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Extraterritoriality: The ATS In Focus

After RJR, the Debate Over the 'Focus' Test Is Over

Law360, New York (October 25, 2016, 10:25 AM EDT) -- In recent years, the U.S. Supreme Court's transnational jurisprudence has dramatically impacted cross-border litigation, particularly lawsuits arising under the Alien Tort Statute. Daimler narrowed broad concepts of personal jurisdiction and Kiobel made clear that the presumption against extraterritoriality applies in ATS cases.[1] Now, the court's recent decision in RJR Nabisco Inc. v. European Community has finally put to rest the debate about whether Morrison's "focus" test applies to the question of extraterritoriality in ATS cases.[2] RJR confirms that, in determining whether the application of a statute is impermissibly extraterritorial, courts must look to the statute's "focus."[3] This ruling displaces decisions from other courts, which held that Kiobel did not adopt the "focus" test for ATS cases.

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The Trilogy of Extraterritoriality Decisions

In 2010, the Supreme Court decided Morrison v. National Australia Bank, the first of three recent Supreme Court decisions — with Kiobel and RJR — to engage in the extraterritoriality analysis. Petitioners sought to apply an anti-fraud provision of the Securities Exchange Act of 1934 to alleged conduct on the Australian stock exchange. Articulating the well-established presumption against extraterritoriality that, absent clear indication to the contrary, statutes do not reach foreign conduct, the court held there was no such indication: "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not."[4] This left the question of whether, notwithstanding that the statute did not apply extraterritorially, the petitioners alleged sufficient domestic conduct to bring their claims within the scope of § 10(b).

While recognizing that the petitioners alleged some domestic conduct, including deceptive conduct and misleading public statements emanating from Florida, the court cautioned that the mere existence of some domestic conduct was insufficient to determine whether the petitioners alleged a permissible domestic application: "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved ..."[5] Drawing on its decision in EEOC v. Arabian American Oil Co.,[6] the court held that, to determine whether application of a statute is permissible, it is necessary to examine the statute's "focus."[7] Determining that the focus

of § 10(b), namely the conduct it sought to regulate, was the purchase or sale of securities in the United States, the court held that the petitioners claims, based on foreign transactions involving securities listed on foreign exchanges, sought an impermissible extraterritorial application.[8]

Three years later, the court had occasion to consider again the extraterritorial application of a statute, this time the ATS. In Kiobel v. Royal Dutch Petroleum Co.,[9] the court examined allegations that defendants had aided and abetted violations of international law in Nigeria. In contrast to Morrison, in which the petitioners alleged some domestic conduct, all the relevant alleged conduct in Kiobel occurred abroad.

Holding that the presumption against extraterritoriality applied to the ATS and nothing rebutted that presumption, the court affirmed dismissal of the claims, concluding that "all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[10] Though citing Morrison, which, as discussed, adopted the "focus" test, the court's use of the language "touch and concern" led some courts to conclude, erroneously, that the court had not applied the "focus" test, or called for a different extraterritoriality test in the ATS context.

ATS Extraterritoriality Confusion

For example, in 2014, the Ninth Circuit explicitly rejected the argument that the "focus" test should be applied in ATS cases and instead concluded that "Kiobel II articulates a new 'touch and concern' test for determining when it is permissible for an ATS claim to seek the extraterritorial application of federal law."[11] Rejecting the argument that the "touch and concern" test is substantially the same as the "focus" test, the court asserted: "Morrison may be informative precedent for discerning the content of the touch and concern standard, but the opinion in Kiobel II did not incorporate Morrison's focus test. Kiobel II did not explicitly adopt Morrison's focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt."[12]

Likewise, in Al Shimari v. CACI Premier Technology Inc., the Fourth Circuit applied the "touch and concern" language rather than Morrison's "focus" test, even as it acknowledged that the language "does not state a precise formula for [the court's] analysis."[13] And a district court in the Southern District of New York interpreted Kiobel to create a new standard even as it expressed confusion regarding how to apply that standard: "the Court failed to provide guidance regarding what is necessary to satisfy the 'touch and concern' standard."[14]

RJR thus is particularly important in clarifying the appropriate standard to be applied in the extraterritoriality analysis, alleviating the confusion reflected in these and other lower court decisions.

