Corporations, Securities & Antitrust

The Rise and (Coming) Fall of "F-Cubed" Securities Litigation

*By George T. Conway, III**

With increasing frequency, the plaintiffs' bar has been filing what are being called "f-cubed" securities fraud cases in U.S. courts: cases on behalf of *f*oreign plaintiffs against *f*oreign companies for trading on *f*oreign exchanges.[1] Dozens of such cases have been filed in the past few years,[2] and they have met with some success. Two of the biggest securities class-action settlements in recent years, in fact, have involved foreign companies and classes that included foreign investors in those companies: Nortel Networks, which paid some $2.2 billion, and Royal Ahold, which settled for $1.1 billion.[3] To be sure, many of the recent f-cubed cases have been dismissed.[4] But enough have survived to make plaintiffs' lawyers' efforts to recruit foreign clients worthwhile.

The f-cubed cases raise many interesting legal questions, but none more interesting, or more important, than the most basic: *Do these cases even belong in American courts?* That is a question of interpretation—of the Securities Exchange Act of 1934, and, in particular, of Section 10(b) of the Securities Exchange Act of 1934,[5] the provision upon which securities class-action plaintiffs typically rely. In interpreting that statute, there is one point on which almost everyone agrees: Congress was silent on whether Section 10(b) may apply abroad.[6] The Supreme Court has never taken an f-cubed securities case, and the federal courts of appeals, in divining meaning from Congress's silence, have produced varying verbal formulas to tell us just when Section 10(b) applies abroad. District judges, for their part, have arrived at different answers in different cases—sometimes different answers in the *same* case—and have made the case law something of a mess. But the right answer, it turns out, is rather simple. Congress, by its very silence, has given it to us—and the Supreme Court has recently told us how.

The Conduct Test and its Inconsistent Application by the Lower Courts

The leading authority on the extraterritorial application of Section 10(b) came from the Second Circuit three decades ago, in an opinion authored by Judge Henry Friendly. The case was *Bersch v. Drexel Firestone, Inc.*,[7] and it involved perhaps the most notorious financial fraud of the 1960s and early 1970s: the IOS scandal. IOS was an overseas mutual-fund company, incorporated in Canada and headquartered in Europe. Its shares were marketed outside the United States throughout the "go-go" bull market of the 1960s. IOS ultimately collapsed, resulting in a slew of civil and criminal proceedings around the globe. The *Bersch* case was a class action brought on behalf of investors who purchased IOS shares in three public offerings. The offerings took place abroad, and the class was virtually entirely foreign. The plaintiffs asserted claims under Section 10(b) and other antifraud provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933, and argued that these provisions of American law applied to the IOS offerings because the IOS offerings were essentially run by investment banks, law firms, and accounting firms in New York.[8]

The plaintiffs had a point. The underwriters, their attorneys, and their accountants met many times in New York to plan one of the offerings; the prospectus for that offering was partly drafted and reviewed in New York; and bank accounts were opened in New York to receive proceeds from the offering.[9] The district court found that "discussions, investigations, decision-making and planning" for the offering "were carried on to a significant extent in the United States by Americans and others, and the acts abroad were substantially supervised from New York."[10] The district court concluded that the federal securities laws applied to the foreign investors' claims because "the[] circumstances viewed *in toto* disclose conduct constituting an essential link in the offering in the United States."[11] In the district court's view, it was enough that the alleged fraud would not have occurred but for the domestic conduct, and it did not matter that "the ultimate representations or inducements" constituting the fraud "do not appear to have occurred in the United States."[12]

The Second Circuit reversed, and held that the foreign plaintiffs could not sue. The court of appeals applied two tests to determine whether the federal securities laws could be applied to foreign securities transactions, tests that today have become known as the "effects" test and the "conduct" test.[13] The "effects" test was derived from an antitrust-law formulation in *United States v. Aluminum Company of America*,[14] and holds that the federal securities laws apply to fraudulent acts committed abroad "when these result in injury to purchasers or sellers ... in whom the United States has an interest, not where acts simply have an adverse affect on the American economy or American investors generally."[15] Injury to investors abroad does not meet the effects test.[16] Even where some Americans suffered losses domestically, as in *Bersch*, foreign investors cannot piggyback on those losses and bring claims for losses suffered abroad.[17]

