

LITIGATION

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Fitting U.S. Law To Extraterritorial Activities

Courts address the extent of that reach in today's global economy.

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WHAT RECOURSE does your client, a famed musician, have when he learns that his name is being used to promote a line of teen clothing in a foreign country, via a Web site based overseas? And when your client, a foreign manufacturer, is accused of engaging in a conspiracy to fix prices throughout the world, are consumers in other countries entitled to invoke the protection of U.S. anti-trust laws?

Due to the nature of the world economy, these and similar, related issues have been percolating in the court system with greater frequency in recent years. As never before, it is common for businesses to sell goods, provide services, and maintain operations in many different countries. Companies have the ability to communicate and conduct transactions with millions of customers around the world, using mere key strokes.

Increasingly, then, courts can be expected to address whether, and to what extent, U.S. law is applicable to activities that take place outside the United States, but that relate to U.S. markets. Accordingly, counsel representing companies based outside the United States, or United States-based companies with foreign operations, should be aware of the legal framework in which courts decide whether to apply U.S. law to conduct that takes place outside the country.

When Does U.S. Law Apply?

The determination whether U.S. law applies to foreign conduct involves three core considerations:

- (1) whether Congress intended the particular statute to apply to conduct abroad;
- (2) whether application of U.S. law in a given situation would be reasonable; and
- (3) whether application of U.S. law may create a conflict with foreign law.

As a general matter, Congress is free to

extend the scope of U.S. law to include foreign conduct. See *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003). However, it is presumed that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 123 S. Ct. 1752, 1755 (2005), citing *Foley Bros., Inc. v. Fillardo*, 336 U.S. 281, 285 (1949).

To overcome this "presumption against extraterritoriality," the party seeking to apply U.S. law to foreign conduct must show that "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975).

Congressional intent may be proven in many ways. Foremost, the language of the statute itself may show that it is intended to apply extraterritorially. For example, as amended by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), the Sherman Act proscribes foreign conduct, with certain limited exceptions, that "has a direct, substantial, and reasonably foreseeable effect" in the United States, provided the conduct "give[s] rise to a claim" under the statute. 15 U.S.C. §6(a).

A statute's legislative history may provide valuable insight as well. See *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006) (legislative history indicated Sarbanes-Oxley whistleblower provision was only intended to apply domestically).

Indeed, the conduct that the statute intends to regulate may itself indicate Congressional intent. See *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("It is natural to expect that a statute that protects the borders of the United States, unlike ordinary domestic statutes, would reach those outside the borders.").

Based on an analysis of congressional intent, courts have long held that many U.S. statutes can be applied to conduct overseas. For instance, even before the passage of the FTAIA, courts held that the Sherman Act could be applied to foreign conduct as long as the conduct was intended to, and did, result in

substantial and direct effects in the United States. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-444 (2d Cir. 1945).

Likewise, U.S. trademark, securities, and racketeering laws have been applied to conduct outside the United States, when the conduct in question exhibited a sufficient relationship to this country. See *Steele v. Bulova Watch Co., Inc.*, 344 U.S. 280, 285-289 (1952) (extraterritorial application of the Lanham Act depends on citizenship of defendant, the effects of defendant's conduct on U.S. commerce, and whether there is a conflict between U.S. and foreign law); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (Securities and Exchange Act of 1934 extends to foreign conduct that is intended to, and does, result in direct and substantial effects in the United States); *North-South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051-1052 (2d Cir. 1996) (RICO applies to foreign conduct that results in direct and substantial effects in the United States).

Consider International Comity

Where the "presumption against extraterritoriality" is overcome and the conduct is sufficiently related to the United States to be subject to U.S. law, the next consideration courts will address is whether extraterritorial application of a particular U.S. statute is tempered by considerations of international comity. That is, "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-815 (1993) (Scalia, J. dissenting), quoting *Murray v. Schooner Charming Betsy*, 2 L. Ed. 208 (1804) (Marshall C.J.).

Congress has the constitutional authority to legislate extraterritorially without regard to "customary international law," but will be presumed to observe customary limits on jurisdiction. *Id.* at 815; see also *Yousef*, 327 F.3d at 86 ("[Congress] may legislate with respect to conduct outside the United States, in excess of the limits posed by international law." (internal citation and quotation omitted)).

The touchstone for determining whether U.S. law applies to specific foreign conduct, is

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whether the application of U.S. law is reasonable in light of the interests of other nations. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004); see also Restatement (Third) of Foreign Relations Law §403(2) (setting forth factors for courts to weigh in determining whether application of U.S. law to foreign conduct is reasonable).

Finally, courts will consider whether application of U.S. law to conduct outside of this country would conflict with foreign law. In such instances, the Restatement counsels courts to weigh the interests of the U.S. against those of the other interested jurisdiction, and to apply the law of the nation that has the greater interest. See Restatement (Third) of Foreign Relations Law §403(3).

However, the Supreme Court has declared that a true conflict of laws only arises when it is impossible for a party to act in accordance with both U.S. and foreign law. See *Hartford Fire Ins. Co.*, 509 U.S. at 799. "No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" Id. at 799 (quoting Restatement (Third) of Foreign Relations Law, §415, comment j).

Applying Principles to Cases

In recent years, courts have increasingly been called upon to apply these well-established principles to cases reflecting the global nature of current corporate activities. A few examples are provided:

In *Carnero*, 433 F.3d 1, the First Circuit held that a whistleblower provision of the Sarbanes-Oxley Act, 18 U.S.C. §1514A(a), did not apply to an Argentine employee, working in Argentina, for an Argentine subsidiary of Boston Scientific.

