American Bankruptcy Institute Law Review

Volume 10 Number 1 Spring 2002

Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code

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Introduction

You can't escape the long arm of the law. Or can you? For as long as there have been federal laws, legislators and jurists have been grappling with whether such laws should be applicable beyond our own borders. The tension between the need to avoid unnecessary international conflicts and our own domestic interests has often been pronounced. American law has adopted the path of least resistance, holding that legislation passed by Congress applies only within the borders of the United States, unless a contrary intent is evident. [3]

The Supreme Court upheld this presumption against extraterritoriality in its decision in *Foley Bros., Inc. v. Filardo* holding that the federal Eight Hour Law did not apply to American employees working abroad for contractors hired by the United States. [4] The Court did not apply the presumption again until its decision in *E.E.O.C. v. Arabian American Oil Co*. ("*Aramco*"). [5] The *Aramco* Court held that title VII of the Civil Rights Act of 1964 [6] did not apply to discriminatory employment practices of U.S. employers employing U.S. citizens abroad. Only a "clear statement" of Congress's intent in the statute itself would be sufficient to rebut the presumption against extraterritoriality. [7] The language of title VII, the legislative history, and the EEOC's and the Justice Department's own interpretations of the law were not, in the aggregate, sufficient to satisfy the "clear statement" requirement, nor to supplant it.

Following *Aramco*, the Supreme Court has applied the presumption to two other federal statutes − the Federal Tort Claims Act in *Smith v. United States* [8] and the Immigration and Nationality Act in *Sale v. Haitian Centers Council, Inc*. [9] Significantly, however, neither case utilized the "clear statement" standard employed by the majority in *Aramco* − as so characterized by Justice Marshall in his dissent − in determining whether the presumption against extraterritoriality had been rebutted. In *Smith*, Chief Justice Rehnquist did not in the first instance rely on the "clear statement" standard, instead examining the language and structure of the Federal Tort Claims Act and, most importantly, the Act's legislative history. [10] In *Sale*, the Court "looked to all available evidence about the meaning [of the statute]," [11] including the statute's wording, its structure and its legislative history. [12] Although the "clear statement" standard was neither endorsed nor rejected by *Smith* and *Sale*, it appears that the rigid *Aramco* standard has been softened at the very least. Indeed, the Court in *Hartford Fire Ins. Co. v. California* [13] affirmed the extraterritorial applicability of the Sherman Antitrust Act without even mentioning the presumption against extraterritoriality or the standard for rebutting the presumption suggested in *Aramco*. Nevertheless, irrespective of the proper standard used to rebut it, the presumption against extraterritoriality, although perhaps weakened, remains alive and well and the confusion engendered over its applicability puts a burden on Congress to make its intentions clear.

The question of the Bankruptcy Code's [14] intended extraterritorial reach has not yet been addressed by the Supreme Court. The intended extraterritorial reach of the Bankruptcy Code is, however, vital to the Code's ability to be effective as debtors with assets and interests across the globe become more the norm than the exception. The challenge for courts interpreting the intended extraterritorial reach of the Code is how the law's most basic provisions can be upheld while not running roughshod over the presumption against extraterritoriality and the inherent principles of international comity upon which it is based. Absent a clear expression of Congress's intent for the Bankruptcy Code's provisions to have extraterritorial effect, the Code could be deprived of its ability to administer a debtor's assets and ensure that creditors receive a dividend on account of their allowed claims according to the statutory

priorities.

The authors of the this article argue that while a winning argument can be made that the Bankruptcy Code, as currently constituted, was meant to apply extraterritorially, it should contain a clear expression of Congressional intent that the Code apply to actors and conduct beyond our own domestic borders. It may be argued with some force that the Bankruptcy Code reflects Congress's recognition of the realities of the modern globalized business world. Through its broad and borderless definition of what constitutes property of the estate, Congress intended to enable the bankruptcy courts to safeguard interests of a debtor's estate regardless of their physical location. Were the opposite true, fundamental policies underlying the Code, such as preservation of estate property and equitable distribution to its creditors, would be severely undercut. The orderly administration of a bankruptcy estate demands that the automatic stay be enforceable against a foreign creditor, assuming that personal jurisdiction over such creditor is established, who initiates actions in a foreign country against property or interests of a U.S. debtor's estate. Similarly, the "fresh start" afforded a debtor under the Bankruptcy Code should not be compromised by a foreign actor acting in blatant derogation of the court's discharge injunction or other orders. If the Bankruptcy Code did not have extraterritorial reach, the very same chaotic and uncoordinated scramble for the debtor's assets that the Bankruptcy Code was designed to prevent could occur. This could not have been the intent of Congress.

The lower courts that have grappled with the issue of the Bankruptcy Code's intended extraterritorial reach have been decidedly inconsistent in their analysis. Such confusion over the proper basis for concluding that a Bankruptcy Code has extraterritorial reach lends credence to the conclusion that Congressional intent is not as clear as it should be.

Part I of this article will examine the recent history of the presumption against extraterritoriality and specifically the Court's decision in *Aramco* and its progeny. We will discuss what we believe to be the current status of the presumption and apply it to particular provisions of the Bankruptcy Code. In Part II, we will examine to what extent the Bankruptcy Code, as currently constituted, contains clear indicia of Congress's intent to apply the Bankruptcy Code extraterritorially. Finally, we will examine the decisions of the lower courts that have dealt with the extraterritorial application of the Bankruptcy Code's most vital provisions.

Given the importance of extraterritoriality to the efficacy of the Bankruptcy Code, if there exists any doubt as to the intended extraterritorial reach of the Bankruptcy Code, such doubts should be affirmatively resolved in favor of the extraterritorial application of U.S. bankruptcy laws in any forthcoming bankruptcy legislation.

I.The Presumption Against Extraterritoriality

Prior to the *Aramco* decision, the most often cited decision reflecting the long−established presumption against extraterritoriality was the Supreme Court's decision in *American Banana Co. v. United Fruit Co*. [15] which applied the presumption to limit the Sherman Antitrust Act to uncompetitive actions commenced within the United States. The Court held that whether a particular action should be considered lawful or unlawful should be determined by the country where the act was committed. [16] Such a rule "would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." [17]

The presumption was applied again in *Foley Bros*. to limit the applicability of the Federal Eight Hour Law to U.S. workers employed within the United States only. The Court next considered the presumption against extraterritoriality in *Aramco*. The petitioner in *Aramco*, Ali Boureslan, was a naturalized United States citizen born in Lebanon. Mr. Boureslan was hired as a cost engineer by Aramco's United States subsidiary, Aramco Service Company, and was transferred, at Boureslan's request, to work for Aramco in Saudi Arabia. After four years, Boureslan was dismissed and he soon filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that his firing was based on his race, religion and national origin. [18]

Writing for the majority, Chief Justice Rehnquist began by acknowledging that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." [19] The question whether Congress intended to enforce the provisions of title VII extraterritorially was a "matter of statutory construction." [20] The Chief Justice reiterated the long−standing presumption against extraterritoriality and validated it as a means by which to effectuate unexpressed

Congressional intent that its laws are designed first and foremost to address domestic conditions. The Court also found that the presumption was an important means by which to "protect against unintended clashes between our laws and those of other nations which could result in international discord." [21]

In applying the presumption, the *Aramco* court "looked to see whether 'the language in the [relevant act] gives any indication of a Congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" [22] The Court assumed that Congress legislated "against the backdrop of the presumption against extraterritoriality" and that therefore "unless there is an affirmative intention of the Congress clearly expressed . . . [the Court] must presume [the act] is primarily concerned with domestic conditions." [23]

The EEOC advanced three primary arguments that Congress intended for the protections of title VII to extend to American workers employed by American employers abroad. First, title VII's broad definition of commerce to include commerce "between a State and any place outside thereof," [24] necessarily reflected Congress's intent for the law to apply to areas outside of the United States. The Court discounted the petitioner's reliance on the broad jurisdictional language of title VII as boilerplate which could be found in a number of other federal acts, such as the Consumer Product Safety Act, [25] Federal Food, Drug, and Cosmetic Act, [26] Transportation Safety Act of 1974, [27] Labor−Management Reporting and Disclosure Act of 1959, [28] and the American with Disabilities Act of 1990, none of which was meant to apply overseas. [29] The Court found that "[t]he [jurisdictional] language relied upon by petitioners [30] − and it is they who must make the affirmative showing − is ambiguous, and does not speak *directly* to the question presented here." [31] While the Court found the petitioner's interpretations of title VII's jurisdictional language plausible, it cautioned that "if we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption." [32] Moreover, the Court pointed out that although title VII makes mention of "States," the statute "fails even to mention foreign nations or foreign proceedings," thus strongly suggesting that the law has a purely domestic focus. [33]

