

TheGavel

COMMERCIAL LITIGATION NEWSWIRE

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New York Court of Appeals Approves Derivative Lawsuits for LLCs

Until recently, the ability of limited liability company (“LLC”) members to institute derivative actions on behalf of the company has been a contested issue. As previously reported, see *The Gavel* at 1 (Issue 2, June 2007), the Appellate Division, First Department in *Tzolis v. Wolff*, 39 A.D.3d 138, 829 N.Y.S.2d 488 (1st Dep’t 2007), held that the New York Limited Liability Company Law’s (“LLC Law”) omission of language allowing for derivative actions is not sufficient to deprive a limited partner of the right to assert a claim on behalf of the LLC. The First Department’s holding was counter to the Second Department’s holding in *Hoffman v. Unterberg*, 9 A.D.3d 386, 388-89, 780 N.Y.S.2d 617, 620 (2d Dep’t 2004).

The New York Court of Appeals finally settled this issue in *Tzolis v. Wolff*, 2008 WL 382345, 10 N.Y.3d 100, ___ N.Y.S.2d ___ (N.Y. Feb. 14, 2008). Affirming the First Department’s ruling, the Court held that even though the LLC Law does not expressly authorize members to bring such actions, derivative lawsuits may be instituted by LLC members on behalf of their LLCs.

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Procedural Background

In *Tzolis*, minority members of an LLC brought a derivative action on behalf of the LLC, alleging breaches of fiduciary duty in connection with the sale and lease of the LLC’s apartment building, and seeking a declaration that the sale and lease were void. *Id.* at *1. The trial court dismissed these claims, reasoning that they could not be brought by plain-

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LLCs

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tiffs individually, because they were “to redress wrongs suffered by the corporation.” *Id.* (citation omitted). The First Department reversed, holding that LLC derivative lawsuits are permitted, and granted two defendants permission to appeal on a certified question. *Id.* (citation omitted).

The Majority Opinion’s Holding and Reasoning

Affirming the First Department’s order, the four judges in the majority relied on a long history of English and American cases allowing derivative actions in other contexts. Writing for the majority, Judge Robert S. Smith noted that, although the ability to bring a derivative action on behalf of an ordinary corporation was eventually codified by statute, the absence of a statute had not prevented courts from recognizing the derivative action as a remedy. *Id.* at *2-*3 (citing *Robinson v. Smith*, (1832) 3 Paige Ch. 222, 232 (Ch.) (holding that a beneficiary could institute a lawsuit on behalf of a trust); *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294 (2d Cir. 1965) (holding that limited partners could sue on behalf of a partnership); *Riviera Congress Assoc. v. Yassky*, 18 N.Y.2d 540, 547, 277

(internal citations omitted). Thus, the Court held, in light of such precedents, LLC members are authorized to use the same legal remedy as is available to corporate shareholders:

To hold that there is no remedy when corporate fiduciaries use corporate assets to enrich themselves was unacceptable in 1742 and in 1832, and it is still unacceptable today. Derivative suits are not the only possible remedy, but they are the one that has been recognized for most of two centuries, and to abolish them in the LLC context would be a radical step.

Id. at *3.

Since the passage of the LLC Law in 1994, which omits any reference to derivative lawsuits, some lower courts have held that LLC members have no derivative remedy. *Id.* at *3 (citing *Hoffman v. Unterberg*, 9 A.D.3d 386, 388-89, 780 N.Y.S.2d 617, 620 (2d Dep’t 2004); *Lio v. Zhong*, 10 Misc. 3d 1068(A), 814 N.Y.S.2d 562 (Table), 2006 WL 37044, at *3 (N.Y. Co. Jan. 6, 2006); *Schindler v. Niche Media Holdings, LLC*, 1 Misc. 3d 713, 772 N.Y.S.2d 781 (Sup. Co. N.Y. Co. 2003)); see also *Caprer v. Nussbaum*, 36 A.D.3d 176, 825 N.Y.S.2d 55 (2d Dep’t 2006). Nevertheless, because the “[l]egislature obviously did not intend to give corporate fiduciaries a license

Although the ability to bring a derivative action on behalf of an ordinary corporation was eventually codified by statute, the absence of a statute had not prevented courts from recognizing the derivative action as a remedy.

