

NEW YORK INTERNATIONAL LAW REVIEW

Winter 2008
Vol. 21, No. 1

NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL LAW & PRACTICE SECTION

© 2008 New York State Bar Association
ISSN 1050-9453 (print) ISSN 1933-849X (online)

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Ebb and Flow: The Changing Jurisdictional Tides of Global Litigation

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The United States has long provided an attractive and enticing venue for foreign plaintiffs,¹ particularly in the securities realm,² because of the potential availability of class actions, the right to civil jury trials, extensive discovery rights, large damage awards, and avoidance of legal costs.³ With the globalization of capital markets and the cross-border mergers of

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1. See James P. George, *Civil Law, Procedure, and Private International Law: Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 307 (2006) (acknowledging that the United States is the venue of choice for foreign parties); see also Jonathan T. Schmidt, Note, *Keeping US Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 233 (2006) (noting that foreign plaintiffs recognize U.S. courts to be more favorable toward them); Jeffrey Silva, *Courting Multilateralism*, RCR WIRELESS NEWS, April 5, 2004, at 10 (affirming that risks are low and benefits are great for foreign plaintiffs filing suit in the United States).
 2. See Brandy L. Fulkerson, *Extraterritorial Jurisdiction and US Securities Law: Seeking Limits for Application of the 10(b) and 10b-5 Antifraud Provisions*, 92 KY. L.J. 1051, 1051 (2003) (stating that the United States remains an attractive forum for securities litigation due to its deference to plaintiffs). *But see* James J. Finnerty III, *The "Mother Court" and the Foreign Plaintiff: Does Rule 10b-5 Reach Far Enough?*, 61 FORDHAM L. REV. 287, 320 (1993) (suggesting that a "purpose use" analysis to the application of securities actions restricts a foreign plaintiff's access to U.S. courts).
 3. See Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments against Alien Defendants*, 39 HASTINGS L.J. 799, 828 (1988) (listing the benefits of the U.S. judicial system such as a jury trial, avoidance of legal fees, and extensive discovery).

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exchanges and self-regulatory organizations proceeding apace, it is likely that United States courts will be asked to hear such claims with increasing frequency.⁴ Although federal courts have generally opened their doors to these plaintiffs, they have often struggled with the issue of when they should entertain claims brought by foreign plaintiffs against foreign defendants in the United States.⁵ As foreign plaintiffs repeatedly turn to the U.S. legal system for redress, defendants are increasingly seeking to avoid securities class action litigation in the United States⁶—employing both jurisdictional and *forum non conveniens* arguments.⁷

An analysis of the current state of the law governing litigation involving predominantly foreign parties and events in U.S. federal and state courts is therefore in order.

I. Determining When Jurisdiction Exists over Claims Involving Primarily Foreign Transactions

The increasingly global nature of financial transactions often results in U.S. lawsuits involving federal securities claims where at least one party is a domiciliary of another country.⁸

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4. See Michael A. Perino, Symposium, *Securities Law for the Next Millennium: A Forward-Looking Statement: Introduction*, 75 ST. JOHN'S L. REV. 1, 7–9 (2001); see also Perry E. Wallace, *The Globalization of Corporate Governance: Shareholder Protection, Hostile Takeovers and the Evolving Corporate Environment in France*, 18 CONN. J. INT'L L. 1, 16–17 (2002) (discussing the class actions suits a French company faced in American courts based on the globalization of U.S. securities law); Andrew Longstreth, *When Can Foreign Investors Who Bought Shares of Foreign Companies on Foreign Exchanges Sue in the U.S.?: Billions of Dollars in Settlements and Attorneys' Fees Can Hang on the Answer*, AMERICAN LAWYER, Nov. 2006, at A1 (attributing the increase in the number of foreign companies sued in securities class actions to globalization).
 5. See Kevin B. Clark & Joseph G. Davis, *The Long Arm of Companies and Their Directors and Officers to US Securities Laws*, THE METROPOLITAN CORPORATE COUNSEL (Northeast Edition), July 2003, at 4 (stating that the U.S. courts apply the conduct test to test jurisdiction over claims of foreign plaintiffs against foreign defendants); see also Finnerty, *supra* note 2, at 307 (explaining that courts apply the Exchange Act to reject a foreign plaintiff's private action where the defendant's acts in the United States are "merely preparatory").
 6. See David Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 196 (1985) (affirming that foreign plaintiffs consistently turn to U.S. courts for redress); Peter Kurer, *America: The Legal Nation*, EUROMONEY INST. INVESTOR PLC, Jan. 1, 2007, at A1 (noting that defendants settle securities class actions in order to avoid litigation in the United States). *But see* Robert S. De Leon, *Some Procedural Defenses for Foreign Defendants in American Securities Litigation*, 26 IOWA J. CORP. L. 717, 718 (2001) (establishing three procedural defenses that foreigners may raise in defending securities actions).
 7. See Dan Jerker B. Svantesson, *In Defence of the Doctrine of Forum Non Conveniens*, 35 H.K.L.J. 395, 413 (2005) (explaining author Hu Zhenjie's contention that jurisdiction and *forum non conveniens* applications make it easy for foreign defendants to sue in the United States).
 8. See Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. REV. 103, 103 (2007); see also Clark & Davis, *supra* note 5, at 4 (stating that the growth in globalization resulted in many foreign company defendants in U.S. courts under securities laws).