The Second Circuit nonetheless held that foreign investors could sue under the federal securities laws if there were sufficient domestic conduct involved in a fraud. But instead of the "but for" causational link that the district court had found to be sufficient, the court of appeals held there had to be *direct* causation between the domestic conduct and the alleged fraud for the federal securities laws to apply. "[T]he anti-fraud provisions of the federal securities laws," the Second Circuit held in *Bersch*, "[d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States *directly caused* such losses."[18]

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And by "direct" causation, *Bersch* meant that relevant misrepresentations had to have been made in the United States. "The fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the purchasers' hands," Judge Friendly wrote.[19] That had occurred abroad, the court concluded, because "[h]ere the final prospectus emanated from a foreign source—London or Brussels … Toronto … and apparently the Bahamas and Geneva." The conduct directly causing a securities fraud, Judge Friendly emphasized, took place "where... the misrepresentations were communicated":

> Not only do we not have the case where all the misrepresentations were communicated in the nation whose law is sought to be applied ... or the case where a substantial part of them were ... but we do not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad.[20]

As Judge Friendly formulated it, the *Bersch* "conduct" test is easy enough to understand and to apply: if the misrepresentations took place abroad and the purchases took place abroad, a foreign purchaser's claim does not lie under the federal securities laws. It is a clear, bright-line rule. And Judge Robert Bork later wrote for the District of Columbia Circuit in *Zoelsch v. Arthur Andersen & Co.*,[21] the *Bersch* rule was "most restrictive"; Section 10(b) could only be applied to a foreign plaintiff's claim

> where the domestic conduct comprises all of the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5: the fraudulent statements or misrepresentations must originate in the United States, must be made with scienter and in connection with the sale or purchase of securities, and must cause the harm to those who claim to be defrauded, even though the actual damages and reliance may occur elsewhere.[22]

Faithful application of *Bersch*'s conduct test has led to the dismissal of many of the recent f-cubed cases. The typical factual scenario in these cases goes roughly like this: a foreign company, headquartered abroad, with most of its operations abroad and most of its equity trading abroad, nevertheless has some operations in the United States. The company suffers a setback in those American operations and, as a result, its share prices on foreign stock exchanges fall. Foreign plaintiffs, represented by American class-action lawyers, bring suit under Section 10(b) in federal district court, alleging that the foreign company had inflated its share prices on foreign exchanges by making false statements about its American operations. The foreign plaintiffs seek damages under the fraud-on-the-market theory for the losses they suffered when the truth about the American operations was revealed to the market, and they argue that that these losses were "directly" caused by conduct in the United States—namely, the creation in the United States of false information that was passed on to corporate headquarters abroad, and from there passed on to the market.[23]

The courts that have correctly applied *Bersch* have dismissed these claims, on the ground that the alleged misstatements to the market were made abroad. These courts have recognized that "the conduct relevant" to establishing the applicability of the federal securities laws "is the alleged misrepresentations or omissions made, not the underlying acts,"[24] and that "[s]imply making fraudulent statements about what is happening in the United States does not make those statements 'United States conduct' for purpose of the conduct test."[25] In such cases, the domestic conduct "amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad."[26] Where "the alleged activities in the United States were merely the objects of fraudulent representations made abroad,"[27] or the "inflated financial information emanated from the United States,"[28] but the statements made to investors were published abroad, the courts have held that the federal securities do not apply to foreign plaintiffs' claims.[29] These cases, like *Bersch*, apply a clear line: if, to use Judge Friendly's words, "the bullet was fired from places abroad"—if the allegedly fraudulent statements were transmitted from places outside the United States to the foreign investors—then the federal securities laws do not apply.[30]

Still, not all federal courts have adhered to *Bersch*'s version of the conduct test. The circuits have split, for example, over how the conduct test should be expressed. The Fifth, Seventh, and District of Columbia Circuits have followed the Second Circuit's approach.[31] The Third, Eighth, and Ninth Circuits, however, "generally require some lesser quantum of conduct" than the Second Circuit.[32] To the extent that the Third, Eighth, and Ninth Circuits have adopted "a common position, it appears to be that the domestic conduct need be only significant to the fraud rather than a direct cause of it."[33] Nevertheless, it remains unclear how these differences among the circuits would affect the outcome of the current crop of "f-cubed" securities class-action cases; the courts of appeals have yet to face any of these cases,[34] and their opinions on the conduct test have addressed rather different factual contexts—usually individual plaintiffs bringing claims of fraud in face-to-face transactions, and not fraud-on-the-market claims on behalf of a class.[35]

