

US Class Actions with Non-US Citizens as Class Members: Fairness Issues Considered

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As international commerce expands, citizens of countries other than the United States will participate increasingly in US-based commerce and, as a result, they will be exposed more and more to the US system of justice and dispute resolution. Perhaps the single largest, costliest, and riskiest civil litigation event for any defendant in the United States is a class action lawsuit. The application of US class actions to non-US citizens raises a host of questions that the courts, in the United States and abroad, will have to address. A specific question under consideration at the moment is how US courts can deal fairly with defendants in a class action where non-US class members may have the opportunity to bring a second, subsequent lawsuit against the same defendants in the plaintiffs' home country – a 'second bite' action. As the courts chart their course, they should keep in mind fundamental protections for defendants that have been a part of class litigation from its inception to ensure fairness. In particular, the current approach to international class litigation may create a significant risk to defendants of unfair, redundant litigation. This article discusses the current approach and potential solutions and alternatives that may manage for that risk.

It is clear that class action litigation in the United States, generally under Federal Rule of Civil Procedure 23 (or similar versions of that rule found in state, as opposed to federal, courts), plays an extraordinary role in American civil business litigation. Rule 23 empowers very small groups of ordinary citizens, including plaintiffs' lawyers who are generally working

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on a contingent fee basis, to have an enormous impact on a wide swathe of American business and industry. Securities offerings, consumer financial services and consumer product sales are among the areas of American business that have been dramatically affected and, in some respects, reshaped by class action litigation.

It is equally clear that American business is, inevitably, going global. The international economist Fareed Zakaria writes in his 2008 book *The Post American World* that 'large US-based multinationals almost uniformly report that their growth now relies on penetrating new foreign markets... . Annual revenue growth for those firms is only 2–3 per cent a year in the United States, compared with 10–15 per cent a year abroad'.

Only a few courts have thus far had the opportunity to grapple with the issue of how this increased globalisation will affect US class actions – specifically the issue of how foreign citizens will be treated in class actions. One of the most recent and prominent opinions is *In re: Vivendi Universal, SA Securities Litigation*.¹ *Vivendi* is, in most respects, a commonplace example of class action litigation in US courts. The plaintiffs alleged that the defendant company, Vivendi SA, fraudulently concealed its true financial condition from public disclosure. Once the truth became known, the price of Vivendi shares tumbled to the detriment of allegedly defrauded investors. The distinction between this case and the run-of-the-mill US securities fraud class action – or consumer class action, or products liability class action, for that matter – is that non-US citizens were directly involved. Vivendi stock was traded not only on the New York Stock Exchange, but also on the Bourse in Paris. Large numbers of French shareholders were affected by the alleged fraud, along with shareholders in the United States. The question presented in *Vivendi* was whether to include those French shareholders in the US class action proceeding, and whether doing so would be fair to the defendants. The framework for thinking about this issue requires a quick review of how US class actions are supposed to work.

Remember that a class action is a procedural device found – or not – in the rules of the jurisdiction where the case is pending. It does not currently exist in many jurisdictions outside America. A class action permits a single plaintiff to bring a lawsuit not only on behalf of himself, but also on behalf of all others who have experienced the same alleged wrong.

By far the most commonly used class action rule in US federal courts is Federal Rule of Civil Procedure (FRCP) 23(b)(3).² FRCP 23(b)(3) has various requirements to ensure that litigation may only move forward on a

1 02 CIV 5571 (RJH) (HBP), 2009 WL 855799 (SDNY 31 March 2009).

2 While the individual states have their own class action rules, those rules are largely modelled on the federal rules and follow federal jurisprudence.

class basis if certification of a class would be fundamentally fair to all affected parties. For example, the named plaintiff must adequately represent the members of the class, the vast majority of whom will never participate in the litigation in any meaningful way. The class representative must also have claims that are essentially the same as the members of the class, both to avoid conflicts of interest and to ensure that the issues being litigated by the named plaintiff are, in fact, the same issues that need to be resolved for all of the class members. The members of the class, other than the named class representative, are absent from almost all of the litigation activity, but their rights will be determined by the class proceeding.

