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International Clawbacks: How Long is the Arm Holding the Claw?

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I. Introduction: Avoiding or Hedging Your Extraterritoriality Battle Bet

A bankruptcy trustee (or DIP) in a United States bankruptcy case who is considering filing a claw-back action in the United States where the transfer involved is not obviously a domestic transfer has a minefield to cross.

II. The Domestic Minefield

A. Is There Personal Jurisdiction Over the Alleged Transferee?

One of the first concerns for a US fiduciary considering a claw-back suit in the US is whether the Bankruptcy Court has personal jurisdiction over the proposed defendant(s). In recent years, the Supreme Court has significantly narrowed when it is constitutionally permissible to sue a defendant in the United States based upon "general jurisdiction," that is personal jurisdiction over a defendant when the cause of action does not have a nexus to the defendant's activities in the forum. Until recently, most courts understood that a defendant was subject to general jurisdiction not just when it had it place of incorporation or principal place of business in the forum but also when it had continuous and systematic business contacts with the forum.[1] However, in 2014, the Supreme Court determined that despite Daimler having a significant, continuous and systematic business presence in California through its US subsidiary it was not subject to general jurisdiction for a cause of action unrelated to that presence.[2] In fact, the Daimler court held that general jurisdiction, other than when the corporation is incorporated, has its principal place of business, or is "essentially at home" in the forum would exist only in an "exceptional case."[3] Applying this to the claw-back context, general jurisdiction as the basis for personal jurisdiction

[1] *See, e.g.*, *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 425 (7th Cir. 2010) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 US 408, 415–16 (1984)).

[2] *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

[3] *Id.* at n.19.

over a claw-back defendant likely only applies to defendants who have their principal place of business in the United States.[4]

Accordingly, the US fiduciary suing on a claw-back is much more likely to rely upon "specific jurisdiction" asserting that the cause of action has a nexus to the activity of the defendant in the US. Of course, this notion begs many of the same questions discussed in the case law regarding whether US claw-back statutes have extraterritorial application. Moreover, there may be some debate whether the nexus needed for "specific jurisdiction" looks at only the nexus to the transfers themselves or to the underlying transaction upon which the transfer was based.[5]

B. Is the Transfer Foreign or Domestic?

Even if personal jurisdiction exists over a defendant, the US fiduciary must consider the next mine in the minefield. Will the US Court find that the transfer involved is foreign or domestic? As seen in the other materials, this choice of law analysis is slightly different then the question of whether the US claw-back statutes apply extraterritorially.

The presumption against extraterritoriality is best understood as a canon of construction rooted in the notion that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[6] A century after making this pronouncement, the Supreme Court explained that "in case of doubt, a federal statute should be construed to be

[4] In *In re Hellas Telecomm. (Luxembourg) II, SCA*, 525 B.R. 488 (Bankr. S.D.N.Y. 2015), the Court held it lacked general jurisdiction over most of the non-US corporate defendants because they were not incorporated not did they have their principal place of business in the United States. The Court did hold that it did have general jurisdiction over one corporate entity because it was "essentially at home" in the United States due to its $5 billion in US assets, 1.6 million square feet of office in the US, and its 1600 employees in the U.S. *Id.* at 508. This holding distinguished Daimler on the basis that the facts supporting Daimler being "essentially at home" in California was via ownership of a subsidiary rather than direct. *Id.* Even this holding, however, may no longer be good law. *See also In re Libor-Based Fin. Instruments Antitrust Litig.*, 2015 WL 6243526, n.43 (S.D.N.Y. 2015) (expressly disagreeing with *Hellas* court on this point).

[5] *See Hellas*, 525 B.R. at 508–11.

[6] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[7] Indeed, is a "longstanding principle of American law [that] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[8]

More recently, the Supreme Court articulated a two-part test for determining whether the presumption against extraterritoriality bars a claim:

1) Identify whether "the statute gives a clear, affirmative indication that it applies extraterritorially."[9] A court need not apply a "clear statement" rule, but may also consider context.[10]

a) If the statute *does* have extraterritorial effect, then step two is not necessary. Rather the court must instead consider the scope of the statute "which turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's focus."[11]

2) If the statute is not extraterritorial, the court must analyze the "focus of congressional concern" to determine whether the conduct at issue constitutes a domestic application of the statute.[12] If the conduct covered by the statute occurred in the United States, then the presumption will be rebutted. Conversely, applying a statute to conduct that is relevant to the statute's focus would constitute an impermissible extraterritorial application of that statute.[13]

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[7] *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

[8] *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *see also Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 248 (2010).

[9] *Id*. at 255; *see also RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2101 (2016).

[10] *Morrison*, 561 U.S. at 265.

[11] *RJR Nabisco*, 136 S. Ct. at 2101.

[12] *Id*.; *see also Morrison*, 561 U.S. at 266–67.

[13] *RJR Nabisco*, 136 S. Ct. at 2101.

