The stock subscription agreement, which also failed to include Agile's fees, specified that Bio Defense "shall have no obligation hereunder until the Company shall execute and deliver to the Purchaser an executed copy of this Subscription Agreement and until the closing conditions . . . have been satisfied." *Id.* In practice, the investors would sign the subscription agreements, send them to either Morrone or Jurberg in Boston to sign, and Lu would then counter-sign the subscription agreements before mailing them from Boston to investors in Europe. *Id.*

¹⁴ See *id.* at 57-58 (describing SEC's complaints). Morrone was also made aware by the chairman of Bio Defense's advisory board of complaints of "boiler-room tactics" being used by the call centers. *Id.*

¹⁵ See *id.* at 58 (describing relevant charges against all defendants); Pet'r Compl. ¶ 105-10 (stating defendants' conduct alleged to be in violation of Rule 10b-5).

¹⁶ See *Morrone*, 997 F.3d at 58 (outlining allegations); Pet'r Compl. ¶ 105-07 (stating specific charges against Morrone and Jurberg). Additionally, the SEC alleged that Morrone and Jurberg violated Sections 5 and 17 of the Securities Act of 1933 ("Securities Act"), Section 17 of the Exchange Act, and were also liable as control persons under Section 20(a) of the Exchange Act. *Morrone*, 997 F.3d at 58.

¹⁷ See *Morrone*, 997 F.3d at 58-59 (discussing trial court finding and penalties imposed on defendants); *SEC v. Bio Defense Corp.*, 2019 WL 7578525, *35 (D. Mass. Sept. 6, 2019), *aff'd sub nom.* *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021) (granting summary judgment in favor of plaintiff).

¹⁸ See *Morrone*, 997 F.3d at 59-60 (summarizing petitioners' appeal); Appellant Br., 2020 WL 6629320 at *16, *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021) (articulating reasons why summary judgment was improper); *Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014) (amending irrevocable liability test to include "predominant foreign" inquiry); see also Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 *FORDHAM L. REV.* 225, 241 (2016) (discussing Second Circuit irrevocable liability test). Morrone and Jurberg argued that simply having some domestic connection is insufficient to invoke United States jurisdiction. Appellant Br., 2020 WL 6629320 at *16. Their argument was based on the fact that foreign firms conducted the overseas solicitations, no U.S. citizens were solicited, and no solicitation was made to an individual within the United States. Appellant Br., 2020 WL

analysis of the defendants' irrevocable liability, concluding that the Exchange Act does not focus on the place where the deception originated, but upon purchases and sales which occur in the United States.¹⁹ The First Circuit ultimately concluded that the defendants were subject to the federal securities laws because they incurred irrevocable liability in the United States based on (1) the subscription agreements for Bio Defense stock, signed by Bio Defense in Boston, which stated that the company had "no obligation until Bio Defense executes and delivers to the purchaser a signed copy," and (2) the issuance of shares from Boston to investors in Europe by Morrone and Jurberg.²⁰

6629320 at *16. The Second Circuit's holding in *Parkcentral* has been regarded as an extension of the test establishing irrevocable liability because it makes irrevocable liability necessary, but alone insufficient to state a proper domestic claim under Section 10(b) of the Exchange Act. Seymour, *supra* note 18, at 241. Under *Parkcentral*, a plaintiff would also have the additional hurdle of showing that the transaction is not "so predominantly foreign so as to be impermissibly extraterritorial." *Parkcentral Global HUB Ltd.*, 763 F.3d at 216; *see also* Cavello Bay Reinsurance Ltd. v. Stein 986 F.3d 161, 165-68 (2d Cir. 2021) (affirming holding in *Parkcentral* recognizing additional standard); Appellant Br. 2020 WL6629320 at *17 (arguing foreign solicitation should not be bound by U.S. securities laws). The petitioners argued for a more holistic approach when deciding whether to apply U.S. securities laws—if the essence of solicitations and sales by Agile were outside the United States, then it makes little sense to apply U.S. securities laws. Appellant Br. 2020 WL6629320 at *17. These so-called "ministerial" acts, according to the defendants, are not something *Morrison* contemplated as being included in Section 10(b)'s reach. Appellant Br. 2020 WL6629320 at *18 (citing *Parkcentral*, 763 F. 3d at 215-16).