The EEOC next argued that a negative inference could be drawn from title VII's "alien exemption provision" [34] which provides that the statute "shall not apply to an employer with respect to the employment of aliens outside any State." The EEOC contended that because Congress explicitly exempted a class of individuals employed abroad from title VII, it must have meant it to apply to U.S. citizens working abroad for U.S. companies. The Court responded by pointing out that if this inference is valid, then title VII should apply to all employers employing U.S. citizens, even foreign employers. "Without clearer evidence of congressional intent to do so than is contained in the alien−exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment−discrimination regime upon foreign corporations operating in foreign commerce." [35]

Finally, the petitioners urged the Court to defer to the EEOC's and the Justice Department's consistent administrative interpretations that title VII applied to discriminatory employment practices against American citizens overseas. The Court ultimately found the EEOC=s interpretations "insufficiently weighty to overcome the presumption against extraterritorial application." [36] Thus, it is reasonable to assume, as Justice Marshall did in his dissent, that the majority's opinion in *Aramco* permits rebuttal of the presumption against extraterritoriality only by a clear statement of Congress's intent for a law to have extraterritorial effect. Subsequent cases dealing with the presumption did not, however, impose as stringent a standard as suggested by Justice Marshall in *Aramco*.

One of the cases to come after *Aramco* was *Smith v. United States*, which held that the Federal Tort Claims Act (the "FTCA") did not apply to claims arising in Antarctica. [37] With Chief Justice Rehnquist writing for the nearly unanimous Court, the Court did not require a "clear statement" of Congressional intent; rather, "clear evidence of congressional intent" to apply the FTCA to claims arising in Antarctica was the standard expressed. [38] The Court examined the language and structure of the Act, and most significantly, its legislative history. [39] The Court did not address or otherwise attempt to reconcile the so−called "clear statement" rule.

In *Sale v. Haitian Centers Council, Inc*., the Court held that section 234(h) of the Immigration and Nationality Act of 1952, which provided that the Attorney General could not deport or return any alien to a country where he or she

would be subject to persecution, did not apply to Haitians apprehended by the Coast Guard on the high seas. [40] The Court again did not view the presumption against extraterritoriality as a "clear statement" rule, but rather examined the legislative history and overall structure of the Act to determine Congressional intent. [41] In a significant departure from the seemingly stringent standard established in *Aramco,* the *Sale* court acknowledged that "all available evidence" about the meaning of a particular statute should be examined to determine whether the law was intended to have extraterritorial effect. [42]

Finally, the vitality of the "clear statement" standard was severely questioned by the Supreme Court's decision in *Hartford Fire Ins. Co. v. California* [43] in which the Court upheld the extraterritorial application of the Sherman Antitrust Act despite the Act's direct conflict with foreign law. The question before the Court in *Hartford* was whether the Sherman Act should be applied to an alleged conspiracy by a group of reinsurance companies based in London to affect the American insurance market. [44] The Court did not invoke the newly reinvigorated presumption against extraterritoriality to find that the Sherman Act was not intended to be applied to the actions of the London−based insurers. Rather, the Court observed:

Although the proposition was perhaps not always free from doubt, see American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. [45]

Thus, the Court was satisfied that irrespective of the presumption against extraterritoriality, the established precedent enabled U.S. courts to prosecute violations of the Sherman Act by foreign actors which are intended to have an effect on domestic markets. [46]

According to Professor Dodge, the Supreme Court's unwillingness to apply the presumption against extraterritoriality in the *Hartford* case may be explained by the fact that the particular defendant's actions were intended to cause harmful effects within the United States. [47] As Professor Dodge points out, the extraterritorial actions in *Aramco*, *Sale* and *Smith* did not cause harmful effects within the United States, whereas the actions in *Hartford* did have a clear and potentially deleterious domestic effect. [48] Thus, it appears that since *Aramco*, the Supreme Court has adopted a view of the presumption against extraterritoriality that suggests that Congress legislates with the intention that its acts are presumed to apply to conduct that causes effects in the United States. [49]

In the second part of the article, the authors will examine whether the language, structure and legislative history of the Bankruptcy Code evidences clear Congressional intent of extraterritorial application. Unlike the boilerplate language found in *Aramco*, for example, the Bankruptcy Code's broad definition of what constitutes property of the estate and the jurisdiction given the bankruptcy courts over such property indicate at least a strong Congressional intent for the Code to be applied extraterritorially when needed.

II. Evidence of Congressional Intent Rebutting the Presumption Against Extraterritoriality in the Bankruptcy Code.

The language, structure and legislative history of the Bankruptcy Code all suggest that Congress fully intended for it to have extraterritorial application. The first place such an extraterritorial intention may be found is, appropriately enough, the first chapter of the Bankruptcy Code. [50] Chapter One, entitled General Provisions, contains provisions which are applicable throughout the Bankruptcy Code. [51] Section 101 contains definitions of certain terms used throughout the statute. Of importance to the question of the intended extraterritorial reach of the Bankruptcy Code is its definition of governmental unit found in section 101(27). Governmental unit is defined as the:

United States; State; Commonwealth; District; Territory; municipality; *foreign state*; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a *foreign state*; *or other foreign or domestic government*. [52]

According to the legislative history, Congress intended to define governmental unit in the broadest sense possible. [53] The term governmental unit is in turn made a part of the Code's definition of entity. [54] This is significant since the automatic stay provision of the Code, which operates as a stay of the continuation or commencement of proceedings

seeking recovery for pre−petition debt, is applicable to all *entities*. [55] It is thus clear that Congress meant for the automatic stay, one of the most fundamental protection afforded a debtor, [56] to be effective against both domestic and foreign entities at least if such entities are governments. The inference to be drawn is that Congress was aware that a particular debtor's assets and other interests would not always lie within the borders of the United States. By necessity, the Bankruptcy Code was drafted with the realization that the Code's key provisions would be applied extraterritorially when needed to effectuate its principle goals of asset preservation and equitable distribution of the same to holders of allowed claims. Nevertheless, this need to preserve the Code must still be balanced against the overarching reluctance to meddle in foreign laws.

The intended extraterritorial applicability of the Bankruptcy Code is further evidenced by the numerous references to foreign entities and proceedings throughout the statute. This is significant in light of the *Aramco* Court's finding that title VII had a purely domestic focus in part because "[w]hile title VII consistently speaks in terms of 'States' and state proceedings, it fails even to mention foreign nations or foreign proceedings." [57] Section 304 of the Bankruptcy Code [58] is the most straightforward example of the Code's recognition that it must be responsive to international realities. Section 304 provides for the commencement of a case that is ancillary to a foreign proceeding under which a bankruptcy court may grant certain relief designed to preserve the property of a foreign entity located in the United States, among other relief that may be ordered. [59]

In addition to section 304, section 306 [60] provides for the ability of a foreign representative to make a limited appearance in the bankruptcy court without subjecting itself to the general jurisdiction of the bankruptcy court or any other U.S. court, in connection with a petition for relief under section 303, 304 or 305 of the Bankruptcy Code. Significantly, both sections 304 and 306 are found in a chapter with applicability to the entirety of title 11.

The specific references in the Bankruptcy Code to foreign entities and proceedings implies that the Code's focus is not entirely domestic. Other provisions of the Code also lend support to the notion that Congress intended for the Code to have extraterritorial effect.

Section 541(a) of the Bankruptcy Code provides that the commencement of a bankruptcy case creates an estate which is comprised of property "wherever located and by whomever held." [61] The scope of what constitutes property of the estate is broad indeed and is intended to maximize the estate's value and eventual distribution to creditors. Such an all−encompassing definition of what constitutes property of the estate is a clear indication of Congress's intent not to be bound by the physical location of the property or the entity holding such§ property. The bankruptcy court's jurisdiction over estate property is derived by referral from the district court [62] and is equally broad. [63] As will be discussed in greater detail in Part III, several lower courts have adopted the bankruptcy court's exclusive *in rem* jurisdiction over estate property to justify the extraterritorial application of the Bankruptcy Code. [64] Indeed, it is well−settled that property of the estate includes assets held abroad [65] and the failure to disclose foreign assets is a clear violation of section 541(a) of the Bankruptcy Code. [66]

The Court in *Aramco* determined that title VII's inclusion of the definition of commerce, for example, could not be the basis for determining that Congress had an extraterritorial intent since the definition was boilerplate and found in numerous other acts which were never found to apply extraterritorially. [67] The all−inclusive definition of property of the estate and the broad jurisdiction granted over such property is not, however, mere boilerplate. [68] It may be reasonably interpreted as a deliberate jurisdictional grant which Congress determined was necessary to give the Code the ability to marshal and administrate assets in an orderly way.