The presumption against extraterritoriality "applies regardless of whether there is a risk of conflict between the American statute and a foreign law."[14]

It is important to note that the European Union through regulation provides for a presumption that the law of the bankruptcy forum applies to claw-back actions but such presumption is overcome by showing the transfer was wholly domestic in another member state and the transfer would not be avoided under the laws of such other state.[15]

C. Do the US Clawback Statutes Apply Extraterritorially?

Next, the US fiduciary will need to convince the US court that the US claw-back statutes apply extraterritorially under the split of cases discussed below. The Supreme Court's increased focus on territorialism presents unique challenges in the context of insolvency proceedings, and specifically fraudulent conveyances. Are transfers any less domestic or foreign if the parties reside abroad? What if the transfers at issue were part of a global scheme to defraud domestic creditors? Or what if a large-scale international transaction soured abroad, but harmed domestic creditors? Should a domestic debtor be forced to seek relief in foreign courts in order to recover assets located abroad? Does the analysis change if the debtor is foreign? Should we ignore all of these issues and instead rely on a pure transactional test that looks at where the transfers are made? Finally, is the presumption against extraterritoriality a means for courts to avoid thorny choice of law issues that require consideration of the priority of U.S. law vis-à-vis foreign law?

In recent years, bankruptcy and appellate courts around the country have grappled with these issues, but a clear pattern has yet to emerge. While is easy to figure out which courts believe that the fraudulent transfer provisions of the bankruptcy code apply extraterritorially, there is no

[14] *Morrison*, 561 U.S. at 255 (citing *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173–74 (1993)).

[15] *See Lutz v. Bauerle*, [2015] EUECJ C-557/13.

consensus as to how to apply the "focus" prong of the *Morrison* test or how to determine whether a transfer occurred abroad.

i. Cases Where Claims Were Not Barred By the Presumption Against Extraterritoriality

a. Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c))[16]

Facts: Prior to its bankruptcy, the debtor, a bank organized under the laws of Bahrain, entered into short-term investments pursuant to placement agreements with the defendants, two Bahraini entities.[17] The placement agreements were negotiated and signed in Bahrain and were governed by either Bahraini or Shari'ah law.[18] Pursuant to those agreements, the debtor transferred millions of dollars from its account at JP Morgan Chase in New York to the correspondent bank accounts of the defendants, which were also located in New York. Less than one month later, the debtor filed a voluntary petition for relief under Chapter 11 in the Southern District of New York. The placements matured the following month, but the defendants did not deliver the proceeds to the debtor. Instead, they asserted that the proceeds from those placement agreements were being set off against other prepetition debts that Arcapita owed them. The creditor's committee sued the defendants, seeking, *inter alia*, the return of the initial placement payments as avoidable transfer.[19]

[16] Adv. Pro. No. 13-01434 (SHL), ECF No. 54 (Bankr. S.D.N.Y. Oct. 13, 2017). These placement agreements obliged the defendants to purchase investments on the debtor's behalf, and then return the proceeds to the debtor on a deferred payment basis, including an agreed-upon return on the maturity date.

[17] *Id.* at 3.

[18] *Id.*

[19] *Id.* at 5–6. The Committee also brought claims for breach of contract; return of the placement proceeds under sections 541, 542, and, 550; violations of the automatic stay; and disallowance under section 502(d).

Transfers Domestic: The court found that "the conduct here touched and concerned the United States in a manner sufficient to displace the presumption against extraterritoriality,"[20] citing to a decision of the district court in this case that dealt with personal jurisdiction.[21]

b. Emerald Capital Advisors Corp. v. Bayerische Moteren Werke Aktiengeselleschaft (In re FAH Liquidating Corp.)[22]

Facts: Judge Gross considered claims brought by a liquidating trustee seeking to avoid and recover transfers made by U.S. debtors[23] to BMW, a German entity.[24] The payments were made pursuant to agreements between the debtors and BMW for services and supplies.[25] The allegations is that the debtors pre-paid for the services and supplies, which BMW never supplied. Accordingly, the trustee sought to unwind those payments as constructively fraudulent pursuant to section 548(a)(1)(B) of the Bankruptcy Code. The Court held that the transfers were extraterritorial, but that section 548 of the bankruptcy code was intended to cover extraterritorial conduct.[26]

Transfers Extraterritorial: The court analyzed whether the transfers were extraterritorial in nature by applying the "center of gravity" test, looking at the component events of the transfers.[27] The court was unpersuaded by the argument that because the transfers originated in the United States, they must be deemed domestic. Rather, it focused on the agreements that governed the payments in concluding that the transfers were extraterritorial. For example, certain

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[20] *Id.* at 21.

[21] *Id.* at 21–22 and note 8.

[22] Adv. Pro. No. 15-51898 (KG), 2017 WL 2559892 (Bankr. D. Del. June 13, 2017).

[23] *Id.* at *1, n. 2.

[24] *Id.* at *2.

[25] *Id.*

[26] *Id.* at *4 (citing *Weisfelner v. Blavatnik (In re Lyondell)*, 543 B.R. 127, 148 (Bankr. S.D.N.Y. 2016)).