If the domestic execution of the plaintiffs' agreements could alone suffice to invoke Section 10(b) liability . . . , then it would subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges . . . That is a result *Morrison* plainly did not contemplate. . . .

Appellant Br. 2020 WL6629320 at *18 (citing *Parkcentral*, 763 F. 3d at 215-16).

¹⁹ *See Morrone*, 997 F.3d at 60 (focusing on reasoning used in *Morrison*).

²⁰ *See id.* at 59-60 (relaying facts to support finding of irrevocable liability); *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012) (quoting *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876 (2d Cir. 1972)) (defining irrevocable liability determined when "parties to the transaction are committed to one another"); *see also* SEC v. Morrone, No. 12-11669-DPW, 2019 WL 7578525, at *12 (D. Mass. Sept. 6, 2019) (detailing when irrevocable liability occurs); Brief and Addendum for Defendants-Appellants Jonathan Morrone and Z. Paul Jurberg at 16-17, SEC v. Morrone, 997 F.3d 52 (1st Cir. 2021) (No. 19-2007) (arguing irrevocable liability did not arise in United States). Irrevocable liability is found to occur either when the purchaser incurs irrevocable liability within the United States to take and pay for a security, or when the seller incurs irrevocable liability within the United States to deliver a security. *Morrone*, 2019 WL 7578525 at *12 (citing *Absolute Activist*, 677 F.3d at 68). In *Morrone*, the subscription agreement for the stock designated the execution and delivery of a signed copy of the stock agreement to the investor to be the beginning of obligation. *Morrone*, 997 F.3d at 60. Thus, since Lu became bound to effectuate the transaction once he signed the agreement, and he signed the agreement in Boston, Lu became subject to the Exchange Act. *Id.* Similarly, since Morrone and Jurberg issued shares from Boston, they were also subject to the Exchange Act. *Id.* at 61-62. Morrone and Jurberg argued that the stock subscription signature page, which was relied on by the SEC as an exhibit stated, "the undersigned Purchaser . . . by execution and delivery of this signature page, hereby agrees to

The Securities Act and Exchange Act seek to provide investors with information on securities and prevent deceptive practices in the securities market.²¹ While the Exchange Act's provisions are clearly intended to regulate securities transactions in the secondary market, issues have arisen in determining whether the Exchange Act applies to transactions involving foreign countries.²² Delineating the Exchange Act's extraterritorial application has led courts to develop a series of tests that attempt to answer this question.²³

In what is known as the pre-*Morrison* era, the Second Circuit developed the “conducts and effects” test to determine the Exchange Act's extraterritorial application.²⁴ Under this test, courts inquire into whether the wrongful conduct giving rise to a securities law violation (1) occurred in the United States, or (2) had a substantial effect in the United States or upon United States citizens.²⁵ This test was flexible, and courts typically

purchase the number of shares indicated”, therefore irrevocable liability on the investors' part was created overseas. Brief and Addendum for Defendants-Appellants Jonathan Morrone and Z. Paul Jurberg at 16-17, *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021) (No. 19-2007); see generally *Radiation Dynamics Inc. v. Goldmuntz*, 464 F.2d 876, 890-91 (2d Cir. 1972) (explaining when parties in transaction become committed to each other).

²¹ See Alisha Patterson, Case Comment, *Securities Law—Section 10(b) Liability Not Applicable to Domestic Securities-Based Swap Agreements on Foreign Securities—Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014), 38 SUFFOLK TRANSNAT'L L. REV. 233, 233 n.1 (2015) (summarizing historical advent of securities laws).

