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Pleading Extraterritorial Claims in New York in Light of *Global Re v. Equitas*

Courts have long grappled with how to apply state and federal laws to disputes that arise entirely outside U.S. borders, sometimes concluding that such laws should not be applied extraterritorially at all. Earlier this year, the New York Court of Appeals weighed in on this issue in an antitrust case, *Global Reinsurance Corp. v. Equitas Ltd. et al.*, 969 N.E.2d 187 (N.Y. 2012) ("*Global Re*"), holding that New York law did not extend to an alleged antitrust violation involving foreign defendants and a foreign conspiracy. The case itself turned on the Court's interpretation of the Donnelly Act, New York's antitrust statute; but litigants may try to extend the decision to cases involving non-antitrust claims, such as securities violations and various business torts. Whether or not those efforts are successful, *Global Re* highlights the potential problems that can arise when state-law claims based on international conduct are asserted. Maintaining these types of claims requires careful pleading, particularly in the wake of *Global Re*. Litigants contemplating claims based on foreign transactions should consider the full range of available options—including not only litigation, but aggressive arbitration—a strategy the *Global Re* plaintiff was ultimately forced to employ.

The Global Re *Decision*

Global Re arose out of a retrocessionary reinsurance dispute. Retrocessionary reinsurance is global reinsurance that covers a variety of risks, including so-called "non-life" coverages for environmental, catastrophic, and asbestos-related exposures. By the early 1990s, it was clear that a number of reinsurers had issued "non-life" retrocessionary policies without appreciating the long-term liabilities that these policies could cover (*e.g.*, significant losses from asbestos liability). As claims began to mount, some reinsurers concluded that their exposure under these policies could outstrip reserves. *Global Re*, 969 N.E.2d at 189.

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Kathleen Sullivan Named a "Top 10 Female Litigator" by *Benchmark Litigation* and *Euromoney Legal Media Group*

Kathleen Sullivan, Quinn Emanuel name partner and Chair of the firm's Appellate Practice, has been named one of the nation's "Top 10 Female Litigators" in the inaugural edition of *Top 250 Women in Litigation* published by *Benchmark Litigation* and *Euromoney Legal Media Group*. The 250 honorees were selected based on *Benchmark Litigation*'s 2012 state rosters of litigation stars. From there, the publications selected the top 10 female litigators by reviewing their work on high profile matters, as well as the overall success of their careers.

Benchmark Litigation and *Euromoney Legal Media Group* praised Ms. Sullivan not only for her litigation accomplishments and her "appellate superstar[dom]," but also for her "storied career in academia" and her string of "firsts." Ms. Sullivan made history as one of the first female professors at Harvard Law School, the first female Dean of Stanford Law School, and the first female lame nartner at an AmLaw 100 firm. Ms. Sullivan's "standout appellate litigation record" includes recent victories at the U.S. Supreme Court defending Wyeth (a division of Pfizer) and Shell Oil, and earlier this month she argued before the Court on behalf of Shell Oil's ultimate parent. Q

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One such group was Lloyd's of London, a London-based insurance market comprised of competing underwriters. Lloyd's members concluded they could not stem rising "non-life" liabilities without concerted action; if underwriters individually imposed difficult hurdles on "non-life" claims, those underwriters could no longer compete for new business against other companies that were not imposing these same hurdles. *Id.* Lloyd's members therefore created a new entity, Equitas—the defendant in the *Global Re* case—to assume obligations under existing "non-life" retrocessional reinsurance policies. Equitas was given free rein to handle claims arising under these policies. It immediately took a "hard-nosed" approach aimed at limiting exposure, including burdensome documentation requirements that led to the denial of many claims. *Id.* at 189-90.

Plaintiff Global Reinsurance Corporation ("Global Re") was the U.S. branch of a German reinsurance company that had purchased retrocessional coverage through Lloyd's. Global Re believed Equitas' new claim resolution procedures caused denials on claims that would have been approved by individual Lloyd's members. Because Equitas' procedures were only possible due to the elimination of competition among other retrocessional reinsurers in the Lloyd's marketplace, Global Re's New York branch filed Donnelly Act claims in New York court, alleging that the merger of individual reinsurers into Equitas suppressed competition in the retrocessional reinsurance market. The complaint alleged that while individual participants in the Lloyd's marketplace were once "disposed to settle claims expeditiously and fairly" because they "competed with each other for new business and were thus anxious to curry favor" with potential customers, Equitas eliminated "any competitive disincentive to the adoption of sharp claims management practices." *Id*. at 190-91.

The trial court dismissed the Donnelly Act claim, concluding the complaint failed to adequately allege market power. The Appellate Division reversed and reinstated, finding market power had been adequately alleged, and that Defendants' other argument for dismissal—that a London-based conspiracy to restrain trade was not actionable under the Donnelly Act even if market power was adequately alleged—also did not warrant dismissal. *Id.* at 191-92.

The Court of Appeals reversed. The Court concluded that market power was not adequately alleged in the complaint; for example, coverage available from Lloyd's participants could presumably be obtained on competitive terms elsewhere after Equitas was formed. Thus, no Donnelly Act claim was adequately alleged. *Id.* at 194.

