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Extraterritoriality

In *Morrison*, *Kiobel* and *RJR Nabisco*, the U.S. Supreme Court reaffirmed the presumption against the extraterritorial application of U.S. statutes. Attorneys from Holwell Shuster & Goldberg LLP look at the cases in the wider context of substantive canons of construction and address questions common to the application of those canons.

Statutory Interpretation and the *Morrison* Presumption Against Extraterritoriality

BY DANIEL SULLIVAN AND KEVIN BENISH

In recent years, the U.S. Supreme Court has issued three decisions reaffirming the presumption against the extraterritorial application of U.S. statutes. The trio begins with the 2010 decision *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), continues with *Kiobel v. Royal Dutch Petroleum Co.*, 81 U.S.L.W. 4241, 2013 BL 103044, 133 S. Ct. 1659 (U.S. April 17, 2013), and concludes with last Term's *RJR Nabisco, Inc. v. European Community*, 84 U.S.L.W. 4450, 2016 BL 196077, 136 S. Ct. 2090 (U.S. June 20, 2016). These decisions have had dramatic results: For example, in *Morrison*, the Court abrogated an extensive body of law developed over several decades in the Courts of Appeals governing when to apply the securities laws in transnational cases; *Kiobel* rejected the extraterritorial application of the Alien Tort Statute, similarly abrogating prior lower-court decisions that had held that allegations of torture and other misdeeds abroad stated claims under the statute; and *RJR Nabisco* held that private RICO plaintiffs must plead injury in the United States to state a RICO claim. The *Morrison* trio of decisions emphasizes that, whatever rules the lower courts previously fashioned for particular areas of the law, the presumption must be applied: Unless a federal statute clearly applies abroad, its scope is limited to the territory of the United States.

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The potentially far-reaching consequences of these cases, however, is not the whole story. With *RJR Nabisco* on the books, it is an appropriate time to revisit the legal reasoning of this trilogy of decisions. This article attempts to do so, specifically by: (1) situating the *Morrison* trio in the wider context of substantive canons of construction; and (2) considering how the trio has addressed some questions common to the application of such canons.

Summarizing the *Morrison* Trio

In *Morrison*, the Supreme Court addressed the application of Section 10(b) of the Securities Exchange Act of 1934 to a so-called ''foreign-cubed'' action—foreign plaintiffs suing a foreign defendant for securities fraud in connection with stock transactions on a foreign stock exchange. Until *Morrison*, the Supreme Court had

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never considered the application of Section 10(b) to transnational fact patterns.

The Courts of Appeals, however, had. Starting in the late 1960s, they erected a series of ''conduct'' and ''effects'' tests to determine whether domestic conduct or effects (or a mixture of both) justified application of the statute to transnational securities fraud schemes. *See Morrison*, 561 U.S. at 255–60 (summarizing history of the case law). Neither test required that the conduct or effect in the United States be sufficient on its own to constitute a violation of the statute. *See id.* at 258. Moreover, these tests did not derive from the language of Section 10(b), which is silent as to its extraterritorial application. *See, e.g.*, *Bersch v. Drexel Firestone, Inc.*, 519 F. 2d 974, 993 (2d Cir. 1975) (''[I]f we were asked to point to language in the statutes, or even in the legislative history, that compelled [the conduct-and-effects test], we would be unable to respond.'') (quoted with disapproval in *Morrison*, 561 U.S. at 258). Instead, courts asked whether, given some effect on American markets or investors or some conduct in the United States, the facts of the case were such that, '' 'if Congress had thought about the point,' it would have wanted § 10(b) to apply.'' *Morrison*, 561 U.S. at 257 (quoting *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F. 2d 1326, 1337 (1972)).

Morrison rejected the conduct-and-effects tests as ''judicial-speculation-made-law.'' *Id.* at 261. In their place, the Court insisted that the presumption against extraterritoriality be applied ''in all cases.'' *Id.* Under that presumption, the Court held, ''[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'' *Id.* at 255. Because neither the text nor structure of Section 10(b) contains such a clear indication, *Morrison* held that the statute does not apply abroad.

The *Morrison* court insisted that the presumption against extraterritoriality be applied "in all cases" and said that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."