²² See Will Kenton, *Securities Exchange Act of 1934*, INVESTOPEDIA, <https://perma.cc/HPG4-3UC8> (last updated Oct. 30, 2020) (explaining purpose of Exchange Act). Secondary markets are where investors buy and sell securities, and is what most people commonly think of as “the stock market.” Will Kenton, *Secondary Market*, INVESTOPEDIA, <https://perma.cc/YUX8-ZBYN> (last updated Nov. 27, 2020) (defining scope of secondary market); see also *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 255-56 (2010) (discussing uncertainty among courts and variety of tests to determine whether federal securities laws apply).

²³ See John Koury, Article, *Extraterritoriality For Securities Fraud Post-Morrison*, 1 EMORY CORP. GOVERNANCE ACCOUNTABILITY REV. 63, 63-68 (2014) (providing background of tests used before and after *Morrison*).

²⁴ See Koury, *supra* note 23, at 63-64 (discussing Second Circuit's series of tests prior to *Morrison*).

²⁵ See Koury, *supra* note 23 at 63-64 (explaining function of conducts and effects test). The Second Circuit's conducts and effects test derived from two primary cases: *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968) (“*Schoenbaum*”); and *Leasco Data Processing Corp. v. Maxwell*, 486 F.2d 1326 (2d Cir. 1972) (“*Leasco*”). Koury, *supra* note 23 at 63-64. In *Schoenbaum*, the underlying conduct involved a Canadian corporation that publicly traded shares in the stock market and sold treasury shares in Canada. Koury, *supra* note 23, at 63-64. The Second Circuit concluded that the Exchange Act applied because the sales affected shares in the American stock market. Koury, *supra* note 23, at 63-64. In *Leasco*, an American company purchased securities from an English corporation located in England. Koury, *supra* note 23, at 63-64. Although the English corporation had no securities in American markets, fraudulent conduct did occur in the United States, leading the Second Circuit to conclude that the Exchange Act applied. Koury, *supra* note 23, at 63-64; see also *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 257-58 (2010) (discussing influence Second Circuit had on securities regulation); Toman, *supra* note 1, at 662

determined the reach of U.S. securities laws on a case-by-case basis.²⁶ In *Morrison v. National Australia Bank*, the Supreme Court introduced a new bright-line test which dictated when Section 10(b) laws apply: (1) in transactions for securities listed on domestic exchanges; and (2) domestic transactions in other securities.²⁷ Circuit courts struggled to define the second

(discussing Second Circuit's high level of influence); Seymour, *supra* note 18, at 225 (noting "the Second Circuit produced nearly five times as many securities law opinions as the average federal appellate court . . ."). The Second Circuit formalized the holdings in *Schoenbaum* and *Leasco* by creating the conducts and effects tests, jointly regarded as the "north star" of the Second Circuit's Section 10(b) jurisprudence. *Morrison*, 561 U.S. at 257-58. The conducts and effect tests evolved to function as an extension of Congressional intent—the Second Circuit courts were left to discern whether Congress would have intended the statute to apply in the particular case at hand, and the Second Circuit's holdings gradually developed to form the principles that underlie the conducts and effects test. *Id.* at 255-56.

²⁶ See Koury, *supra* note 23, at 64 (explaining practical ramifications of conducts and effects test); *Morrison*, 561 U.S. at 258-59 (citing *ITT, Int'l Inv. Tr. v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980)) ("There is no more damning indictment of the 'conduct' and 'effects' test than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases.'") The flexibility of the conducts and effects test was criticized by some courts for being inconsistent across circuits and difficult to apply. *Morrison*, 561 U.S. at 258-59; see also True, *supra* note 4, at 518 ("These tests . . . allowed the courts to exercise a substantial amount of discretion in weighing the relative importance of each.")