But the Court's analysis did not end there. The Court then proceeded to address a much broader question: whether, if market power had been adequately alleged, the Donnelly Act could ***ever*** extend to a claim for injury inflicted by a foreign defendant, caused by a foreign conspiracy, whose impacts were felt in New York only because a participant in the worldwide market happened to be located in New York. On that question, the Court held the complaint failed to set out a sufficient case for applying the Donnelly Act:

> Injury so afflicted, attributable primarily to foreign, government approved transactions having no particular New York orientation and occasioning injury here only by reason of the circumstance that plaintiff's purchasing branch happens to be situated here, is not redressable under New York State's antitrust statute.

Id.

In reaching that conclusion, the Court noted the presumption against applying New York statutes extraterritorially, observing that this presumption is especially strong where corresponding federal law was expressly limited so as not to apply extraterritorially: "The established presumption is, of course, against the extraterritorial operation of New York law, and we do not see how it could be overcome in a situation where the analogue federal claim would be barred by congressional enactment." *Id*. The Court acknowledged, however, that extraterritorial application of the Donnelly Act might be warranted in some circumstances:

> For a Donnelly Act claim to reach a purely extraterritorial conspiracy, there would, we think, have to be a *very close nexus* between the conspiracy and injury to competition in this state. That additional element is not discernable form the pleadings before us.

Id. at 196. Plaintiff failed to establish any nexus to New York, much less a "very close nexus": it did not allege injury to competition in New York, focusing instead on constrained competition in a London-based market (Lloyd's) that allegedly caused worldwide injuries—not injuries with any particular and special connection to New York. *Id*. Thus, the court concluded that even if market power had been adequately alleged, and even if a Sherman Act claim had been stated, no Donnelly Act claim was possible based on the complaint.

The Potential Impact of Global Re *on New York Litigants*

In the wake of the *Global Re* decision, commentators have suggested that defense counsel might use *Global Re* to limit the territorial reach of New York law generally.

Global Re specifically held only that antitrust plaintiffs cannot avoid the Sherman Act's territorial limitations by bringing claims under the Donnelly Act, but some commentators suggest that defendants should argue that claims of any sort under New York law are barred by *Global Re* when they would apply New York law extraterritorially.

Those sorts of arguments seem likely in securities-related litigation, where federal claims arising out of foreign conduct have been limited in recent years. The Supreme Court's decision in *Morrison v. National Australia Bank*, 130 S.Ct. 2869 (2010), limited claims under Section 10(b) of the Securities Exchange Act and Rule 10b-5 to those involving securities listed on American exchanges or securities purchased or sold in the United States. *Morrison* dismissed so-called "F-cubed" claims that involved (1) foreign investors, (2) a foreign defendant, and (3) a foreign securities transaction. The Court broadly rejected the "F-cubed" claims under federal law, on the rationale that extraterritorial application of federal laws should not be presumed absent an express congressional statement to that effect:

> It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" … Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." … When a statute gives no clear indication of an extraterritorial application, it has none.

Morrison, 130 S.Ct. at 2877-78 (citations omitted).

In the wake of *Morrison*, plaintiffs in securities-related cases used state statutory and common-law claims to address injuries where no federal causes of action existed. In *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441 (S.D.N.Y. 2010), for example, the court dismissed foreign plaintiffs' federal securities law claims against Citigroup under *Morrison* because the transactions at issue took place on a foreign exchange. *Id.* at 447. But the court denied a motion to dismiss plaintiffs' common-law fraud claims, finding that plaintiffs adequately alleged reliance and causation. *Id.* at 454-55.

Before *Global Re*, efforts to use state law as a substitute for federal securities laws were on the rise. Those efforts received a boost from a recent New York Court of Appeals decision, *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc.*, 962 N.E.2d 765 (N.Y. Dec. 20, 2011), which held that the Martin Act (a New York securities fraud and enforcement statute) does not preempt claims under New York common law in securities-related cases. Plaintiff Assured Guaranty sued J.P. Morgan for breach of fiduciary duty, gross negligence, and breach of contract based on mismanagement of a portfolio that was insured by Assured Guaranty. J.P. Morgan moved to dismiss, arguing that plaintiff's claims were preempted by the Martin Act because they involved allegations of securities and investment fraud that were the exclusive purview of the New York Attorney General under the Martin Act. The Court rejected that argument, finding nothing in the legislative history of the Martin Act expressly indicating that it was meant to preempt common-law claims by civil plaintiffs. *Id.* at *6 -7. This decision rebuffed a line of cases finding common-law claims preempted under New York law. *See, e.g., Horvath v. Banco Comercial Portuges, S.A.*, 2011 WL 666410, at *7-8 (S.D.N.Y. Feb. 15, 2011) (in case involving foreign transaction, dismissing federal securities claims under *Morrison* and also dismissing common-law claims for aiding and abetting and negligent misrepresentation as precluded by the Martin Act).

In future suits involving foreign transactions, defendants may try to use *Global Re* to stem the tide of state-law claims authorized by *Assured*. Defendants are likely to argue that even where New York common law claims are not preempted by the Martin Act, they are precluded by *Global Re* if they would apply New York law extraterritorially and regulate international conduct.