N.Y.S.2d 386, 392 (N.Y. 1966) (“[t]here can be no question that a managing or general partner of a limited partnership is bound in a fiduciary relationship with the limited partners . . . and the latter are, therefore, *cestuis que trustent*. . . . It is fundamental to the law of trusts that *cestuis* have the right, ‘upon the general principles of equity’ and ‘independently of [statutory] provisions’”)

to steal,” the Court of Appeals ruled that LLC members must also have some legal recourse. *Id.*

Conceivably responding to this need, some courts have held LLC members may institute direct claims against fiduciaries for conduct that harmed the LLC, which obscures the traditional line between direct and derivative claims. *Id.* at *3-*4 (citing *In re Marciano v. Champion Motor Group*,

Inc., 2007 N.Y. Slip Op. 34071(U), 2007 WL 4473342 (Trial Order) (Sup. Co. N.Y. Dec. 7, 2007); *Out of the Box Promotions LLC v. Koschitzki*, 15 Misc.3d 1134(A), 841 N.Y.S.2d 821 (Table) (Sup. Co. N.Y. Co. May 10, 2007); *Lio* 2006 WL 37044, at *3). The Court of Appeals noted, however, that an LLC member's using a direct claim as a proxy for a derivative lawsuit

ultimately failed. *Id.* at *10 ("The deletion from the adopted LLC legislation of provisions authorizing derivative actions manifests a legislative bargain: the Senate refused to pass an LLC statute if it allowed for derivative suits").

Disagreeing with the Court's holding, the dissenters noted: "the majority has effectively rewritten the law to

The Court has concluded that the derivative action right exists as a matter of common law.

raises certain critical issues. *Id.* at *4. For example, an LLC member can be liable for the same theft or fraud to multiple LLC members. *Id.* Thus, absent the availability of the derivative remedy to LLC members, there is a potential for an LLC member to incur double liability. *Id.*

In addition, the majority rejected the appellant's and the dissent's argument that the failure of the LLC law expressly to authorize derivative lawsuits suggests that the legislature had implicitly enjoined such lawsuits. *Id.* The Court noted the LLC Law's legislative history fails to imply that the legislature intended to "eliminate, rather than limit or reform, derivative suits." *Id.* (emphasis in original). Though the legislature did not enact legislation governing LLC derivative actions, the LLC law's legislative history does not address the omission. *Id.*

The Dissent

The dissenters, Judge Susan Phillips Read, Judge Victoria A. Graffeo and Judge Theodore T. Jones Jr., argued that the legislative history of the LLC Law suggests the intent of the legislature to prohibit LLC derivative actions. *Id.* at *9. Writing for the dissenters, Judge Read indicated that due to the New York State Senate's refusal to allow LLC derivative actions, several of the New York State Assembly's bills that had been introduced in 1992 and 1993 allowing LLC derivative lawsuits

add a right that the Legislature deliberately chose to omit. For a Court that prides itself on resisting any temptation to usurp legislative prerogative, the outcome of this appeal is curious." *Id.* at *15.

Conclusion

The New York Court of Appeals' decision in *Tzolis* should finally settle the issue of whether an LLC may bring a derivative claim on behalf of the LLC. The Court has concluded that the derivative action right exists as a matter of common law. ©

Southern District Rejects Suit Against ICC Court Seeking Review of Decision to Reject Arbitration

The United States District Court for the Southern District of New York recently addressed the reviewability of a decision by the International Chamber of Commerce (“ICC”) Court regarding whether a matter pending before the ICC was arbitrable. In *Global Gold Mining, LLC v. Peter M. Robinson*, 533 F. Supp. 2d 442 (S.D.N.Y. 2008), Judge Gerard E. Lynch dismissed the petition of Global Globe Mining, LLC (“GGM”), which sought to compel the ICC Court to refer an arbitrability determination to a full arbitration panel.

Factual Background

In 2003, GGM entered into a contract to purchase the shares of an Armenian company from its three sharehold-

ers. Under Article 6(2) of the ICC Rules, when a Respondent questions the arbitrability of a dispute, or fails to respond to an arbitration demand, the ICC Court is empowered to make an initial determination of the arbitrability of the dispute. In this case, the ICC Court made a *prima facie* determination that the claims against the three disclosed shareholders were arbitrable and, therefore, referred them to an arbitral panel. The ICC Court also determined that the dispute against Ayvazian was not arbitrable. *Id.* at 443.