In Part III, we will examine some of the lower court decisions that have dealt with the Bankruptcy Code's intended extraterritorial reach.

III. The Presumption Against Extraterritoriality and the Bankruptcy Code

A. Simon

The Ninth Circuit Court of Appeals in *Hong Kong and Shanghai Banking Corp. v. Simon* (*In re Simon*) [69] found a clear Congressional intent for the Bankruptcy Code to have extraterritorial effect. Looking at the language and

structure of the Code, the Court concluded that based on the principles underlying the Code and the broad *in rem* jurisdiction given the courts over the debtor's property, Congress clearly intended that the Code be applied beyond our own borders. [70] Moreover, the *Simon* court found that where the interests or property of the estate was being threatened by foreign actions, the bankruptcy court should utilize its *in rem* jurisdiction to protect estate property regardless of its location. [71] Thus, the *Simon* court's conclusion supports the idea that if foreign actions produce effects harmful to U.S. interests, extraterritorial application of the statute is appropriate.

In *In re Simon*, Hong Kong and Shanghai Banking Corp. (the "Bank"), an international banking company incorporated in Hong Kong with offices in San Francisco and New York, extended a $24 million loan (the "Loan") to Odyssey International Holdings, Ltd. ("Odyssey"), an international company incorporated in the British Virgin Islands. William Simon (the "debtor") was the principal shareholder of Odyssey and personally guaranteed the Loan. At the time the guarantee was executed, Simon lived in and operated his company from Hong Kong. Prior to the time Simon was to have made good on the guaranty, he moved back to the United States and filed a personal chapter 7 petition for relief declaring over $200 million in debts, including his guaranty of the Loan. [72]

The Bank filed a proof of claim in the debtor's case in the amount of $37 million arising from its share in a separate $200 million syndicated loan, but neither filed a proof of claim related to the personal guaranty nor objected to the debtor's discharge. The bankruptcy court entered orders granting the debtor his discharge and enjoining any creditor from pursuing further collection or enforcement actions against such discharged debts pursuant to section 524(a)(2) of the Bankruptcy Code. [73]

After issuance of the discharge injunction, the Bank instituted an adversary proceeding seeking a declaratory judgment pursuant to 28 U.S.C. Section 2201(a) that the discharge injunction, while effective within the United States, did not operate to prevent the Bank from enforcing the terms of the personal guaranty outside of the United States. In the alternative, the Bank sought a modification of the injunction to permit it to act against the debtor with respect to the guaranty outside of the United States. [74] The bankruptcy court dismissed the adversary proceeding for failure to state a claim upon which relief may be granted, but noted that while the discharge injunction is not directly enforceable in Hong Kong, "it was enforceable in United States district court via the imposition of sanctions against the Bank followed by appropriate collection proceedings against the Bank's property located in the United States." [75] The district court affirmed holding that "it cannot be said that enjoining actions, wherever they may be instituted, so as to preserve the court's exclusive *in rem* jurisdiction is an extraterritorial application of the Court's equitable powers." [76] The district court also held that since the Bank had submitted to the equitable jurisdiction of the bankruptcy court by the filing of its proof of claim, the bankruptcy court was not acting extraterritorially in enforcing its injunction. [77] Indeed, unlike the Ninth Circuit after it, the district court seemed to be bending over backwards to avoid acknowledging that it was applying the Bankruptcy Code extraterritorially.

The *Simon* court first recognized Congress's "unquestioned authority to enforce laws beyond the territorial boundaries of the United States." [78] Against the backdrop of the presumption against extraterritoriality, the court found that in divining Congress's intent to rebut the presumption, the court was not limited to plain statutory language, but could look to "similarly−phrased legislation," the "overall statutory scheme," and, if all else fails, "administrative interpretations of the law." [79]

Taking more steam from the presumption against extraterritoriality, the court found that the presumption will not be applied, even if Congressional intent cannot be determined, in two instances. First, the presumption is generally not applicable where "the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." [80] Second, the presumption does not apply when the regulated conduct is "intended to, and results in, substantial effects within the United States." [81] Beyond this, of course, the court also found that the presumption against extraterritoriality may be overcome with something significantly less than a "clear statement."

Utilizing these standards, the Ninth Circuit concluded "as to actions against the bankruptcy estate, Congress clearly intended extraterritorial application of the Bankruptcy Code." [82] The court relied on the broad definition of property of the debtor's estate under section 541(a) and the bankruptcy court's exclusive *in rem* jurisdiction over such property. "The court's exercise of 'custody' over the debtor's property, via its exercise of *in rem* jurisdiction, essentially creates a fiction that the property −− regardless of actual location −− is *legally* located within the jurisdictional boundaries of

the district court in which the court sits." [83] Likening the discharge injunction under section 524 to the automatic stay under section 362(a), the court concluded it was wholly appropriate for the bankruptcy court to exercise its *in rem* jurisdiction by issuing and enforcing the discharge injunction to prevent actions against property of the estate "regardless of its geographic location." [84]

Having established that Congress evinced a clear intent for the Code to have extraterritorial application, the *Simon* court sidestepped the much trickier issue of the appropriate response to a foreign collection action against a debtor personally if the creditor has not submitted to the equitable jurisdiction of the bankruptcy court by filing a proof of claim in the case, as did the Bank. [85] Instead, the presumption against extraterritoriality is not applicable, according to the Ninth Circuit, where allowing a participating creditor to ignore the bankruptcy court's discharge injunction would have substantial effects in the United States. [86] This view is consistent with the post−*Aramco* decisions which focus on the domestic impact of foreign actions vis−à−vis U.S. entities. The *Simon* court reasoned that the discharge injunction did not enjoin the Hong Kong courts; rather, it enjoined the Hong Kong creditor from commencing any actions against the debtor, enforced with the *in terrorem* threat of bankruptcy court sanctions against it and its property in the United States. [87] Thus, the imposition of sanctions against the Bank in the event it were to violate the injunction provided for under the section 524 discharge order was not an improper extraterritorial application of U.S. law, but a proper exercise of the bankruptcy court's personal jurisdiction over the creditor. The Bank's status as a participating creditor in the debtor's estates enabled the court to avoid deciding the closer question of whether section 524 itself has extraterritorial applicability in all cases, including instances where a foreign action was commenced against a debtor personally. [88]

Finally, the *Simon* court dealt with the Bank's argument that the principles of international comity mandated that it defer to whatever collection proceedings may be initiated in Hong Kong. Traditionally, international comity is understood as being neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive and judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. [89] Comity among nations is thus generally understood to mean that the laws of one nation should not be construed to violate the laws of other nations "if any other possible construction remains." [90]

The Bank argued that the structure of the Bankruptcy Code supports the so−called "territorial" theory of international law whereby the jurisdictions in which the specific property is located is alone responsible for seizing and controlling their assets. [91] The debtor contended that the Bankruptcy Code has adopted the competing "universalist" outlook which contemplates that jurisdiction over the plenary action should control all aspects of the insolvency proceedings, "including the administration of assets world−wide." [92] The *Simon* court declined to accept either interpretation and instead opined, we believe correctly, that the Bankruptcy Code has adopted a "flexible approach to international insolvency dependent upon circumstances of the particular case." [93] As the court points out, this conclusion is buttressed by the provisions of section 304 of the Bankruptcy Code which permit, among other things, a foreign representative to file an ancillary proceeding to an existing foreign proceeding; and the relief available (albeit as to U.S. assets) is very much dependent upon the circumstances of the particular case. In addition, section 305 permits a bankruptcy court to dismiss the domestic proceeding upon the request of the foreign representative if there is a pending foreign proceeding and the dismissal is supported by the factors listed in section 304(c) of the Bankruptcy Code. [94] Thus where there are parallel insolvency proceedings, "the bankruptcy court must consider the status and progress of other nations' insolvency proceedings in determining how to manage domestic bankruptcies." [95]

The court distinguished the Second Circuit's decision in *Maxwell Communication Corp. v. Societe Generale* (*In re Maxwell Communication Corp.*) [96] which found that the principles of international comity did not favor the extraterritorial application of the Bankruptcy Code's preference avoidance provision. In *Maxwell*, the court held that the domestic proceeding before it must defer to a parallel British insolvency proceeding because an actual conflict existed between the preference laws of the U.S. and those of Great Britain. Whereas *Maxwell* had competing insolvency proceedings and the facts centered almost exclusively in Great Britain, there were no competing foreign proceeding and no conflict with a foreign law in *Simon* since the discharge injunction did not apply to the Hong Kong courts, but rather to the foreign creditor. [97]

