**Transnational Class Actions in United States Courts**

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American courts entertaining transnational class actions seek to shield defendants from the risk of follow-up lawsuits abroad. They concern themselves with the possibility that a defendant that prevails in a United States court may nevertheless face follow-up claims by class members in other nations' courts if the American class action judgment is not recognized. To reduce this risk, American courts exclude foreign plaintiffs from transnational class actions. This exclusion may shield defendants from follow-up litigation, but it undermines important competing goals, such as compensating victims, deterring wrongdoing, and advancing the policies underlying the laws invoked in the litigation.

Recent changes in the American legal landscape enhance the risk that transnational class actions will fail to achieve the goals of compensation, deterrence, and advancement of the policies underlying the laws at issue. Three particular changes in the legal landscape deserve attention here: the revitalized presumption against extraterritoriality; the proliferation of class action waivers; and increasing obstacles to class certification.

First, in recent years, the United States Supreme Court has revitalized the presumption against extraterritoriality. Under this presumption, unless a statute clearly evinces an intention on the part of Congress for the law to apply beyond the territorial limits of the United States, then it applies only domestically. Limiting the extraterritorial reach of United States law translates into compensation for fewer non-Americans (or Americans living abroad) and less deterrence of wrongdoing in violation of United States law that occurs outside our borders.

Second, the Supreme Court has upheld class action waivers that corporations have included in many types of contracts. These clauses not only deny customers, employees, and others the opportunity to present their claims in court, but also deprive them of the opportunity to join together with others to present their claims in a collective proceeding (whether a class action or a class-wide arbitration). In the Court's view, the Federal Arbitration Act preempts state law that deems class action waivers unconscionable. The Court has even upheld a class action waiver where the costs of presenting a claim under federal law would have been prohibitive for an individual suing alone. Thus, even where a class action waiver constituted a prospective waiver of the right to pursue a statutory remedy, the Court upheld it: "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."

Third, as the geographical reach of United States law is shrinking and the number of class action waivers is skyrocketing, the requirements for gaining certification of an American class action are increasing. The Supreme Court has required proof substantiating the merits of the plaintiffs' claims at the certification stage, even though the governing Federal Rule requires only a showing of questions common to the class. Just in the last month the Court has heard arguments in cases that could make it easier for defendants to dispose of class actions by "picking off" the named plaintiff; by challenging the named plaintiff's standing; and by challenging the use of representative and statistical evidence.

Taken together, these three changes in the legal terrain – all at the hands of the Court – threaten the utility of transnational class actions to compensate victims, deter wrongdoing, and advance the policies underlying the laws invoked in the litigation.

The trajectory of the transnational class action in United States courts is not likely to be altered, at least not in the short term. Congress is not likely to act; proposed amendments to the Federal Rules are not likely to be adopted; and state attorneys general are not likely to have the resources or, in some cases, even the standing to press claims on behalf of their citizens. Even if state attorneys general filed such lawsuits, however, the suits would rarely benefit non-American victims of wrongdoing.

Attention must therefore shift to the prospect of effective group litigation in other nations. At least three challenges exist. First, given the skepticism outside the United States of contingent fee arrangements, alternate means of funding group litigation must exist or be developed. Second and related, parties may be reluctant to initiate group litigation abroad if they will have to pay the defendant's attorneys' fees if they lose the group action. Third, skepticism of American-style opt-out class actions may result in group litigation on behalf of fewer victims of wrongdoing, thereby diminishing the potential of the action to compensate victims and deter wrongdoing. I welcome comments on both the framing of the problem and potential remedies.