Morrison next analyzed whether the particular application of the statute sought by the plaintiffs in that case was, in fact, extraterritorial. That is, having resolved ''step 1''—does the statute apply extraterritorially?—the Court proceeded to ''step 2''—does this case in fact involve a putative extraterritorial application? *See RJR Nabisco*, 136 S. Ct. at 2101 (describing *Morrison*'s ''two-step framework''). Although the plaintiffs alleged that some misstatements had been prepared in Florida, the Court concluded that ''the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.'' *Morrison*, 561 U.S. at 266. After all, the Court reasoned, ''Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.' '' *Id.* (quoting 15 U.S.C. § 78j(b)). Therefore, the Court held, Section 10(b) only applies to ''transactions in securities listed on domestic exchanges, and domestic transactions in other securities.'' *Id.* at 267. Because the transactions at issue occurred on the Australian Stock Exchange, Section 10(b) did not apply.

Kiobel came next. In the context of allegations that foreign corporations had aided the Nigerian government in brutalizing its own citizens in Nigeria, *Kiobel* applied the presumption against extraterritoriality to the Alien Tort Statute (''ATS''). The Court observed that, even though the ATS permits courts to recognize claims against ''an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States'' (28 U.S.C. § 1350), ''that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States.'' 133 S. Ct. at 1665. After reviewing the historical context of the meaning of violations of the law of nations, the Court concluded that this evidence did not clearly imply extraterritorial application. *See id.* at 1666-67. Therefore, the ATS has no such application and, the Court held, because ''all the relevant conduct took place outside the United States,'' the plaintiffs had no claim.

In a confusing coda at the end of its opinion, the Court in *Kiobel* remarked, ''even where the claims *touch and concern* the territory of the United States, they must do so with sufficient force to *displace* the presumption against extraterritorial application.'' *Id.* at 14 (emphases added). It is unclear what it would mean for the specific claims in a given case to ''displace'' the presumption, since the presumption is either rebutted or not as a matter of statutory interpretation at step 1 (and *Kiobel* held it was not rebutted). Illustrating the confusion the ''touch and concern'' language has caused, recent ATS cases have held that a plaintiff may raise certain concerns to justify applying the statute to an action where it is otherwise presumed Congress did not mean for it to do so. *See, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185-87 (2d Cir. 2014) (setting forth a separate, two-step ''touch and concern'' analysis). Some commentators suggest that the Court's reaffirmation, in *RJR Nabisco*, of *Morrison*'s two-step framework impliedly abrogates such cases (*e.g.*, Perlette Jura & Dylan Mefford, *The ATS In Focus: After RJR, the Debate Over the ''Focus'' Test is Over*, Law360 (Oct. 25, 2016, 10:25AM)).

In contrast to *Kiobel*, in *RJR Nabisco* the Court held that the Racketeer Influenced and Corrupt Organizations Act (''RICO'') *does* apply abroad, albeit to a limited extent. *See* 136 S. Ct. at 2103. A RICO violation requires proof of a pattern of racketeering activity, which consists of two or more so-called predicate acts. The predicate acts are defined as violations of a list of other federal or state laws, some of which expressly apply extraterritorially. *See id.* at 2101–02 (giving examples). The Court therefore held that a ''violation of'' the RICO statute ''may be based on a pattern of racketeering activity that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial.'' *Id.* at 2103. Because the presumption was rebutted at step 1 of the *Morrison* analysis, there was no need to proceed to step 2 and determine RICO's ''focus.'' *Id.* at 2103.

This holding did not resolve the case, however, because the lawsuit had been brought by private parties rather than the U.S. government Although RICO is

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known best as a criminal statute, a distinct provision permits private parties to bring suit if they have been ''injured in [their] business or property'' by a RICO violation. *Id.* at 2106 (quoting 18 U.S.C. § 1964(c)). But that particular provision does not contain any indication of extraterritorial application. Accordingly, the Court in *RJR Nabisco* held that ''[a] private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property.'' *Id.*

The Reasoning of the *Morrison* Trio

Some courts and commentators have treated *Morrison* and the presumption against extraterritoriality as either a unique interpretive presumption or as one of a series of related doctrines (including forum non conveniens, international comity, and others) specific to transnational cases. However, at bottom the presumption is a substantive canon of construction, similar to other such canons, and that fact should be the starting place for analysis. Proceeding from that starting place, one notes that *Kiobel* and *RJR Nabisco* raise at least two interpretive questions common to the application of substantive canons of construction.