²⁷ See *id.* at 267 ("And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."). *Morrison* involves National Australia Bank, an institution with common stock that was only traded in foreign stock exchanges, which purchased a U.S. company and allegedly committed fraud by deceptively raising its self-reported asset value, in turn hurting the U.S. company shareholders. *Id.* at 251-54. The Court began its argument by asserting 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.'" *Id.* at 248 (quoting *Equal Emp. Opportunities Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The Court then looked at Section 10(b) of the Exchange Act, determining it to not apply extraterritorially where there is a presumption against extraterritoriality and no language in the statute suggested its applicability abroad. *Id.* at 265. Acknowledging that each case presents its own facts, and that the presumption against extraterritoriality is not dispositive, the Court looked to its precedent in *Aramco*, which focused on congressional concern behind the statute through which the defendant was being prosecuted. *Id.* at 266 (discussing *Arabian Am. Oil Co.*, 499 U.S. at 255). Using the same method of reasoning in *Aramco*, the Court looked to 10(b), and concluded 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." *Id.* (discussing *Arabian Am. Oil Co.*, 499 U.S. at 255). "Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Morrison*, 561 U.S. at 266 (citing 15 U.S.C. § 78j(b)). The statute focuses on purchase and sales transactions; therefore, the statute seeks to regulate those transactions and protect parties affected by those transactions. *Id.* at 267. Thus, the transaction test that determines 10(b)'s applicability is whether the purchase or sale was made in the United States or involved a security listed on a domestic exchange. *Id.* See generally 15 U.S.C. § 78aa(b) (expanding scope of conducts and effects test for SEC actions); *Sec. & Exch. Comm'n v. Scoville*, 913 F.3d 1204, 1214-16 (10th Cir. 2019) ("Congress has clearly indicated . . . that the antifraud provisions apply when either significant steps are taken in the United States to further a violation of those antifraud provisions or conduct outside the United States has

half of the *Morrison* test—domestic transactions in other securities—due to lack of clarity surrounding the definition of a “domestic transaction.”²⁸

The Second Circuit first interpreted what constitutes a domestic transaction under Rule 10b-5 in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, ruling that a transaction is considered domestic when irrevocable liability occurs in the United States.²⁹ Less than three years later, in *Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE*, the Second Circuit considered the same question of extraterritorial application under a different set of circumstances.³⁰ The type of security at issue in *Parkcentral*—a securities-based swap agreement—was unusual because it did not involve the actual ownership, purchase, or sale of the reference security.³¹ Thus, differentiating *Absolute Activist* from *Parkcentral*, the court decided that it could not apply federal securities laws to this case because the transactions were so “predominantly foreign” that they did not trigger U.S. securities laws.³²

Since *Parkcentral*’s holding in 2014, the Third and Ninth Circuits have explicitly adopted the irrevocable liability test, but no circuit courts

a foreseeable substantial effect within the United States.”); True, *supra* note 4, at 513 (explaining why transactional test caused dispute). Significantly, after *Morrison*’s adoption of the transactional test, Congress amended the federal securities laws to apply extraterritorially under a conducts and effects test when the action was brought by the SEC. See 15 U.S.C. § 78aa(b).

²⁸ See *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012) (describing *Morrison*’s lack of guidance regarding application of its test); *Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 201 (2d Cir. 2014) (discussing difficulty discerning whether transaction was domestic when considered non-conventional); *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 947-48 (9th Cir. 2018) (commenting on Court’s lack of clarity for second category of transactional test).

²⁹ See *id.* at 67-68 (establishing irrevocable liability test). The court came to this conclusion by first breaking down a domestic transaction into a domestic purchase or sale. *Id.* To determine the meaning of a domestic purchase or sale, the court considers how purchase and sale are defined in the Act. *Id.* Both definitions suggest that the act of purchasing or selling securities is equivalent to the act of entering into a binding contract to purchase or sell securities, and the purchase and sale actually takes place when the parties become bound to effectuate the transaction, or when they become irrevocably liable to each other. *Id.*

³⁰ See *id.* at 201 (classifying securities-based swap agreement at issue as different security).