Thereafter, GGM brought a petition against the members of the ICC Court in the New York State Supreme Court, seeking an order referring the dispute with Ayvazian, including the question of its arbitrability, to the panel that had been convened to arbitrate the dispute involving the other shareholders. The Respondents removed the case to federal court and thereafter filed a motion to dismiss for improper service, lack of personal jurisdiction, and failure to state a claim.¹ *Id.*

The Analysis

As Judge Lynch noted in his decision, the principal question presented in the case was whether the District Court had the authority to “review” the ICC Court’s threshold decision not to refer the claim against Ayvazian to an arbi-

The principal question presented in the case was whether the District Court had the authority to “review” the ICC Court’s threshold decision not to refer the claim to an arbitration panel for a decision on whether such claim was arbitrable.

tration panel for a decision on whether such claim was arbitrable. The Contract contained an arbitration clause, providing for arbitration of any disputes between the parties in New York under the ICC Rules. In December of 2006, GGM initiated an arbitration against the three shareholders, as well as a fourth individual, Varden Ayvazian (“Ayvazian”), who GGM alleged was an undisclosed shareholder of the corporation. None of the four individuals responded to the arbitration demand.

Under the terms of the Contract and the applicable Rules, the Parties had committed to arbitrate any question of “arbitrability.” And, as noted above, under the ICC Rules,

¹ Respondents subsequently abandoned their service and jurisdictional objections.

where there is a dispute as to the arbitrability of a claim, or where a Respondent fails to respond to a demand for arbitration, the ICC Court is empowered to make an initial decision as to whether the dispute is arbitrable. Should the ICC Court decide that the matter at issue is arbitrable, it refers the matter to a full arbitration panel, which then makes a final determination on the arbitrability question. However, where the ICC Court determines that the dispute is not arbitrable, the Rules specifically direct that the aggrieved party may seek redress in a court. As the District

determination of arbitrability. *Id.* at 445. As the District Court noted, the purpose of the ICC Court’s initial screening is to determine if there is any basis for arbitrability. If GGM’s position were correct (i.e., that even if the ICC Court determined that there were no basis for arbitrability, it nonetheless would be required to refer the question to an arbitral panel), this initial screening process would be rendered virtually meaningless.

Second, the District Court noted that, having agreed that

There were no precedents cited by GGM to support the unique relief that it sought: compelling arbitration by pursuing a lawsuit against an arbitral organization.

Court noted, however, under the ICC Rules, the manner in which the aggrieved party is to proceed in a court is less than clear. GGM contended that the ICC Rules contemplated that the party seeking relief should bring an action for “judicial review” of the ICC Court’s decision. Noting that it had agreed to arbitrate *all* disputes, as well as the many precedents that allow arbitration panels to decide questions of arbitrability, GGM argued that the ICC Court was required to submit the question of arbitrability to *an arbitration panel* in order for the panel to make a final determination on such question, and asked the District Court to direct the ICC Court to do so. Conversely, the Respondents contended that the appropriate judicial step is an action to compel arbitration directed against the party who resisted arbitration—in this case, Ayvazian—not a suit against the ICC Court.

The District Court rejected GGM’s argument and agreed with Respondents, for the following reasons.

First, the District Court found that GGM’s position effectively ignored the ICC Rules, and particularly Article 6(2) of those Rules, which allows the *ICC Court* to make an initial

the question of arbitrability would be determined under the ICC Rules, GGM was now bound to follow the process created by the ICC Rules to make such determination. *Id.* The ICC Rules specifically directed that the threshold decision on arbitrability would be made by the ICC Court, and that, if the ICC Court’s decision were in the negative, then judicial (non-arbitral) remedies could be pursued. The Court therefore rejected GGM’s argument that it was entitled to a decision on this question by an arbitration panel, because the Rules to which GGM admitted it was bound did not provide for this. *Id.*

Third, the District Court noted that there were no precedents cited by GGM to support the unique relief that it sought: compelling arbitration by pursuing a lawsuit against an arbitral organization, rather than seeking to compel arbitration by pursuing a lawsuit against the party seeking to resist to arbitration. *Id.* at 447.