Plaintiffs may face similar arguments based on *Global Re* when bringing claims under New York's Organized Crime Control Act ("OCCA"), the state analogue to the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act. In recent years, some courts have refused to apply RICO to conduct occurring entirely abroad, citing *Morrison* as a general limitation on extraterritorial application of federal law. *See, e.g., Cedeño v. Castillo*, No. 10-cv-3861, 2012 WL 205960, at *37 (2d Cir. Jan. 25, 2012). Defendants may similarly argue that cases barred by territorial limits on RICO should not be authorized under OCCA.

Indeed, defendants may try to use *Global Re* to limit the scope of nearly any state-law action involving foreign acts, including claims relating to intellectual property rights. For example, a New York fashion designer recently sued Japanese companies in New York for merchandise sales in Japan that allegedly violated the designer's trademarks and trade dress rights. The suit involved claims under the Lanham Act, claims under the New York General Business Law, and claims for common-law trade dress infringement,

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Contingency Fees in England After April 2013

Beginning in April 2013, lawyers in England will be permitted to recover fees from the damages awarded to their clients. This type of contingency fee agreement was formerly prohibited in the UK, but a comprehensive review of civil litigation costs in 2009 prompted the recent passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which will permit damages-based fee agreements when the first part of the Act comes into force, which is expected in April 2013. Many details concerning these agreements will be contained in regulations that are still being developed. Nonetheless, it is clear that the introduction of damage-based fee agreements will shake up the way litigation is conducted in the UK.

Although contingency fees were long barred in the UK, one sort of contingency fee arrangement, success fees, has been a feature of the UK litigation environment for the past two decades. Success fees entitle lawyers to an increase in fees, capped at 100%, in the event of a successful outcome. Success fees are said to encourage the prosecution of meritorious claims which lack funding and provide lawyers with incentives to win cases without emphasising the size of the resulting award.

In 2000, successful claimants were allowed for the first time to recover from defendants, not just their usual fees, but also success fees as well as any premiums for after-the-event insurance, which protects litigants against costs that may be imposed upon them in unsuccessful litigation. Although in England successful parties traditionally have been able to recover legal fees from the losing party in most cases, the recovery of success fees and insurance premiums significantly increased the costs burden for unsuccessful parties. Moreover, this burden was asymmetric because unsuccessful claimants could often insulate themselves from large costs bills by taking out after-the-event insurance and entering into success fee arrangements based on an initial reduced fee.

Commentators criticized the disparate cost burdens created by shifting the costs of contingency fees and after-the-event insurance. These concerns, along with the growing interest in enabling greater access to justice, led to a significant review of civil litigation costs in England. As a result, the Master of the Rolls, the second most senior judge on the Court of Appeal of England and Wales, mandated his colleague, Lord Justice Jackson, with reviewing civil litigation costs. Lord Justice Jackson issued a report in December 2009. In the forward to that report, Lord Justice Jackson commented, "In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice." Accordingly, Lord Justice Jackson recommended permitting barristers and solicitors in England to enter into damages-based contingency fee agreements, but prohibiting shifting the costs of after-the-event insurance premiums and success fees. These reforms were adopted in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and will progressively come into effect, with contingency fees expected to be effective in April 2013.

If the United States' experience with contingency fees is any guide, these reforms will bring significant benefits. It is more likely that impecunious claimants with meritorious, high-value claims will be able to find representation. It is also expected that barristers and solicitors will become more creative with their costs structures and will depart more and more from simple time-sheet billing. In addition, clients may begin to expect creativity from their legal counsel in structuring fee deals to deliver commensurate value.

On the other hand, the retention of the English practice of awarding legal fees to the prevailing party is likely to prevent many of the speculative claims experienced in the U.S. The "no win, no fee" concept utilized in the United States won't apply in England because, regardless of whether a matter is conducted under a contingency fee arrangement, in England the unsuccessful party normally bears the reasonable costs of the successful party's legal fees and disbursements. Moreover, because of the reforms contained in the recent legislation, defendants will not be induced to settle by the threat of contingency fees because insofar as the contingency fee payable to a solicitor exceeds what would be chargeable under a normal fee arrangement, the successful party must bear that cost.

Numerous questions concerning the new damages-based contingency fee arrangements remain open. Many are being addressed by the regulations on which the Civil Justice Council ("CJC") is advising. For example, the CJC has recommended that there should be no maximum cap set for contingency fee agreements in general commercial litigation. (There would be caps, however, in litigation concerning certain areas such as employment law and personal injury.)

The CJC is also considering whether lawyers should themselves be made subject to adverse costs awards as third party funders may be in some circumstances. In third party funding arrangements, an investor finances all or part of a client's legal costs and expenses in exchange for an agreed share of any recovery. Under current law, third party funders may be held directly liable for adverse cost awards, but lawyers are immune from such awards. The CJC has recommended retaining both practices. However, some commentators have suggested that, if lawyers are not liable for adverse cost awards in circumstances when third party funders are, litigation funders may buy into or set up law firms in order to avoid adverse costs liability.

Even after the regulations are issued, questions will remain concerning contingency fee arrangements. One issue will be the impact of the common law doctrines of maintenance and champerty. Maintenance is the act of supporting litigation in which a party has no legitimate interest, while champerty is maintaining a party on the basis that the funder will be rewarded upon a successful outcome. The Criminal Law Act 1967 abolished both the crimes and torts of maintenance and champerty. Nevertheless, the common law rules against maintenance and champerty remain, and therefore a contingency fee agreement that violates those rules may be held contrary to public policy and unenforceable. Case law suggests that a funding arrangement amounts to maintenance or champerty if it permits an unjustifiable intrusion into the running of the case or disproportionate control or profit, or creates a clear tendency to corrupt justice.