[27] *Id.* at *4 (citing *French v. Liebmann (In re French)*, 440 F.3d 145, 149 (4th Cir. 2006); *Maxwell Commc'n Corp. plc v. Societe General plc (In re Maxwell Commc'n Corp. plc)*, 186 B.R. 807, 816 (S.D.N.Y. 1995)).

milestones were to be achieved in Germany, a forum selection clause required disputes to be adjudicated in Germany under German law, and payment was required in Euros.[28]

Section 548 Applies Extraterritorially: Nevertheless, the court found that the trustee's claims could not be dismissed on extraterritoriality grounds because Congress intended section 548 to apply outside the United States. Agreeing with Judge Gerber's decision in *Lyondell*, Judge Gross reasoned that section 541 of the Bankruptcy Code covers all "interests of the debtor in property," which tracks the language found in section 548. Judge Gross interpreted section 541 as a provision dealing with the timing of when property becomes part of the debtor's estate, but the use of parallel language in sections 541 and 548 suffices to evince Congressional intent that both provisions apply extraterritorially. "By incorporating the language of section 541 to define what property a trustee may recover under his avoidance powers, section 548 plainly allows a trustee to avoid any transfer of property that *would have been* "property of the estate" prior to the transfer in question as defined by section 541 even if that property is not property of the estate *now*.[29]

c. Weisfelner v. Blavatnik (In re Lyondell Chemical Co.)[30]

Facts: Litigation trustee sought avoidance and recovery of a shareholder distribution paid in connection with a merger / LBO. That distribution was paid from a foreign entity that had acquired Lyondell to its foreign shareholders. The trustee alleged that the LBO left the resulting company and Lyondell insolvent, rendering the transfers avoidable under section 548 of the Bankruptcy Code.

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[28] *Id.* at *5 (citing *Sherwood Investments Overseas Ltd., Inc. v. The Royal Bank of Scotland N.V. (In re Sherwood Investments Overseas Ltd., Inc.)*, 2015 WL 4486470 (Bankr. M.D. Fla. July 22, 2015)).

[29] *Id.* at *5 (emphasis in original).

[30] 543 B.R. 127 (Bankr. S.D.N.Y. 2016).

Transfers Extraterritorial: Applying the "center of gravity" test, the court examined the component events of the pre-merger distribution and the merger itself.[31] Although the trustee argued that the distribution was orchestrated by Blavatnik in the United States, and that the merger had substantial connections to the United States, the Court found that the transfers were extraterritorial.[32] The Court relies heavily on the fact that the transfers were between two Luxembourg entities in concluding that the transfers were extraterritorial.[33]

Section 548 Applies Extraterritorially: Having concluded that applying section 548 to the transfers at issue would constitute an extraterritorial application of U.S. law, Judge Gerber then turned to the question of whether Congress intended section 548 to apply extraterritorially. Answering that question in the affirmative, Judge Gerber turned to the bankruptcy court's *in rem* jurisdiction over "all of a debtor's property, whether foreign or domestic."[34] Judge Gerber agreed with the reasoning of *In re French*, and explained that fraudulently transferred property, though not property of the estate as of the petition date, would have been property of the estate but for the fraudulent transfer.[35] Essentially, Judge Gerber ties this analysis to the "context" prong of *Morrison*, which permits a court to construe a statute when there is no clear language indicating

[31] *Id.* at 149.

[32] *Id.* at 149–150.

[33] *Id.* The court noted the importance of the citizenship of the transferor and transferee: "[The] allegation—that the transfer itself was not made between two foreign entities—would be of particular importance in the extraterritoriality analysis. . . . And the court expresses no view on whether a transfer involving a domestic transferor or transferee would be extraterritorial." *Id.* at 150 n. 91.

[34] *Id.* at 151–52 and notes 104, 105 (citations omitted).

[35] *Id.* at 152.

extraterritorial reach.[36] Additionally, Judger Gerber noted that the focus of Section 548 is "the nature of the transaction in which property is transferred."[37]

Judge Gerber went on to address the likely concern that his conclusion would run afoul of the Second Circuit's holding in *Colonial Realty*,[38] which held that fraudulently transferred property is not part of the bankruptcy estate until it has been recovered.[39] To support his conclusion, Judge Gerber explained that *Colonial Realty* recognizes the timing distinction between sections 541(a)(1) and 541(a)(3), and that observation "falls far short of holding that property not in the estate as of the commencement of the case cannot be brought into the estate because it is in a foreign locale."[40] Judge Gerber reiterated the importance of the bankruptcy court's *in rem* jurisdiction and notes that Congress could not have intended "that property located anywhere in the world could be property of the estate once recovered under section 550, but that a trustee could not avoid the fraudulent transfer and recover that property if the center of gravity of the fraudulent transfer were outside the United States."[41]

d. French v. Liebmann (In re French)[42]

Facts: U.S. chapter 7 debtor transferred Bahamian real estate to her children, but did not record that transfer by deed until years later. Shortly after that deed was recorded, an involuntary chapter 7 proceeding was filed against the debtor. The chapter 7 trustee commenced an adversary

[36] *Id.* at 151 (presumption against extraterritoriality is not a "clear statement rule," and courts may look to context).