Thus, a domestic plaintiff may initiate a lawsuit in the United States against a foreign defendant,⁹ or a foreign plaintiff may sue a domestic defendant in a U.S. court.¹⁰ Because subject matter jurisdiction depends on a plaintiff's or defendant's relationship with the U.S.,¹¹ such disputes are almost always less problematic in terms of jurisdictional issues than those involving a foreign plaintiff who purchased the securities of a foreign defendant in an overseas market.¹²

While the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")¹³ prevents certain class actions alleging securities fraud from being filed in state courts,¹⁴ certain types of securities fraud claims may still be brought in state courts under state Blue Sky Laws.¹⁵ Just as in federal courts, personal jurisdiction is often contested.¹⁶ On the state level, personal jurisdiction is governed by the forum's long arm statute and federal constitutional due process requirements.¹⁷ The due process clause requires that the defendants have "minimum contacts" with

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9. See Jessica Garcia, *Made in America: Latin American Consumers Meet Their Maker*, 4 J. INT'L & COMP. L. 759, 772 (1998) (noting that the Foreign Sovereign Immunities Act allows plaintiffs to sue a foreign defendant in U.S. courts).
 10. See David I. Becker, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT'L L.J. 183, 184 (1998) (affirming that since the Constitution was ratified, U.S. courts have been open to disputes between foreign plaintiffs and domestic defendants); see also S. Lynn Diamond, *Empagran, the FTAA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 805 (2006) (stating that U.S. case law embraces many antitrust cases between foreign plaintiffs and domestic defendants).
 11. See Finnerty, *supra* note 2, at 294–95 (announcing that subject matter jurisdiction over securities fraud exists if the securities are traded on a U.S. exchange and could affect U.S. investors); see also Robert A. Prentice, *The Internet and Its Challenges for the Future of Insider Trading Regulation*, 12 HARV. J.L. & TECH. 263, 338–40 (1999) (presenting two tests under which a party's relationship to the United States helps establish subject matter jurisdiction for securities fraud claims).
 12. See generally *Interbrew v. Edperbrascan Corp.*, 23 F. Supp. 2d 425 (S.D.N.Y.1998) (SEC filings were insufficient to confer jurisdiction over a foreign investor of a foreign corporation even though the corporation had U.S. investors); Kun Young Chang, *Multinational Enforcement of US Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 114 (2003) (U.S. courts opt either to dismiss securities actions against foreign issuers purely on grounds of *forum non conveniens* or redirect those cases to foreign courts).
 13. 15 U.S.C. § 78a (1998).
 14. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78a, 101 (1998). See Jennifer O'Hare, *Director Communication and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475, 487–88 (2002) (establishing that the SLUSA makes federal court the exclusive venue for most securities fraud class actions involving nationally traded securities).
 15. See Jeannette Filippone, Comment, *Clearer Skies for Investors: Clearing Firm Liability Under the Uniform Securities Act*, 39 SAN DIEGO L. REV. 1327, 1360 (2002) (stating that the SLUSA's preemption of certain state causes of action applies only to class actions and thus state Blue Sky Laws are available to individual investors). But see Robert W. Brownlie, *Specific Applications: Federal Preemption as a Possible Response to a New Challenge: Securities Class Actions in State Court*, 34 CAL. W. L. REV. 493, 502–03 (1998) (reporting that due to jurisdictional constraints, state Blue Sky Laws may limit the ability of plaintiffs to successfully shift nationwide securities fraud class action from federal to state courts).
 16. See Lewis R. Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 COLUM. L. REV. 423, 426–27 (1970) (discussing an action where the defendants contested the court's personal jurisdiction); Rosalie Van Nuis, *Securities Regulation—Kentucky Takeover Bids Act Declared Unconstitutional—Esmark, Inc. v. Strode*, 10 N. KY. L. REV. 461, 484 (1983) (citing *Esmark, Inc. v. Strode*, where plaintiff challenged a state court's personal jurisdiction); James W. Paulsen & Gregory S. Coleman, *Survey: Civil Procedure*, 25 TEX. TECH. L. REV. 509, 517 (1994) (noting that the Texas state court upheld defendant's personal jurisdiction challenge in *Viller v. Crowley Maritime Corp.*).
 17. See *WRS Credit Corp. v. Graeme Dow*, 1994 Del. C.P. Lexis 21, 2 (1994).

the forum whereby defendants purposefully avail themselves of the privileges and benefits of conducting activities within the forum state,¹⁸ and the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”¹⁹

II. The Effects and Conduct Tests

Federal courts have employed two principal tests for determining whether subject matter jurisdiction exists for claims involving largely foreign transactions: the “effects test” and the “conduct test.” Under the effects test, “a court has jurisdiction where illegal activity abroad causes a substantial adverse effect within the United States, either on American investors or on American securities markets.”²⁰

The “conduct test,” on the other hand, considers “whether the fraudulent conduct that formed the alleged violation occurred in the United States.”²¹ Courts have applied the conduct test with varying degrees of strictness. The Second, Fifth, and D.C. Circuits employ relatively strict standards in determining whether conduct can be characterized as “occurring” domestically.²² The Second and Fifth Circuits, for example, require the defendant’s activities or culpa-

18. See David M. Cielusniak, Note, *You Cannot Fight What You Cannot See: Securities Regulation on the Internet*, 22 *FORDHAM INT’L L.J.* 612, 622 (1998) (stating that to exercise personal jurisdiction over securities transactions in the United States, the defendant must have established minimum contacts with a forum state to the degree that he could reasonably anticipate being haled into court in the state); see also Christine T. Jarmer, Comment, *International Internet Securities Fraud and SEC Enforcement Efforts: An Update*, 73 *TUL. L. REV.* 2121, 2134 (1999) (maintaining the SEC’s success in obtaining personal jurisdiction over foreign defendants for securities fraud by applying the minimum contacts test).

19. See, e.g., *Aaronson v. Lindsay Hauer Int’l Ltd.*, 597 N.W.2d 227, 264–69 (Mich. Ct. App. 1999) (holding that a Canadian corporation was subject to specific jurisdiction because (1) it actively participated in a business relationship with a Michigan resident through mail and telephone; (2) it had an interest in protecting its citizens from fraud; and (3) Michigan was the most convenient forum); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (stating that the traditional notions of fair play and substantial justice were satisfied when defendant received adequate service that gave him actual notice of the proceeding and the opportunity to be heard).

