District Court in Vivendi Class Action Denies Plaintiffs' Bid for Interlocutory Appellate Review

February 15, 2012 by Louis M. Solomon

In re Vivendi Universal, S.A., Securities Litigation, 02 Civ. 5571 (RJH) (S.D.N.Y. 2012), involves claims by non-U.S. persons — specifically persons in France, England, and the Netherlands (in addition to the U.S.) who purchased ordinary shares of American Depositary Shares of Vivendi stock. A jury found the defendants liable for securities law violations. Then the Supreme Court rendered its *decision in Morrison v. National Australia Bank (No. 08-1191),* which held that Section 10(b) of the Securities Exchange Act of 1934 did not provide a private cause of action in "foreign-cubed" cases—cases where foreign plaintiffs sue foreign defendants for misconduct in connection with securities traded on foreign exchanges (hence "foreign cubed"). The Court rejected over 40 years of lower-court jurisprudence – which focused on where "conduct" and "effects" occurred or would be felt to determine the reach of Rule 10b-5. Instead the Supreme Court held that Section 10(b) reaches frauds only where "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange" (see our dozen plus postings concerning this seminal decision and cases decided since; search under "Morrison" in the Search box of this blog).

Morrison, as the District Court now describes it, "upended Second Circuit precedent on the issue" of the reason of the federal securities laws. On the basis of Morrison the District Court dismissed the federal securities fraud claims. The Second Circuit refused to hear the class rulings on an interlocutory appeal under Fed. R. Civ. P. 23(f), concluding that "the issues raised by the petition do not relate to the class certification requirements of Rule 23 and the petitioners have not demonstrated that the relevant issues are likely to escape effective review after entry of final judgment, or that the district court's decision is manifestly erroneous". In re Vivendi Universal, S.A., No. 11-908 (2d. Cir. 2011).

On returning to the District Court, the plaintiffs sought to have a final judgment entered under Fed. R. Civ. P. 54(b), which is the general exception to the rule that all issues in a federal court case need to be adjudicated prior to any appeal. In this decision, the District Court considers, and rejects, the argument that a Rule 54(b) final judgment is appropriate.

The District Court analyzed two different issues — whether there was judicial efficiency to be served by separate appeals, and whether the plaintiffs would suffer any undue or unique prejudice were they to have to wait till after the entire trial to take up the *Morrison* issue. The Court found the plaintiffs' demonstration deficient in both respects. On the first prong the Court ruled that the plaintiffs needed to show that the claims

were separate or separable, or the strong policy of the Circuit to get all the issues once, "in a unified package, overrode the risk that the plaintiffs would have to try their entire case twice, in the event the Circuit reverses the dismissal on the basis of *Morrison*. Indeed, the Court credited the defendants' argument that they would be prejudiced by having to raise multiple issues on appeal multiple times.

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