Finally, the District Court noted the strong policy reasons for rejecting GGM’s argument. The Court observed that should administrative institutions such as the ICC or the ICC Court be required to defend their decisions in the

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Southern District Rejects Suit

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national courts, the expense of defending such suits would threaten to constrain the judgment of such institutions, and to make the arbitration process more complicated and expensive than it is intended to be. *Id.*

Department, upheld personal jurisdiction in New York based solely on electronic contacts. *Fischbarg v. Doucet*, 38 A.D. 2d 270, 832 N.Y.S. 2d 164 (1st Dep't 2007). In *Fischbarg*, a New York-based attorney sued a California corporation and its principals in the New York State Supreme Court, seeking unpaid legal fees. The attorney had been retained by the defendants to represent them in a lawsuit in an

The “real parties in interest” in the dispute over whether the claims against Ayvazian were arbitrable were GGM and Ayvazian himself.

Conclusion

Having considered the ICC Rules and policy considerations referenced above, the District Court determined that the “real parties in interest” in the dispute over whether the claims against Ayvazian were arbitrable were GGM and Ayvazian himself. Thus, the District Court determined that the proper procedural mechanism for GGM to seek redress of the ICC Court’s finding that its claims against Ayvazian were not arbitrable was a suit by GGM against Ayvazian seeking to compel Ayvazian to arbitrate the claims. The District Court dismissed the petition for failure to state a claim. ☺

Oregon federal court. All communications between the attorney and clients during the course of the representation were via mail, e-mail, fax or telephone. The trial court found such contacts sufficient to establish jurisdiction under C.P.L.R. 302, and the Appellate Division, with two judges dissenting, affirmed.

On December 20, 2007, a unanimous Court of Appeals affirmed the Appellate Division’s decision in *Fischbarg v. Doucet*, 9 N.Y. 3d 379, 849 N.Y.S. 2d 501 (2007). The Court observed:

“when defendants projected themselves into New York via telephone to solicit plaintiff’s legal services, they necessarily contemplated establishing a continuing attorney-client relationship with him. Having established such a relationship and repeatedly projecting themselves into New York via telephone, mail, e-mail and facsimile to advance their legal position in the Oregon action through communications with plaintiff here, defendants purposely availed themselves of the benefits and protections of New York’s laws governing lawyers. This lawsuit arises out of defendants’ contacts here. Requiring them to defend the present suit properly comports with traditional notions of fair play and substantial justice.” ☺

Court of Appeals Affirms Finding that Electronic Contacts are Sufficient to Establish Jurisdiction

In an earlier issue of *The Gavel*, see *The Gavel* at 11 (Issue 2, June 2007), we reported on a significant decision whereby a divided panel of the Appellate Division, First

Failure to Get Insurers' Consent to Settlement Dooms Coverage

In 2002, the Securities & Exchange Commission and other regulators commenced a joint investigation of Bear Stearns Companies, Inc. and ten other major financial institutions. The investigation focused on whether research analysts at these financial institutions were improperly influenced by their investment banking wings. In late 2002, Bear Stearns reached a settlement with the regulators by which it agreed to pay \$80 million in restitution and penalties. Bear Stearns executed a settlement-in-principle agreement by which it acknowledged that the regulators would commence an action against it, and agreed to consent to pay the settlement amount in resolution of such action.

Bear Stearns had in place a \$10 million professional liability insurance policy issued by Vigilant Insurance Company that, Bear Stearns contended, covered the wrongful acts alleged. Also in place were two excess liability policies providing an additional \$40 million in coverage issued by Federal Insurance Company and Gulf Insurance

settlement agreement, in April 2003 Bear Stearns executed a consent agreement by which it agreed to the entry of final judgment pursuant to which it would pay the \$80 million settlement amount. That consent agreement was subject to court approval.

Several days after it executed the consent agreement, but before it was approved by the court, Bear Stearns requested its insurers' consent to the settlement. In response, the insurers denied coverage and refused to consent on the grounds that Bear Stearns entered into a settlement without the insurers' consent in violation of the policy terms.