20. *In re Royal Ahold N.V. Sec. and Erisa Litig.*, 219 F.R.D. 343, 351 (D. Md. 2003). It should be noted that although the effects test is generally applicable to largely foreign transactions, courts are typically unwilling to find this test to be satisfied where the claims at issue are by foreign investors who purchased shares of a foreign corporation on a foreign exchange. See, e.g., *In re Rhodia S.A. Sec. Litig.*, Civ. Action No. 1:05 Civ. 5389(DAB), 2007 WL 2826651, at *8 (S.D.N.Y. Sept. 26, 2007); *Froese v. Staff*, No. 02 CV 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003) (finding effects test not satisfied where plaintiffs were all foreign investors in a foreign corporation whose shares were sold on a foreign exchange, and U.S. investors made up an “exceptionally small percentage” of the total number of investors in the corporation).

21. *Robinson v. TCI/US West Communications, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997).

22. See *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995); *Zolesch v. Arthur Anderson & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987).

ble failures to act within the United States (1) to be more than “merely preparatory” to a securities fraud conducted elsewhere²³ and (2) to “directly [cause] the claimed losses.”²⁴

In *Bersch v. Drexel Firestone, Inc.*,²⁵ a seminal case on subject matter jurisdiction over foreign securities fraud claims, the Second Circuit Court of Appeals held that the anti-fraud provisions of the federal securities laws do not apply to securities sold to foreigners outside the United States unless acts or culpable failures to act “within the United States directly cause[] such losses,” and determined that these laws should therefore not be extended to claims by foreign plaintiffs against a Canadian company that was primarily engaged in the sale and management of mutual funds.²⁶ Those claims included fraudulent misrepresentations by underwriters as to the company’s suitability for public ownership and the failure of the company’s prospectuses to disclose illegal activities.²⁷ While the court found that the mailing of prospectuses containing alleged material misrepresentations or omissions into the United States and the reliance upon them by domestic investors established subject matter jurisdiction over claims by American citizens and residents in the United States, the court held that the exercise of subject matter jurisdiction over foreign claims would be improper, as such “merely preparatory” activities in the United States will not confer jurisdiction over claims of foreign plaintiffs.²⁸ A more recent decision of the U.S. District Court for the Southern District of New York raises questions as to the level of United States-related conduct that warrants a finding of subject matter jurisdiction.²⁹

Conversely, courts within the Third, Fourth, Eighth and Ninth Circuits are viewed as employing a more relaxed standard for the conduct test, which essentially requires the domestic

23. In interpreting what rises to the level of “more than merely preparatory,” one court found, for instance, that the creation of false financial information within the United States, the transmission of this false financial information overseas, and the approval of the resulting false financial statements in the United States prior to sending these statements to investors constituted conduct that was “more than ‘merely preparatory’” and warranted extension of subject matter jurisdiction. See *SEC v. Berger*, 322 F.3d 187, 194 (2d Cir. 2003); see also *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 169–70 (S.D.N.Y. 2003) (finding that a scheme to acquire U.S. companies “specifically to increase investments by United States investors,” was more than merely preparatory in nature). But see *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (noting that the “merely preparatory” requirement does not require the domestic conduct itself to be a securities violation).

24. *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 111 (S.D.N.Y. 2005); see also *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975); *Robinson*, 117 F.3d at 905–06; *In re Rhodia S.A. Sec. Litig.*, 2007 WL 2826651 at *11 (stating that foreign corporations’ U.S. activities were “neither significant in light of the global scope of their business, nor can they be said to have been a direct cause of” the foreign plaintiffs’ losses, and declined to extend subject matter jurisdiction).

25. 519 F.2d at 993.

26. *Id.*; cf. Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 *FORDHAM J. CORP. & FIN. L.* 89, 97 (2003) (arguing that under *Bersch*, “merely preparatory” acts of fraud do not grant jurisdiction to a U.S. court when the acts injure foreigners outside of the United States but may confer such jurisdiction when resident Americans are harmed).

27. *Bersch*, 519 F.2d at 986–87. For a comprehensive review of *Bersch* and its progeny, see Lawrence Jackson & Richard Bortnick, *Foreign Shareholder Securities Fraud Litigation: Welcome to Our Federal Courts*, *PLUS J.* (Prof. Liab. Underwriting Soc’y, Minneapolis, Minn.), November 2005, at 1.

28. *Id.* at 987–93.

29. See *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855(RMB), 2003 WL 22077464, at *7 (S.D.N.Y. 2003).

conduct at issue to be significant in scope and a substantial component of the alleged fraud, rather than a direct cause of the loss.³⁰

There is no requirement that the two tests be applied separately from one another,³¹ and indeed, “an admixture or combination of the two often gives a better picture of whether there is sufficient US involvement to justify the exercise of jurisdiction by an American court.”³²

III. Grounds for Finding Subject Matter Jurisdiction over Foreign Corporations

Domestic courts confronted with claims brought by foreign purchasers of securities of non-U.S. entities on foreign exchanges have the difficult task of determining whether any U.S. interests are implicated in a manner that warrants the exercise of jurisdiction.³³ In *Bayer AG Securities Litigation*,³⁴ for example, the court held it lacked jurisdiction and granted the defendants’ motion to dismiss a securities fraud class action as to claims brought by foreign investors who bought shares in Bayer AG, a corporation headquartered in Germany.³⁵ The court held that because the majority of the alleged material misstatements at issue originated in Germany, and only a small percentage of shares were held by U.S. investors during the class period, the plaintiffs failed to show sufficient contact with the United States to warrant a finding of subject matter jurisdiction.³⁶ The court further determined that plaintiffs were unable to demonstrate a substantial effect on U.S. citizens to support jurisdiction over the foreign purchasers of Bayer AG stock and concluded that “[t]he magnitude of Bayer AG’s conduct abroad and the overwhelming number of Foreign Purchasers affected thereby” militated against a finding that subject matter jurisdiction should be extended.³⁷

30. While the Seventh Circuit professed to adopt the approach followed by the Second and Fifth Circuits, it appears to have in fact adopted an approach more akin to circuits employing a more relaxed standard, stating that federal courts have jurisdiction over securities fraud claims when the United States–based conduct “directly causes” the alleged loss “in that the conduct forms a substantial part of the alleged fraud and is material to its success.” *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); see *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–25 (9th Cir. 1983) (adopting the test established by the Eighth Circuit in deciding that subject matter jurisdiction was established because the misrepresentations in question were significant); see also *In re Cable & Wireless, PLC, Sec. Litig.*, 321 F. Supp. 2d 749, 762–63 (E.D. Va. 2004) (adopting the “middle ground” approach used by the Seventh, Eighth, and Ninth Circuits, which allow significant levels of fraudulent conduct in the United States to confer subject matter jurisdiction on U.S. courts).

