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European Supplement
Advocate
FOR INSTITUTIONAL INVESTORS
A Securities Fraud and Corporate Governance Newsletter

Second Quarter 2009

Foreign Investors' Access to US Courts Evolves with Recent Class Certification Decisions

By Beata Gocyk-Farber and Boaz Weinstein

In a previous article on European litigants in U.S. courts, we discussed the requirement for plaintiffs in U.S. courts to show that a class action is a superior means (in terms of fairness and efficiency) for resolving a dispute. (see 2nd Quarter 2008, *Advocate European Supplement*). In cases involving foreign investors, defendants routinely argue that a securities class action involving foreign shareholders would not be a superior means of adjudication because foreign courts might not recognize and give preclusive effect to the U.S. judgment. In this article, we take a closer look at this issue, focusing on recent decisions in the *Alstom* and *Vivendi* securities litigations.

The Superiority Requirement

Pursuant to Federal Rule of Civil Procedure 23(b)(3), a U.S. federal court must find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" before certifying an action as a class action. Courts considering whether a class action would be superior to other methods for resolving a particular controversy consider, among other things, the class members' potential incentives for individually filing and controlling a separate action; whether class members have brought other lawsuits involving the same controversy; whether it is desirable to concentrate litigation of the claims in a particular forum; and the likely difficulties in managing a class action.

In cases involving foreign investors, courts also consider whether foreign courts would recognize a U.S. judgment as binding in the event that a foreign shareholder who subsequently filed an action in those courts did not officially opt out of the U.S. class action. In other words, courts consider the likelihood that a foreign court would hold that a U.S. judgment in favor of the defendants is binding on the foreign shareholders who subsequently brought suit and prevent those shareholders from bringing subsequent suits in foreign courts.

Defendants routinely argue against certifying a securities class action involving foreign shareholders because foreign courts might not recognize and give preclusive effect to a U.S. judgment.

The *Alstom* and *Vivendi* Decisions

In a 2007 decision, the Southern District of New York in the *Vivendi* action certified a class of French, English, and Dutch shareholders, but excluded German and Austrian shareholders. Relying on affidavits submitted by the parties, the court found it more likely than not that French, English and Dutch courts would recognize its decision, but unlikely that German and Austrian courts would recognize its decision.

In August 2008, a different federal court in the Southern District of New York certified a class in the *Alstom SA Securities Litigation* which included English, Dutch and Canadian shareholders, but excluded French shareholders. In excluding French shareholders from the class, the *Alstom* court relied both on a forum selection clause in Alstom's Articles of Association and affidavits submitted by the parties. Based on those affidavits, the court found that recent legal developments in France (subsequent to the 2007 *Vivendi* decision) now indicated that French courts would likely not recognize a U.S. judgment.

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Eye on the Issues

LEGISLATIVE/REGULATORY AND JUDICIAL UPDATES AND DEVELOPMENTS OF INTEREST TO EUROPEAN INVESTORS

By Takeo Kellar

Growing Involvement Of International Investors In U.S. Securities Class Actions

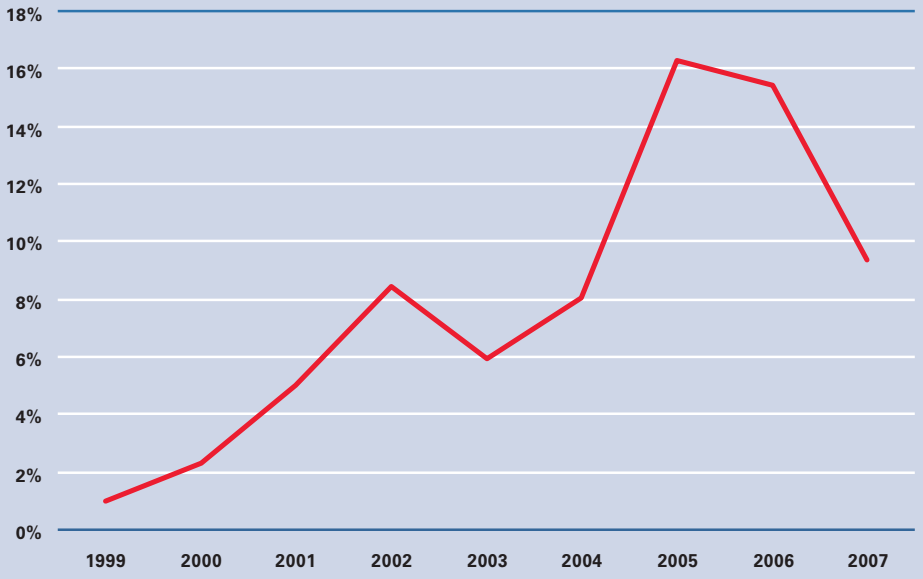
International investors' involvement in U.S. securities class action lawsuits continues to grow, according to statistics tracked by RiskMetrics Group.

From 1996 through 2007, international institutional investors sought to serve as lead plaintiff in U.S. securities class action lawsuits 234 times in 134 separate cases. Notably, international investors have filed lead plaintiff motions in more than 5 percent of all new federal securities class actions in every year since 2002. The investors involved in these cases include public pension funds, asset managers, mutual funds, union pension plans, hedge funds, and other types of investors.

