

Economic Issues in Cross-Border Litigation

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Presentation Overview

- Expert Discovery in Cross Border Actions
- Economic Analysis in Securities Cases
- Considerations in Assessing Damages

Expert Discovery in Cross-Border Actions

- While legal settings can differ, the tools and methods of economic analysis for assessing liability and damages are broadly similar for actions that are brought in the U.S., Canada, and other jurisdictions.
 - Economic experts often opine on
 - Assessment of damages conditional on liability
 - Whether the claims raise common issues across a proposed class of plaintiffs
 - Whether and how damages can be measured systematically across a proposed class of plaintiffs
 - The legal systems can differ on procedure and standards of proof prior to trial, but the tools of economic analysis are broadly similar.

Expert Damages Analysis

- Economic analysis is broadly similar across different legal systems but can vary in its complexity.
- At the class certification stage, the economic analysis across the two jurisdictions can vary significantly.
 - Per *Comcast*, U.S. plaintiffs proffering a class-wide damages model must show that the damages model is consistent with the theory of liability
 - Per *Prosys*, Canadian plaintiffs must articulate the existence of a sufficiently plausible class-wide damages model that can be employed at the merits phase
- At the merits stage, economic analysis can be similar.
- Cross-border class actions can raise questions when experts have access to nonpublic data in different jurisdictions (e.g. *Irving Paper*).

Expert Discovery at Class Certification and Merits

- In U.S. class actions, class certification fact discovery is substantial, while Canadian actions have limited fact discovery prior to class certification.
- Analysis by experts in securities actions typically employs publicly-available data.
 - E.g. public stock price data, analyst reports, SEC/SEDAR filings, public press
- By contrast, detailed empirical liability and damages analysis in antitrust or consumer fraud actions often employs nonpublic data obtained through discovery, leading to substantial differences between the U.S. and Canada at class certification.
 - E.g. customer sales data, production data, sales contracts

Example of Economic Analysis: Securities Class Actions

- In securities class actions, the focus of economic analysis is often:
 - Assessing market efficiency
 - Measuring the impact of any alleged misstatement, omission, or disclosure
 - Conducting damages analysis

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U.S. and Canadian Securities Class Actions

- In the U.S., plaintiffs are allowed a rebuttable presumption of reliance
 - Under *Basic*, plaintiffs typically assert reliance via the "fraud-on-the-market" theory by asserting that markets are efficient.
 - Experts often use the *Cammer* five factors and the *Krogman* three factors
 - Class certification expert discovery in the U.S. often focuses on questions of market efficiency
- For statutory secondary market claims under the Ontario Securities Act ("OSA"), plaintiffs need not show reliance. The burden of proof is to show that
 - A misrepresentation or omission was made, and
 - Plaintiffs acquired the stock after the misrepresentation
- OSA statutory damages impose a strict cap.
 - The greater of 5% of the issuer's market capitalization and \$1 million
- Rule 10b(5) damages in the U.S. are not capped by statute.

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Cross-Border Securities Damages Example

Example: Company XYZ's stock is cross listed in the U.S. (NYSE) and Canada (TSX)

- Total of 100 million shares are registered. They are freely tradable in both the U.S. and Canada, and 50% of trading occurs in each country.
- Company XYZ makes a disclosure of missed earnings.
- XYZ stock falls 5% following the disclosure of missed earnings.
- Class actions are filed in both U.S. and Canada.

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Cross-Border Securities Damages Example (cont'd)

- In settlement negotiations in Canada, plaintiffs' expert Dr. Smith uses a damages model applied to the 100 million shares and reported TSX trading volume. Dr. Smith estimates \$200 million in damages.
- In settlement negotiations in the U.S., plaintiffs' expert Dr. Jones uses the same damages model applied to the 100 million shares and reported NYSE trading volume. Dr. Jones estimates \$200 million in damages.
- Simple exercise: Assume XYZ stock is not cross-listed, but rather trades in only one market.
 - It has 100 million shares and the same daily trading volume, but on only one exchange in a single jurisdiction
 - Dr. Smith/Jones' damages model results in \$275 million in total damages
 - Why the difference between \$275 million and \$400 million?
 - The model is sensitive to assumptions about the likelihood of shares to trade with other putative class members
 - The two separate models can end up double counting damages because some of the 100 million shares end up damaged in both the U.S. and Canada.

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Questions of Jurisdiction for Estimating Damages

- Following *Morrison*, U.S. courts have generally declined to exercise jurisdiction over non-U.S. issuers, with the exception of sponsored ADS or cross-listed securities.
- Ontario examples:
 - Certified a global class including non-residents of Canada regardless of whether they purchased securities through the TSX or a U.S. exchange (*Silver v. IMAX Corp*)
 - Certified a class including non-residents of Canada in an action involving a security that only traded on the TSX (*Dobbie v. Arctic Glacier*)
- Significant implications for assessing damages when parallel actions are pending and class definitions are uncertain

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