31. See *Euro Trade & Forfaiting, Inc., et al. v. Vowell, et al.*, No. 00 Civ. 8431 (LAP), 2002 U.S. Dist. LEXIS 5385 at *19, *21 (S.D.N.Y. Mar. 29, 2002); Stuart M. Grant and Diane Zilka, *The Current Role of Foreign Investors in Federal Securities Class Actions*, 1620 PLI/CORP 11, 36 (2007) (recounting the Second Circuit’s declaration that the effects and conduct tests do not need to be applied separately).

32. *Itoha Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995).

33. Cf. Grant & Zilka, *supra* note 31, at 18–19 (describing a case in which foreign investors and purchasers faced serious subject matter jurisdiction problems under the “conduct test,” and the court ruled there were insufficient facts to confer subject matter jurisdiction).

34. 423 F. Supp. 2d 105, 106–07 (S.D.N.Y. 2005).

35. *In re Bayer AG*, 423 F. Supp. 2d at 106–07.

36. *Id.* at 111–13 (also reasoning that because U.S. investors controlled only 8% of Bayer AG’s shares, the Court did not have subject matter over the dispute in this case).

37. *Id.* at 114.

Similarly, in *Paraschos v. YBM Magnex Int'l, Inc.*,³⁸ the court found that it lacked subject matter jurisdiction over claims brought by shareholders of a Canadian corporation alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, as well as negligent misrepresentation under state law, resulting from defendants' purported money-laundering scheme.³⁹ The court found that because the claims were brought by "a purported class of investors who are virtually all Canadian, against predominantly Canadian defendants, concerning a Canadian corporation whose stock was sold only on Canadian stock exchanges," and because 11 proceedings relating to the same alleged securities fraud dispute were pending in Canada, Canadian interests predominated.⁴⁰ Although the court recognized that some shares of the corporate defendant may have been held by U.S. investors, it found that dismissal was proper due to the absence of trading of the shares at issue on U.S. stock exchanges; and because the corporate defendant's prospectus indicated that its securities had not been registered under the U.S. Securities Act of 1933; and that its internal controls and financial reporting standards would comport with those generally applicable to Canadian public companies, thus putting any and all investors on notice that Canada would have "significant interests in the company and in any potential legal action concerning" it.⁴¹

In contrast, the court in *Nortel Networks Corp. Securities Litigation*⁴² held that it had subject matter jurisdiction, for purposes of class certification, over foreign plaintiffs who traded on the Toronto Stock Exchange shares of the Canadian corporation Nortel Networks Corp. ("Nortel"), a supplier of Internet and other network services.⁴³ Plaintiffs alleged that they were misled and defrauded as a result of the artificial inflation of Nortel's revenue, which was used to fund an "aggressive growth-by-acquisition strategy, then misled investors by failing to write down the goodwill associated with its numerous US acquisitions despite substantial declines in their value."⁴⁴ Plaintiffs argued that because the vast majority of Nortel's customers and potential customers during the relevant period were located in the United States, subject matter jurisdiction should be extended to these foreign purchasers' claims.⁴⁵ The court agreed, holding that because defendants extended financing to numerous customers in the United States, whom they knew to be uncreditworthy, to artificially inflate revenues, their activities satisfied the test for subject matter jurisdiction.⁴⁶

38. 130 F. Supp. 2d 642, 647 (E.D. Pa. 2000).

39. *Paraschos*, 130 F. Supp. 2d at 643.

40. *Id.* at 645-47.

41. *Id.* at 646-47.

42. 4142 No. 01 Civ. 1855(RMB), 2003 WL 22077464, at *1 (S.D.N.Y. Sept. 8, 2003).

43. *In re Nortel Networks*, 2003 WL 22077464, at *8.

44. *Id.* at *7.

45. *Id.*

46. *Id.* at *7.

IV. Additional Grounds for Dismissal: The Doctrine of *Forum Non Conveniens*

A court confronted with an action with little or no connection to the United States may also decide not to hear the case under the doctrine of *forum non conveniens*,⁴⁷ which permits courts to decline exercising their jurisdiction where “dismissal would ‘best serve the convenience of the parties and the ends of justice.’”⁴⁸ Although *forum non conveniens* “remains an exceptional tool to be employed sparingly,”⁴⁹ multiple courts have recently employed the doctrine to dismiss claims found to be centered in locations outside the United States.⁵⁰

At the outset of an inquiry into whether the doctrine of *forum non conveniens* warrants dismissal, courts consider the deference to which the plaintiff’s choice of forum is entitled.⁵¹ The doctrine exists alongside the principle that a plaintiff’s choice of forum should rarely be disturbed,⁵² which is partially based on the assumption that a plaintiff’s choice of forum is grounded in considerations of convenience.⁵³ “When the plaintiff is foreign, however, this assumption is much less reasonable . . . and a foreign plaintiff’s choice [therefore] deserves less deference.”⁵⁴ Courts currently afford a plaintiff’s choice of forum a degree of deference that

47. See MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE 1–3 (2004) (explaining that *forum non conveniens* gives a court “discretionary powers” to decide if another forum is better suited to host the case); see also Jinku Hwang, *Is the ACPA a Safe Haven for Trademark Infringers?—Rethinking the Unilateral Application of the Lanham Act*, 22 J. MARSHALL J. COMPUTER & INFO. L. 655, 691 (2004) (emphasizing that a court must possess subject matter jurisdiction before *forum non conveniens* avails).