While the coming regulations and existing common law doctrines such as champerty and maintenance will place some restrictions on the new damages-based contingency fees, there undoubtedly will be much room for creative new fee arrangements, which lawyers and clients alike should explore. Q

Pharma Patent Litigators Nick Cerrito and Eric Stops Join Quinn Emanuel

F. Dominic "Nick" Cerrito and Eric Stops, former intellectual property lawyers at Jones Day, joined the firm's New York office as partners in June. Both concentrate on intellectual property disputes in the pharmaceutical industry, including Hatch-Waxman litigation and client counseling in the navigation of FDA laws.

Nick Cerrito, former co-head of Jones Day's pharmaceutical group, focuses his practice on Hatch-Waxman litigation and the intersection of patent and FDA laws. He has litigated a wide variety of different products in different therapeutic classes including anti-cancer, central nervous system, analgesics, anti-hypertensive and gastrointestinal products on behalf of large pharmaceutical companies, established biotechnology companies, and start-ups. Cerrito's practice also includes due diligence in the areas of pharmaceutical product acquisition, strategic planning, and patent prosecution strategies. He has been listed in *The Best Lawyers in America* and as a BTI Client Service All-Star. He received his J.D. from New York Law School and holds a B.S. in Chemistry from Case Western Reserve University.

Eric Stops also specializes in Hatch-Waxman patent litigation on behalf of innovator pharmaceutical companies. His recent representations include litigations concerning Revlimid® (a treatment for multiple myeloma and myelodysplastic syndromes); Nuedexta® (a treatment for pseudobulbar affect); Xyrem® (a treatment for excessive daytime sleepiness and cataplexy in patients with narcolepsy); and Lotronex® (a treatment for female irritable bowel syndrome). Stops counsels clients regarding FDA issues, patent portfolio evaluation, and the preparation of opinions concerning the patentability of inventions, validity of patents, and freedom-to-operate for prospective technologies. His experience includes the development of licensing strategies and the negotiation and preparation of agreements. He received his J.D. from New York University and holds a B.S. in Biochemistry, *magna cum laude*, from SUNY Geneseo. Q

White Collar Litigation Update

***Second Circuit Clarifies "Substantial Assistance" Standard for Aiding and Abetting Liability in SEC Enforcement Actions*:** Section 20(e) of the Securities Exchange Act of 1934 allows the SEC, but not private litigants, to bring civil actions against aiders and abettors of securities fraud. Under this section, the SEC may bring an enforcement action against "any person that knowingly provides substantial assistance" to a primary violator of the securities laws. On August 8, 2012, in *SEC. v. Apuzzo*, 689 F.3d 204 (2d Cir. 2012), the Second Circuit lowered the bar necessary to state a claim for aiding and abetting. Noting that prior case law may have been unclear, the Second Circuit rejected the argument that the SEC is required to plead or prove that an aider and abettor proximately caused the primary securities law violation. Instead, relying on a 75-year-old decision by Judge Learned Hand, the Court stated that once the government proves that a primary violation occurred and that the defendant had knowledge of it, the government need only prove that the defendant associated himself with the fraudulent scheme and sought to make it succeed. This relaxed standard will make it easier for the SEC to pursue enforcement actions against individuals who assist others in committing securities violations.

Joseph Apuzzo was the Chief Financial Officer of Terex Corporation, a manufacturer of mining equipment. The government alleged that, with Apuzzo's assistance, United Rentals, Inc., one of the largest equipment rental companies in the world, and its Chief Financial Officer, Michael Nolan, carried out two fraudulent sales-leaseback transactions designed to allow United Rentals to recognize revenue prematurely and inflate the profit generated from sales. As part of this scheme, United Rentals sold used equipment to General Electric Credit Corporation ("GECC") and leased the property back for a short period of time. In order to secure GECC's participation in the sales-leaseback, United Rentals convinced Terex to agree to resell the equipment for GECC at the end of the lease period and to guarantee that GECC would receive no less than 96% of the purchase price that GECC paid United Rentals to acquire the equipment. To obtain Terex's agreement, United Rentals secretly promised to indemnify Terex for any losses that Terex sustained and to make substantial equipment purchases from Terex in the future.

Pursuant to Generally Accepted Accounting Principles, United Rentals could immediately recognize the revenue generated by the sale of equipment to GECC if it could demonstrate, among other things, that the risks and rewards of ownership had been fully transferred to GECC. However, because it had secretly agreed to indemnify Terex for any losses that Terex incurred, that requirement was not met, and therefore United Rentals could not properly record the revenue from the sales. The government alleged that Apuzzo knew that if the indemnification payments were disclosed, United Rentals would not be able to recognize the revenue. The government also claimed that Apuzzo executed various agreements and approved false invoices to conceal the indemnification payments.