Although the majority in *Simon* considered it to be clear that Congress intended for the Bankruptcy Code to have extraterritorial effect, Judge Hall, concurring in the judgment and dissenting in part, found Congress's intent to be "less than clear:"

The majority concludes that Congress clearly intended the extraterritorial application of the Bankruptcy Code as it applies to the property of the estate. The majority bases this conclusion on a single vague speculation in 11 U.S.C. § 541(a) that the estate is comprised of the debtor's legal or equitable interests in property "wherever located and by whomever held." While this language may plausibly apply to property located within foreign jurisdictions, we do not simply apply statutes extraterritorially if it is plausible or even desirable to do so. We must "assume that Congress legislates against the backdrop of the presumption against extraterritoriality." [Aramco, 499 U.S. at 248]. As the Supreme Court has pointed out, "if we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption." [*Id*. at 253.] [98]

Judge Hall nevertheless concurred in the judgment of the court because she did not find that extraterritoriality was implicated since the bankruptcy court has general jurisdiction over property of the estate which is deemed to be located in the United States by operation of law. [99]

Judge Hall's dissent highlights the problems associated with interpreting the Bankruptcy Code's intended extraterritorial applicability in light of the stringent *Aramco* standard. By finding that expressions of Congressional intent fall short of the most stringent *Aramco* standard, yet concurring with the judgment because of the *in rem* jurisdiction of the bankruptcy court, Judge Hall highlights what we believe is evident in the majority's sometimes strained opinion: Congressional intent to have the Bankruptcy Code apply extraterritorially is not as clear as the majority would have us believe.

B. Rimsat

The Simon court adopted the simple analysis of the Seventh Circuit's decision in *Underwood v. Hilliard* (*In re Rimsat, Ltd*.) [100] that the bankruptcy court's *in rem* jurisdiction over property of the estate permits it to enjoin a foreign proceeding pursuant to the automatic stay. [101] *Rimsat* was in many ways a much easier case for the court to decide on extraterritoriality grounds than *Simon*.

The debtor in *Rimsat* was a satellite communications provider servicing Tonga and other islands in the South Pacific. The debtor was incorporated in the Federation of Saint Kitts and Nevis and had its principal place of business in Fort Wayne, Indiana where most of the company's financial assets were located. When the debtor began to experience serious financial difficulties, Hilliard, a director and shareholder, took steps to obtain an injunction from the High Court of Nevis enjoining the debtor from declaring bankruptcy and from continuing a lawsuit commenced against Hilliard by the debtor in the United States. By subsequent order of the Nevis court, Hilliard was appointed receiver with full power to manage the debtor. [102]

Soon after the Nevis orders were entered, a group of creditors filed an involuntary chapter 11 petition in the United States. The second chapter 11 trustee appointed in the case [103] commenced an adversary proceeding against Hilliard and obtained three orders which were challenged on appeal: (1) an order enjoining Hilliard from exercising any further control over the debtor's property or otherwise interfering in the debtor's bankruptcy proceeding; (2) an order directing Hilliard to turn over to the chapter 11 trustee any of the debtor's property in his possession or under his control; and (3) an order that Hilliard pay a civil contempt sanction for failing to comply with the second order. [104]

The automatic stay was implicated by Hilliard's actions shortly after the involuntary proceeding was filed by the petitioning creditors. Hilliard sought a dismissal of the bankruptcy case on the grounds that the bankruptcy court was required under 11 U.S.C. section 305(a)(2)(A) to dismiss the proceeding in deference to the so−called insolvency proceeding commenced in the Nevis court under which he was appointed receiver. [105] The bankruptcy court denied Hilliard's motion on the grounds that, among other things, Hilliard's receivership was not an insolvency proceeding, but was instead a means by which Hilliard wrested control of the company from management. [106]

Undeterred, Hilliard returned to the Nevis court to obtain an order expanding his receivership powers and enabling him to pay, adjust, and, if necessary, discharge the debtor's debts. It was this last move that the lower courts and ultimately the Seventh Circuit found contrary to the express prohibitions of the automatic stay under section 362(a) of the Bankruptcy Code. The court found that although the automatic stay's primary function was to prevent the bankruptcy estate from being picked apart by its creditors, the stay is also meant to prevent a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts": [107]

Unlike a creditor's action, Hilliard's recourse to the Nevis court did not threaten to deplete the estate directly. But it did imperil the orderly administration of the bankruptcy proceeding, and by doing so it posed an indirect threat to the estate. [108]

On the issue of whether the continuing civil contempt sanctions imposed on Hilliard for violation of the automatic stay was an impermissible extraterritorial application of the stay, the court found that the existence of a foreign proceeding does not *per se* invalidate the application of the automatic stay. Chief Judge Posner avoided having to divine Congressional intent by relying on the court's power to enjoin a U.S. citizen from "conduct[ing] proceedings anywhere in the world that would affect the debtor's property." [109] The court's only real reference to the presumption against extraterritoriality was to find that the presumption was not meant to defeat the application of the automatic stay to prevent a U.S. citizen from pursuing a foreign action having a detrimental effect on a U.S. debtor whose assets were located domestically. [110]

Indeed, *Rimsat* may be read as furthering the theory that the presumption against extraterritoriality has no applicability where the foreign action is intended to have an effect in the United States and on a bankruptcy court's ability to control and administer the debtor's estate. [111] Thus, under *Rimsat*, the presumption against extraterritoriality, and apparently the concern over a potential conflict with the laws of other nations, goes out the window when the motivation for the extraterritorial application of the Code centers on the need to preserve the efficacy of U.S. bankruptcy proceedings. The facts of *Rimsat*, however, provided the Seventh Circuit with ample opportunity to avoid having to find expressly that the automatic stay had extraterritorial applicability. A U.S. citizen obtained an order in a foreign proceeding in order to take control over U.S. assets after the U.S. bankruptcy proceeding had already begun. Nevertheless, the principle upheld dictates that the court utilized the automatic stay to enjoin a foreign proceeding which would have had a debilitating effect on the U.S. court's ability to control its own proceedings by administering the debtor's assets. It would be reasonable to assume, therefore, that the Seventh Circuit would have arrived at essentially the same conclusion vis−à−vis the extraterritorial application of the automatic stay even if the offending party had not been a U.S. citizen.

C. Other Lower Courts Applying the Principles of Simon and Rimsat

Other lower courts have adopted the underlying principle of *Rimsat* more fully articulated in *Simon*, that the concerns for comity arising from the extraterritorial application of the Bankruptcy Code are outweighed by the potential effects of such actions on interests in the United States. One of the most compelling recent examples comes from the Western District of Missouri bankruptcy court in *In re Chiles Power Supply Co.* which enjoined foreign creditors from proceeding with discovery of the debtor and its insurance carrier in a Canadian proceeding by reliance on the permanent channeling injunction contained in the debtor's confirmed chapter 11 plan of reorganization. [112]

Prior to its chapter 11 filing, the debtor in *Chiles* was one of several defendants in litigation brought in Canada (the "Canadian Litigation") concerning a product liability tort action commenced by CIBC Development Corp. ("CIBC") with respect to the alleged faulty installation of certain snow melting and radiant floor heating system know as the Entran II System. As a result of the Canadian Litigation and other actions related to the Entran II Systems, the debtor was forced to file its chapter 11 petition for relief. [113]

The debtor confirmed a liquidating chapter 11 plan which provided for the establishment of a special insurance fund to be funded by the debtor's insurance carriers (the "Carriers"), to satisfy the allowed claims of all product liability claimants (the "Insurance Fund"). The debtor's plan provided for a permanent channeling injunction which released the Carriers and the debtor from any and all liability with respect to known or unknown claims related to the Entran II Systems. [114]

Although CIBC filed a proof of claim in the debtor's case, the other defendants in the Canadian Litigation did not; nor did they participate in confirmation of the debtor's plan, although they were scheduled as creditors and were given notice of the proposed confirmation and an opportunity to object to the proposed channeling injunction. [115] Instead, the other defendants continued to defend themselves and prosecute their cross claims against the debtor and the Carriers in the Canadian Litigation by, among other things, obtaining an order of the Canadian court compelling the production of discovery irrespective of the U.S. bankruptcy court's confirmation order and permanent channeling injunction. The debtors and the Carriers then filed a motion in the U.S. bankruptcy court to hold the other defendants in contempt of the court's permanent channeling injunction. [116]