48. *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996) (quoting *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947)).

49. *Windt v. Qwest Commc’ns Int., Inc.*, Civ. Action No. 04–3026 (GEB), 2006 WL 2987097, at *4 (D.N.J. Oct. 17, 2006).

50. See *Pollux Holding Ltd. v. The Chase Manhattan Bank*, 329 F.3d 64, 76 (2d Cir. 2003) (granting defendant’s motion to dismiss because witnesses could be compelled to appear only in a British court); *Varnelo v. Eastwind Transp., Ltd.*, No. 02 Civ. 2084 (KMW) (AJP), 2003 WL 230741, at *26 (S.D.N.Y. Feb. 3, 2003) (explaining that the location of key witnesses in Russia strongly favored dismissal); Mary Elliott Rollé, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT’L ENVTL. L. REV. 135, 161–62 (2003) (acknowledging that *forum non conveniens* applies even to foreigners exercising their statutory right to sue in U.S. courts).

51. See *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225–26 (3d Cir. 1995) (noting that a court must consider the plaintiff’s right to sue in the United States); *Kirch v. Liberty Media Corp.*, No. 04 Civ. 667 (NRB), 2006 WL 3247363, at *2 (S.D.N.Y. Nov. 8, 2006) (explaining that first, a court determines the “degree of deference” to give the plaintiff’s choice of forum).

52. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6 (1972) (discouraging courts from disturbing a plaintiff’s choice of forum unless the facts are “strongly” in the defendant’s favor); see also E.E. Daschbach, *Where There’s a Will, There’s a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiff’s Actions Against U.S. Multinationals*, 13 L. & BUS. REV. AM. 11, 13 (2003) (recognizing the initial “strong presumption” in plaintiff’s favor). *But see* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (explaining that a presumption in favor of the plaintiff is rebuttable if the chosen forum would be “oppressive” to a defendant).

53. See *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1186–87 (2007) (advising courts to consider “convenience, fairness, and judicial economy”); see also Dmitry Gololobov, *Yukos Risk: The Double-Edged Sword—A Case Note on International Bankruptcy Litigation and the Transnational Limits of Corporate Governance*, 3 N.Y.U. J. L. & BUS. 557, 594 (2007) (listing possible factors that determine whether the present forum is convenient, such as location of witnesses, choice of law, and hardship for the defendant).

54. See *Piper Aircraft Co.*, 454 U.S. at 241.

moves along a “sliding scale.”⁵⁵ Where the plaintiff has a “bona fide connection” with the United States and the chosen forum, the defendant will generally have difficulty obtaining dismissal on the grounds of *forum non conveniens*.⁵⁶

In contrast, if the plaintiff’s choice of forum is not supported by such a “bona fide connection” to the United States, “the choice of forum warrants less deference and it will be easier for defendant to prevail on a motion to dismiss.”⁵⁷

In *Kirch v. Liberty Media Corp.*,⁵⁸ for example, the court found that the German plaintiffs’ choice of forum was entitled to minimal deference because their various tort claims allegedly arose from a German Bloomberg TV German-language broadcast of an interview of the CEO of Deutsche Bank discussing plaintiff KirchGroup’s liquidity crisis.⁵⁹ The court found that although the interview was conducted in New York, “the inherently German nature of the dispute” cautioned against awarding great deference to plaintiff’s choice of forum and so dismissed the suit.⁶⁰

After determining the appropriate level of deference to which a plaintiff’s forum selection is entitled, courts considering whether to dismiss on *forum non conveniens* grounds look first to whether an adequate alternative forum is available.⁶¹ To show that an adequate alternative forum exists, it must be established that: (1) the defendant is amenable to process in the alternative forum; and (2) the subject matter of the lawsuit is cognizable in the alternative forum.⁶²

55. See *Iragorri v. U. Tech. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001); *In re Assicurazioni General S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 351 (S.D.N.Y. 2002); see also Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT’L L. 1, 32 (2004) (explaining that the “sliding scale” test analyzes the level of connection the plaintiff has with the forum).

56. See *Iragorri*, 274 F.3d at 72; see also Helen E. Mardirosian, Symposium, *Developments in the Law: Federal Jurisdiction and Forum Selection*, 37 LOY. L.A. L. REV. 1643, 1660 (2004) (listing factors that help determine a “bona fide connection”). *But cf.* John R. Wilson, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 688 (arguing that a foreign plaintiff would not likely have a “bona fide connection” with the forum because it generally has fewer contacts with the United States).

57. See *Windt v. Qwest Commc’ns Int., Inc.*, Civ. Action No. 04–3026 (GEB), 2006 WL 2987097, at *3 n.11 (D.N.J. Oct. 17, 2006) (quoting *Iragorri*, 274 F.3d at 72).

58. No. 04 Civ. 667(NRB), 2006 WL 3247363 (S.D.N.Y. Nov. 8, 2006).

59. *Kirch*, 2006 WL 3247363, at *1–3.

60. *Id.* at *4.

61. See *Rustal Trading US, Inc. v. Makki*, 17 F. App’x 331, 335 (6th Cir. 2001); see also *Kirch*, 2006 WL 3247363, at *2 (explaining that after determining what level of deference the plaintiff’s choice of forum deserves, the court must consider defendant’s proposed “alternative forum”); Peter J. Carney, Comment, *International Forum Non Conveniens: “Section 1404.5”—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 495 n.105 (1995) (enumerating instances where courts considered an alternate forum).

62. See *The Tech. Dev. Co., Ltd. v. Onischenko*, No. Civ.A. 05-4282(MLC), 2007 WL 1202412, at *3 (D.N.J. Apr. 25, 2007); *Kultur Int’l Films Ltd. v. Covent Garden Pioneer, FSP, Ltd.*, 860 F. Supp. 1055, 1063 (D.N.J. 1994).