³¹ See *id.* at 206 (explaining how securities-based swap agreements function in market); see also *The Regulatory Regime for Security-Based Swaps*, U.S. SEC. & EXCH. COMM’N, <https://perma.cc/896M-QQCB> (last visited Oct. 18, 2021) (providing background information on security-based swaps). Securities-based swap agreements are synthetic investments that do not involve ownership, purchase, or sale of the reference security. See *Parkcentral*, 763 F.3d at 206. Transactions, or “swaps”, occur when “counterparties agree to make certain transfers ‘without also conveying a current or future direct or indirect ownership interest.’” *Id.*

³² See *Parkcentral*, 763 F.3d at 216-17 (establishing test while limiting conclusion to facts of this case). The Second Circuit, in reaching its conclusion, did not “purport to proffer a test that will reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial.” *Id.* at 217.

have followed the Second Circuit's "foreign nature" test.³³ In *Stoyas v. Toshiba Corp.*, the Ninth Circuit critiqued *Parkcentral* as "contrary to . . . *Morrison* itself," and emphasized that the Exchange Act focuses on transactions, not the place where deceptive conduct occurred.³⁴ The question of whether the Second Circuit intended the predominantly foreign inquiry to extend to other securities transactions, not just securities-based swap agreements, remained open until the Second Circuit's 2021 decision in *Cavello Bay Reinsurance Ltd. v. Shubin Stein*.³⁵ In *Cavello Bay*, the Second Circuit held that the predominantly foreign inquiry is one the court must make when deciding whether to apply federal securities laws to a transaction.³⁶ This decision thus marked a circuit split about whether irrevocable liability is sufficient to apply domestic securities laws to a transaction, or whether an additional inquiry—the predominantly foreign test—is also needed.³⁷

In *SEC v. Morrone*, the First Circuit applied the test adopted by the Third and Ninth Circuits, holding that irrevocable liability was sufficient under *Morrison* to determine whether Section 10(b) applies and declining to consider whether the transaction was so predominantly foreign so as to evade the reach of federal securities laws.³⁸ In determining whether irrevocable

³³ See *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018) (explaining why asking whether transaction is predominantly foreign is contrary to *Morrison*); *United States v. Georgiou*, 777 F.3d 125, 136 (3d Cir. 2015) (adopting irrevocable liability test).

³⁴ See *id.* at 950 (criticizing holding in *Parkcentral*). The court in *Stoyas* criticized *Parkcentral*'s heavy reliance on the foreign location of deceptive conduct and called *Parkcentral*'s test open-ended and under-defined, "akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a 'clear,' administrable rule." *Id.*

³⁵ See *Cavello Bay Reinsurance Ltd. v. Shubin Stein*, 986 F.3d 161, 166-67 (2d Cir. 2021) (expanding scope of predominantly foreign inquiry).

³⁶ See *id.* (stating holdings).

³⁷ See Eric Belfi & David Saldamando, *New Circuit Split Complicates Domestic Securities Test*, LAW360 (May 25, 2021, 4:32 PM), <https://www-law360.com.ezproxysuf.flo.org/articles/1387869/new-circuit-split-complicates-domestic-securities-test> (describing circuit split on domestic securities test). Circuit splits tend to influence parties to conduct transactions in the jurisdiction that best protects them. See Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After Morrison v. National Australia Bank*, 97 MINN. L. REV. 132, 135-38 (2012) (discussing choice of law competition across jurisdictions post-*Morrison*); Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, 14 YALE L. & POL'Y REV. 177, 177-78 (1996) (discussing how states engage in detrimental interdependent behavior). A geography-based transaction test, such as the test that evolved from *Morrison*, is easy to manipulate; it is "relatively effortless for sophisticated parties to move a transaction to a different location if they want a different law to apply." Kaal & Painter, *supra* note 37, at 197. The fact that different standards exist across circuits reaffirms the need for a harmonized, uniform test that can produce predictable results in every region of the country. See Klevorick, *supra* note 37, at 178.