At the district court level, however, there is even greater disarray—even in courts that are bound by *Bersch*. Relying on interpretations of Second Circuit decisions in differing factual contexts after *Bersch*, some district judges seem to have dispensed with *Bersch*'s focus on where allegedly fraudulent communications to shareholders were issued, and instead applied balancing tests that purport to weigh the degree of foreign conduct involved in the case with the amount of domestic conduct upon which the plaintiffs rely.[36]

One major problem with such an approach was well expressed by Judge Bork in *Zoelsch*: it is "counterproductive to adopt a balancing test, or any test that makes jurisdiction turn on a welter of specific facts," because "[a]s we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently predictable."[37] As a result, they "thus present powerful incentives for increased litigation, which inevitably tends to defeat efforts to protect limited American judicial resources."[38]

The application of a balancing test also subjects foreign corporations to unpredictable and inconsistent legal standards. A French company, for example, should expect that the disclosures it makes in France to French shareholders who buy its shares on the Paris Bourse should be subject to French law,

and that any fraud claims its French shareholders may think they have should be governed by that law as well. But in one recent case in the Southern District of New York, a judge held that a French conglomerate should be subjected to a class action in the United States brought by European shareholders because its most senior executives spent more than a "*de minimis*" amount of time in New York on business.[39]

In another recent case in the same court, a judge likewise allowed European shareholders to sue another French conglomerate in the United States for statements the company made in Europe.[40] In the second case, the basis for the application of Section 10(b) was the fact that false financial data for an American subsidiary was sent to French headquarters and incorporated into the financial reports the company distributed abroad.[41] Echoing the district judge who was reversed in *Bersch* three decades earlier, the court found that Section 10(b) applied because the domestic conduct "served as an essential link" in the alleged fraud.[42]

Empagran and the End of F-Cubed Securities Litigation

This uncertainty in the district courts, however, comes at a time when the answer to the f-cubed question should be *more* certain than ever. The answer comes from two recent Supreme Court decisions rejecting the extraterritorial application of American law. In those decisions, the Supreme Court has emphasized the strength of both "[t]he presumption that United States law governs domestically but does not rule the world,"[43] as well as the "principle of general application ... that courts should 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'"[44]

The first and most important decision was *F. Hoffmann-La Roche Ltd v. Empagran S.A.* in 2004.[45] The case involved the perfect antitrust-law analog of an f-cubed securities-law case. It was a class action, and the question presented was "[w]hether plaintiffs"—foreign plaintiffs—"may pursue Sherman Act *claims* seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce."[46] The foreign plaintiffs in *Empagran* alleged a global vitamin price-fixing conspiracy that took place both in the United States and abroad, and harmed both domestic and foreign purchasers.[47] There was "significant foreign anticompetitive conduct," although "some of the anticompetitive price-fixing conduct alleged here took place in *America.*"[48] Customers who purchased vitamins in the United States were harmed, but the plaintiffs in *Empagran* bought vitamins abroad, and, as a result, suffered harm that was independent of the harm suffered by Americans.[49]

Unlike the plaintiffs in f-cubed securities cases, the foreign antitrust plaintiffs in *Empagran* relied on a statutory provision that expressly authorizes some extraterritorial application. The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") specifically places within the Sherman Act's reach conduct that "has a direct, substantial, and reasonably foreseeable effect" on United States commerce and "such effect gives rise to a [Sherman Act] claim."[50] The foreign plaintiffs argued, and the District of Columbia Circuit agreed, that because the global price-fixing conspiracy had effects on American commerce, and because those effects gave rise to claims of *others*—namely, the Americans who purchased vitamins in the United States—the foreign plaintiffs could sue for the injury they suffered abroad.[51]

The Supreme Court unanimously reversed—and held that the foreign plaintiffs could not sue. Justice Breyer's opinion for the Court did briefly consider the "language and history" of the statute.[52] But that was secondary: the Court looked *first* to, and discussed far more extensively, the rule that courts must "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[53] "This rule of statutory construction," the Court observed, "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."[54] The rule "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."[55]

The Court went on to hold that, under this rule of statutory construction, the FTAIA had to be construed to apply only when the plaintiffs themselves alleged that they suffered injury in the United States. The Court noted that when "*domestic* ... injury" is involved, "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable" even if it "interfere[s] with a foreign nation's ability independently to regulate its own commercial affairs."[56] But that is not true, the Court held, when the injury is foreign. When foreign harm is involved, the Court held, "the justification for that interference seems insubstantial."[57] Justice Breyer's opinion for the Court pointedly asked:

