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Alison Frankel's **ON THE CASE**

To evade Morrison, Australia fund sues Goldman in state court

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There's a good reason most supposed victims of securities fraud bring claims under federal securities laws, rather than common-law fraud claims in state court: The standard of proof is lower under the federal cause of action. To prove common-law fraud, plaintiffs have to show clear and convincing evidence. By contrast, most federal claims have to meet only a preponderance of evidence standard.

**Eric Lewis** of **Lewis Baach** made that calculation in 2010, when he filed a billion-dollar complaint against Goldman Sachs in U.S. district court in Manhattan. Lewis represented Australia's Basis Yield Alpha Fund, an Australian hedge fund that invested \$81 million in credit-default swaps linked to Goldman's notorious Timberwolf collateralized debt obligation. (Perhaps you remember? That's the CDO one Goldman insider described as "a sack of shit.") BYAF claimed that the money it lost in the Timberwolf deal led to its demise.

But the fund didn't get too far in federal court, thanks to *Morrison v. National Australia Bank*. (Bet you saw that one coming.) As I reported in July, U.S. District Judge **Barbara Jones** of Manhattan dismissed HYBF's case, concluding that because the CDO wasn't listed on a U.S. exchange and the swap agreements between Goldman and BYAF were executed overseas, U.S. courts didn't have jurisdiction to hear BYBF's claims under *Morrison*. Jones dismissed without prejudice, though, so BYAF counsel Lewis could have filed an amended complaint in Manhattan federal court.

Instead, he chose to bring a new suit against Goldman Sachs in New York state Supreme Court in Manhattan. The 58-page complaint tells basically the same story as BYAF's federal court complaint. But this time around the fund is seeking damages for fraud, breach of contract, negligent misrepresentation, and several other state- or common-law causes of action.

"In this case, the evidence of fraud is so egregious that the difference in the standard of proof didn't seem like it would be an issue," Lewis told me. He was tempted to file an amended complaint in federal court, he said, because he believes courts need to do a better job of establishing the contours of foreign transactions under *Morrison*, but "the pragmatist in me said let's get this done in state court," he said. "I did not relish the proposition of spending another six months litigating [in federal court] about where to litigate."

Basis Yield isn't the first foreign plaintiff to turn to state courts after its federal-court claims were felled by *Morrison*. Some racketeering cases have been refiled in state court, and, as Lewis noted, another plaintiff with securities-fraud claims against Goldman, Heungkuk Life Insurance, brought a state-court action after its federal case was dismissed. (Heungkuk and Goldman, according to the state-court docket, are in talks to resolve the case.) But BYAF, with its billion-dollar claim and its "sack of shit" evidence, may be the highest-profile plaintiff to test the state-court alternative to *Morrison*-barred federal cases.

Lewis is hoping his filing, like Heungkuk's, persuades Goldman to negotiate. "If I were Goldman Sachs, I'd be concerned about facing a New York jury and trying to justify 'one shitty deal,'" he said. Goldman Sachs told Reuters BYAF was a sophisticated investor that understood the CDO's risks and that it did nothing wrong. **Jonathan Schiller** of **Boies, Schiller & Flexner**, who successfully represented Goldman in BYAF's federal-court case, declined to comment.

(Reporting by Alison Frankel)

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