For a defendant to be liable as an aider and abettor in a civil enforcement action, the SEC must prove: "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009) (quoting *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985)). Relying on *Bloor*, the District Court found that although the complaint plausibly alleged that Apuzzo had actual knowledge of the primary violation, it did not adequately allege "substantial assistance" because the government did not allege that Apuzzo proximately caused the harm on which the primary violation was predicated. Specifically, the Court held that "the complaint contains factual allegations which taken as true support a conclusion that there was a 'but for' causal relationship between Apuzzo's conduct and the primary violation, but do not support a conclusion that Apuzzo's conduct proximately caused the primary violation." *SEC v. Apuzzo*, 758 F. Supp. 2d 136, 148 (D. Conn 2010). Concluding that proximate causation was required to satisfy the "substantial assistance" component of aider and abettor liability, the District Court granted Apuzzo's motion to dismiss.

The Second Circuit reversed and clarified the standard for determining the substantial assistance prong for aider and abettor liability. Relying on criminal case law for guidance, the Court reasoned that the conduct of an aider and abettor that was sufficient to impose criminal liability would also be sufficient to impose civil liability in an enforcement action. The Court then noted that in *Peoni*, Judge Hand set forth the classic formula for aider and abettor liability in criminal cases by stating that the government—in addition to proving that the primary violation occurred and that the defendant had knowledge of it—must prove "that he in some sort associate[d] himself with the venture, that [the defendant] participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed." *Apuzzo*, 689 F.3d at 206. (quoting *Peoni*, 100 F.2d at 402.)

The Second Circuit concluded that this was likely the clearest definition possible and then rejected Apuzzo's argument that substantial assistance should, instead, be defined as proximate cause. The Court determined that that argument ignored the difference between an SEC enforcement action and a private suit for damages. "Proximate cause" is the language of private tort actions; it derives from the need of a private plaintiff, seeking compensation, to show that his injury was proximately caused by the defendants' actions. But, in an enforcement action, civil or criminal, there is no requirement that the government prove injury, because the purpose of such actions is deterrence, not compensation. *Id*. at 213.

Applying this new standard, the Second Circuit concluded that the complaint alleged that Apuzzo provided substantial assistance in carrying out the fraud because he negotiated the details of both transactions, extracted agreements for Terex, and signed inflated invoices to further the fraud. The Court thus reversed the District Court's order and remanded the case for trial.

Because only the SEC may bring civil claims for aiding and abetting securities law violations, this decision will not affect private litigants. However, it will likely increase the number of enforcement actions brought against individuals who assist others in transactions designed to make financial statements seem more attractive. The SEC has long relied on theories of secondary liability to enforce the federal securities laws. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which confirmed that knowing or reckless behavior can form the basis for liability for securities fraud. The Second Circuit's decision in *Apuzzo* continues this recent trend in easing the SEC's burden in secondary liability cases.

***NLRB Prohibits Employers from Requesting that Employees Keep Silent About Internal Investigations*:** The National Labor Relations Board (the "Board") recently issued a surprising decision that has important ramifications for internal investigations conducted by employers. In *Banner Health System d/b/a Banner Estrella Medical Center*, 358 N.L.R.B. No. 93 (July 30, 2012), the Board found unlawful the common practice by employers of requesting that an employee witness in an investigation not discuss the matter with other employees pending the completion of the investigation. Although the verbal instruction—which the employer provided to all employees involved in an investigation—was not accompanied by any threat of disciplinary consequences for its violation, the Board held that the request constituted an impermissible restraint on employees' right to engage in protected concerted action under Section 7 of the National Labor Relations Act. As such, the Board issued an order requiring the employer to cease and desist from "[m]aintaining or enforcing the rule that employees may not discuss with each other ongoing investigations of employee misconduct" and to post a notice stating the same. *Banner Health System*, 358 NLRB No. 93 (Slip Opinion at 3).

The underlying investigation involved an employee who alleged that his negative performance review was in retaliation for his refusal to follow his supervisor's improper instructions. In interviewing the employee, a human resources manager utilized a standard interview form wherein the employee was given the following verbal instruction:

> This is a confidential interview and I will keep our discussion confidential except as required by law, or [Company] policy or as necessary to conduct this investigation. I ask you not to discuss this with your coworkers while the investigation is going on, for this reason: when people are talking it is difficult to do a fair investigation and separate facts from rumor.

A copy of the form was not provided to the employee.

For reasons apart from this instruction and not relevant to this note, the employee subsequently filed a claim with the NLRB alleging that Banner Health System committed certain violations of Section 8(a)(1) of the National Labor Relations Act, which prohibits employers from interfering, restraining, or coercing employees' enjoyment of their Section 7 rights. The Board issued a complaint and notice which was subsequently amended to address the verbal confidentiality instruction.

Following a hearing on the complaint, the Administrative Law Judge upheld the verbal confidentiality instruction, finding that the employer had a "legitimate business reason for making this *suggestion*." *Id.* at 6 (emphasis added). Specifically, the hearing judge recognized that the purpose of the "suggestion" was "to protect the integrity of the investigation." *Id.*

On appeal, the Board reversed in a 2-1 decision. The Board found that the employer's "blanket" (rather than case-by-case) approach of instructing all employee witnesses in an investigation to maintain confidentiality was an impermissible restraint on the employees' Section 7 rights. The Board explained that an employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights" to engage in concerted action for mutual aid and protection. *Id.* at 2.