> But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*...
>
> Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?[58]

The Court held that there was "no good answer" to these questions—"no convincing justification for the extension of the Sherman Act's scope" to redress foreign harm.[59]

Justice Breyer emphasized, moreover, that it was the mere "*risk* of interference with a foreign nation's ability independently to regulate its own commercial affairs"—not proof of *actual* interference—that controlled the interpretation of the statute.[60] The idea that courts should weigh "comity considerations case by case" was "too complex to prove workable."[61] In the Court's view, what mattered was that other nations could disagree about what conduct should be illegal, and "even where [they] agree" on that, they could "disagree dramatically about appropriate remedies."[62] All of this created a risk, for example, that "to apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic ... laws embody."[63]

The Court accordingly concluded that Congress could not be presumed to have imposed American economic policies upon other nations "in an act of legal imperialism, through legislative fiat":

> Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. *But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.*[64]

The Supreme Court dealt with the extraterritoriality of United States law once again last year in *Microsoft Corp. v. AT&T Corp.*, a patent case.[65] There AT&T alleged that Microsoft, through the worldwide licensing of its Windows operating system, had induced the infringement of an AT&T patent for digitally encoding and compressing speech.[66] Microsoft conceded that it was liable domestically—that it had induced the infringement of the AT&T patent to the extent that it had licensed Windows to United States manufacturers of personal computers.[67] The Supreme Court faced the question of whether Microsoft could be held liable for licensing Windows abroad to foreign manufacturers. The controlling provision of the patent law, like the antitrust statute at issue in *Empagran*, expressly provided for extraterritorial liability. It provided that anyone who "supplied in or from the United States all or a substantial portion of the components of a patented invention," and "actively induce[d] the combination of such components outside of the United States," would be "liable as an infringer" if the combination would have "infringe[d] the patent [had it] occurred within the United States."[68]

The Court had to decide whether Windows, in the form in which Microsoft transmitted it abroad, was a "component of a patented invention" within the meaning of this provision.[69] Microsoft argued that the word should be read narrowly, and contended that the "master disks" it shipped abroad could not be a "component" because the disks could not themselves be used in a personal computer. AT&T, in contrast, argued that the master disks were properly treated as a "component" because Windows could be so easily transferred from the master disk format to a medium readable by a personal computer.[70] The Supreme Court ruled in favor of Microsoft, and held that Windows did not become a "component" until it was converted into a form readable by a personal computer, and, accordingly, that no "component of a patented invention" had been "supplied in or from the United States" under the statute.[71]

As in *Empagran*, the Court emphasized the importance of the presumption against extraterritoriality. Justice Ginsburg's opinion for a seven-Justice majority emphasized, among other points, that "United States law ... does not rule the world," that "'[f]oreign conduct is [generally] the domain of foreign law,'" and that foreign law "'may embody different policy judgments'" than those made by Congress.[72] In particular, the Court rejected AT&T's argument that the presumption did not apply because the statute specifically provided for extraterritorial application. The presumption "remains instructive in determining the *extent* of the statutory exception."[73] The Court also rejected AT&T's argument that the presumption did not apply because the statute at issue only applied "to domestic conduct, *i.e.*, to the supply of a patented invention's components 'from the United States.'"[74] The Court observed that AT&T's reading of the law would have had a significant—and impermissible—extraterritorial effect: it would have "'convert[ed] a single act of supply from the United States into a springboard for liability each time a copy of the software is subsequently made [abroad] and combined with computer hardware [abroad] for sale [abroad].'"[75]

Empagran and *Microsoft* sound the death knell for f-cubed securities actions. Indeed, the federal securities laws actually provide a *weaker* basis for extraterritorial application than the antitrust and patent laws at issue in those cases. The Securities Exchange Act contains no relevant provision *at all* that addresses liability for foreign conduct, let alone one that expressly provides, as did the statutes in *Empagran* and *Microsoft*, that such conduct may in some cases be subjected to American law.[76] Indeed, the provision upon which f-cubed and domestic securities plaintiffs most often rely—Section 10(b) of the Securities Exchange Act[77]—does not, by its terms, provide for any right of action at all. There is no textual or historical evidence that Congress even contemplated that *domestic* conduct could trigger a private suit under Section 10(b). As the Supreme Court emphasized once again this Term, "[t]he § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes."[78] Nothing in Section 10(b) in particular, or in the securities laws generally, suggests that Congress sought to provide redress for foreign plaintiffs who suffer foreign harm from foreign conduct, and under *Empagran* and *Microsoft* such congressional silence means that United States law must be construed not to apply.