It has also been fundamental in US class action jurisprudence that fair treatment of defendants requires that members of a plaintiff class cannot wait, as class members, to see how the class litigation either has or is likely to (based on interim substantive rulings) turn out and then decide to opt out of the class and bring their own individual lawsuits for a ‘second bite’ at the defendant if they are displeased with the results of the class litigation. The defendant has the right to insist that the class litigation will finally determine the rights of the class members. There are no ‘second bites’, unless the defendant waives that right.

The ‘second bite’ issue presents somewhat differently in purely US litigation as opposed to international litigation. In a US lawsuit with only US class members, the ‘second bite’ risk is primarily that a class member will opt out of the class after a substantive ruling but *before* a final determination. As discussed below, the US courts have addressed this issue. The possibility of a second action in a US court *after* a final determination in a class action is not significant. Once there has been a final determination, the doctrine of *res judicata* bars subsequent actions in US courts. With non-US class members in a US class action, however, even after a final determination, it is possible that a non-US citizen could return to his home jurisdiction to commence a redundant lawsuit because that home jurisdiction may not recognise the validity and binding effect of the final determination in a US class action. The class action mechanism will not necessarily be recognised by foreign courts that have their own public policy and jurisprudential considerations to apply.

The *Vivendi* court determined without much difficulty that the fraudulent concealment of financial information, the subsequent discovery of that information and the following drop in share price presented a set of issues sufficiently common and shared among both the named plaintiffs and the absent class members so that class treatment was appropriate when judged on those criteria. The issue that consumed the court’s time was the ‘fairness’ requirement – would it be fair to the defendants to include the French shareholders in the class?

The issue, more specifically, was whether the class members who were French citizens would be able to wait to see how the US litigation finally turned out and, then, if that result was not to their liking, bring new actions against these same defendants on their own behalf – individually – in France. Whether French courts would reject ‘second bite’ actions by French citizens and give *res judicata* effect to the determination by the US court is an open question. The *Vivendi* court stated that if French courts would more likely than not refuse to recognise the class action determination by the US court as final – permitting ‘second bite’ actions in France – then the *Vivendi* court would be inclined to find that including French shareholders in the class would be unfair to the defendants. Such a class action would not be permitted.

The *Vivendi* court, of course, looked to French law for the answer to this question, but French law had not determined whether it would recognise the legitimacy of a class action ruling by a US court. In fact, the issue remains open to controversy today. Indeed, as various members of the European Union begin to consider the use of class actions, they are reaching different results as to the international public policy and other jurisprudential questions of the acceptability of class or ‘group’ actions.

The defendants in *Vivendi*, eager to have class certification denied, argued both in their initial opposition to class certification and in a motion for reconsideration that the French courts would not honour the American ruling. In their motion for reconsideration the defendants argued that ‘recent events’ in France have ‘now made it clear beyond any doubt’ that the *Vivendi* class action would be found to be unconstitutional in France. That is, the defendants argued, the determinations made in the US litigation would not be final in French courts and the defendants would be exposed to ‘second bite’ actions by French citizens in France. Indeed, Vivendi’s general counsel solicited letters from the French Ministry of Justice to marshal authority in support of Vivendi’s opinion. The plaintiff, however, offered expert testimony that conflicted with the defendants’ position as to what the French courts might do with this issue were it before them.

Ultimately, the *Vivendi* court determined that ‘it is unlikely that a French court will decline to respect a US judgment’ certifying a class in that case, and so found that a Vivendi class action, including French shareholders, would be fair and could proceed.

In August 2008, though, only seven months before the *Vivendi* court’s March 2009 opinion on the defendants’ motion for reconsideration, another court in another case, also pending in the US District Court for the Southern District of New York, came to the opposite conclusion as to what the French courts would do, if and when called on to address the issue.