Although dismissal on the grounds of *forum non conveniens* is improper “where the alternative forum does not permit litigation of the subject matter of the dispute,”⁶³ it may be proper even when it would result in a change of law unfavorable to the plaintiff.⁶⁴

If an adequate alternate forum is found to exist, the court must then balance certain public and private factors.⁶⁵ The private interests to be considered include: relative ease of access to evidence; availability of compulsory process for attendance of unwilling witnesses; the cost of attendance of willing witnesses; enforceability of a judgment once obtained,⁶⁶ and other relative “advantages and obstacles to a fair trial.”⁶⁷ Public interest factors relevant to this inquiry include administrative difficulties resulting from court congestion, the local interest in resolving disputes at or near home, avoiding the imposition of jury duty on people of a community with no relation to the litigation, and avoiding problems of unfamiliarity with and application of foreign law.⁶⁸ Courts have stressed the importance of weighing all relevant factors, rather than placing central emphasis on any one factor, to maintain the “very flexibility” that makes the *forum non conveniens* doctrine so valuable.⁶⁹

After concluding that the Netherlands was an adequate alternative forum, particularly in light of a related action pending before its courts, the court in *Windt v. Qwest Communications International, Inc.*⁷⁰ employed a balancing test of public and private factors and held that the claims brought by Dutch plaintiff-attorneys acting as bankruptcy trustees for a Dutch corporation should be dismissed on grounds of *forum non conveniens*. The fact that two defendants were domiciled in the United States, and that numerous board meetings and conference calls by defendants took place in the United States, did not establish that the dispute was “local” in nature in as much as the case concerned “allegations of fraud and mismanagement of a Dutch business entity by” a board member, executives, and the controlling holder of that corporation.⁷¹ To hold otherwise, the court held, would render almost any transaction with even a

63. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

64. *Id.* at 247, 252 n.19; see De Leon, *supra* note 6, at 730 (stressing that differences in foreign and U.S. law are not relevant in a *forum non conveniens* analysis). *But see* Mardirosian, *supra* note 56, at 1670 (pointing out that courts dismiss cases for reasons other than a “genuine concern’ for convenience”).

65. See, e.g., Kirch v. Liberty Media Corp., No. 04 Civ. 667 (NRB), 2006 WL 3247363, at *2 (S.D.N.Y. Nov. 8, 2006); see also Mardirosian, *supra* note 56, at 1656 (defining private interests as those relating to the parties of the transaction); Rollé, *supra* note 50, at 159 (identifying public interest factors as those affecting the local society).

66. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). *But see* N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT’L ECON. L. 601, 672 (2006) (suggesting that applying private interests undermines “dynamic principles of adjudicatory comity”).

67. *Gulf Oil*, 330 U.S. at 508.

68. *Id.* at 508–09; see Kirch, 2006 WL 3247363, at *8.

69. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249–50 (1981); see also Daschbach, *supra* note 52, at 42 (suggesting courts be flexible under *forum non conveniens*); Aaron J. Lockwood, Note, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 739 (2007) (recognizing that there is no strict formula for *forum non conveniens*).

70. No. 04-3026 (GEB), 2006 WL 2987097 (D. N.J. Oct. 17, 2006).

71. *Windt*, 2006 WL 2987097, at *8.

remote connection to the United States “Americanized,” thereby “making the U.S. federal court system the surrogate court for the entire modern world global economy,”⁷² and thus essentially inviting the world to litigate its disputes in the United States without regard to the existence of substantial domestic connections therein. Because the actual dispute had little connection to the United States, the court held that the interests of having disputes settled locally and avoiding burdening jurors with the resolution of matters unrelated to the community would not be furthered by entertaining the case.⁷³

In *Warlop v. Lernout*,⁷⁴ the court deemed Belgium an adequate forum and dismissed, under the doctrine of *forum non conveniens*, claims alleging securities law violations under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder brought by class action plaintiffs who had purchased shares of a corporate defendant on Europe’s EASDAQ market.⁷⁵ Despite previously denying defendants’ motion to dismiss claims brought by plaintiffs who purchased shares on the American NASDAQ exchange based on concerns about Belgium’s “lack of a class action mechanism and its failure to recognize the fraud-on-the-market theory,” the court found that the balance of private factors “strongly support[ed] dismissal.”⁷⁶ The court noted that although there were “much more difficult hurdles for plaintiffs in Belgium,” dismissal under the doctrine of *forum non conveniens* was proper because the alleged fraud occurred primarily in Belgium, the primary witnesses and documents were located in Belgium, the lead plaintiffs and most class members were non-U.S. residents, and, “most significantly,” all shares of stock at issue were obtained on the EASDAQ exchange.⁷⁷

Thus, while a plaintiff seeking to litigate securities claims may find the U.S. legal system appealing for a number of reasons—including the availability of jury trials, the potential for punitive and/or treble damages, and the extensive discovery process⁷⁸—a court may dismiss these claims under the doctrine of *forum non conveniens*, even where certain or all benefits unique to the U.S. legal system will no longer be available to the plaintiff or the plaintiff may otherwise be harmed by a change in applicable law, so long as an adequate alternative forum exists and dismissal would promote both convenience and justice.⁷⁹

72. *Id.*

73. *Id.* at *9.

74. 473 F. Supp. 2d 260, 261 (D. Mass. 2007).

75. *Id.* at 261.

76. *Id.* at 263.

77. *Id.* at 264.

78. See *Diamond*, *supra* note 10, at 805 n.3; see also *Mardirosian*, *supra* note 56, at 1669 (stating that U.S. courts are attractive forums because of their extensive discovery process and availability of jury trials).

79. See *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 804 (7th Cir. 1997); see also *Kinney Sys. Inc. v. Cont’l Ins. Co.*, 674 So.2d 86, 93 (Fla. 1996) (holding that although the corporation’s principal place of business was in the United States, this fact does not necessarily preclude *forum non conveniens*). But see John R. Schmertz & Mike Meier, *In Dispute Between BCCI and Pakistani State Bank Over \$50 Million Loan, Second Circuit Remands to District Court for Forum Non Conveniens Analysis Where Pakistan May Be Alternative Forum and Pakistani Banking Laws Changed While Case Was Pending in Second Circuit*, 8 INT’L L. UPDATE 2, 2 (2002) (arguing that a court may dismiss a case on *forum non conveniens* grounds, even though it cannot make a definitive finding about the adequacy of the foreign forum).