The other defendants argued that because they had not filed a proof of claim or participated in the estate's administration, they were not subject to the personal jurisdiction of the bankruptcy court. Secondarily, the defendants argued that they would be unduly prejudiced in the Canadian Litigation if they were not permitted to take discovery of the debtor and the Carriers, and that in any event, the discovery order of the Canadian court should be afforded deference since the defendants were all Canadian enterprises and the decision was made by a Canadian court utilizing precedent under Ontario law. [117]

The bankruptcy court noted that the permanent channeling injunction was an integral part of the debtor's chapter 11 plan without which the Carriers would have never funded the Insurance Fund to the tune of $2.9 million. Accordingly, the court found that the defendants' actions, which would in effect strip the debtor and the Carriers of the protections afforded them under the approved channeling injunction, posed a direct threat to the bankruptcy estate by threatening to deplete the estate. [118] The court analogized the channeling injunction to the automatic stay and found that just as the automatic stay ensures the efficient administration of an estate by effectively marshaling the debtor's assets, the plan "is the most efficient mechanism for administering" the debtor's most substantial asset −− the insurance policies. [119] Because the confirmed chapter 11 plan resulted from negotiations between the Carriers and the debtor and was ultimately confirmed by the creditors after due notice and an opportunity to be heard, the court concluded that "[t]o allow the Defendants to proceed against the Carriers in a foreign proceeding in defiance of the release issued by this Court would destroy the finality all other parties are entitled to expect from the Plan confirmation process." [120]

Adopting the reasoning of *Simon*, the Court held that the broad definition of what constitutes the debtor's property of the estate and the bankruptcy court's jurisdiction over such property, enabled it to rebut the presumption against extraterritoriality and apply the automatic stay beyond the territorial limits of the United States. [121] The court recognized that for its orders to have effect against the defendants, it must be able to exercise personal jurisdiction over them. [122] But recognizing that the channeling injunction was a material, negotiated part of the debtor's plan, the court concluded that it need only find that the defendants "performed an act in Canada that has an effect on [the debtor] in the United States in order to find that the Defendants are personally subject to the jurisdiction of this Court." [123] In essence, the court's finding of critical *in personam* jurisdiction was predicated on the efficacy of its own final confirmation order and channeling injunction, which the defendants threatened by the continuing the Canadian Litigation. Thus, the defendants' actions in Canada were deemed to have a "profound effect in the United States where the estate res is located," enabling the court to find that the defendants were in violation of the automatic stay and the channeling injunction. [124] Such a finding was consistent with the growing notion that the strength of the presumption against extraterritoriality is inversely proportional to the effect of the foreign actions on U.S. interests.

In *Nakash v. Zur* (*In re Nakash*), [125] the debtor filed his chapter 11 petition in response to the entry of a foreign judgment and a subsequent order of attachment issued by a U.S. court upon the motion of the foreign receiver seeking to collect on such judgment. Following the filing of the debtor's chapter 11 petition, the receiver commenced an involuntary foreign proceeding against the debtor. In finding that the receiver's filing of the second involuntary proceeding (a previous involuntary proceeding against the debtor, filed pre−petition, was dismissed by the Israeli court) violated the automatic stay, [126] the bankruptcy court rejected the receiver's arguments that (a) the automatic stay did not apply extraterritorially, (b) the filing of the second involuntary proceeding was an Act of State immune from the bankruptcy court's review, (c) comity required that the bankruptcy court defer to the Israeli proceeding, and (d) the second involuntary proceeding was filed in aid of the U.S. bankruptcy proceeding. [127]

The foreign receiver in *Nakash* argued that under *Aramco's* "clear statement" standard, the automatic stay is presumed not to have extraterritorial applicability absent an affirmative statement of Congress to the contrary. The receiver

further argued that sections 541 (defining property of the estate) and 362(a) (automatic stay) contained the same sort of boilerplate language identified by the *Aramco* court as being insufficient to rebut the presumption against extraterritoriality. [128]

As the Ninth Circuit would hold in *Simon* two years later, the bankruptcy court determined that the broad statutory language defining property of the estate, the applicability of the automatic stay to all entities, and the exclusive jurisdiction over property of the estate to the bankruptcy courts evidenced Congress's clear intent for the automatic stay to apply extraterritorially. [129] Citing to the overall importance of the automatic stay to the court's ability to administer the assets over which it has exclusive *in rem* jurisdiction, the court found that it could not countenance "acts against the debtor, which served to impugn the court's jurisdiction over and administration of the estate." [130]

Lykes Bros. S.S. Co. v. Hanseatic Marine Service

(*In re Lykes Bros. S.S. Co.*) is another decision which adopts the reasoning that the effect that foreign actions have or could have on U.S. interests is a sufficient basis for enforcing the automatic stay without an independent basis for the exercise of personal jurisdiction. The debtor in *Lykes* was a major international liner shipping company which prior to its bankruptcy filing chartered certain vessels from two shipping companies, Altonia Schiffahrtsgesellschaft mbh & Co. KG ("Altonia") and Andrea Shipping (PTH) Ltd. Singapore ("Andrea"). Both Altonia and Andrea claimed the debtor was indebted to them as result of the pre−petition charters. Altonia was the only one of the two to file a proof of claim in the debtor's case. [131] After the commencement of the bankruptcy proceeding in the U.S., Altonia and Andrea transferred their claims against the debtor, without informing the debtor or the U.S. courts, to a German company known as Hanseatic Marine Service GmbH ("Hanseatic"). Thereafter, Hanseatic caused the arrest of one of the debtor's vessels in Belgium to compel payment of the pre−petition amounts due to Altonia and Andrea. [132]

With respect to the court's ability to exercise personal jurisdiction over Altonia, Andrea and Hanseatic, the court determined that jurisdiction had been established over Andrea by virtue of its filing of a proof of claim in the debtor's case [133] and over Altonia because it had sufficient minimum contacts with the U.S. to justify the imposition of personal jurisdiction. [134] With respect to Hanseatic, however, the bankruptcy court admitted that while there was no basis in the record for finding that it was subject to the personal jurisdiction of the bankruptcy court, jurisdiction over Hanseatic could be imposed on account of the court's jurisdiction over property of the estate and the applicability of the automatic stay to actions affecting such property. [135]

The bankruptcy court relied on its jurisdiction over property of the estate and the overriding importance of the automatic stay with respect to the court's ability to effectuate an orderly and fair liquidation of the debtor's property. [136] Thus, the court concluded that Hanseatic's actions in Belgium were intended to and had the effect of disrupting the debtor's business and the bankruptcy court's administration of the estate. Thus, the bankruptcy court's jurisdiction assertion over Hanseatic did not violate traditional notions of fair play and substantial justice where Hanseatic "knew or reasonably should have known" that the seizing of the debtor's property in Belgium would have a direct and substantial effect in the United States. [137]

Conclusion

As is evident from the decisions examined above, courts have done all they could to avoid dealing with the intended extraterritorial reach of the Bankruptcy Code. The *Simon* court avoided confronting the issue by relying on the foreign party's participation as a creditor in the debtor's bankruptcy case. In *Rimsat*, the court did not decide whether the automatic stay was applicable extraterritorially since the creditor in that case was a U.S. citizen over whom Congress had jurisdiction to enjoin from any actions which would have detrimental results in the U.S. The thornier issue of whether the automatic stay should apply to a foreign citizen committing the same acts was not addressed.

Other courts have strained to find a basis for personal jurisdiction over foreign actors by relying on the legal fiction of *in rem* jurisdiction. In *Chiles*, a group of Canadian creditors who did not participate in the debtor's case or make any claim to the debtor's assets were denied the basic right to discovery because the court found that such actions would strip the debtor and the plan funders of the protections contained in the channeling injunction found in the confirmation order. The court based its finding of personal jurisdiction over the Canadians on the potential adverse

effect of the continuing Canadian Litigation on the debtor's estate. The *Lykes* court even acknowledged that there was no traditional basis upon which to base personal jurisdiction over one of the creditors, ultimately relying on the creditor's continuing knowledge that its actions in Belgium would have the effect of disrupting the debtor's U.S. bankruptcy case and its property.

We believe that Congress intended for the Bankruptcy Code to have an extraterritorial reach. What the decisions examined here reveal, however, is that such intent is less than clear: were it otherwise, the need for the jurisdictional gyrations would be obviated. The Bankruptcy Code's lack of clarity leads to decisions whose reasoning is decidedly results−oriented. Congress should take the opportunity in the forthcoming bankruptcy reform act to make its intent plain so that the vital goals of the Bankruptcy Code – an orderly distribution of assets and the ability to provide honest debtors with a "fresh start" – may be preserved regardless of the physical location of the debtor's property or creditors. Congress can and should provide the necessary tools to pursue or enjoin entities who would seek to undermine the Bankruptcy Code's purposes from afar.