In *In re: Alstom SA Securities Litigation*,³ the plaintiff alleged that Alstom, a French company that was traded on the New York Stock Exchange as well as the Euronext and the London Stock Exchange, defrauded investors by failing to disclose negative financial information in violation of US securities laws. Like the *Vivendi* defendants, the defendants in *Alstom* argued ‘that a United States class action is not a superior method for adjudicating plaintiffs’ claims because a resulting judgment would not be given preclusive effect by courts in France’. (The *Alstom* defendants also had occasion to make the same argument with regard to the courts in England, the Netherlands and Canada). The plaintiff countered, predictably, that the foreign courts ‘would probably find any judgment rendered by this court as preclusive’.

The *Alstom* court considered the state of French law and found that ‘French courts have not expressly determined the extent, if any, to which they would recognize a United States class action judgment... . Because France and the United States are not party to any bilateral or multinational convention regarding recognition and enforcement of judgments rendered in the United States, French case law regarding the recognition of a foreign judgment would govern’.

The *Alstom* court ultimately found that the ‘plaintiffs have not sufficiently demonstrated that French courts would more likely than not recognise and give preclusive effect to any judgment rendered by this Court against Defendants’, and therefore refused to certify a class including French plaintiff class members. (The court reached varied conclusions regarding English, Dutch and Canadian courts as among the various defendants.) The analysis required that the court speculate as to the most likely outcome using what the *Vivendi* court previously identified as the ‘Probability Standard’, as opposed to the ‘Possibility Standard’, which the *Alstom* court also considered. Neither the *Vivendi* nor the *Alstom* determination has been tested by a federal court of appeals in the United States, nor are they binding on any other trial courts in the United States.

Both plaintiffs and defendants are left to speculate as to what the next US court will conclude would be the most likely outcome in a French court faced with the question of whether to give the determination of a US court in a class action case preclusive effect. This is an inherently speculative exercise, and is also a moving target. France continues to consider class issues. Its position on class litigation is evolving. Indeed, almost no matter what the first French court may do when the time comes, the process of having French jurisprudence develop to the point of relative certainty and predictability on this equivalent of a *res judicata* issue is likely to take years.

3 253 FRD 266 (SDNY 2008).

This same speculative analysis will, of course, continue with regard to other EU countries as well. The *Alstom* court is an early example of that. Nor is it likely that the EU countries are where this analysis will stop. What about India, Brazil and China, for example? It is most likely that this developing litigation issue will be coextensive with the geography of growing commercial activity.

Further, both the *Vivendi* and *Alstom* courts dealt with securities laws. Class action suits in the arena of products liability and other consumer protection suits may well raise different public policy concerns and therefore create additional variability in results from case to case.

Moreover, as foreign jurisdictions begin to decide the extent to which they may want to reject, or embrace, aspects of the US model of class litigation in their own jurisdictions, the results will be fluid as their jurisprudence evolves in response to initial choices and the impact of those decisions – perhaps unforeseen – on that jurisdiction’s economic interests. In other words, there will be trial and error in these jurisdictions that will make speculation by US courts about the expected outcomes in foreign courts inherently unreliable.

It is not difficult to see how the *Vivendi* model of trying to anticipate the outcome in a foreign court in order to determine fairness in a US class action proceeding might become extremely complex and even unworkable.

Perhaps most importantly, basic concepts of fairness as protected through the application of the doctrine of diversity jurisdiction in the federal courts will be defeated by the current approach. A central purpose of diversity jurisdiction is to avoid the possibility of being ‘home towned’ by local courts. Indeed, the recently adopted Federal Class Action Fairness Act is premised on providing access to presumably fairer federal venues, rather than local state courts, for the most serious and threatening class actions. This basic idea of relying on the fairness of the federal court system – where judges are not elected in a political environment but appointed for life tenure – to insulate litigants from the possibility of local prejudice is fundamental to assuring the fairness and legitimacy of the court system in our largest and most important disputes. The approach taken by the *Vivendi* court, though, ultimately leaves the actual determination of fair treatment of a defendant in a US court – specifically determining whether class certification in the US action was fair – to the eventual judgment of a foreign court in a foreign jurisdiction determining the claims of its own citizens. That is, while a US court will speculate as to the outcome in a foreign court as the *Vivendi* test requires, once a class with foreign members is certified by a US court, only the actual outcome in that foreign court will determine whether the defendants actually will or will not be subject to foreign ‘second bite’ actions.