Moreover, it was of no consequence to the Board that the instruction was merely a request. Nor did it matter that the request was not accompanied by an express threat of discipline for violation of the request. In the Board's view, "[h]owever characterized, [the instruction], viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint…." *Id.*

In reaching this decision, the Board announced that, for a confidentiality instruction to be valid, an employer must first assess whether the instruction is necessary given the circumstances of the specific situation. In making that determination, the employer should consider the following non-exhaustive factors:

(1) "[W]hether in any give[n] investigation witnesses need[] protection";
(2) Whether "evidence [is] in danger of being destroyed";
(3) Whether "testimony [is] in danger of being fabricated";
(4) Whether "there [is] a need to prevent a cover up."

Employers conducting internal investigations of complaints and alleged misconduct have routinely issued confidentiality instructions for purposes of preserving the integrity of the investigation. Pursuant to this ruling—which applies to both union and non-union workplaces—such confidentiality instructions violate Section 8(a)(1) unless the instruction is narrowly tailored to the specific situation.

A strict interpretation of the Board's decision would prove difficult to implement. Oftentimes, an understanding of the facts necessary to fully contemplate the considerations listed by the Board is impossible without at least some investigation. By the time that sufficient facts have been gathered to support a confidentiality instruction, the investigation may have already been tainted by behavior that would have been prevented by the earlier issuance of an instruction. The Board, however, would have no reason to promulgate an unworkable rule. This suggests that the Board, though uncomfortable with blanket confidentiality restrictions, views instructions appropriate so long as grounded in a reasonable basis that is specific to the matter under investigation. In other words, employers should utilize confidentiality instructions only after identifying specific concerns that make such an instruction appropriate.

With this understanding in mind, employers should revisit their internal policies and procedures governing (and agreements applicable to) internal investigations. Policies and procedures should be updated if necessary to implement a formal company policy regarding the issuance of confidentiality instructions. The policy should specifically address each of the four considerations identified above and require the individual undertaking the investigation to specifically list the facts at issue that justify the instruction prior to issuing the instruction. This record should be maintained in the event of subsequent litigation.

International Arbitration Litigation Update

In recent years, a hotly contested issue in international arbitration practice has been the extent to which parties to foreign seated arbitrations can employ 28 U.S.C. § 1782 to obtain discovery in the U.S. for use in the arbitration. In a decision of potentially great significance, the U.S. Court of Appeals for the Eleventh Circuit recently held that a party engaged in a private foreign arbitration may employ Section 1782 to obtain discovery in the U.S. The decision creates a split with the Fifth and Second Circuits, which had both previously precluded discovery in aid of private foreign arbitrations, allowing it only in the service of foreign state-sponsored adjudicatory proceedings. The Eleventh Circuit's decision heralds potentially significant opportunities for parties to obtain discovery in aid of foreign commercial arbitrations, while exposing those within the Eleventh Circuit's jurisdiction to potentially enlarged discovery burdens, even as non-parties to foreign arbitral proceedings.

***The Section 1782 Discovery Mechanism*:** Section 1782 is a powerful tool for Federal Court assistance in gathering evidence for use in foreign proceedings. Under the Section, a U.S. court may grant discovery where: (a) the person from whom the discovery is sought is found in the Court's district; (b) the application is made by a foreign or international tribunal or "any interested person"; and (c) the evidence is for use in a proceeding before a "foreign or international tribunal." Although the Section's language is relatively clear, controversy has long persisted over (i) whether Congress intended the term "tribunal" to include arbitral panels, and, if so, (ii) whether that definition is broad enough to encompass both governmental or state-sponsored arbitral panels (such as those established under NAFTA or the World Bank's International Convention for the Settlement of Investment Disputes (ICSID)) as well as arbitration panels presiding over private commercial cases.

The U.S. Supreme Court's 2004 decision in *Intel*

Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), suggested that a private arbitral tribunal may fall within the scope of Section 1782, but the Court did not decide the issue. Before the *Intel* decision, both the Second and Fifth Circuits held that Section 1782 does *not* permit discovery assistance to foreign private commercial arbitration tribunals. *See Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999); *Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999). District Courts reviewing the issue since the *Intel* decision have divided on the question.

***The Eleventh Circuit's Decision*:** Splitting with the Second and Fifth Circuits, the Eleventh Circuit recently held that a party engaged in a private foreign arbitration *can* rely on 28 U.S.C. § 1782 to obtain discovery from persons or companies located in the U.S. for use in that arbitration. *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012). The case concerned a foreign shipping contract billing dispute between wireless communications operator, Consorcio Ecuatoriano de Telecomunicaciones S.A. ("CONECEL") and an air freight carrier, Jet Air Service Equador S.A. ("JASE"). JASE commenced arbitration proceedings against CONECEL in Ecuador. Thereafter, CONECEL filed an *ex parte* application in the U.S. District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1782 to obtain discovery from JASE's U.S. counterpart, JAS Forwarding (USA), Inc. The District Court granted the application and denied JASE's subsequent motion to quash.

In affirming the District Court's order, the Eleventh Circuit, relying heavily on the *Intel* decision, held that the arbitral tribunal before which the dispute was pending was a "foreign tribunal" for purposes of Section 1782. It reasoned that the statutory requirements for judicial assistance were met here because: (i) the arbitral panel acted as a first-instance decisionmaker; (ii) it permitted the gathering and submission of evidence; (iii) it would resolve the dispute; (iv) it would issue a binding order; and (v) its order would be subject to judicial review. Section 1782, according to the panel, "requires nothing more." *Id.* at 990. The Eleventh Circuit distinguished the contrary holdings of the Second and Fifth Circuits as being at odds with the broader and more functional definition of a "tribunal" posited in *Intel*.