[37] *Id.* at 150 and note 94 (citing *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 513 B.R. 222, 227 (S.D.N.Y. 2014)).

[38] *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992).

[39] *Lyondell*, 543 B.R. at 153.

[40] *Id.* at 154.

[41] *Id.* at 154–155.

[42] 440 F.3d 145 (4th Cir. 2006).

proceeding seeking to avoid the transfer of the Bahamian property as constructively fraudulent pursuant to section 548(a)(1)(B) of the Bankruptcy Code.

Transfers Not Extraterritorial: Recognizing the difficulty of defining foreign conduct, the court found that "any definition must eschew rigid rules in favor of a more flexible inquiry into the "place" of regulated conduct."[43] Without affirmatively proscribing a test to determine the focus of the statute at issue, the Fourth Circuit noted that in the antitrust context, courts should consider "whether the participants, acts, targets, and effects" in the transaction are "primarily foreign or primarily domestic."[44] The court also endorsed the *In re Maxwell Commc'n Corp. plc* test, requiring examination of the component events of the transfer in question.[45] Under that rubric, the court notes that the debtor and creditors were all in the United States, and the determination of the debtor's insolvency required an accounting of almost entirely domestic assets and debtor. And although the recordation of the deed took place in the Bahamas, the court found the act of recording the deed to be "at most incidental" to the conduct covered by section 548.[46]

Section 548 Applies Extraterritorially: The court concluded that section 548 of the Bankruptcy Code applies extraterritorially because it incorporates the language of section 541, which includes foreign and domestic property.[47] The court further noted that its conclusion is supported by consideration of the purpose of avoidance laws aimed at preventing dissipation of

[43] *Id*. at 149.

[44] *Id.* at 150 (citing *Dee-K Enters.*, 299 F.3d at 294).

[45] *Id.* (citing *In re Maxwell Commc'n Corp. plc*, 186 B.R. at 816).

[46] *Id.* The court declined to answer the "slippery question" of whether application of United States law could affect Bahamian real property because section 548 is properly applied in this case. *Id.* at 150–51.

[47] *Id.* at 151. The court acknowledged the split among circuits on the question of whether property of the estate includes fraudulently transferred property, but explains that its holding does not take a position on such issue. *Id.* at 152 n.2 ("Because we hold that § 548 applies to the transfer in this case *even assuming* that § 541's definition of property of the estate" does not by itself extend to the Bahamian property, we need not join this dispute.").

assets that should be made available for pro rata distribution to unsecured creditors.[48] The concurring opinion elaborates on Congressional intent, pointing out that "it is unlikely that Congress would desire to accord an invariable exemption from the Code's operation to those who leave our borders to engage in fraud."[49] Moreover, the concurrence distinguishes bankruptcy law as one area that should not be subject to "general pronouncements on extraterritoriality."[50]

Application of U.S. Law Appropriate Even Under Comity Analysis: The court addressed defendants' argument that application of U.S. law would be inappropriate due to concerns of international comity. Because the property at issue involved real property, the court noted that in some cases, it would make sense to apply the law of the situs. However, because the property was part of the bankruptcy estate (an aggregate *res*), the court concluded that the United States has a greater interest in regulating the transaction because of the Bankruptcy Code's unquestionable policy goal of protecting the rights of debtors and creditors.

e. Picard v. Bureau of Labor Insurance[51]

Facts: The trustee in the Securities Investor Protection Act liquidation of the Bernard L. Madoff Investment Securities Ponzi scheme brought an adversary proceeding to recover allegedly fraudulent transferred funds from subsequent transferee the Bureau of Labor Insurance (BLI). BLI moved to dismiss the trustee's avoidance action on grounds that the trustee's claims were barred by the presumption against extraterritoriality.

Focus of Avoidance and Recovery Provisions is the Initial Transfer: The court found that the trustee's claims were not barred by the presumption against extraterritoriality. In light of the

[48] *Id.* at 152.

[49] *Id.* at 155.

[50] *Id.*

[51] 480 B.R. 501 (Bankr. S.D.N.Y. 2012).

"focus" test annunciated in *Morrison*, in conjunction with pragmatic considerations, Judge Lifland found that the focus of the Bankruptcy Code's avoidance and recovery provisions lies with the initial transfers that depleted the bankruptcy estate and not on the recipient of the transfers or the subsequent transfers. The court found that application of Section 550 in this case was domestic because the depletion of the BLMIS estate occurred in the United States.

Section 550 Applies Extraterritorially: Congress expressed clear intent for such an application and the presumption against extraterritoriality "must give way when Congress exercises its undeniable 'authority to enforce its laws beyond the territorial boundaries of the United States.'"[52]

ii. Cases Where Claims Were Barred By the Presumption Against Extraterritoriality

a. Spizz v. Goldfarb Seligman & Co (In re Ampal-American Israel Corp.)[53]

Facts: Chapter 7 trustee for New York corporation sought avoidance and recovery of a single payment made within 90 days of the petition date as a preference under section 547. The payment was made to an Israeli law firm that provided services to one of the debtor's subsidiaries in Israel. The funds were transferred from an Israeli bank to the law firm's Israeli bank account.