It seems likely that the variability and the inherent uncertainty present in the *Vivendi* equation might place the ability to anticipate the outcomes in

foreign courts with any degree of certainty or reliability, and with the requisite assurances of fairness, beyond our reach. We suggest a modification of the approach taken by the US courts thus far that would prohibit certification of a class including foreign class members, unless the defendant waives its right to insist that a class action provide a final determination of all class claims. Our suggestion is guided by well-tested principles from existing class action jurisprudence.

The problem of a foreign citizen and class member returning to his home country at the end of a class action to bring a repeat claim is new, but the fundamental idea of protecting defendants from repeat claims by class members is not. As mentioned above, in the domestic context, the problem arises when a class member waits long enough in the class litigation to see an adverse substantive ruling from the class action court and then opts out of the class to start a new action of his own in what he hopes will be a friendlier venue.

Whether it is a foreign citizen returning to his home jurisdiction after an adverse class outcome, or a US citizen leaving midstream in the litigation to find a friendlier court after an adverse substantive ruling, the problem for the defendant is the same. Both present the ‘second bite’ problem.

To address this potential unfairness in the domestic context, the federal courts in the United States have already developed the doctrine of ‘one-way intervention’. Under this doctrine, a defendant may prohibit a class member from opting out of a class *after* the court hearing the case has weighed in regarding the substance of the case. The defendant may waive this protection, but that is the defendant’s choice. The ‘one-way intervention’ doctrine affords the defendant protection from the ‘second bite’ problem.

In *Peritz v Liberty Loan Corp*,⁴ the court considered these issues where the plaintiffs attempted to delay the class certification decision until after liability had been decided. The court determined that giving the plaintiffs the advantage of a potential class action without, at the same time, protecting the defendant from fragmented litigation by putative class members was unfair and inconsistent with the basic structure of Rule 23:

‘The Supreme Court had discussed in some depth the reasons behind the 1966 amendments to the class action rule and had focused in particular on the problem of “one-way intervention” whereby a potential class member could await a resolution of the merits of the claim before deciding whether or not to join the lawsuit. *Am Pipe & Const Co v Utah*, 414 US 538, 545–49, 94 S Ct 756, 38 L Ed 2d 713 (1974). The Court in that case specifically pointed out that:

4 523 F 2d 349 (7th Cir 1975).

“(T)he 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments. 414 US at 547, 94 S Ct at 763 (footnote omitted).”

The obvious import of this language is that the amended Rule 23 requires class certification prior to a determination on the merits... . Section 23(c) (1) makes it plain... that the order determining class status is to be made and finalized “before the decision on the merits”... . Section 23(c) (3), by providing that the judgment shall bind all class members, was specifically intended to confront the one-way intervention problem... .’

The court in *Ahne v Allis-Chalmers Corp.*⁵ also explained the issue:

‘Pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, the district court must determine the propriety of class certification “[a]s soon as practicable after the commencement of an action brought as a class action... .” As both parties have observed in their letter briefs, the courts have typically interpreted this as a requirement that the issue of class certification be addressed prior to any substantive resolution of the merits of the underlying complaint. In fact, this general rule forms the centerpiece of the United States Supreme Court’s 1974 decision in *Eisen v Carlisle & Jacquelin*, 417 US 156, 177–178, 94 S Ct 2140, 2152–2153, 40 L Ed 2d 732 (1974):

“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c) (1) that the court determine whether a suit denominated a class action may be maintained as such ‘[a]s soon as practicable after the commencement of [the] action’.”

This jurisprudence is of long standing,² and it is useful here. Under Rule 23, the United States has recognised that a defendant should not be subjected to the risk of later, ‘second bite’ claims. That aspect of Rule 23 did not include a discussion as to the *likelihood* of those claims being allowed because there was no uncertainty regarding the application of *res judicata* in US courts.

⁵ 102 FRD 147 (D Wis 1984).