***Impact of Decision and the Path Forward*:** Although the *CONESCO* decision is binding only within the Eleventh Circuit, its impact is nevertheless likely to be significant. It provides a potent tool—essentially opening up the panoply of discovery devices under the Federal Rules of Civil Procedure—to parties to foreign arbitral proceedings who may wish to obtain discovery within the Eleventh Circuit's jurisdiction (Alabama, Florida and Georgia), whether or not they are parties to those proceedings. Indeed, one of the hallmarks of Section 1782 discovery is that it does not inquire whether such discovery would be available in the foreign proceedings. Thus, it is possible for parties to obtain far broader discovery through Section 1782 than would normally be authorized in the arbitration itself.

It is yet to be seen whether other Courts will adopt the Eleventh Circuit's position. It seems likely though that this question will at some point return to the Supreme Court. The Eleventh Circuit's split with the Fifth and Second Circuits is arguably not yet ripe for review, because both of those Circuit's decisions disallowing Section 1782 discovery in aid of foreign private arbitral tribunals pre-dated the Supreme Court's 2004 *Intel* decision. However, future published decisions confirming those earlier holdings could well provide a basis for the Supreme Court to again weigh in. In the meantime, for better or worse, the courts in the Eleventh Circuit may well become a magnet for discovery applications in aid of foreign arbitrations.

***Other International Arbitration Practice News*:** In other news, the United States District Court for the District of Columbia recently cited favorably to an article published by New York international arbitration associate, Lucas Bento, in the Berkeley Journal of International Law. Mr. Bento's article, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish,* 29 Berkeley J. Int'l L. 399, 418 (2011), examines international law and jurisprudence on maritime piracy. It is quoted twice in the D.C. Court's opinion in *United States v. Ali Mohamed Ali*, No. 11-0106, 2012 WL 2870263 (D.D.C., July 13, 2012).

(Lead Article continued from page 3)

all arising out of these foreign sales. Defendants moved to dismiss the Lanham Act claims based on *Morrison*, and similarly cited *Global Re* to argue for a general presumption against extraterritorial application of New York law. *See Jill Stuart (Asia) LLC v. Sanei Int'l Co., Ltd.*, 2012 WL 3601203 (S.D.N.Y. June 1, 2012). Similar arguments could be made in essentially any substantive area of law where New York plaintiffs seek to recover for wrongs committed abroad.

Avoiding the Pitfalls of Global Re *Going Forward*

Defendants' efforts to convert *Global Re* into a general prohibition on state-law claims may be legally misguided. *Global Re* involved the extraterritorial scope of a New York *statute*—not claims under New York *common law*. The authority cited by the Court of Appeals for a presumption against the extraterritorial application of that statute was a treatise on New York statutory law—McKinney's Consolidated Law of NY, Book 1, Statutes § 149—which states that "every *statute* in general terms is construed as having no extraterritorial effect" (emphasis added). *Global Re*'s emphasis on legislative history and congressional intent regarding territorial scope does not speak common law claims. Plaintiffs seeking to recover losses stemming from foreign transactions may argue that common-law claims simply are not implicated by the statutory presumptions discussed in *Global Re* or *Morrison*.

Moreover, plaintiffs can and should anticipate *Global Re*-style arguments in future cases involving foreign transactions, and avoid the pleading pitfalls that ensnared the *Global Re* plaintiff. In *Global Re*, the Court's opinion repeatedly emphasized that the complaint alleged "a *purely* extraterritorial conspiracy," where "[t]he *only* harm to competition alleged is within a particular London reinsurance marketplace" and that "only *incidentally* affected commerce in this country" through "transactions having *no particular New York orientation* and occasioning injury here *only by reason of the circumstance* that plaintiff's purchasing branch happens to be located [in New York]." *Global Re*, 969 N.E.2d at 194-95 (emphases added).

To head off *Global Re* arguments, Plaintiffs should make efforts to avoid pleading *purely* foreign transactions with local injuries that are *incidental*. For example, to the extent possible, plaintiffs should set forth some acts underlying the transaction that occurred in or were specifically directed at New York—such as pre-transaction correspondence directed to New York, meetings in New York, and the like. Plaintiffs should also highlight the predictability of injuries suffered in New York—for example, identifying evidence that defendants actually knew New York residents would be harmed by their conduct. With careful analysis and thorough pre-filing investigations, plaintiffs may be able to satisfy the "very close nexus" standard *Global Re* articulated.

Arbitration the Answer?