FOOTNOTES:

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[3] See Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (presuming Congress is primarily concerned with domestic conditions). Back To Text

[4] Id. at 285−87 (stating unless contrary intent appears legislation applies only within territorial jurisdiction of United States). Back To Text

[5] 499 U.S. 244, 248 (1991) (noting Congress legislates with presumption against extraterritoriality). Back To Text

[6] 42 U.S.C. §§ 2000e − 2000e−17 (1994). Back To Text

[7] See Aramco, 499 U.S. at 252 (stating title VII's more limited, boilerplate "commerce" language does not support expansive construction of congressional intent). Back To Text

[8] 507 U.S. 197, 203−04 (1993). Back To Text

[9] 509 U.S. 155, 173−74 (1993). Back To Text

[10] 507 U.S. at 201−03 (stating "[t]he history of the FTCA reveals that Congress declined to enact earlier versions of the statute that would have differentiated between foreign and United States residents"). Back To Text

[11] 509 U.S. at 177. Back To Text

[12] See id. at 176; see also William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berk. J. Int'l Law 85 (1998) (discussing, in detail, presumption against extraterritoriality). Back To Text

[13] 509 U.S. 764 (1993). Back To Text

[14] 11 U.S.C. § 101, et. seq., as amended (1994). Back To Text

[15] 213 U.S. 347 (1909). Back To Text

[16] Id. at 356 (stating "the general and almost universal rule is that the character of an act as either lawful or unlawful must be determined wholly by the law of the country where the act is done"). Back To Text

[17] Id. at 357 (noting when doubt exists statutes extend only where lawmaker has legitimate power). Back To Text

[18] See E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 246−47 (1991) (setting forth facts of case). Back To Text

[19] Id. at 248 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284−85 (1949)) (holding when Congress intends, Congress can enforce laws extraterritorially). See generally Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957) (discussing public policy concerns to illustrate exercise of jurisdiction over foreign vessel in domestic port is discretionary). Back To Text

[20] Benz, 353 U.S. at 147 (stating "[f]or us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."). Back To Text

[21] Aramco, 499 U.S. at 248 (citing McCulloch v. Sociedad Nacional De Marineros de Honduras, 372 U.S. 10, 20−22 (1963)). Back To Text

[22] Id. at 248 (citing Foley Bros., 336 U.S. at 285). Back To Text

[23] Id. (internal citations omitted). Back To Text

[24] 42 U.S.C. § 2000e (g) (1994). Back To Text

[25] 15 U.S.C. § 2052(a)(12) (1994) (defining commerce as trade, traffic, commerce, or transportation "between a place in a state and any place outside thereof"). Back To Text

[26] 21 U.S.C. § 321(b) (1994) (defining interstate commerce as "(1) commerce between any state or territory and any place outside thereof"). Back To Text

[27] 49 U.S.C. § 1802(1) (1994). Back To Text

[28] 29 U.S.C. § 401 (1994) (noting employer employee relations substantially impacts national commerce). Back To Text

[29] See E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 251 (1991). Back To Text

[30] Specifically, the Court rejected the argument that title VII's definition of "commerce" was sufficient to evidence an extraterritorial intent. "Commerce" is defined in title VII as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof . . .." The court found that such a definition is part of various other acts, none of which have extraterritorial reach. Id. Back To Text

[31] Aramco. 499 U.S. at 250 (emphasis supplied). Justice Marshall, in his dissent, suggested that the majority's opinion created a "clear statement" rule which did not find support in the Court's previous decisions dealing with the presumption against extraterritoriality. Id. at 261 (Marshall, J., dissenting). Justice Marshall argued that "[t]he range of factors that the Court considered in Foley Brothers demonstrates that the presumption against extraterritoriality is not a 'clear statement' rule." Id. at 262 (emphasis in original). "Indeed, the Court considered the entire range of conventional sources 'whereby unexpressed congressional intent may be ascertained,' [Foley Bros., Inc. v. Filardo,] 336 US, at 285 . . ., including legislative history, statutory construction, and administrative interpretations." Id. at 263. Back To Text

[32] Aramco, 499 U.S. at 253. Back To Text

[33] Id. at 256. Back To Text

[34] 42 U.S.C. § 2000e−1(a) (1994). Back To Text

[35] 499 U.S. at 255. Back To Text

[36] Id. at 258. In his concurring opinion, Justice Scalia opined that the EEOC's interpretations should be entitled to deference, but accepted only where they are reasonable "in light of the principles of construction courts normally employ." Id. at 260 (Scalia, J., concurring). Thus, in light of the presumption against extraterritoriality and the requirement that Congress's intent be clearly expressed, Justice Scalia concluded that it would not be reasonable "to give effect to mere implications from the statutory language as the EEOC has done." Id. In essence then, such deference is lip−service only, because if Congress expresses its intent clearly, the EEOC's opinion is meaningless. And if Congress does not express a clear intent, then the deference would be unreasonable. Back To Text

[37] 507 U.S. 197, 204 (1993). Back To Text

[38] Id. at 204. Back To Text

[39] Id. at 203−04. Back To Text

[40] 509 U.S. 155, 159 (1993). Back To Text

[41] Id. at 171−74. The Court cited its recent pronouncement in Smith, that the presumption against extraterritoriality has a broader foundation than just a "desire to avoid conflict with the laws of other nations." Id. at 174. "[T]he presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." Smith, 507 U.S. at 204 n.5. Back To Text

[42] Sale, 509 U.S. at 177. The Court lists the following evidence it examined: (1) the Government official at whom the section of the Act was directed, (2) the location of the particular section within the Act, and (3) the effect of a later amendment. Id. Back To Text

[43] 509 U.S. 764 (1993). Back To Text

[44] Id. at 769. Specifically, the respondents alleged that the foreign and domestic reinsurance companies conspired against certain primary insurance companies to change the terms of their commercial general liability policies to conform with the policies the defendant insurers wanted to sell. Id. at 770−71. Back To Text

[45] Id. at 795−96 (citations omitted) (indicating Hartford involves exactly this type of conduct. London reinsurers engaged in unlawful conspiracies to affect market for insurance in United States and that their conduct in fact produced a substantial effect). Back To Text

[46] In his partial dissenting opinion, Justice Scalia stated that irrespective of the established precedent, the Court should have considered the cannon which dictates that statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. Id. at 815 (Scalia, J., dissenting in part). Adopting the premise that extraterritorial application of domestic laws should be tempered by consideration of international law, Justice Scalia looked to the Restatement (Third) of Foreign Relations Law of the United States which prescribes that even where a state has a basis for extraterritorial jurisdiction, such jurisdiction should not be exercised when it would be unreasonable. See Hartford, 509 U.S. at 818 (Scalia, J., dissenting in part); Restatement (third) of Foreign Relations Law § 403(1) (1987). The reasonableness of such an exercise of jurisdiction turns on a number of factors including, but limited to, the extent to which the activity takes place within the territory, see id. § 403(2)(a) (1987); the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, id. § 403(2)(b); the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted, id. § 403(2)(c); the extent to which another state may have an interest in regulating the activity, id. § 403(2)(g); and the likelihood of conflict with regulation by another state. Id. § 403(2)(h). Justice Scalia found that the application of these factors weighed

strongly in favor of permitting the English courts to deal with the issue without the interference of American laws since all of the defendants were English corporations, all of the actions took place in England, and English law has a developed body of law regarding the regulation of the reinsurance business. Hartford, 509 U.S. at 819 (indicating rarely would these factors point more clearly against application of United States law). Back To Text

[47] See Dodge, supra note 10, at 100. Back To Text

[48] See id. Back To Text

[49] See id. Back To Text

[50] 11 U.S.C. §§ 101−110 (1994). Back To Text

[51] 11 U.S.C. § 103(a) (1994) (providing "[e]xcept as provided in section 1161 of this title, chapters 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title"). Back To Text

[52] Id. § 101(27) (emphasis supplied). Back To Text

[53] See T I Federal Credit Union v. Delbonis, 72 F.3d 921, 930−31 (1st Cir. 1995) (indicating because Congress meant to define term broadly 11 U.S.C. § 101 encompasses federal credit unions as federal instrumentalities); H.R. Rep. No. 95−595, at 311 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6268. Back To Text

[54] 11 U.S.C. § 101(15) (1994) (including person, estate, trust, governmental unit, and United States Trustee). Back To Text