Similarly in state courts, “whenever considerations of convenience, expense and the interest of justice dictate that litigation in the forum selected by the plaintiff would be unduly inconvenient, expensive or otherwise inappropriate,”⁸⁰ a court, on the basis of *forum non conveniens*, may decline to hear a case even where jurisdiction is present.⁸¹ Where a forum state has substantial interest in the subject of the action, a *forum non conveniens* motion will often be denied.⁸² Thus, in *Canadian Imperial Bank of Commerce v. Pamukbank Tas*, the Court denied defendant’s motion to dismiss, holding that New York was the proper forum for a suit between a Canadian bank and a Turkish bank because the letter of credit being sued on was to be performed in New York and the state had a substantial interest in the transaction.⁸³ However, if there is little public interest in the suit, and a strong connection between the claims and the forum state does not exist, the court is more likely to grant the motion.⁸⁴ In *Finance & Trading Ltd. v. Rhodia S.A.*, for example, the Court dismissed an action against foreign defendants alleging fraudulent inducement to purchase stock on the Paris Stock Exchange because (1) the alleged meetings between the parties in a New York City hotel did not create a substantial nexus with the state because the transaction occurred in a foreign jurisdiction; (2) actions were pending in France that were similar to the instant case; and (3) a majority of documents and witnesses were French.⁸⁵

Courts are, however, sometimes very reluctant to dismiss a case on the grounds of *forum non conveniens*, even when the public and private interests seem better served in the foreign jurisdiction.⁸⁶ Such was the case in *Buettner v. Bertelsmann*,⁸⁷ where two German entrepreneurs sued in a California state court for their equity stake in a European joint venture.⁸⁸ The court denied defendants’ motion to dismiss on the basis of *forum non conveniens*, despite the fact that plaintiff and defendant were German citizens, the contract at issue was executed in Germany

80. *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 550–51 (Del. Ch. 1999).

81. *See* M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1086 n.54 (1999). *See generally* David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 795 n.54 (1993) (maintaining that this is true even though jurisdiction and venue are proper).

82. *See* *Canadian Imperial Bank of Comm. v. Pamukbank Tas*, 632 N.Y.S.2d 918, 922 (Sup. Ct. 1994) (holding that since New York had a substantial interest in the international letter of credit transaction, New York courts have jurisdiction); *see also* *J. Zeevi & Sons Ltd. v. Grindlays Bank Ltd.*, 333 N.E.2d 168, 227 (N.Y. 1975) (stressing New York’s supreme interest in outcome of the case).

83. *Canadian Imperial Bank of Comm.*, 632 N.Y.S.2d at 921–22.

84. *See* *Fin. & Trading Ltd. v. Rhodia S.A.*, 816 N.Y.S.2d 7, 8 (App. Div. 2006); *see also* *Martin v. Mieth*, 321 N.E.2d 777, 779 (N.Y. 1974) (reminding that since *forum non conveniens* is based upon flexibility, courts are not required to entertain causes of action lacking a substantial nexus with New York).

85. *Fin. & Trading Ltd.*, 816 N.Y.S.2d at 8–9.

86. *See* Hwang, *supra* note 47, at 693 (establishing that a U.S. court is reluctant to dismiss a hijacking claim brought by a U.S. registrant against a foreign trademark under *forum non conveniens*); *see also* De Leon, *supra* note 6, at 731 (claiming that the application of *forum non conveniens* is almost impossible to predict because of its discretionary nature).

87. No. 1038215 (Cal. Super. Ct. Dec. 11, 2003).

88. *Buettner*, No. 1038215.

and written in German, all relevant documents were in German, and German law governed.⁸⁹ The court held that because the plaintiffs had left Germany and had been U.S. residents for several years before the suit, they were entitled to bring the case in the United States and enjoy the same benefits as other California residents.⁹⁰

V. Concerns Related to a Finding of Jurisdiction

In considering whether subject matter jurisdiction exists, several courts have expressed concern that too restrictive an approach may render U.S. courts ineffective in addressing fraud in an increasingly global securities market.⁹¹ On the other hand, a concern has been expressed that the increased exercise of subject matter jurisdiction over largely foreign claims may lead other countries to expand their exercise of jurisdiction over U.S. parties.⁹²

Courts have also been troubled by the possibility that foreign courts may choose not to recognize the judgments of U.S. courts where the conduct and transaction(s) involved are substantially foreign in nature.⁹³ The fear of nonrecognition is not unfounded, as a recent decision by the Court of Appeal for Ontario illustrates. In *Currie v. McDonald's Restaurants of America Limited*,⁹⁴ a consumer matter alleging the manipulation of promotional games, the court held that a class action settlement approved by an Illinois state court was not binding on a Canadian plaintiff who had not participated in the Illinois proceedings.⁹⁵ The court found that the plaintiffs had “done nothing to invite or invoke Illinois jurisdiction,” that customers of McDonald’s restaurants in Ontario had “no reason to expect” that claims they wished to assert against McDonald’s Canada would be adjudicated in the United States, and that the procedures adopted in the Illinois action were insufficient to afford Canadian plaintiffs in *Currie* with adequate notice of these proceedings.⁹⁶ After concluding that the Illinois judgment lacked *res judi-*

89. See *Bertelsmann Loses California Verdict*, N.Y. TIMES, Dec. 12, 2003, at C6; Jeff Leeds, *Jury Hits Bertelsmann With \$250-Million Award for Pair*, L.A. TIMES, Dec. 12, 2003, at C2; see also Nora L. Tooher, *Two German Entrepreneurs Win \$255 Million*, LAW. WKLY., 2004, at ¶ 53–54 (reasoning that the case would have been prohibitively expensive to bring in Germany).