Section 547 Does Not Apply Extraterritorially: After considering the reasoning underlying several cases, including *In re French* and *In re Lyondell*, the court concluded that section 547(b) does not apply extraterritorially.[54] The court rejected the argument that section 541 could serve as a basis for concluding that the avoidance provisions deserve extraterritorial reach: "property transferred to a third party prior to bankruptcy in payment of an antecedent debt is neither property

[52] *Id.* at 526.

[53] 562 B.R. 601 (Bankr. S.D.N.Y. 2017).

[54] *Ampal*, 562 B.R. at 612.

of the estate nor property of the debtor *at the time the bankruptcy case is commenced*, the only two categories of property mentioned in Bankruptcy Code § 541(a)(1)."[55]

Focus of Avoidance and Recovery Provisions is the Initial Transfer: The Court turned to the "focus" prong of the *Morrison* test and concluded that the initial transfer is the focus of the avoidance and recovery provisions of the Bankruptcy Code.[56] Drawing a distinction between the right afforded under section 547 or 548 and the remedy permitted under section 550, the court noted that "in the case of the initial and subsequent transferees, the trustee is essentially tracing property into the hands of the recipient . . . the sole question should be whether the trustee can enforce that remedy consistent with the principles of personal jurisdiction."[57]

Transfer Extraterritorial: The court concluded that the transfer at issue was not domestic because the transfer was made from an entity headquartered in Israel (though incorporated in the U.S.), to an Israeli entity, and accomplished between two Israeli bank accounts at the same bank. The fact that some connection existed to the U.S., in the court's view, was insufficient to render the transfer domestic.[58]

b. Sherwood Investments Overseas Ltd., Inc. v. The Royal Bank of Scotland N.V. (In re Sherwood Investments Overseas Ltd., Inc.)[59]

Facts: Debtor sought to avoid transfers made to the defendant relating to complex financial transactions resulting from the collapse of Lehman Brothers in September 2008. The payments at issue were made from the debtor's bank account in Switzerland and received by the defendant in

[55] *Id.* (emphasis in original).

[56] *Id.* at 613.

[57] *Id.*

[58] *Id.* (the debtor's class A shares traded on NASDAQ, and the law firm provided services related to the debtor's SEC and NASDAQ filings).

[59] Adv. Pro. No. 10-00158 (KSJ), 2015 WL 4486470 (Bankr. M.D. Fla. July 22, 2015) *aff'd* No. 15-cv-1469-Orl, 2016 WL 5719450 (M.D. Fla. Sept. 30, 2016), *appeal dismissed*, No. 16-16824 (11th Cir. Apr. 24, 2017).

its non-U.S. bank accounts. The defendant argued that the presumption against extraterritoriality barred the debtor's claims because the transfers were entirely foreign.[60]

Focus of Section 548 and the Extraterritorial Nature of the Transfers: The Court articulated the test for determining the "focus of congressional concern" in the fraudulent transfer context as requiring examination of "the *transfers* sought avoided, not the parties' relationship or locus."[61] From there, it concluded that the transfers at issue were extraterritorial because "[t]he recipient was a Netherlands entity. The transferor was a British Virgin Islands entity. All trading and creation of the underlying securities purchased with the Transfers was performed in London, England."[62] The court rejected the plaintiffs argument that the debtor's principal lived in the U.S. and directed its business with the defendant and UBS from the U.S., but noted that the "initiation of the Transfers from the United States does not defeat the presumption's application when the actual Transfers occurred abroad. UBS transferred monies from Sherwood's Swiss account to RBS's English Account."[63]

c. Sec. Investor Prot. Corp. v Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)[64]

Facts: The trustee in the SIPA liquidation of the Madoff Ponzi scheme brought adversary proceedings to recover funds transferred from Madoff Securities to various "feeder funds" and then subsequently transferred foreign defendants.

Focus of Section 550: The court first reviewed Section 550 to determine if the circumstances at issue required an extraterritorial application and applied *In re Maxwell Commc'n*

[60] *Id.* at *10.

[61] *Id.*, at *19.

[62] *Id.* at *21.

[63] *Id.* at *20.

[64] 513 B.R. 222 (S.D.N.Y. 2014)

Corp. plc's "location of the transfers as well as the component events of those transactions" analysis. While the transfers initiated with BLMIS in the United Sates, the chain of transfers brought them outside of the United states once they were transferred from a foreign "feeder fund" to the foreign subsequent transferee defendant.

Section 550 Does Not Apply Extraterritorially: The court then concluded that nothing in the language of Section 550 suggested that "Congress intended for this section to apply to foreign transfers."[65] Further, citing *In re Colonial Reality Co.*,[66] the court explained that Section 541's definition of "property of the estate" was not relevant to interpreting "property of the debtor" under Section 550 does not necessarily imply that transferred property is to be treated as "property of the estate" under Section 541.