F-cubed securities litigation poses exactly the sort of impermissible risks to international comity the Supreme Court described at length in *Empagran*. It poses the risk, in particular, of "unjustifiably permit[ting]" foreign plaintiffs "to bypass their [home countries'] own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic ... laws embody."[79] There are very many such competing considerations that go into designing a private securities enforcement system. A nation could even decide not to have such a system at all, and instead rely solely on enforcement by public authorities, or perhaps by exchanges or self-regulatory organizations.

If a nation chooses to allow actions by private investors, it must make a profusion of decisions about how that system will work, substantively and procedurally. It would have to decide, for example, whether to allow American-style opt-out class actions; what level of scienter to require; what standard of materiality to apply; whether to require plaintiffs to prove individual reliance, or to adopt a fraud-on-the-market theory as a substitute for actual reliance; whether to impose liability on corporate issuers for secondary trading in which the issuer was not a party; what standards of causation to apply; how to measure damages; whether, and to what extent, to allow contribution and indemnity; whether to allow discovery, and, if so, how much; what limitations periods to apply, if any; whether to apply the English rule or the American rule on attorneys' fees, or neither rule; and whether to use judges, juries, or specialized arbitrators to decide facts.

American judges and lawmakers have struggled with questions like these for years, and today, foreign nations are

increasingly addressing them as well.[80] *Empagran* and *Microsoft* teach that foreign nations should be allowed to reach their own conclusions, and should be allowed to apply those conclusions to the claims of people who suffer harm on their soil—and should not have their laws supplanted by American law "in an act of legal imperialism."[81] To paraphrase one of Justice Breyer's rhetorical questions in *Empagran*: *Why should American law supplant a foreign country's own determination about how best to protect its investors from fraudulent conduct engaged in significant part by its own companies?*[82]

The answer, as in *Empagran*, is that there is "no good answer to the question."[83]

Endnotes

1 *See*, *e.g.*, Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, Wall St. J., Sept. 2, 2005, at A1, *available at* http://tinyurl.com/2gky39 (subscription required); Andrew Longstreth, *Coming to America*, Am. Law., Nov. 1, 2006, *available at* http://tinyurl.com/2kd3my (subscription required).

2 *See* PriceWaterhouseCoopers, 2006 Securities Litigation Study 58-59 (noting number of cases brought against foreign issuers, without regard to whether the plaintiffs are domestic or foreign), *available at* http://tinyurl.com/397ep3.

3 *Id.* at 63; *see also* Longstreth, *supra* note 1.

4 *E.g.*, *In re* Royal Dutch/Shell Transport Sec. Litig., Civ. No. 04-374 (JAP), 2007 WL 3406599, at *11 (D.N.J. Nov. 13, 2007); *In re* Rhodia S.A. Sec. Litig., No. 05 Civ. 5389 (DAB), 2007 WL 2826651, at *12 (S.D.N.Y. Sept. 26, 2007); *In re* National Australia Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006), *modified on other grounds*, 2006 WL 3844463 (S.D.N.Y. Nov. 8, 2006), *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. Feb. 16, 2007); *In re* Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243 (WHP), 2006 WL 3026024, at *11-*12 (S.D.N.Y. Oct 25, 2006); Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 374 (D. Del. 2006); *In re* Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 115 (S.D.N.Y. 2005); Froese v. Staff, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003); Tri-Star Farms Ltd. v. Marconi, PLC, 225 F. Supp. 2d 567, 581 (W.D. Pa. 2002).

5 15 U.S.C. § 78j(b).

6 According to the Second Circuit, for example, "[t]he Securities Exchange Act is silent as to its extraterritorial application," Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991), so courts must use their "best judgment as to what Congress would have wished if these problems had occurred to it," Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), and, in particular, must decide "whether Congress would have wished the precious resources of the United States courts" to be devoted to extraterritorial acts, *id.* at 985.

7 519 F.2d 974 (2d Cir. 1975).

8 *See, e.g.*, *id.* at 978-84.

9 *Id.* at 985 n.24.

10 Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446, 457 (S.D.N.Y. 1974), *rev'd*, 519 F.2d 974 (2d Cir. 1975).