Whatever the impact of *Global Re* on state-law claims, the outcome of that case highlights another issue: as New York courts, federal courts, or other courts restrict the availability of litigation to redress harms from foreign transactions, international arbitration will become increasingly important. For example, after *Global Re's* claims under New York law were all dismissed, *Global Re*'s only hope of recovery was arbitration—specifically, an international arbitration proceeding against underwriters, seeking damages for alleged abuses under insurance treaties. *Id*. at 194 (noting plaintiffs were "pursuing contract claims against Lloyd's underwriters in arbitration based on the same claims handling practices presently alleged"). Plaintiffs in future cases involving foreign defendants and foreign transactions need to carefully consider their opportunities for arbitration, and aggressively pursue arbitral awards as part of their global litigation strategy. A litigation-only approach would have left *Global Re* without avenues for recovery after its state-law claims were dismissed. Plaintiffs considering whether to assert U.S. claims in future cases involving foreign transactions should not overlook the importance of instituting arbitrations, and making forceful efforts to maximize recoveries in those arbitrations. Q

Peter Armenio Named One of "America's Best Life Sciences Litigators" by *Managing Intellectual Property* Magazine

Quinn Emanuel is pleased to announce that Peter Armenio, Co-Chair of the firm's Global Life Sciences Practice, has been named one of "America's Best Life Sciences Litigators" by *Managing Intellectual Property* magazine. This list of "the top 10 life sciences litigators in the U.S." was compiled as part of the extensive research that forms the basis for the forthcoming *LMG Life Sciences 2012* directory. The research included over 1,000 online surveys and nearly 600 attorney interviews, as well as a comprehensive review of case dockets. Q

Design Patent Victory for Motorola Mobility

The firm recently obtained a complete dismissal for our client Motorola Mobility of all claims asserted by Apple in a German design patent action. In 2011, Apple filed an action with the Düsseldorf District Court seeking a pan-European injunction against Motorola's tablet computer Xoom. Apple claimed that the Xoom infringed three design patents registered to Apple in the European Union. Apple further asserted trade dress claims and claims for infringement of an unregistered three dimensional trademark in the shape of the iPad. The case was tried in two hearings, one dealing with design patent and trade dress claims, the other one dealing with trademark claims. Quinn Emanuel convinced the Court that the impression created by the design of Motorola's Xoom device differs from the impression created by Apple's design patents. Consequently, the Court found non-infringement. Quinn Emanuel also convinced the Düsseldorf Court that Apple's trade dress claims (*i.e.*, alleged confusion as to source and alleged exploitation of reputation) were invalid and that Apple had no trademark claims, which resulted in a complete dismissal of Apple's action.

Dismissal of Charges of Violating the Iran Trade Embargo, Following Successful Appeal

In representing Mahmoud Reza Banki, an Iranian-American and former McKinsey & Co. associate, the firm negotiated the dismissal of federal criminal charges filed in the Southern District of New York that Banki had violated the Iran Trade Embargo and operated an illegal money transmitting business. The dismissal followed the firm's success in obtaining a rare reversal in the Second Circuit of convictions on those charges, following a trial in which the defense had been conducted by other firms.

Banki, a graduate of the University of California, Berkeley, and Princeton University, was arrested in January 2010 and held without bail, after being charged with violating the Iran Trade Regulations ("ITR") for receiving money from his family in Iran through an informal money transfer system called a "hawala." While conceding that it does not violate the ITR to receive money in the U.S. from Iran, federal prosecutors contended that, because the "hawala" broker in Iran used by Banki's family typically offset his transfers of funds to the U.S. with transfers of funds in the opposite direction, Banki's receipt of funds aided and abetted outgoing transfers of money that violated the ITR. The government also contended that the same conduct constituted "operation" of an unlicensed money transmitting business. Before trial the government added two false statement counts, for purportedly lying to the Office of Foreign Assets Control in correspondence regarding the funds transfers. The jury convicted Banki on all counts, and he was sentenced to 30 months' imprisonment.

Quinn Emanuel obtained a reversal of all counts except the false statement counts, on the grounds that the jury had not properly been instructed either that: (1) the ITR exempts non-commercial family remittances (in either direction); or (2) a money transmitting business must consist of more than one transaction conducted for a fee or profit. The decision in the expedited appeal, however, was issued just weeks before Banki had in any event nearly finished serving his 30-month sentence.

On remand, the firm negotiated the dismissal of the counts that had been remanded for re-trial, in exchange for Banki's agreement not to contest civil forfeiture in the amount of $700,000—one-fifth the amount the government had sought at trial. In addition, the firm represented Banki at resentencing, at which the sentencing judge (to whom the case had been reassigned following remand) accepted Banki's argument that he should be re-sentenced to a term of zero months' imprisonment and no term of supervised release. The judge noted in imposing the new sentence that the sentence served by Banki before the Second Circuit issued its decision "vastly exceeds any conceivable sentence" that would likely have been imposed on the false statement counts standing alone, that the "damage" to Banki's life "cannot be measured only by the 22 months in which he lost his liberty and which he cannot get back," and that the Court's aim in imposing the new sentence was to enable Banki, as much as possible, and acknowledging the convictions that survived appeal, "to get his life back."

Complete Dismissal of $1 Billion False Claims Act Lawsuit

Quinn Emanuel recently obtained dismissal of a False Claims Act lawsuit filed against its client, a government contractor. The relator had alleged that our client and another company had jointly defrauded the government based on errors in the design and construction of a multi-billion satellite, and was seeking over $1 billion in damages. When Quinn Emanuel was hired, the government had already commenced an investigation of the relator's allegations. The firm quickly dispatched a team of lawyers to thoroughly investigate each of the relator's many allegations and present the findings to the government. The government ultimately declined to intervene in the lawsuit on behalf of the relator. Shortly thereafter, the relator himself gave up and dismissed his lawsuit against the firm's client (though he is continuing to pursue the case against others). Q

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