Comity As Alternative Basis for Dismissal: The court explained that comity could be an alternative basis for dismissal, noting that comity is "especially important" in bankruptcy proceedings, and that "[m]any of the feeder funds are currently involved in their own liquidation proceedings in their home countries."[67]

d. In re Midland Euro Exchange Inc.[68]

Facts: Chapter 7 trustee brought adversary proceeding to avoid, fraudulent transfers made in furtherance of alleged Ponzi scheme.

Bankruptcy Code Does Not Apply Extraterritorially: The court explained that why the policy goals of the Bankruptcy Code require a trustee to "marshal the assets of the debtor wherever

[65] *Id.* at 228.

[66] *Id.* at 229 (citing *In re Colonial Realty Co.*, 980 F.2d 125, 131 (2d Cir. 1992) (citation omitted) (quoting *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla.1989)).

[67] *Id.* at 231–32.

[68] 347 B.R. 708 (Bankr. C.D. Cal. 2006).

located,"[69] these considerations must be balanced against the presumption against extraterritoriality. Disagreeing with *In re French*'s analysis of Section 541(a), the court concluded that "property that has been fraudulently transferred only becomes property of the estate when the transfer has been set aside."[70] On this basis, the court rejected the argument that Congress intended section 548 to apply extraterritorially.

e. Maxwell Commc'n Corp. plc v. Societe General plc (In re Maxwell Commc'n Corp. plc)[71]

Facts: The debtor transferred funds to two British banks and one French bank in satisfaction of various credit facilities.[72] Those funds were sourced from the sale of the debtor's U.S. assets. Shortly after the bank payments were made, the debtor filed a petition under Chapter 11 in the United States, and the day after sought relief in an insolvency proceeding in London.[73] The debtor then filed adversary proceedings seeking to recover the bank transfers as avoidable preferences.[74] The bankruptcy court dismissed the claims on extraterritoriality and international comity grounds.[75]

Bankruptcy Code Does Not Apply Extraterritorially: On appeal, the district court affirmed the judgment of the bankruptcy court, agreeing that section 547 does not govern extraterritorial transfers,[76] and that deference to the U.K. proceeding was appropriate under principles of international comity.[77] Judge Scheindlin analyzed the extraterritorial nature of the transfers by

[69] *Id.* at 718 (internal citation marks omitted).

[70] *Id.* at 719.

[71] 186 B.R. 807 (S.D.N.Y. 1995).

[72] *Id.* at 813.

[73] *Id.*

[74] *Id.* at 814.

[75] *Id.* at 812.

[76] *Id.* at 820–21.

[77] *Id.* at 822–23.

consdiering considering the component events of those transfers.[78] Under that model, the court found that the transfers clearly took place overseas, because the parties were foreign, their relationship was anchored in England, and the only connection to the U.S. was the source of funds that were used to effect the transfers.[79] With respect to the extraterritorial reach of section 547, the district court agreed with the bankruptcy court's earlier conclusion that congress did not intend for it to extend beyond U.S. borders.[80]

D. Will the Court Use an "International Comity" Override?

Next, the US fiduciary will need to convince the US court that it should not use international comity to abstain or defer under the reasoning in the cases discussed in the other materials.

iii. Conflicts of Laws & Comity Issues

***a. Maxwell Commc'n Corp. plc v. Societe Generale (In re Maxwell Commc'n Corp. plc)*[81]**

Facts: UK liquidators appealed again, this time to the Second Circuit, which affirmed the lower court, ultimately holding:

> [I]n this unique case involving cooperative parallel bankruptcy proceedings seeking to harmonize two nations' insolvency laws for the common benefit of creditors, the doctrine of international comity precludes application of the American avoidance law to transfers in which England's interest has primacy.[82]

Comity Precludes Application of U.S. Bankruptcy Code: The Court explained that international comity is not meant to limit a nation's ability to enact laws applicable to conduct

[78] *Id.* at 816.

[79] *Id.* at 817.

[80] *Id.* at 819–820. The court rejected the argument that the "wherever located" language found in section 541 sufficed to evince congressional intent for the preference statute to apply abroad.

[81] 93 F.3d 1036 (2d Cir. 1996).

[82] *Id.* at 1054–55.

abroad, but rather guides the "interpretation of statutes that might otherwise be read to apply to such conduct."[83] Comity considerations are particularly important to consider where the Bankruptcy Code is at play, the Court said, because: (1) deference to foreign bankruptcy proceedings will usually facilitate distribution of the debtor's assets, and (2) Congress revised the bankruptcy laws to explicitly recognize the import of international comity as pertains to insolvency proceedings overseas.[84] Reviewing old 11 U.S.C. § 304 and *Cunard*, the Court found that the comity "should not be read 'to overrule in foreign bankruptcies well-established principles based on considerations of international comity.'"[85] The Court also found that, unlike *Hartford Fire*, a true conflict existed between U.S. and English law based on the dispute over the applicability of the avoidance provision of the Bankruptcy Code.[86]

Like the district court, the Second Circuit found that England had a closer connection to the dispute because appellant "was incorporated under the laws of England, largely controlled by British nationals, governed by a British board of directors, and managed in London by British executives."[87] The Court noted that "it is assuredly most relevant that the transfers in this case related primarily to England."[88] As to the United States' interest, the Court found that the sale of the appellant's subsidiaries in the United States was one of the only factors connecting it to America and that fact was "not particularly weighty because those companies were sold as going

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[83] *Id*. at 1047.