Thereafter, the insurers commenced a lawsuit against Bear Stearns in New York state court, *Vigilant Insurance Company v. Bear Stearns Companies*, by which they sought a declaratory judgment that Bear Stearns' failure to seek the insurers' consent to the settlement prior to its consummation relieved them of any obligation under the policies. In October 2003, the federal district court approved the SEC's settlement with Bear Stearns and entered final judgment.

In their state court declaratory judgment action, the insurers moved for summary judgment. The trial court denied that motion finding the existence of triable issue of fact. Specifically, because the federal court had not

The Court found unpersuasive the argument that the consent provision was not violated because the federal court had not approved the settlement at the time the request for consent was made.

Company. The policies at issue expressly provided that Bear Stearns would not settle any claim in excess of \$5 million without first obtaining the consent of the insurance carriers.

Several months later, the SEC brought a lawsuit in New York federal court against Bear Stearns. As called for by the

approved the settlement at the time Bear Stearns requested the insurers' consent, the court found that whether the consent provision had been violated was a factual issue to be determined at trial. The Appellate Division affirmed.

The insurers appealed to the New York Court of Appeals.

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Insurers' Consent

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In its March 13, 2008 opinion, the Court of Appeals reversed and directed that the insurers be granted summary judgment on their declaratory judgment claim. The Court had no doubt that provision requiring the insurers consent was fully enforceable. The Court found:

“As a sophisticated business entity, Bear Stearns expressly agreed that the insurers would ‘not be liable’ for any settlement in excess of \$5 million entered into without their consent. Aware of this contingency in the policies, Bear Stearns nevertheless elected to finalize all outstanding settlement issues and executed a consent agreement before informing its carriers of the terms of the settlement. Bear Stearns therefore may not recover the settlement proceeds from the insurers.” *Vigilant Ins. Co. V. Bear Stearns Companies, Inc.*, 10 N.Y. 3d 170 (2008)

The Court found unpersuasive the argument that the consent provision was not violated because the federal court had not approved the settlement at the time the request for consent was made. For one, the Court noted that, although the consent agreement expressly provided it was subject to court approval, it did not similarly provide that it was subject to the insurers' consent. Further, despite the fact that court approval had not yet been given at the time the insurers' consent was requested, the Court found that Bear Stearns was contractually bound to the settlement and “not free to walk away from it before entry of a final judgment.” *Id.*

Notably, whether the settlement was reasonable, or whether the insurers would have approved the settlement had their consent been sought in a timely manner, were not factors mentioned in the Court's decision. ©

Publicly Traded Companies May Be Subject to Sarbanes-Oxley Whistleblower Provisions Regarding Employees Working Outside US Where Alleged Underlying and Retaliatory Acts Can be Said to Have Occurred Domestically

In a significant decision for public companies with employees abroad, *O'Mahony v. Accenture Ltd., et al.*, 07 Civ 7916, 2008 WL 344710 (S.D.N.Y. Feb. 7, 2008), the United States District Court for the Southern District of New York recently held that the whistleblower protection provisions of Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX”) can apply to an employee of a company listed on the New York Stock Exchange who was working outside the United States. The holding of the case resulted from the court's finding that the fraudulent and retaliatory acts alleged in the complaint occurred within the United States and not extraterritorially.

Plaintiff's Allegations

The defendants in *O'Mahony* were Accenture LTD (“LTD”), a Bermuda company listed on the New York Stock Exchange, and Accenture LLP (“LLP”), LTD's United States subsidiary. The plaintiff, Rosemary O'Mahony, was a partner and employee of LLP from 1984 through August 31, 2004 and, thereafter, of Accenture SAS — a French subsidiary of LTD which was not named as a defendant in the action. Beginning in 2002, O'Mahony worked in France, first for LLP and then for SAS.

From 1992-1997, LTD or LLP obtained a certificate of coverage exempting it from paying social security contributions to France on behalf of O'Mahony. However, O'Mahony alleged that, beginning in September 1997, the

exemption lapsed and the company became responsible for paying such contributions but failed to do so; O'Mahony further alleged that she informed certain LLP executives of this obligation but that she was advised that the company's

'interests' would be better served by not making any of the French social security contributions and continuing to affirmatively conceal from the French authorities the fact that [O'Mahony] had been working in France since 1992.