RJR Reaffirms the "Focus" Test

As the first decision since Morrison in which the Supreme Court has held that the presumption against extraterritoriality was rebutted as to a federal statute, on June 20, 2016, the Supreme Court confirmed in RJR that Morrison's "focus" test controls the extraterritoriality analysis. The case involved claims under the Racketeer Influenced and Corrupt Organizations Act, which incorporates a number of federal and state criminal laws, the violation of any of which may constitute a predicate act of racketeering. The court held that RICO applies extraterritorially only to the extent that the underlying predicate criminal offenses — the predicate acts — required to establish a RICO claim may apply to extraterritorial conduct.

The court explained that the analysis of whether a statute applies extraterritorially requires a “two-step framework”: the court must first ask whether the normal “presumption against extraterritoriality” has been rebutted by a “clear, affirmative indication that [the statute] applies extraterritorially,” and only if there is no such indication, then the court must ask whether the case otherwise involves a domestic application of the statute by looking to the statute’s “focus.”[15] Regarding the second step, the court explained that if conduct relevant to the statute’s focus occurred in the United States, then the case may involve a domestic application of the statute “even if other conduct occurred abroad.”[16] But if the conduct relevant to the statute’s focus occurred abroad, “then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.”[17] The court also clarified what it implied in Kiobel — that where “‘all the relevant conduct’ regarding the[] violations ‘t[akes] place outside the United States,’” the claim may be dismissed without the need to apply the “focus” test.[18]

RJR Confirms that the Extraterritoriality Analysis in ATS Cases Is Guided By Morrison’s “Focus” Test

RJR reaffirms that Morrison’s “focus” test is the controlling standard in analyzing whether application of a statute is impermissibly extraterritorial, in RICO, ATS and other cases. RJR also provides important course correction to courts that were interpreting Kiobel as creating a “touch and concern” test that was distinct from Morrison’s “focus” test.

Courts that held that the “touch and concern” test applied in ATS cases instead of Morrison’s “focus” test often so held because the Supreme Court did not expressly apply the “focus” test in Kiobel. But this is easily explained. Where, as in Kiobel, the presumption applies and there is no allegation of relevant domestic conduct, the impossibility of the claim alleging a permissible domestic application means there is no need for the court to determine the “focus” of the statute.[19] And the Supreme Court explicitly clarified as much in RJR: “Because ‘all the relevant conduct’ regarding those violations [in Kiobel] ‘took place outside the United States,’ we did not need to determine, as we did in Morrison, the statute’s ‘focus.’”[20]

Conclusion

Although it is a RICO case, the Supreme Court’s decision in RJR is an important transnational decision insofar as it clarifies the appropriate two-step framework for analyzing extraterritoriality issues, thereby alleviating any confusion about whether the “focus” test applies in ATS or other cases.

As the Kiobel court noted, though the presumption against extraterritoriality, a canon of statutory construction, does not strictly apply to the “jurisdictional” ATS, there are even greater reasons to apply the presumption to ATS claims than in other contexts: “Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.”[21] As the court recognized in Sosa v. Alvarez-Machain, a decision addressing the reach of the ATS, the foreign policy risks counsel caution: “‘the potential [foreign policy] implications ... of recognizing ... causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.’”[22] “‘Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.””[23] Citing these foreign policy considerations, the Kiobel court concluded: “The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.”[24]

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[1] Daimler AG v. Bauman, 134 S.Ct. 746 (2014); Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

[2] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) ("RJR"); Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

[3] RJR Nabisco, Inc., 136 S. Ct. at 2101.

[4] Morrison, 561 U.S. at 265.

[5] Id. at 266.

[6] 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("Aramco").

[7] Morrison, 561 U.S. at 266.

[8] Id. at 266-67, 273.

[9] 133 S. Ct. 1659.

[10] Id. at 1669 (citing Morrison, 561 U.S. 247, 130 S.Ct., at 2883–2888).

[11] Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1027 (9th Cir. 2014).

[12] Id. at 1028.

[13] Al Shimari v. CACI Premier Technology, Inc., 758 F.3d 516, 529 (4th Cir. 2014).

[14] Tymoshenko v. Firtash, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013).

[15] RJR Nabisco, Inc., 136 S.Ct. at 2101.

[16] Id.

[17] Id.

[18] Id.

[19] Kiobel, 133 S.Ct. at 1669.

[20] RJR Nabisco, Inc., 136 S.Ct. at 2101 (quoting Kiobel, 133 S.Ct. at 1670) (internal citation omitted).

[21] Kiobel, 133 S.Ct. at 1664.

[22] Id. (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004)).

[23] Kiobel, 133 S.Ct. at 1664 (quoting Sosa, 542 U.S. at 727-28).

[24] Kiobel, 133 S.Ct. at 1665.

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