Yet, in both *Alstom* and *Vivendi* the courts engaged in a likelihood analysis to determine the probability that a foreign court would give preclusive effect to a US court's rulings. As applied, that standard is dependent on consistent and accurate determinations regarding the anticipated outcomes in foreign courts. The conflicting results in *Alstom* and *Vivendi* have already spoken to the problem of consistency. Which of them is correct will not be known until the French courts rule.

Moreover, the very fact of this likelihood analysis simply does not sit side by side with Rule 23 as it was written. Uncertainty is an unavoidable result of the *Vivendi* approach.

Setting aside for the moment the political and legal complexities inherent in the following, and focusing for the moment only on this limited problem, the United States could eliminate this uncertainty through international treaties and conventions whereby signatory nations would agree to recognise and enforce each other's rulings and judgments, including those rendered in US class actions. This would include US class action judgments. This approach has been successfully achieved in parts of Europe. For example, European countries, including France, Germany and the United Kingdom, have signed the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels 1968), as amended by Council Regulation (EC) No 44/2001 (22 December 2000) (the 'EC Convention'). Article 33 of the EC Convention specifically states that, with a few specified exceptions, judgments given in a Member State shall be recognised by other Member States. Similarly, Article 4 of the Hague Convention on Foreign Judgements in Civil and Commercial Matters (1 February 1971) (the 'Hague Convention'), which was ratified by contracting states including Portugal and the Netherlands, states that decisions rendered in one contracting state will be recognised and enforced in another contracting state, with certain exceptions.

In the nearer term, class action defendants can attempt to address the uncertainty of the *Vivendi* test by seeking to expand the common law doctrine of *lis alibi pendens*. At present the *lis alibi pendens* doctrine can be invoked where there is an existing suit in another jurisdiction pending between the same parties regarding the same dispute. Specifically, *lis alibi pendens* allows one jurisdiction to recognise another matter pending in a different jurisdiction and either stay or dismiss the matter before it. *Lis alibi pendens* is not often recognised or utilised in US courts, but European countries are more familiar with the doctrine. For example, Articles 27–29 of the EC Convention have codified the common law principle of *lis alibi pendens*. Article 27(1) specifically states that 'any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction

of the court first seised is established' where the proceedings involve the same cause of action and between the same parties.

However, the *lis alibi pendens* doctrine only applies, at present, to concurrent proceedings. 'Second bite' actions, by definition, only occur after the conclusion of the earlier US class action. Moreover, and seemingly a greater problem, is that the same public policy and procedural concerns that create the possibility of 'second bite' claims in the first instance – a refusal to recognise US class action judgments – are likely to limit the expansion of the *lis alibi pendens* doctrine here.

In the absence of the level of certainty created by the common law doctrine of *res judicata* and the one-way intervention doctrine in the United States, and in the absence of treaties or conventions, we suggest that the defendant be permitted to choose to engage in class litigation with foreign class members, where a 'second bite' is possible, only as its own business calculus may dictate. It should not, however, be forced to accept this risk of 'second bite' actions as a new component of risk in class action litigation. If the defendant does not choose to submit to class litigation with this known risk, then a class including foreign citizens whose home courts may not give *res judicata* effect to the class litigation in the United States should not be permitted. In other words, we propose that US courts not grant class certification where the proposed class includes non-US citizens who may then be able to pursue the same claims in their home country.

Perhaps those class members can be offered the chance to 'opt in' to the class with their express and individual acknowledgment that their claims, other than through that class action proceeding, are thereby extinguished. Alternatively, perhaps that group of plaintiffs can obtain the equivalent of a declaratory judgment from the courts of their home jurisdiction, recognising the validity and enforceability of the US class action determination. Rule 23 should not, however, be stretched beyond what is fair.

In the end, the well-developed class action jurisprudence in the United States will continue to attract and sustain an active plaintiffs' bar. As the global economy continues to expand, with US interests broadening their involvement in foreign markets, it will be important to preserve those basic notions of fairness that were present at the inception of the class action device in order to ensure just results and a credible system of dispute resolution.