Id. at *1. O'Mahony alleged that, after objecting to this course of action, her "level of responsibility" (a term used by Accenture to denote the tier in which a partner is placed for compensation purposes) was reduced, as was her compensation. *Id.*

ited by the SOX whistleblower provisions or whether they occurred extraterritorially and, thus, did not provide a basis for subject matter jurisdiction.

SDNY Distinguishes *Carnero*

While acknowledging the *Carnero* holding — "that a foreign employee complaining of misconduct abroad by overseas subsidiaries [can]not bring a claim under [the SOX whistleblower provision] against the United States parent company" — the *O'Mahony* court held that the facts alleged in the case before it were distinguishable for several significant reasons:

1. Unlike the plaintiff in *Carnero* who was employed and paid entirely by a foreign subsidiary of a US company, O'Mahony was alleged to be employed and paid by a United States

The more appropriate question was whether plaintiff's claims properly raised a federal question — that is, whether the alleged bad acts were domestically-based and, therefore, prohibited by the SOX whistleblower provisions.

After unsuccessfully seeking a remedy through the Department of Labor, O'Mahony filed an action in the Southern District of New York pursuant to the whistleblower provisions of SOX. The defendants moved to dismiss the complaint, asserting — in reliance on a 2006 decision by the First Circuit in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006) — that SOX would not govern the acts in question because its whistleblower provisions could not properly be applied extraterritorially.

While the defendants moved to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted, the *O'Mahony* court held that the more appropriate question was whether plaintiff's claims properly raised a federal question — that is, whether the alleged bad acts were domestically-based and, therefore, prohib-

subsidary of a foreign company. Thus, the *O'Mahony* court held that any concerns about the "United States interfering with the employment relationship of a foreign employer and their foreign employees" were not present with respect to O'Mahony's claims;

2. In *Carnero*, the claimed wrongful conduct occurred outside the United States (in Latin America); on the other hand, O'Mahony asserted that the alleged fraud (*i.e.*, the alleged decision not to pay the French social security contributions) — and the subsequent retaliation against her (*i.e.*, the alleged decision to downgrade O'Mahony's tier of responsibility as well as her compensation) — were perpetrated by defendants' employees in the United States; and
3. The defendant in *Carnero* was a domestic parent sued for

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Whistleblower Provisions

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the alleged misconduct of its foreign subsidiary; in *O'Mahony*, the defendants were the foreign parent and a United States subsidiary who were sued for the alleged misconduct (occurring in the United States) of the United States subsidiary.

O'Mahony, 2008 WL 344710, at *4-5.

Corporate Decisions and the Application of SOX

Having distinguished the holding in *Carnero*, the *O'Mahony* court went on to consider whether the allegations before it would require the extraterritorial application of the SOX whistleblower provisions, a question that it determined could be analyzed in one of two ways: (1) by considering whether the allegedly wrongful conduct at issue occurred in the United States (the “conduct test”); or (2) by considering whether the allegedly wrongful conduct at issue had a substantial adverse effect in the United States or upon United States citizens (the “effects test”). *O'Mahony*, 2008 WL 344710, at *6. Because *O'Mahony* conceded that relevant

in foreign states; (3) the timeline identifying when and where the relevant domestic and foreign acts occurred; (4) the materiality/substantiality of the domestic conduct relative to the particular fraudulent transaction the pleadings describe; (5) the causal connection between the domestic conduct and the alleged financial losses resulting from the alleged fraudulent transaction; and (6) an overarching measure of reasonableness gauged by the intent of congressional policy and principles of fairness in the circumstances surrounding the particular case.

Id.

Relying almost entirely on the plaintiff’s allegations that the alleged fraud — and the alleged decision to retaliate — at issue had been committed by the defendants primarily in the United States (insofar as the employees making the relevant decisions resulting in the alleged fraud and retaliation were allegedly located in the United States when such decisions were made), the *O'Mahony* court determined that application of the “conduct test” led to a clear conclusion that the plaintiff’s claims would not

The court determined that application of the “conduct test” led to a clear conclusion that the plaintiff’s claims would not require the extraterritorial application of the SOX whistleblower provision.

allegations of her case would not meet the “effects test”, the court focused on the “conduct test”, noting that six factors are relevant to such an analysis:

- (1) the elements of the wrongful conduct in question as plead in plaintiff’s theory of fraud in relation to the specific acts to which the statute applies; (2) the location of domestic conduct and contacts associated with the transaction in relation to those located

require the extraterritorial application of the SOX whistleblower provisions and, therefore, that it had subject matter jurisdiction over the plaintiff’s claims against LTD, the US-based subsidiary.¹

¹ While noting that it was “less clear” whether plaintiff could meet the conduct test with respect to LTD (the Bermuda parent company), in light of its finding that *O'Mahony* had presented a “colorable claim” against LTD, the court also denied LTD’s motion to dismiss.