[84] *Id*. at 1048 (citing *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985); *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987); 11 U.S.C. § 304).

[85] *Id*. at 1049 (quoting *Cunard*, 773 F.3d at 456).

[86] *Id*. at 1050 (arguably disagreeing with the district court's analysis on *Hartford Fire* and finding that "there is a true conflict necessitating the application of comity principles to ascertain the compass of the Code").

[87] *Id*. at 1051.

[88] *Id*.

concerns."[89] Finally, the Court pointed to "a high level of international cooperation and a significant degree of harmonization of the laws of the two countries" as "a compelling systemic interest pointing in this instance against the application of the Bankruptcy Code."[90]

b. In re LLS Am., LLC,[91]

> "Although there undoubtedly were events relevant to this dispute which occurred in Canada, the evidence indicates that this cross-border activity, whether or not it constituted a Ponzi scheme, had it center or gravity in Spokane, Washington. The application of the doctrine of conflict of laws results in the conclusion that the laws of the United States and not the laws of Canada are applicable."

On appeal, the Ninth Circuit appears to have affirmed the above conclusion based on extraterritoriality.[92] We review de novo questions of extraterritoriality.[93] "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."[94] Here, the district court properly applied United States law to a domestic matter. Kriegman sought to avoid transfers made by LLS America, a company that was headquartered in Spokane, Washington. Defendants' location in Canada does not indicate where the pertinent activity occurred; rather, the focus of Kriegman's avoidance claims is on LLS America's location, as the debtor, in the United States.[95]

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[89] *Id*. at 1052.

[90] *Id*. at 1053.

[91] No. 09-06194-PCW, 2012 WL 2564722, at *11 (Bankr. E.D. Wash. July 2, 2012)

[92] *In re LLS Am., LLC*, No. 15-35198, 2017 WL 2713444 (9th Cir. 2017)

[93] *United States v. Ubaldo*, 859 F.3d 690, 699–700 (9th Cir. 2017) (citing *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006)).

[94] *Morrison*, 561 U.S. at 255 (internal quotation marks omitted).

[95] *See, e.g.*, 11 U.S.C. § 548 ("The trustee may avoid any transfer ... incurred by the debtor ....") (emphasis added).

c. Hosking v. TPG Capital Mgmt, L.P. (In re Hellas Telecomm. (Luxembourg) II SCA)[96]

Facts: In this Chapter 15 case, the liquidators appointed pursuant to a U.K. proceeding brought claims under New York Debtor Creditor Law, seeking avoidance and recovery of actual and constructive fraudulent transfers. Defendants argued, *inter alia*, that the DCL did not apply extraterritorially to transfers lacking a nexus to NY and the NY legislature did not clearly evince intent for DCL to apply extraterritorially; and the constructive fraudulent transfer claims must be dismissed because under NY choice of law rules, Luxembourg or the U.K. have greater interest in regulating the transfer at issue and neither law recognizes claims for constructive fraudulent conveyances.

Judge Glenn avoided the extraterritoriality question,[97] instead concluding for the actually fraudulent transfer claims, a true conflict existed, and that either the U.K. or Luxembourg had a greater interest in applying its laws to the propriety of the transfers.

Judge Glenn devotes a lengthy footnote to discussing how extraterritoriality relates to choice of law and conflicts principles.

III. Can US Fiduciary Sue Under Foreign Clawback Laws in US?

A US fiduciary considering a claw-back claim in the United States for a transfer that is not obviously a domestic transfer, might try to hedge the bet by including claw-back claims under the laws of the foreign country. Obviously, the success of this attempt is likely to rest on the particulars of the foreign statutes or laws. Since foreign representatives under Chapter 15 are prohibited by

[96] 524 B.R. 488 (Bankr. S.D.N.Y. 2015).

[97] *Hosking*, 524 B.R. at 497, 502 n.23, 517 n.32, & 529 n.41.

Section 1521(a)(7) from suing under certain US claw-back statutes, these foreign fiduciaries have sued under the laws of their foreign proceeding.[98]

Obstacles present in foreign claw-back statutes that seem to prevent them from being asserted in the US might be overcome if they are deemed "procedural" in nature.[99] However, the issue of standing looms large in that many foreign claw-back statutes identify that the person entitled to file the claim is the fiduciary appointed under the foreign insolvency law. This standing issue typically does not arise in the Chapter 15 context as the foreign representative is the fiduciary appointed under the foreign insolvency law.

