

## LITIGATOR OF THE WEEK:

# Scott Musoff of Skadden, Arps, Slate, Meagher & Flom

By David Bario

Even before the dismissal of a class action suit against Société Générale last week, it was clear that the U.S. Supreme Court's ruling in *Morrison v. National Australia Bank* was making life difficult for securities plaintiffs. As our readers know well by now, *Morrison* held that, under the Exchange Act, investors can't pursue fraud claims in the United States over securities purchased on foreign exchanges.

But as we wrote last Thursday, the SocGen decision extended *Morrison*'s reach even further. In addition to dismissing claims by investors who purchased their SocGen shares in France, Manhattan federal district court judge Richard Berman ruled that *Morrison* barred claims by plaintiffs who bought American Depositary Receipts in the United States. Judge Berman limited the ruling to over-the-counter ADRs not listed on U.S. exchanges, but the decision still surprised many in the securities bar--especially since SocGen's own lawyers at Skadden, Arps, Slate, Meagher & Flom hadn't asked the judge to dismiss the ADR plaintiffs' claims.

The lead plaintiffs in the SocGen case were American pension funds Vermont Pension Investment Committee, Boilermaker-Blacksmith National Pension Fund, and United Food and Commercial Workers Union Local SSG-Retail Food Employers Joint Pension Fund. The funds sued the French bank in 2008, alleging that SocGen and former officers and directors concealed losses tied to the bank's subprime exposure and failed to institute adequate risk controls, leading to SocGen trader Jérôme Kerviel's \$7 billion trading scandal.

SocGen's lawyers, led by Skadden's Scott Musoff, moved to dismiss the claims made by the first two named plaintiffs, which bought their shares in France. Musoff argued both that the plaintiffs had not proven that his clients acted with

scienter and that their claims were barred under *Morrison*.

In his decision, Judge Berman agreed with Musoff on both scienter and *Morrison* grounds, and he dismissed the claims made by the Vermont fund and Boilermaker-Blacksmith. But he also dismissed the claims made by UFCW, which held only SocGen ADRs. The judge ruled that that trade in SocGen ADRs is a "predominately foreign securities transaction" because ADRs represent shares in foreign stock, and that U.S. securities fraud claims over the ADRs are therefore barred under *Morrison*. (That reasoning led The D&O Diary's Kevin LaCroix to note that "Judge Berman's conclusion seemingly put domestic ADR transactions in an odd category about which it may be asked - which jurisdiction's laws apply to these transactions if not U.S. law?")

The decision was a three-fold win for Musoff: Not only did Judge Berman grant Musoff's motion to dismiss on both grounds he put forward, he went ahead and dismissed the claims by the third remaining plaintiff to boot. Musoff told us he was gratified that the judge didn't just rely on *Morrison*. "It's important to note that Judge Berman dismissed the complaint on the independent ground that plaintiffs failed to adequately plead scienter regardless of the application of *Morrison* to this case," he said. Musoff added that he was indebted to support he received from Pierre Servan-Schreiber in Skadden's Paris office.

The SocGen plaintiffs, represented by Robbins Geller Rudman & Dowd, have 30 days to appeal Judge Berman's decision. Whether they do or not, we're confident that the ruling won't be the last word from the courts on *Morrison*'s applicability to ADRs--or to other types of securities for that matter. But for now at least, it's a ruling Scott Musoff's clients can live with.