90. See Leeds, *supra* note 89, at C2 (noting that both plaintiffs moved to California in the late 1990s).

91. See *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1990) (discussing the relaxed standards of the Third, Eighth, and Ninth Circuits for deciding subject matter jurisdiction in foreign transactions cases); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–25 (9th Cir. 1983) (opining that a restrictive approach might make the United States a haven for those who wish to defraud foreign securities purchasers).

92. See *Blechner v. Daimler Benz A.G.*, 410 F. Supp. 2d 366, 372 (D. Del. 2006) (predicting that where U.S. courts increasingly grant jurisdiction on foreign claims, in reciprocity, more foreign jurisdictions will hear U.S. cases). See generally Press Release, Newswire Europe Including UK Disclose, Royal Dutch Shell PLC—1st Quarter Results (May 3, 2007) (referring to a recent development relating to the Royal Dutch/Shell Transport litigation brought in U.S. federal court, where Royal Dutch Shell announced that it settled 50 European institutional investors’ claims in exchange for \$450 million, thereby creating the potential for European litigants to forgo the U.S. class action mechanism and attempt to settle litigations locally. This settlement is not binding on U.S. investors, and we have yet to see how U.S. courts will react to this development).

93. See Joel P. Rochon, *The Transnational Class: A Canadian Perspective on Cross-Border Class Actions*, 1 ATLA ANN. CONVENTION REFERENCE MATERIALS ¶ 1 (2006) (noting the difficulties in obtaining decisions in U.S. courts with international finality when foreign claimants are involved).

94. 70 O.R. (3d) 53 (2004).

95. *Id.* at 54.

96. *Id.* at 57 (2004).

cata effect on the claims in Ontario,⁹⁷ the Ontario court held that the plaintiff was not precluded from pursuing a Canadian action against McDonald's on behalf of the Canadian class members he sought to represent.⁹⁸

The decision in *Currie* may lead courts to curtail the extension of subject matter jurisdiction over certain "foreign" claims. However, some courts appear willing to risk the potential nonrecognition of their judgments in favor of extending subject matter jurisdiction over securities fraud claims.⁹⁹ For example, the court in *Cable & Wireless, PLC, Securities Litigation*¹⁰⁰ was unwilling to find a lack of jurisdiction over claims brought by foreign investors against a British telecommunications company despite defendants' argument that England might not recognize a U.S. judgment in the action, thereby exposing them to multiple suits.¹⁰¹

Similarly, despite the defendants' contention that lack of enforceability of any judgment made exercise of subject matter jurisdiction "futile and improper," the court in *Royal Dutch/Shell Transport Litigation*¹⁰² held that it had subject matter jurisdiction over securities fraud claims brought by putative class members who were foreign nationals that purchased the securities of defendant corporations Royal Dutch (headquartered in The Netherlands) and Shell Transport (headquartered in England) on foreign exchanges.¹⁰³ The court found that although defendants had presented testimony from various experts that there was a "very real" concern that foreign courts would not enforce a U.S. judgment, these experts had not concluded that nonenforceability was a "near certainty," and their testimony therefore did not warrant dismissal.¹⁰⁴

In the more recent case of *Vivendi Universal, S.A. Securities Litigation*,¹⁰⁵ the court examined to what extent any judgment in a class action would be granted preclusive effect in considering on a country-by-country basis whether a class action was the superior method of class certification for putative foreign class members.¹⁰⁶ The court reasoned: "The closer the likelihood of non-recognition is to being a 'near certainty,' the more appropriate it is for the Court to deny certification of the foreign claimants."¹⁰⁷ In its analysis, the court took evidence and reviewed at some length the prospect that a judgment in the class action would be granted pre-

97. *Id.* at 54.

98. *Id.*

99. *E.g.*, *Cromer v. Berger*, 205 F.R.D. 113, 134–36 (S.D.N.Y. 2001). *But see* *Bersch v. Drexel Firestone*, 519 F.2d 974, 996 (2d Cir. 1975) (holding that while a U.S. court may enter a judgment when there is a possibility that a foreign court may not recognize it, it should not do so when such recognition may be a near certainty).

100. 321 F. Supp. 2d 749 (E.D. Va. 2004).

101. *Id.* at 765–66.

102. 380 F. Supp. 2d 509 (D.N.J. 2005).

103. *In re Royal Dutch/Shell*, 380 F. Supp. 2d at 547.

104. *Id.* at 547.

105. 242 F.R.D. 76 (S.D.N.Y. 2007).

106. *In re Vivendi*, 242 F.R.D. at 95–96, 102–05. *See In re Vivendi Universal, S.A. Securities Litigation: The Long Arm of US Jurisdiction*, LATHAM & WATKINS LLP CLIENT ALERT (June 6, 2007) (arguing that it must be shown that the class action is superior to other available methods for the case's adjudication for plaintiffs from each country at issue).

107. *In re Vivendi*, 242 F.R.D. at 95.

clusive effect in five foreign jurisdictions.¹⁰⁸ Ultimately, it found that a class action was the superior method of dispute resolution for French, English, and Dutch shareholders, but not for German and Austrian shareholders, and thus certified a class that included the former.¹⁰⁹

VI. Conclusion

More companies, foreign and domestic, are entering the global marketplace and turning to capital markets to raise the monies necessary for global competition. The price of admission, for those who turn to the U.S. markets, is the application of federal securities laws, attendant oversight of federal regulators, and the risk and potential exposure of securities class action lawsuits.

The risk of exposure to federal securities lawsuits, particularly those brought by foreign plaintiffs, increases with the nexus to American capital markets and, critically, the warmth of the reception that American judgments may receive in the foreign jurisdictions that are home to those non-U.S. plaintiffs. It is this latter concern—the nonrecognition of U.S. judgments—that may keep the door closed to foreign plaintiffs who ask that U.S. federal courts find jurisdiction over every securities claim in the global marketplace.

108. *Id.* at 95, 102–05.

109. *Id.* at 106.