11 *Id.*

12 *Id.*

13 *See*, *e.g.*, United States v. Berger, 322 F.3d 187, 192 (2d Cir. 2003).

14 148 F.2d 416 (1945).

15 *Bersch*, 519 F.2d at 989.

16 *See*, *e.g.*, Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 128 & n.12 (2d Cir. 1998).

17 *E.g.*, *Bersch*, 519 F.2d at 997 ("direct[ing] that the district court eliminate from the class action all purchasers other than persons who were residents or citizens of the United States"). Applying *Bersch*, courts have consistently held that foreign plaintiffs who purchased securities abroad may not "bootstrap their losses... to independent American losses," *Tri-Star Farms*, 225 F. Supp. 2d 567, 573 n.7 (W.D. Pa. 2002)—meaning that the existence of claims of holders of securities of a foreign company traded on American exchanges (such as American Depositary Receipts) does not support the application of the securities laws to claims of those who purchased the company's securities on exchanges abroad, *see*, *e.g.*, *In re* Rhodia S.A. Sec. Litig., No. 05 Civ. 5389 (DAB), 2007 WL 2826651, at *8 (S.D.N.Y. Sept. 26, 2007); *In re* National Australia Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *2 n.6, *4 (S.D.N.Y. Oct. 25, 2006), *modified on other grounds*, 2006 WL 3844463 (S.D.N.Y. Nov. 8, 2006), *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. filed Feb. 16, 2007); *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 370 (S.D.N.Y. 2005); *In re* Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243 (WHP), 2006 WL 3026024, at *2, *11-*12 (S.D.N.Y. Oct 25, 2006); *In re* Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 110, 114-15 (S.D.N.Y. 2005); *In re* Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 9 & n.11, 11 (D.D.C. 2000); McNamara v. Bre-X Minerals Ltd., 32 F. Supp. 2d 920, 922, 924 (E.D. Tex. 1999); Kaufman v. Campeau Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1990).

18 *Bersch*, 519 F.2d at 993 (emphasis added).

19 *Id.* at 987.

20 *Id.*

21 824 F.2d 27 (D.C. Cir. 1987).

22 *Id.* at 31.

23 *See, e.g.*, *In re* Rhodia S.A. Sec. Litig., No. 05 Civ. 5389 (DAB), 2007 WL 2826651, at *10-*11 (S.D.N.Y. Sept. 26, 2007); *In re* National Australia Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *5, *7 (S.D.N.Y. Oct. 25, 2006), *modified on other grounds*, 2006 WL 3844463 (S.D.N.Y. Nov. 8, 2006), *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. Feb. 16, 2007); Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 367-68, 371 (D. Del. 2006); *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 364-65 (S.D.N.Y. 2005); *In re* Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 107-09, 111 (S.D.N.Y. 2005); Froese v. Staff, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003); *Tri-Star Farms*, 225 F. Supp. 2d 567, 578 & n.12 (W.D. Pa. 2002); *In re* Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 10 n.14 (D.D.C. 2000).

24 *Bayer*, 423 F. Supp. 2d at 111.

25 *In re* Bayer AG Sec. Litig., No. 03 Civ. 1546 (WHP), 2004 WL 2190357, at *17 (S.D.N.Y. Sept. 30, 2004) (quoting *Tri-Star*, 225 F. Supp. 2d at 578).

26 *National Australia Bank*, 2006 WL 3844465, at *8; *accord*, *e.g.*, *Rhodia*, 2007 WL 2826651, at *10.

27 *Rhodia*, 2007 WL 2826651, at *10.

28 *Froese*, 2003 WL 21523979, at *2.

29 *See*, *e.g.*, *Rhodia*, 2007 WL 2826651, at *10-*12; *National Australia Bank*, 2006 WL 3844465, at *6-*8; Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 368-74 (D. Del. 2006); *Bayer*, 423 F. Supp. 2d at 110-15; Froese v. Staff, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003); *Tri-Star Farms*, 225 F. Supp. 2d 567, 576-81 (W.D. Pa. 2002); *In re* Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 9-11 (D.D.C. 2000).

30 *See, e.g.*, *Rhodia*, 2007 WL 2826651, at *10 (quoting *Bersch*, 519 F.2d 974, 987 (2d Cir. 1975)); *National Australia Bank*, 2006 WL 3844465, at *6 (same).

