"Transnational Litigation and Global Securities Class-Action Law-Suits"

Courts apply a number of doctrines, including the conduct and effects test, in determining how far to extend jurisdiction in securities class actions involving transnational securities fraud. Courts often focus on whether foreign jurisdictions will recognize a U.S. class action judgment and the presence of alternative remedies abroad in determining both jurisdiction and the propriety of a class action. We focus our analysis on the present extraterritorial regime as applied to securities class actions involving foreign issuers and, at least in part, foreign investors transacting abroad (often referred to as "f-cubed" litigation). We argue that the conduct and effects test, as well as court inquiries into whether foreign jurisdictions will recognize U.S. judgments and the presence of alternative remedies abroad, are uncertain in their application and as a result unpredictable. We propose instead that courts adopt a uniform, bright-line exchange-based presumptive rule in determining the applicable class in a Rule 10b-5 class action. Courts should presume jurisdiction over all investors trading in a company's securities within the United States and presume no jurisdiction for Rule 10b-5 suits for foreign investors trading outside the United States. Focusing on U.S. investors in a class action results in an equivalent level of incentive for private plaintiffs' attorneys to file a class action under Rule 10b-5 compared with domestic issuers with a similar level of U.S. investor ownership and trading volume and thus an equal level of private deterrence against the negative effects to the U.S. markets of fraud.

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