³⁸ See *Sec. & Exch. Comm'n v. Morrone*, 997 F.3d 52, 60 (1st Cir. 2021) (stating holdings). The First Circuit agreed with the reasoning of the Second, Third, and Ninth Circuits that federal securities laws apply if irrevocable liability is established. *Id.* The First Circuit concurred with the Ninth Circuit's reasoning for declining to inquire about the nature of the transaction for the reason

liability occurred within the United States, the First Circuit referenced the written agreement between the defendants and the investors, which stated that Bio Defense had “no obligation” until Bio Defense “execute[s] and deliver[s] to the Purchaser an executed copy of the agreement.”³⁹ Based on these terms, Bio Defense became irrevocably liable in Boston to deliver the shares to the Purchaser (the investor).⁴⁰

The First Circuit then addressed whether, despite a finding of irrevocable liability, the court should follow the Second Circuit’s reasoning in *Parkcentral* and *Cavello Bay* and hold that U.S. securities laws do not apply due to the predominantly foreign nature of the transaction.⁴¹ The First Circuit, citing the rulings of its sister circuits, ultimately rejected the arguments made in *Parkcentral* and *Cavello Bay*, calling them inconsistent with *Morrison*.⁴² The court reasoned that *Morrison* focused its Section 10(b) analysis on the domestic nature of the securities transaction, and thus no further inquiry as to the transaction’s foreign nature is needed.⁴³ Further, the court stated that holding the transaction to be predominantly foreign would be superfluous.⁴⁴

The First Circuit correctly determined that irrevocable liability alone was sufficient to establish whether a transaction was domestic, and that it was unnecessary to incorporate the predominantly foreign nature test into its analysis.⁴⁵ According to the contractual agreement, Bio Defense was

that the inquiry is contrary to *Morrison* itself. *Id.* Even though *Morrone* was decided after Congress amended the Dodd-Frank Act, the actions at issue occurred before its amendment. *See* Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was it Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 212-15 (2011) (explaining why Dodd-Frank not applied retroactively); *see also* 15 U.S.C. § 78aa(b) (describing when U.S. district courts have jurisdiction).

³⁹ *See Morrison*, 997 F.3d at 60 (stating reason for finding of irrevocable liability).

⁴⁰ *See id.* (summarizing reason behind finding of irrevocable liability).

⁴¹ *See id.* (addressing defendant’s second argument).

⁴² *See id.* (criticizing Second Circuit’s holding).

⁴³ *See id.* (disregarding additional standard imposed by Second Circuit).

⁴⁴ *See Morrison*, 997 F.3d at 60 (explaining why transaction is not predominantly foreign). The court states that even if it were to apply the predominantly foreign standard to these facts, it would still find the transaction to be domestic. *Id.* *Morrone* and *Jurberg* were both based in the United States and conducted almost all their activities in furtherance of the fraud from the United States. *Id.* Moreover, Bio Defense, a U.S. based company, was not traded on a foreign exchange. *Id.*

⁴⁵ *See True*, *supra* note 4, at 535-36 (discussing criticisms of predominantly foreign test). Adding a predominantly foreign inquiry would introduce scenarios where contractual agreements would be effectuated in the United States, but because other aspects of the transaction were conducted abroad, the court would be forced to disregard the terms of the contractual agreement. *Id.* More specifically, the critical concern is that a fact-specific inquiry, required by the predominantly foreign test, would be reminiscent of the conducts and effects test. *Id.* at 535. Therefore, the courts would be engaging in the “unnecessary and inconsistent analysis that the Supreme Court looked to avoid in implanting the test in the first place.” *Id.* Therefore, adopting this test would “take away from the Supreme Court’s intent to focus solely on the limited view of a ‘transaction.’” *Id.* at 536.

obligated to deliver the security to the investor when the stock subscription agreement was counter-signed by Bio Defense.⁴⁶ Thus, although irrevocable liability to the investor occurred while the investor was overseas, Bio Defense became liable to perform its end of the bargain upon counter-signing in the United States.⁴⁷