31 *See, e.g.*, Robinson v. TCI/US West Cable Communications Inc., 117 F.3d 900, 906 (5th Cir. 1997) (expressly "adopt[ing] the Second Circuit's test"); Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 666 (7th Cir. 1998) (applying *Bersch* to private civil RICO claims); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31-32 (D.C. Cir. 1987) ("defer[ring] to *Bersch*" and adopting its "restrictive test").

32 *Robinson*, 117 F.3d at 906; *see* SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 420-21 (8th Cir. 1979); Travis v. Anthes Imperial, Ltd., 473 F.2d 515, 524 (8th Cir. 1973); Butte Mining PLC v. Smith, 76 F.3d 287, 290-91 (9th Cir. 1996); and Grunenthal GmbH v. Hotz, 712 F.2d 421, 424-25 (9th Cir. 1983).

33 *Id.* at 906 & n.11.

34 An appeal is currently pending in the Second Circuit in *National Australia Bank*, a case in which the author represents the lead defendants. *National Australia Bank*, *supra*, 2006 WL 3844465, *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. Feb. 16, 2007). Links to some of the briefs on that appeal, including three briefs of *amici curiae* urging affirmance, may be found at http://tinyurl.com/ystuyq.

35 Of the securities cases cited in notes 31-32 *supra*, only *Zoelsch* appears to have been a class action, but the case does not appear to have involved a fraud-on-the-market claim. *See Zoelsch*, 824 F.2d at 28-29. *Bersch v. Drexel Firestone*, as noted above, was a class action, but likewise did not involve a fraud-on-the-market claim, but rather a claim of fraud in initial public offering prospectuses. *See Bersch*, 519 F.2d at 978-81.

It is not clear that the standards adopted in the Third, Eighth, and Ninth Circuits would lead to different outcomes than would result under *Bersch*, as illustrated by recent dismissals of f-cubed claims by district judges in the Third Circuit. *See In re* Royal Dutch/Shell Transport Sec. Litig., Civ. No. 04-374 (JAP), 2007 WL 3406599, at *8-*11 (D.N.J. Nov. 13, 2007); Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 370-74 (D. Del. 2006); *Tri-Star Farms*, 225 F. Supp. 2d 567, 572-81 (W.D. Pa. 2002). There do not appear to have been any recent district court opinions applying the conduct test in the Eighth or Ninth Circuits.

36 *See*, *e.g.*, *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 375-76 (S.D.N.Y. 2005) (applying a fact-sensitive six-element test that "form[]s a constellation of factors that must be considered," and rejecting "notion that a... cohesive doctrine" may be applied); *In re* Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571 (RJH), 2004 WL 2375830, at *6 (holding that "the location from where the allegedly false statements emanated, while important, has not been the only factor courts considered" in applying the conduct test); *In re* Royal Ahold N.V. Secs. & ERISA Litig., 351 F. Supp. 2d 334, 359 (D. Md 2004) (holding that "the decisive factor" under the conduct test may be "whether the relevant fraudulent conduct underlying the false or misleading statements took place in the United States, regardless of the fact that the false or misleading statements relied upon were issued in overseas prospectuses or press releases"); *In re* Nortel Networks Corp. Sec. Litig., No. 01 Civ. 1855 (RMB), 2003 WL 22077464, at *8 (S.D.N.Y. Sept. 8, 2003) (holding that "degree of economic activity connecting [defendant] to the United States" supports application of federal securities laws; internal quotation marks and citation omitted).

37 *Zoelsch*, 824 F.2d at 32 n.2.

38 *Id.*

39 *Vivendi Universal*, 2004 WL 2375830, at *7 (holding also that "[t]he United States has a strong interest in imposing its law over the conduct of corporate officers operating out of the United States... even if the officers were only operating out of the United States for part of the alleged class period and even if the officers spent approximately half their time carrying on their official functions from a non-U.S. office"); *see also In re* Vivendi Universal, S.A. Sec. Litig., 241 F.R.D. 213, 246 (S.D.N.Y. 2007) (certifying class that includes purchasers from France, England, and the Netherlands).

40 *Alstom*, 406 F. Supp. 2d at 397.

41 *Id.* at 396.

42 *Compare id.* ("the domestically-based conduct certainly served as an essential link in the causal chain leading to the losses suffered by foreign purchasers abroad") *with* Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446, 457 (S.D.N.Y. 1974) ("these circumstances viewed *in toto* disclose conduct constituting an essential link in the offering in the United States"), *rev'd*, 519 F.2d 974 (2d Cir. 1975). Needless to say, *Alstom*'s holding directly conflicts with the holdings in the cases cited *supra* in notes 24-30.

