US Securities Litigation: Foreign Plaintiff Claims, to the Power of Four

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A Texan judge, Judge Ellison, who is presiding over a number of class actions against BP Oil relating to the Deepwater Horizon oil spill, has allowed foreign plaintiffs who purchased their shares on a non-US exchange, the London Stock Exchange ("the LSE"), to bring claims against a non-US company, BP Plc. In doing so, he is the first US judge to circumvent the July 2010 US Supreme Court decision in Morrisons.

Morrisons

D&O insurers well understand the basic tenet of securities litigation in the US. At its most simple, under Section 10 (b) of the Securities Exchange Act of 1934, US shareholders can claim share price losses from a company and its directors if the directors deliberately make untrue statements about the financial health of the company. Typically, the US media will write about some financial calamity affecting a US company, the share price will drop sharply, and US claimant lawyers will start a class action on behalf of all shareholders claiming that the "truth has emerged", and that their clients would not have traded the shares at the "pre-truth disclosure" price had they known the truth.

Twenty years of decisions in the US circuit courts determined jurisdiction of the US courts by two tests, namely the effects test (whether the fraudulent conduct affected securities traded in the US) and the conduct test (whether the fraudulent conduct was carried out on US soil).

Before the Supreme Court in Morrisons, the only claimants were foreign (non-US resident) shareholders of a foreign company who purchased their shares on foreign (non-US) exchanges (thus earning the sobriquet "F-Cubed"). The argument for US jurisdiction was based upon fraudulent conduct carried out in Florida.

The US Supreme court dismissed the action on essentially the following grounds

First, there was an overriding legal principle that unless a US statute expressly provided that it should have extra-territorial effect, it would not have extra-territorial effect. And, s10(b) did not.

Secondly, "the conduct test" had no relevance to determining jurisdiction, because the sole focus of s10(b) was on securities bought and sold in the US. Whether the fraudulent conduct affected securities bought and sold in the US was the sole determining factor for whether the US courts had jurisdiction.

The consequence of the decision in Morrisons has been to substantially narrow the exposure of non-US listed companies to US securities claims, and "F-Cubed" claims have not been successfully pursued in US courts, at least until the Decision of Judge Ellison.

Judge Ellison's decision in the BP Litigation on 30 September 2014

The foreign plaintiff claims in question were brought in a Federal Court in Texas, not under US Securities legislation, which would not have been possible following Morrisons, but in reliance on English common law principles. The judge divided the claims into two tranches, one comprising US plaintiffs, the second comprising foreign plaintiffs, both having purchased BP shares on the LSE. He determined in an earlier decision this year that the first tranche of domestic plaintiffs should be allowed to bring their claim on the basis that, although their claims were based upon English law, the litigation had a “distinctly American bent” given the spill occurred in the States, and the existence of the MDL Deepwater Horizon law suits already in his court. For that reason, he concluded the forum non conveniens arguments in favour of the US court. Having ruled in favour of the first tranche comprising domestic plaintiffs, it was a short step for him to also conclude he had jurisdiction to hear the foreign plaintiffs on similar forum conveniens grounds.

It is a departure from Morrisons. It not only allows foreign plaintiff shareholders who purchased shares on a foreign stock exchange to bring a claim against a foreign defendant in the US, but it allows them to do so under foreign law ("F-Cubed to the Power of Four"). D&O insurers will no doubt monitor claims brought on behalf of foreign plaintiffs that seek to follow this decision.

However, the significance of the decision should not be overplayed. The circumstances in which it will be successfully arguable that forum non-conveniens arguments favour such foreign based plaintiffs are likely to be rare. The facts

underpinning the MDL Deepwater Horizon litigation, which gave the foreign plaintiff claims a “distinctly American bent,” are pretty unique.

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