In so holding, the court found it significant that it was not being asked to “protect a *foreign* citizen working outside the United States for a *foreign* subsidiary of a [publicly-traded company] complaining about alleged

alleged retaliation by [her employer] occurring *in the United States.*” *Id.* at *8-*9 (emphasis added).

While it is to be seen whether and how courts in other districts and circuits confront similar issues, publicly

Publicly traded companies should be alert to the fact that acts or decisions made by them in the United States but relating to employees working abroad may subject them to liability under the whistleblower provisions of SOX.

misconduct of a *foreign* subsidiary” (emphasis added) nor was the plaintiff “seeking enforcement of American law [in a *foreign* country by requiring compliance with *foreign* law].” Rather, it was being asked to apply “American law for money damages [suffered by plaintiff] because of the

traded companies should be alert to the fact that acts or decisions made by them in the United States but relating to employees working abroad may subject them to the restrictions of and liability under the whistleblower provisions of SOX. ©

Chadbourne’s Commercial Litigation Group Expands its International Arbitration and Latin American Capabilities

This past month, Chadbourne’s Commercial Litigation Group welcomed two new partners, Oliver J. Armas and Luis Enrique Graham, formerly of Thacher Proffitt & Wood.

Oliver J. Armas, who will be based in our New York office, handles complex domestic and international litigation and arbitration cases. He has an extensive practice in U.S. federal and state courts, as well as before regulatory agencies, such as the SEC, the U.S. Department of Justice, the New York Attorney General and state insurance regulators (including internal investigations, FCPA audits, OFAC and Sarbanes Oxley compliance).

A large part of Mr. Armas’s practice involves representing foreign and domestic clients in arbitrations before the ICC, AAA/ICDR, LCIA, ICSID, the Court of

Arbitration for Sport (CAS), and other tribunals.

Because he is fluent in Spanish (and can understand Portuguese), a significant percentage of his practice involves counseling clients on various matters involving Latin America and the U.S. Hispanic market. He will spend much of his time working with Chadbourne’s office in Mexico City, and also working extensively throughout Central and South America, Spain and Portugal.

Luis Enrique Graham, who will be based in our Mexico City office, has broad experience in complex civil and commercial litigation, as well as alternative dispute resolution procedures, including domestic and international arbitration before the ICC, the ICDR (AAA), the LCIA, NAFTA/ICSID, and other tribunals. ©

Newsworthy

- On March 22, 2008, New York partner Thomas Bezanson co-chaired the Federal Bar Council reception honoring and introducing the new Chief Judges of the Second Circuit. The reception was held at the Union League Club in New York City.

Awards

- On February 9, 2008, New York partner Judge George Bundy Smith was honored by the American Bar Association Commission on Racial & Ethnic Diversity, which presented him with a Spirit of Excellence Award in recognition of his efforts to achieve racial and ethnic diversity in the legal profession.
- Chadbourne Commercial Litigation partners Thomas Hall, Thomas McCormack, and Thomas Butler have been listed in Super Lawyers' April 2008 Corporate Counsel issue.

Publications

- New York partners Judge George Bundy Smith and Thomas Hall published an article in the New York Law Journal entitled "Commercial Division Update- After 'Stoneridge.'" Judge Smith also published an article in the March edition of the Federal Bar Council News entitled "Reflections Of Justice Marshall." Thomas Hall also published an article, with associate Megan Klein, in the March issue of The Banking Law Journal, entitled "States Lack Enforcement and Investigatory Authority Over National Banks." New York partner Robert Schwinger published an article in the New York Law Journal entitled "Plaintiff's Reliance Needed For Mail Fraud-Based RICO."

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