43 Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746, 1758 (2007).

44 *Id.* (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004)).

45 542 U.S. 155 (2004).

46 Petition for a Writ of Certiorari at i, *Empagran*, 542 U.S. 155 (No. 03-724), 2003 WL 22762741; *see also Empagran,* 542 U.S. at 158 (describing issue as whether foreign plaintiffs could recover damages caused by "anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury").

47 *Empagran*, 542 U.S. at 159.

48 *Id.* at 159, 165.

49 *See id.* at 164, 175.

50 15 U.S.C. §§ 6a(1), (2); *see Empagran*, 542 U.S. at 162.

51 Empagran S.A. v. F. Hoffman-La Roche Ltd., 315 F.3d 338, 340, 347-48, 355-60 (D.C. Cir. 2003), *rev'd*, 542 U.S. 155 (2004).

52 *Empagran*, 542 U.S. at 169.

53 *Id.* at 164.

54 *Id.*

55 *Id.* at 164-65.

56 *Id.* at 165.

57 *Id.*

58 *Id.*; *accord id.* at 166 (repeating first question).

59 *Id.* at 166, 167 (emphasis added).

60 *Id.* at 165 (emphasis added).

61 *Id.* at 168.

62 *Id.* at 167.

63 *Id.*

64 *Id.* at 169 (emphasis added).

65 127 S. Ct. 1746 (2007).

66 *Id.* at 1753.

67 *Id.*

68 *Id.* at 1752 (quoting 35 U.S.C. § 271(f)(1)).

69 *Id.* at 1753-54.

70 *Id.* at 1754-56.

71 *Id.* at 1755-57.

72 *Id.* at 1758 (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioner at 28, *Microsoft*, 127 S. Ct. 1746 (No. 05-1056), 2006 WL 3693464).

73 *Id.*

74 *Id.* (quoting 35 U.S.C. § 271(f)(1)).

75 *Id.* at 1758-59 (quoting Brief for the United States as *Amicus Curiae*, *supra* n.72, at 29).

76 *See supra* note 6. Indeed, there is actually legislative history that cuts directly *against* the extraterritorial application of the federal securities laws. *See generally* Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677 (1990).

77 15 U.S.C. § 78j(b).

78 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 772 (2008); *see also*, *e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975) (both text of statute and legislative history fail to "provide *any* indication that Congress considered the problem of private suits" under Section 10(b)).

79 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167 (2004).

80 *See generally*, *e.g.*, Michael Goldhaber, *"Shell Model" Opens Door to European Class Actions*, Am. Law., Jan. 7, 2008 (discussing the Netherlands), *available at* http://tinyurl.com/34mkhh; Alexia Garamfalvi, *U.S. Firms Prepare for European Class Actions*, Legal Times, Jun. 25, 2007 (discussing Europe generally), *available at* http://tinyurl.com/344co4; Ashurst LLP, The Availability of "Class Actions" in Europe (Dec. 2007) (discussing the United Kingdom, France, Italy, Spain, Sweden, Germany, and the Netherlands); Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Acquis Communautaire, 15 J. Transnat'l L. & Pol'y 281 (2006) (discussing the European Union, Sweden, the Netherlands, France, and Germany); Ted Allen, More Nations Open the Door to Securities Lawsuits (Mar. 7, 2006) (discussing Australia, Canada, Germany, Israel, Italy,

South Korea, and Sweden), *available at* http://tinyurl.com/3xyaza; Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 Melb. U. L. Rev. 399 (2006); Michael Duffy, *"Fraud on the Market": Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 Melb. U. L. Rev. 621 (2005); Ted Allen, Interest in Class Actions Grows Outside the U.S. (June 14, 2005) (discussing Australia, Canada, the United Kingdom, France, the Netherlands, Germany, and the European Union), *available at* http://tinyurl.com/2m9s2b; Jason Betts, The Rise of Shareholder Class Actions in Australia (Apr. 21, 2005), *available at* http://tinyurl.com/3dtc5c; Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 Common L. World Rev. 123 (2002) (discussing Australia); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401 (2002) (discussing Germany, Sweden, the United Kingdom, Australia, and Canada); S. Stuart Clark and Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 289 (2001).

81 *Empagran*, 542 U.S. at 169.

82 *Cf. id.* at 165.

83 *Id.* at 166.