[55] See 11 U.S.C. § 362(a) (1994) (emphasis added). Back To Text

[56] The legislative history underlying section 362 states:

[The] Automatic Stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

[The] Automatic Stay also provides a creditor protection. Without it certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 95−595, at 340−41 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296−97. Back To Text

[57] E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 256 (1991). Back To Text

[58] 11 U.S.C. § 304 (1994) (discussing cases ancillary to foreign proceedings). Back To Text

[59] Id. § 304(b), providing that the court may:

(1) enjoin the commencement or continuation of−−

(A) any action against−−

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against property of such estate;

(2) order turnover of the property of such estate, or proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

Id. Back To Text

[60] Id. § 306 (allowing foreign representatives to appear before bankruptcy courts for actions under sections 303, 304, or 305, without submitting to any U.S. court's general jurisdiction). Back To Text

[61] Id. § 541(a) (describing property comprising estate created by commencement of case under sections 301, 302, or 303). Back To Text

[62] See 28 U.S.C. § 157(a) (1994) (stating, "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."). Back To Text

[63] See id. § 1334(e) (providing "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.") (emphasis added). Back To Text

[64] See, e.g., Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996 (9th Cir. 1998) (construing 11 U.S.C. § 541(a), under which debtor's interest in property wherever located is considered estate property, as evidence of Congress's intent for extraterritorial application of Bankruptcy Code, and stating by exercising custody over debtor's property via in rem jurisdiction, courts create fiction that property is legally located within boundaries of court's jurisdiction) cert. denied, 525 U.S. 1141 (1999); Underwood v. Hilliard (In re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996) (noting absence of authority for allowing presumption against extraterritorial application of U.S. law to defeat application of automatic stay to U.S. citizen to prevent his interfering with U.S. bankruptcy proceeding in which debtor is U.S. corporation); Nakash v. Zur (In re Nakash), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (finding legislative history of 11 U.S.C. § 541(a) and 28 U.S.C. § 1334(e) shows Congress's intent that they be construed to include property in and outside U.S.). Back To Text

[65] See In re Simon, 153 F.3d at 996 (holding estate's property "includes property outside the territorial jurisdiction of the United States"); see also In re Nat'l Safe Ctr., Inc., 41 B.R. 195, 196 (Bankr. D. Haw. 1983) (stating "[d]ebtor's estate is comprised of all property wherever located, not only property within the United States, but also without"). Back To Text

[66] See In re Filipek, 35 B.R. 339, 341 (Bankr. D. Haw. 1983) (holding non−disclosure of foreign assets constitutes failure to comply with 11 U.S.C. § 541(a)). Back To Text

[67] See Aramco, 499 U.S. at 250−51 (holding language of 29 U.S.C. § 2000(g), which defines commerce as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof," did not unambiguously evince Congress' intent that it apply extraterritorially) (emphasis added). Back To Text

[68] See H.R. Rep. No. 595, 95th Cong., 1st Sess. 367−68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82−83 (1978), indicating that:

The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in section 70a of the Bankruptcy Act § 70a [sic] . . .as well as property recovered by the trustee under section 542 . . . if the property recovered was merely out of the possession of the debtor, yet remained property of the debtor.

Id. Back To Text

[69] Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996 (9th Cir. 1998) (concluding statutory language and structure of Code showed Congress' intent that Code be applied extraterritorially) cert. denied, 525 U.S. 1141 (1999). Back To Text

[70] Id. at 995 (determining extraterritorial application of Bankruptcy Code was appropriate based on analysis of congressional intent). Interestingly, while the Simon court cited to Aramco for the proposition that the first step in determining whether the Bankruptcy Code has extraterritorial effect is to examine the statutory language, it also cites to Foley for the proposition that consideration of similarly−phrased legislation and administrative interpretations is also appropriate. Id. This gives credence to the idea that the so−called clear statement rule is not the determinative standard in divining Congressional intent vis−à−vis the intended extraterritorial applicability of a particular statute. Back To Text

[71] Id. at 996 (citing Donovan v. City of Dallas, 377 U.S. 408, 412 (1964), and holding protection of in rem or quasi in rem jurisdiction is sufficient basis for court to restrain proceedings of another court); see Donovan, 377 U.S. 408 at 412 (noting "[i]n such cases, the state or federal court having custody of the property has exclusive jurisdiction to proceed."). This rationale is applicable to foreign proceedings. See In re Simon, 153 F.3d at 996 (noting court which has custody of estate property may restrain proceedings of foreign courts which concern that property (citing Seattle Totems Hockey Club v. National Hockey League, 652 F.2d 852, 855 (9th Cir. 1981), cert. denied, 457 U.S. 1105 (1982))). Back To Text

[72] In re Simon, 153 F.3d at 994. Back To Text

[73] Id. 11 U.S.C. § 524(a)(2)(1994) provides:

(a) A discharge in a case under this title B

* * * * * * * * * *

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . .

Id. Back To Text

[74] In re Simon, 153 F.3d at 994−95. Back To Text

[75] Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 995 (9th Cir. 1998) cert. denied, 525 U.S. 1141 (1999). Back To Text

[76] Id. Back To Text

[77] See id. (noting "[t]he bankruptcy court found that such enforcement did not contemplate the extraterritorial application of a United States statute."). Back To Text

[78] Id. (citing Aramco., 499 U.S. at 248 (1991)). Back To Text

[79] In re Simon, 153 F.3d at 995. Back To Text

[80] Id. (quoting Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993), citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952)). Back To Text

[81] In re Simon, 153 F.3d at 995 (citing Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1982)). Back To Text

[82] Id. at 996. Back To Text

[83] In re Simon, 153 F.3d at 996 (citing Katchen v. Landy, 382 U.S. 323, 327 (1966)). Back To Text

[84] Id. (discussing how invoking in rem jurisdiction treats property as located within jurisdiction regardless of its physical location). Back To Text

[85] See id. at 997 (holding filing proof of claim caused Bank to forfeit any right it had to claim that court lacked power to enjoin Hong Kong−Shanghai from commencing post−bankruptcy collection proceeding); see also Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (per curiam) (stating "[b]y filing a claim against a bankruptcy estate[,] the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power" (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 53, 58−59 (1989), analyzing and adopting Katchen, 382 U.S. at 336)). Back To Text

[86] See id. at 997 (holding presumption against extraterritorial effect of statute does not apply when disregard of bankruptcy court order would have "substantial effects within the United States" (quoting Laker Airways, 731 F.2d at 925)). Back To Text

[87] See In re Simon, 153 F.3d at 995 (stating Hong Kong courts retain jurisdiction but Hong Kong−Shanghai risks United States Bankruptcy Court sanctions if it commences collection proceedings there). Back To Text

[88] See id. (deciding action without discussing applicability of 11 U.S.C. § 524). Of course, the actions that were contemplated by the Bank against the debtor were not against property of the estate. So what impact would their actions actually have? In finding that the Bankruptcy Code had extraterritorial reach, the Ninth Circuit could not have been concerned with any economic impact of the proposed action by the Bank in Hong Kong. Rather, the court centered on the primacy of the bankruptcy court's orders in this case, its discharge order and the resulting effect on the debtor's assets post−discharge. Back To Text

[89] See Hilton v. Guyot, 159 U.S. 113, 163−64 (1895) (describing factors used in comity analysis). Back To Text

[90] In re Simon, 153 F.3d at 998 (9th Cir. 1998) (quoting Murray v. The Charming Betsy, 6 U.S. 64 (1804)); Restatement (Third) of Foreign Relations § 403(1) (1987) (explaining nations should refrain from enforcement of their laws in other nations when exercise of such jurisdiction is unreasonable). Back To Text

[91] See Jay Lawrence Westbrook, The Lessons of Maxwell Communications, 64 Fordham L. Rev. 2531, 2532 (1996) (noting territorial theory sometimes called "grab rule" of international insolvency). Back To Text

[92] In re Simon, 153 F.3d at 998. Back To Text

[93] Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 995 (9th Cir. 1998) cert. denied, 525 U.S. 1141 (1999). Back To Text

[94] See id. 11 U.S.C. § 304, among other things, enables the court to enjoin the commencement or continuation of such actions against a debtor with respect to property involved in the foreign proceeding or against such property itself. In determining whether to grant relief under section 304(b), the court should be guided by what will assure an economical and expeditious administration of the estate consistent with:

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed in this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304(b) (1994). Back To Text

[95] In re Simon, 153 F.3d at 999. Back To Text

[96] 93 F.3d 1036, 1050 (2d Cir. 1996) (listing reasons court chose not to favor extraterritorial application of Bankruptcy Code). Back To Text