The Second Circuit provides a favorable forum for foreign parties who wish to do business in the United States because it has adopted a more flexible test for determining wrongdoing.⁴⁸ For example, a party subject to federal securities laws in the First Circuit due to his irrevocable liability will not be subject to the same laws in the Second Circuit if he can show that the transaction was a predominately foreign one.⁴⁹ Conversely, the harmed party

⁴⁶ See *Morrone*, 997 F.3d at 60 (deciding Bio Defense “incurred irrevocable liability within the United States to deliver a security.”) (quoting *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012)).

⁴⁷ See *Ficeto*, 677 F.3d at 67-68 (determining time of purchase and sale execution). The court in *Ficeto*, which established the irrevocable liability test, came to its conclusion by first analyzing the definitions of a purchase or sale as they are mentioned in *Morrison*’s transactional test. *Id.* The *Morrison* court stated that purchase and sale meant: “[a] contract to buy, purchase, or otherwise acquire” and “any contract to sell or otherwise dispose of” to conclude that the purchase or sale of a security constitutes a binding contract to purchase or sell securities. *Ficeto*, 677 F.3d at 67-68. Moreover, the time at which the actual purchase and sale took place is when the parties became bound to effectuate the transaction. *Id.* The court’s decision in *Radiation Dynamics, Inc. v. Goldmuntz*, also “lends support to the notion that a securities transaction occurs when the parties incur irrevocable liability.” *Ficeto*, 677 F.3d at 67-68. In *Goldmuntz*, the Second Circuit ruled that the district court correctly instructed the jury that the timing of a purchase or sale of securities within the meaning of Rule 10b-5 is when the parties to the transaction are committed to each other. *Id.* at 68 (pointing to time in which parties become irrevocably bound as time of purchase and sale). Commitment between the two parties is “the point at which the parties had obligated themselves to perform what they had agreed to perform, even if the formal performance of their agreement is to be after a lapse of time.” *Ficeto*, 677 F.3d at 68 (defining commitment of parties to one another in transaction) (quoting *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891).

⁴⁸ See *Painter*, *supra* note 38, at 135-36 (discussing “choice of law” competition between jurisdictions); *Klevorick*, *supra* note 37, at 177-78 (explaining how non-uniform system policy leads to suboptimal protection for citizens of a jurisdiction). “The emphasis in Choice of Law competition is on substantive legal rules to attract contracting parties.” *Painter*, *supra* note 38, at n.16. While contracting parties might prefer the diversity of law across circuits so they can choose which court will decide their case, having different standards could contribute to “a race to the bottom.” *Klevorick*, *supra* note 37, at 177-78. To attract resources to their jurisdiction, courts could choose policies that afford their citizens “too little protection.” *Id.*

⁴⁹ See *True*, *supra* note 4, at 514 (explaining how *Morrison*’s test could have negative impact on global investment); *Belfi*, *supra* note 37, at 1 (outlining difficulty of domestic transaction for plaintiffs). Similar to how the adoption of the stricter *Morrison* test made investors more conscious of the potential inability to seek relief under federal security law, investors in the Second Circuit may also make more conservative investment decisions because of the higher burden for them to seek relief. *Belfi*, *supra* note 37, at 1.

will find it more difficult to get a remedy in a circuit that imposes a higher burden in proving that federal securities law should apply.⁵⁰

The First Circuit follows the intent of the Supreme Court in *Morrison* by establishing a reliable and bright-line test.⁵¹ The Second Circuit's holdings in *Parkcentral* and *Absolute Activist* gave too much weight to the presumption against extraterritoriality and reverted to the unclear standards of domesticity that were rejected by *Morrison*.⁵² The Court in *Morrison*, as *Morrone* said, focused on the fact that a transaction is domestic, and did so with full awareness of the presumption against extraterritoriality.⁵³ If the Court wanted a more relaxed standard for applying domestic securities laws to domestic transactions, it would have reasoned with the concurrence and adopted a more fluid "conducts and effects" test rather than a bright-line test.⁵⁴ By choosing to adhere to the irrevocable liability inquiry and setting