The plaintiff claimed that his employment was terminated in retaliation for reporting alleged accounting misconduct. The First Circuit held that the employee was not protected by the whistleblower provision because that provision was only intended to apply domestically—even though the company, itself, could be criminally liable for the same conduct. Id. at 10. The court relied on the presumption against extraterritorial application of U.S. law, and also expressed concern that application of the whistleblower provision would allow U.S. courts to "delve into the employment relationship between foreign employers and their foreign employees." Id. at 15.

Similarly, in *Shekoyan v. Sibley International*, 409 F.3d 414 (D.C. Cir. 2005), the D.C. Circuit affirmed the dismissal of an action for wrongful termination under Title VII of the Civil Rights Act of 1964 by a U.S. resident working for a consulting firm in the Republic of Georgia. Although Title VII has been amended to apply to U.S. citizens employed by U.S. companies in foreign countries, the court held that Title VII was inapplicable, because the plaintiff—while a lawful U.S. resident—was

not a U.S. citizen. Like the court in *Carnero*, the court relied on the presumption against extraterritorial application of U.S. law in determining congressional intent, and therefore applied the statute narrowly.

In *McBee v. Delica Co.*, 417 F.3d 107 (1st Cir. 2005), the First Circuit held that a Japanese corporation's Internet advertisements for its "Cecil McBee" clothing line were not subject to the Lanham Act.

The plaintiff, Cecil McBee (a famed jazz bassist), sued Delica Co. for falsely suggesting that McBee endorsed or sponsored Delica's clothing line. Id. at 115. He sought an injunction prohibiting Delica from advertising the clothing on a Web site "created and hosted in Japan." Id. at 112.

The court observed that due to the "nature of the Internet," the Web site was "reachable from the United States," but ruled that this alone did not support application of the Lanham Act. Id. at 123. The court reasoned that automatic application of the Lanham Act whenever a Web site is visible in the United States "would eviscerate the territorial curbs on judicial authority that Congress is, quite sensibly, presumed to have imposed in this area." Id. at 124.

As a result, McBee was required to prove that the defendant's Web site advertisements resulted in "substantial effects" on U.S. commerce. McBee was unable to make the required showing, because the Web site was "written almost entirely in Japanese characters" and there was no proof that American consumers utilized the Web site. Id. (Interestingly, had Delica been a U.S. company, McBee would not have been required to prove that the use of the allegedly infringing mark on a foreign Web site resulted in substantial effects in the United States. Id. at 118.)

The Federal Circuit recently considered the reach of U.S. patent law in *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005).

NTP, the U.S. patent holder for both a system and method for directing e-mail from a user's computer to a handheld device, sued the Canadian corporation Research In Motion (RIM) for patent infringement pursuant to 35 U.S.C. §271(a). It alleged that RIM infringed its patents by making, selling, and importing into the United States the defendant's BlackBerry™ products and related software. RIM defended on the ground that U.S. patent law did not apply "because the BlackBerry Relay component of the accused system is located in Canada." Id.¹

Recognizing that a claim arising under §271(a) "is only actionable against patent infringement that occurs within the United States," id., the court upheld the application of U.S. law to NTP's claim for "system" infringement, because the "use" and "benefit" of the claimed system (i.e., use of the BlackBerry handheld) by RIM's customers occurred within

the United States. Id. at 1317. The court reached a contrary conclusion as to NTP's "method" infringement claims, holding that §271(a) requires "each of the steps [of the claimed process to be] performed within this country" for liability to attach. Id. at 1318.

The U.S. Supreme Court recently denied RIM's petition for a writ of certiorari. See *Research In Motion, Ltd. v. NTP, Inc.*, No.05-763, ___U.S.___, 2006 WL 152096 (Jan. 23, 2006). Thus, millions of BlackBerry users who rely on their handheld devices await a Feb. 24 hearing that may decide whether service is shut down.

Finally, the U.S. Supreme Court has placed limits on the extent to which U.S. antitrust law can be applied to overseas conduct, even where the conduct has substantial effects in the United States.

In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, supra, foreign purchasers of vitamins claimed that foreign and domestic vitamin manufacturers and distributors engaged in price-fixing, thereby raising the price of vitamins to customers in the United States and other countries. The Court held that the Sherman Act could not be applied to "price-fixing activity that is in significant part foreign," despite the existence of adverse domestic effects, because the plaintiffs' claims were based on injuries that were sustained outside the U.S. and did not proximately result from any injury within the U.S. Id. at 162.

The Court rejected application of the Sherman Act because Congress had an "insubstantial" interest in regulating price-fixing activity causing injury to foreign purchasers, and there was a "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." Id. at 165. The Court concluded that application of U.S. antitrust laws in this situation would be unreasonable and contrary to traditional notions of comity.

Increasingly, the global nature of current business activities is likely to result in litigation that requires courts to consider whether U.S. law can be applied to conduct in other countries. In the future, we should expect both courts and Congress to address and clarify the extraterritorial scope of U.S. laws with more frequency. As a result, foreign companies whose activities relate to U.S. markets, and U.S. companies doing business abroad, should be aware that their conduct may be subject to extraterritorial application of U.S. law.

1. Through a series of intermediate steps, the "Relay" component of RIM's system receives e-mail messages from the user's mail server, and delivers the message to the user's BlackBerry handheld device. Id. at 1290.