[97] In re Simon, 153 F.3d at 999 (describing decision in Maxwell as "completely logical" under those circumstances). Back To Text

[98] Id. at 999−1000. Back To Text

[99] In re Simon, 153 F.3d at 995 (noting principles of extraterritoriality were inapplicable because property was legally located within United States). The Bank in fact conceded that Congress intended for the Bankruptcy Code to have extraterritorial effect with respect to property of the estate. See id. at 996. The creation of the legal fiction that all property of the debtor's estate is located within U.S. territory under the court's broad in rem jurisdiction is itself evidence of Congressional intent that the Code apply extraterritorially. Back To Text

[100] 98 F.3d 956, 961 (7th Cir. 1996) (Posner, C.J.) (stating "[t]he efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located"). Back To Text

[101] See In re Simon, 153 F.3d at 996 (citing In re Rimsat). Back To Text

[102] See In re Rimsat, 98 F.3d at 959. Back To Text

[103] The first chapter 11 trustee, who cooperated with Hilliard and was attempting to negotiate a chapter 11 plan was eventually forced to step down due to pressure from the debtor's creditors. See id. at 960. Back To Text

[104] See id. Back To Text

[105] See id. Section 305(a)(2)(A) provides that the bankruptcy court may, after notice and hearing, "dismiss a case under [title 11], or may suspend all proceedings in the case under [title 11] if . . . there is pending a foreign proceeding . . ." 11 U.S.C. § 305(a)(2)(A) (1994). Back To Text

[106] See In re Rimsat, 98 F.3d at 960. Back To Text

[107] Id. at 961 (discussing whether filing of interpleader action violates stay under section 362 of Bankruptcy Code (quoting In re Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982) and citing In re Falls Bldg., Ltd., 94 B.R. 471, 480 (Bankr. E.D. Tenn. 1988))). Back To Text

[108] Id. Back To Text

[109] See id. (explaining although petitioner moved to France, it is undisputed he was citizen of United States and thus owed allegiance to United States, and therefore was bound by laws of United States (citing Blackner v. United States, 284 U.S. 421, 436 (1932))); see also Restatement (Third) of the Foreign Relations Law of the United States § 402(2)

(1987). Back To Text

[110] See In re Rimsat, 98 F.3d 956, 961 (7th Cir. 1996) (reasoning there is no authority for allowing presumption against extraterritorial application of U.S. statutes to preclude application of automatic stay to U.S. citizen interfering with U.S. bankruptcy proceeding in which debtor is corporation headquartered in United States). Back To Text

[111] The Rimsat court observed that comity "is a doctrine of adjustment, not a mandate for inaction." Id. at 963. The court found that given the uncertainty of the propriety of the Nevis proceeding, the location of the assets and headquarters in the U.S., and the absence of any evidence that application of U.S. bankruptcy laws would offend any principles of law that the Nevis court would apply, it is the Nevis proceeding that should yield to the U.S. proceedings under the principles of comity. Id. The court noted, however, that its views on whether the Nevis proceeding should be entitled to deference may have been different if the injunction first issued by the Nevis court against the debtor filing for bankruptcy in the United States had somehow been applicable to the petitioning creditors or if the U.S. State Department had informed the court that resolution of the issue could have had an impact on international relations with Nevis. Id. Back To Text

[112] See In re Chiles Power Supply Co., 264 B.R. 533, 535 (Bankr. W.D. Mo. 2001) (holding permanent channeling injunction applies to foreign defendants). Back To Text

[113] See id. at 536 (finding "[o]ther lawsuits, in addition to the Canadian Litigation which also alleged the Entran II System was defective, precipitated the filing, at least in part"). Back To Text

[114] See id. at 536−37 (noting defendant did not object to that provision of plan). Back To Text

[115] Indeed, a group of product liability claimants did object to the channeling injunction. These objecting claimants were given an opportunity to proceed against the Insurance Fund or against the Carriers, but not both. See id. at 537. Back To Text

[116] See id. (noting, as grounds for motion, debtor claimed defendants had continued to prosecute their cross claims including conducting discovery). Back To Text

[117] See In re Chiles Power Supply Co., 264 B.R at 537−38. Back To Text

[118] Although the Canadian defendants sought only discovery, the settlement payment by the Carriers and the release thereby obtained was likely intended to avoid not merely the potential liability, but the likely uncontrollable costs and distractions of defending litigations such as the Canadian defendants sought to prosecute. Back To Text

[119] Id. at 541 (analogizing channeling injunction to automatic stay (citing In re Rimsat, 98 F.3d at 961)). Back To Text

[120] Id. at 542. Back To Text

[121] See id. at 542−43 (agreeing with past decisions and finding "[b]y extension of the plain language of [11 U.S.C. § 541(a) and 28 U.S.C. §§ 157(a) and 1334(d)]…Congress intended the stay to apply to property outside the territorial limits of the United States."). Back To Text

[122] See id. (noting court must have personal jurisdiction over defendants, and determining it does); Hobson v. Travelstead (In re Travelstead), 227 B.R. 638, 655 (D. Md. 1998) (holding even though court may have in rem jurisdiction over estate property, "in personam jurisdiction is required before the court may restrain a defendant from interfering with that property"); see also Fotochrome, Inc. v. Copal Co. Ltd., 517 F.2d 512, 516 (2d Cir. 1975) (holding under former Bankruptcy Act automatic stay "cannot be effective . . . without in personam jurisdiction over the creditor who has begun an action in a foreign tribunal that is not within the jurisdiction of the United States"). Back To Text

[123] See id. at 543. But see United States Lines, Inc. v. GAC Marine Fuels Ltd. (In re McLean Indus. Inc.), 68 B.R. 690, 697 (Bankr. S.D.N.Y. 1986) (stating "[t]here is nothing that indicates that Congress sought to assert in personam jurisdiction on any standard other than due process in an action concerning a breach of the automatic stay through arresting, seizing or attaching estate property."). The bankruptcy court in McLean also noted that no claim was made that "in personam jurisdiction may be posited on the notion that the interests of the United States in administering bankruptcy proceedings of domestic corporations is so strong as to justify the right of its courts, in the exercise of exclusive jurisdiction over the property of the estate afforded by 28 U.S.C. § 1334(d), to enjoin attempts to divest them of that jurisdiction and to determine the rights of all creditors wherever they may be." Id. at 697, n.4. Back To Text

[124] See In re Chiles Power Supply Co., 264 B.R. 533, 543−44 (Bankr. W.D. Mo. 2001) (holding defendants were in violation of both automatic stay as well as channeling injunction). Back To Text

[125] 190 B.R. 763 (Bankr. S.D.N.Y. 1996). Back To Text

[126] See id. at 766 (stating consideration of damages for contempt was left for future determination by court). Back To Text

[127] See id. at 767. Back To Text

[128] See id. at 768. Back To Text

[129] See id. (holding automatic stay should be applied extraterritorially). But see Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975) (holding automatic stay under former Bankruptcy Act "cannot be effective . . . without in personam jurisdiction over the creditor who has begun an action in a foreign tribunal that is not within the jurisdiction of the United States"). The bankruptcy court in Nakash found it had in personam jurisdiction over the receiver because the receiver actively participated in the debtor's case by, among other things, filing a proof of claim and objecting to the debtor's discharge. Back To Text

[130] In re Nakash, 190 B.R. at 769. Back To Text

[131] Lykes Bros. S.S. Co. v. Hanseatic Marine Service (In re Lykes Bros. S.S. Co.), 207 B.R. 282, 284 (Bankr. M.D. Fl. 1997). Back To Text

[132] See id. at 285. Back To Text

[133] See id. at 285−86 (explaining Andrea had consented to jurisdiction in United States by filing proof of claim (citing Langenkamp v. Culp, 498 U.S. 42 (1990))). Back To Text

[134] See id. at 286−87 (listing several actions by foreign corporation by which minimum contacts requirement can be satisfied (citing Leasco Data Processing Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972))). Back To Text

[135] See id. at 287 (noting although court has no personal jurisdiction over Hanseatic, it has "jurisdiction over all property of estate wheresoever located"). Back To Text

[136] See In re Lykes Bros. S.S. Co., 207 B.R at 287−88 (stating by instituting separate judicial action against debtor's property, "creditor is affecting the very ability of the bankruptcy court to govern such a liquidation and to fairly distribute same"). Back To Text

[137] While the Lykes decision is consistent with the increasingly prevailing notion that the presumption against extraterritoriality is dependant on the effects actions have in the U.S., the court does not explain what it can actually do to Hanseatic if the entity has no other contact or dealings in the U.S. but for its collection action in Belgium. Back To Text