According to the report, the investors hailed from 26 different countries, with Germany, Canada, Israel, Italy, the United Kingdom, Austria, and Sweden as the most-often represented countries. Institutional investors from Finland, Bahrain and the Czech Republic all filed the first-ever lead plaintiff motion by investors from those countries in 2007.

RiskMetrics also noted that so-called "foreign-cubed" lawsuits, where foreign investors who bought shares of a foreign company on a foreign stock exchange still sue that company in U.S. courts, represent just a fraction of the activity of international institutional investors in U.S. securities class actions, despite the substantial attention such suits received both from academics and the courts.

Percentage of all newly filed cases with international institutional investor lead plaintiff movants



International Movants by Country

Country	# of Movants	Country	# of Movants
Austria	13	Greece	1
Bahamas	1	Ireland	4
Bahrain	1	Isle of Man	1
Belgium	6	Israel	25
Bermuda	1	Italy	15
British Virgin Islands	7	Luxembourg	6
Canada	42	Mexico	5
Cayman Islands	1	Netherlands	7
Czech Republic	1	Netherlands Antilles	1
Denmark	4	Sweden	12
France	6	Switzerland	3
Finland	1	UK	14
Germany	56		

Source: *Report: "Globalization in Securities Class Actions Part I — Non-U.S. Investor Interest in U.S. Suits" (RiskMetrics Group, December 2008).*

The study reports that investors are not limiting themselves to cases involving either non-U.S. companies, or only companies headquartered in the same home country as the investor.

"As other cultures become more familiar, both at home and abroad, with the concepts and realities of securities litigation, they are increasingly likely to become involved with it," the report states. "Despite the increasing number of jurisdic-

tions now allowing some form of securities litigation, the most robust system for investors seeking recoveries through securities litigation remains here in the U.S." *Report: "Globalization in Securities Class Actions Part I—Non-U.S. Investor Interest in U.S. Suits" (RiskMetrics Group, December 2008).*

High Court Ruling Undercuts Expansion of Class Actions in the United Kingdom

The chancellor of the High Court of the United Kingdom, Sir Andrew Morritt, recently issued a ruling that appears to be unfriendly to recent recommendations that "group litigation" be promoted in the U.K. In December, the Civil Justice Council, a U.K. non-departmental public body that advises the Lord Chancellor on civil justice and civil procedure in England and Wales, recommended that the so-called group litigation order ("GLO") be reformed so access to justice barriers would be removed and more entities would be allowed to bring GLOs in the manner of the U.S.-style class action system. In the case at issue, two importers of cut flowers brought an action against British Airways, seeking damages for losses suffered as a result of an alleged cartel in the provision of airfreight services. The claimants sought to act as representatives of all "direct and indirect purchasers of airfreight services, the prices for which were inflated by the agreements or concerted practices" arguing that Civil Procedure Rule 19.6 should be broadened to allow the claimants to act as representatives for a wider action. Morritt, however, ruled that it was up to Parliament to deal with representative actions and not for lawyers to stretch the use of Rule 19.6 to accommodate such cases. Notably, Morritt's opinion carries great weight in the U.K. as he is considered one of the most powerful figures in the senior judiciary. *thelawyer.com, April 15, 2009.*

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The *Vivendi* defendants promptly moved for reconsideration of the court's 2007 decision to include French shareholders in the class, citing the same legal developments presented to the *Alstom* court. The *Vivendi* court, however, denied this motion. Relying on the affidavits submitted by the parties, the *Vivendi* court, in March 2009, found that it was still more likely than not that French courts would recognize its decision.

Implications of the *Alstom* and *Vivendi* Decisions

1. Importance of Experts: The *Alstom* and *Vivendi* decisions indicate that federal courts will undertake a country-by-country analysis in the first instance to determine the likelihood of recognition of a U.S. judgment by foreign courts. In the absence of express guidance from the courts of these nations, these determinations will depend significantly on expert affidavits presented to the courts by the parties. The importance of these affidavits cannot be overstated.

2. Impact of Precedent: While the *Alstom* and *Vivendi* courts disagreed on whether French courts would recognize a U.S. decision, they agreed that English and Dutch courts would recognize such a decision. Plaintiffs will be able to cite these decisions in future cases to support an argument that investors from these countries should be included in certified investor classes.

3. Superiority Even Without a Likelihood of Recognition: Perhaps the most interesting aspect of the *Vivendi* court's March 2009 decision was its citation to a 2001 Southern District of New York decision in the *Cromer Finance Securities Litigation* for the proposition that a court could find a class action a superior means of adjudication even where there is no likelihood of recognition by a foreign court. While the *Vivendi* court did not discuss this proposition in great depth, such an approach might focus less on the likelihood of a foreign court's recognition of a U.S. judgment and more on the likelihood of litigation being filed in that foreign court. European nations do not currently provide for contingency fee arrangements or broad discovery. Many nations do not currently provide for class or mass actions. Consequently, the likelihood of securities litigation being filed in these nations (particularly following an adverse U.S. judgment) is very low. *Cromer* and *Vivendi* thus may herald a move by U.S. courts in this direction—a very positive step for European investors.

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