⁵⁰ See *id.* (stating difficulties plaintiffs will face in Second Circuit); *cf.* True, *supra* note 4, at 514-15 (discussing change of investors' strategy post *Morrison*). Similar to the split between the First and Second Circuit regarding the threshold for a transaction to be sufficiently domestic, True discusses the difference in threshold that existed after the conducts and effects test was replaced by *Morrison*'s transactional test. See True, *supra* note 4, at 514-15; Belfi, *supra* note 37, at 1 (distinguishing burden for plaintiffs to find existence of domestic transaction); see also True, *supra* note 4, at 544 (emphasizing need for Supreme Court revision to transactional test for greater certainty to U.S. investors).

⁵¹ See sources cited *supra* note 18 and accompanying text (describing *Morrison*'s critique of previously used test); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 258-59 (describing vagueness and lack of consistency across circuits prior to *Morrison*). As a result of the unpredictable and inconsistent application of Section 10(b) to international cases, a new test that is both predictable and consistent would be more beneficial to determine extraterritorial application of U.S. securities laws on transactions suspected to violate Section 10(b). *Morrison*, 561 U.S. at 260 (discussing criticism of Section 10(b) application).

⁵² See *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 939, 950 (9th Cir. 2018) (criticizing *Parkcentral*'s test). *Stoyas* articulated that the principal reason *Parkcentral* should not be followed is because it is contrary to *Morrison* itself. *Id.* Section 10(b), which states in part that the domestic "purchase or sale of any security registered on a national securities exchange or any security not so registered," must be interpreted to include any securities, and the court should refrain from a specific carve out for "predominantly foreign" securities from Section 10(b)'s ambit because it thinks that Congress did not intend to include that in its statute. *Id.* (emphasis added); see also *Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 215 (2nd Cir. 2014) ("[I]f an application of the law would obviously be incompatible with foreign regulation, and Congress has not addressed that conflict, the application is one which Congress did not intend.")

⁵³ See *SEC v. Morrone*, 997 F.3d 52, 60 (1st Cir. 2021) (noting *Morrison* focused on transactions regarding Section 10(b)); see also *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) ("It is a 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.'") (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

⁵⁴ See *Morrison*, 561 U.S. at 559 (Stevens, J., concurring) (preferring Second Circuit's "general" approach). Justice Stevens states that when crafting Section 10(b), Congress invited an expansive role for judicial interpretation and by leaving the statute intact after all these years, Congress' intended to leave Section 10(b) up for interpretation. *Id.*

aside the predominantly foreign analysis, the First Circuit avoids the likely inconsistent and unreliable outcomes of a more flexible test.⁵⁵

The First Circuit's decision in *Morrone* has solidified the circuit split regarding the test used to decide whether federal securities laws apply to a transaction. The First Circuit was tasked with interpreting the Supreme Court's decision in *Morrison* together with subsequent circuit decisions interpreting *Morrison*, and concluded that an additional inquiry into the nature of the transaction would be "contrary to *Morrison* itself." The First Circuit, along with the Third and Ninth Circuits, stressed the importance of a bright-line test, a concept accentuated in *Morrison*. The concrete nature of the irrevocable liability test will inevitably produce scenarios in which a "predominantly foreign" transaction is subject to federal securities laws. However, the Second Circuit's approach will only encourage the unclear standards of domesticity that were explicitly rejected in *Morrison* and produce uncertainty for investors engaging in international transactions.

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⁵⁵ See Belfi, *supra* note 37, at 3 ("[T]he Second Circuit's decision in *Cavello Bay* seems to harken back to the pre-*Morrison* conducts and effects test, in that the affirmation of the *Parkcentral* foreignness-inquiry takes steps to distance itself from a purely transaction-based approach.")