More promising is where the foreign claw-back is a creditor remedy (like the Uniform Fraudulent Conveyance Act or Uniform Fraudulent Transfer Act in most US jurisdictions). Under Section 544, the US fiduciary can asserts all the rights and powers of a creditor; accordingly, if the foreign claim is one that can be asserted by a creditor, then the US fiduciary should be able to assert the claim.

IV. The Alternative Foreign Minefield

The US fiduciary can seek to avoid (pun, intended) the domestic minefield by trying to sue in the foreign jurisdiction.

A. Obtain Recognition of US Bankruptcy Case in the Foreign Jurisdiction

The US fiduciary will need to explore if the foreign jurisdiction must recognize the US bankruptcy case or agree to provide assistance to the US fiduciary before allowing the US fiduciary

[98] *See In re Condor Ins. Ltd*, 601 F. 3d 319 (5th Cir. 2010); *In re Condor Ins. Ltd.*, Bankr. No. 07-51045-NPO, Adv. Pro. No. 07-05049-NPO, 2012 WL 720233 (Bankr. S.D. Miss.); *In re Hellas Telecomm. (Luxembourg) II, SCA*, 535 B.R. 543 (Bankr. S.D.N.Y. 2015) (UK claw-back claim).

[99] *See In re Hellas Telecomm. (Luxembourg) II, SCA*, 535 B.R. at 565 (provision in UK claw-back statute naming forum for litigation determined to be a procedural venue provision and thus inapplicable).

any right to sue. For countries that have adopted the UNCITRAL Model Law, such recognition is required. Jurisdictions that have not adopted the Model Law may allow applications for assistance.

B. Sue Transferee in the Foreign Jurisdiction

Once the US fiduciary obtains recognition or is afforded assistance by the foreign court, the claw-back claim might be available. The *Primeo* case originating in The Cayman Islands is an example. In *Primeo*, it was held that the High Court in The Cayman Islands, a non-Model Law jurisdiction, can lend assistance to a US fiduciary to allow the pursuit of a claw-back claim under the laws of The Cayman Islands.[100]

[100] *Picard v. Primeo Fund (In Liquidation)*, 2014(1) CILR 379 (Ct. App. Cayman Is.)

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Avoiding or Hedging Your Extraterritoriality Battle Bet

- Obtaining personal jurisdiction over alleged transferee
  - General vs. personal jurisdiction
    - *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421 (7th Cir. 2010)
    - *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014)

Do the U.S. Clawback Statutes Apply Extraterritorially?

- The presumption against extraterritoriality
  - "[A] federal statute should be construed to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).
  - It is a "longstanding principle of American law [that] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

Do the U.S. Clawback Statutes Apply Extraterritorially?

Two Part Test

1. Identify whether "the statute gives a clear, affirmative indication that it applies extraterritorially." A court need not apply a "clear statement" rule, but may also consider context
2. If the statute is not extraterritorial, the court must analyze the "focus of congressional concern" to determine whether the conduct at issue constitutes a domestic application of the statute. If the conduct covered by the statute occurred in the United States, then the presumption will be rebutted. Conversely, applying a statute to conduct that is relevant to the statute's focus would constitute an impermissible extraterritorial application of that statute.

See Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 248 (2010); *see also RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2101 (2016).

Cases Where Claims Not Barred By Presumption Against Extraterritoriality

- *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c))*, Adv. Pro. No. 13-01434 (SHL), ECF No. 54 (Bankr. S.D.N.Y. Oct. 13, 2017)
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- *Spizz v. Goldfarb Seligman & Co (In re Ampal-American Israel Corp.)*, 562 B.R. 601 (Bankr. S.D.N.Y. 2017)
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- *Maxwell Comm'n Corp. plc v. Societe General plc (In re Maxwell Comm'n Corp. plc)*, 186 B.R. 807 (S.D.N.Y. 1995)

Will the Court Use an "International Comity" Override?

Will concerns of international comity cause a court to abstain, notwithstanding overcoming the presumption against extraterritoriality?

Cases Confronting Conflicts of Laws & Comity Issues

- *Maxwell Commc'n Corp. plc v. Societe Generale (In re Maxwell Comm'n Corp. plc)*, 93 F.3d 1036 (2d Cir. 1996)
- *In re LLS Am., LLC*, No. 09-06194-PCW11, 2012 WL 2564722 (Bankr. E.D. Wash. July 2, 2012)
- *Hosking v. TPG Capital Mgmt, L.P. (In re Hellas Telecommc'ns (Luxembourg) II SCA)*, 524 B.R. 488 (Bankr. S.D.N.Y. 2015)

Can U.S. Fiduciary Sue Under Foreign Clawback Laws in U.S.?

- Hedging your bets by including claw-back claims under the laws of the foreign country.
  - *In re Condor Ins. Ltd.*, 601 F. 3d 319 (5th Cir. 2010)
  - *In re Condor Ins. Ltd.*, 2012 WL 720233 (Bankr. S.D. Miss.)
  - *In re Hellas Telecommunications (Luxembourg) II, SCA*, 535 B.R. 543 (Bankr. S.D.N.Y. 2015)
- Standing issues
- Clawback as creditor remedy under foreign law

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