A Substantive Canon of Construction. The presumption against extraterritorial application, as *Morrison* itself recognized, is not new. *See, e.g.*, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (''The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, . . . is a valid approach whereby unexpressed congressional intent may be ascertained.'' (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932))); *Sandberg v. McDonald*, 248 U.S. 185, 196 (1918) (''Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.''). Although some courts and commentators in the latter half of the twentieth century may have believed that the strength of the presumption had faded, by 1993 the Supreme Court had reiterated that ''[i]t 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.'' *EEOC v. Arabian American Oil Co.* (''*Aramco*''), 499 U.S. 244, 248 (quoting *Foley Bros.*, 336 U.S. at 285). *See generally* Pamela K. Bookman, *Litigation Isolationism*, 67 Stan. L. Rev. 1081, 1098 (2015) (noting the presumed decline of the presumption); Harold Hingju Koh, Transnational Litigation in United States Courts 57–83 (2008) (discussing other decisions around the time of *Aramco* that re-emphasized the presumption).

What *Morrison* did was to synthesize the case law on the presumption. The Court explained that the rule ''represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate.'' *Morrison*, 561 U.S. at 255 (citing *Blackmer*, 284 U.S. at 437). ''It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.'' *Id.* (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)); *see also Foley Bros.*, 336 U.S. at 285. Thus, although the presumption serves to avoid conflict between an American statute and foreign law, and thereby promotes international comity (*E.g.*, *Aramco*, 499 U.S. at 248), the presumption applies ''regardless of whether,'' in the particular case at issue, ''there is a risk of conflict between the American statute and a foreign law.'' *Morrison*, 561 U.S. at 255 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173–74 (1993)). In short, *Morrison* described the presumption against extraterritoriality as a substantive canon of construction.

Substantive canons, like other interpretive assumptions, are tools to ascertain what a statute means. But unlike syntactic and semantic canons, which are interpretive rules based on common understanding of how ordinary readers and writers use language, substantive canons turn on assumptions, in the face of statutory silence or ambiguity, about how Congress expects its statutes to operate in particular areas of the law. The canons against retroactivity, waiver of sovereign immunity, preemption, etc., are examples of similar assumptions. One might justifiably question whether such interpretive thumbs on the scales are appropriate. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Notre Dame L. Rev. 109, 123-25 & sources cited), but, as a practical matter, substantive canons are here to stay.

Morrison articulates, less a specialized rule for transnational cases, than one of the many substantive assumptions about what statutes mean when their text or context is silent or equivocal.

Morrison's dictate that statutes do not apply abroad absent clear indication of such application parallels the operation of other substantive canons. *Compare INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (''A statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result.''); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992) (''Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed.'') (quotation marks omitted); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (''If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'') (alteration and quotation marks omitted).

The two-step framework that *Morrison* created also bears a resemblance to the application of other substantive canons. Courts use a similar two-step approach, for example, in retroactivity cases—first, one determines whether the statute clearly applies retroactively and, if it does not, one determines whether the application sought is in fact retroactive. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). Assessing whether a given application of a statute triggers an unrebutted presumption is not always straightforward, of course, but the mode of analysis is familiar.

Thus, *Morrison* articulates, less a specialized rule for transnational cases, than one of the many substantive assumptions about what statutes mean when their text or context is silent or equivocal. One might argue, of course, with how plausible that assumption is, as one can in the case of most substantive canons. But the critical point is that, in applying the presumption against

extraterritoriality, a court should start from the recognition that it is a substantive canon of construction.

Statutory Context and Conduct. *Kiobel* and *RJR Nabisco* highlight two interpretive questions in the application of the presumption against extraterritoriality.

First, *Morrison* made it clear that overcoming the presumption does not require that the statute say so expressly. ''Assuredly context can be consulted as well.'' 561 U.S. at 265. The question arises, then, what types of contextual evidence suffice to rebut the presumption? *Kiobel* and *RJR Nabisco* give some hints.

In *Kiobel*, the mere fact that the ATS permits claims for violations of the law of nations or treaties—claims that may feel vaguely transnational—did not rebut the presumption, since, the Court explained, ''such violations affecting aliens can occur either within or outside the United States.'' 133 S. Ct. at 1665. Even piracy, a violation of the law of nations publicly recognized at the time the ATS was enacted and one that surely most often occurs beyond our shores, was not sufficient evidence of extraterritorial application. By contrast, in *RJR Nabisco*, the Court focused on the statutory structure of RICO—the statute is violated, in part, by a pattern of violating *other* laws, some of which expressly apply extraterritorially. ''This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite [itself] lacking an express statement of extraterritoriality.'' 195 S. Ct. at 2103. Taking these two cases as guideposts, the Court appears more prepared to see an implied provision for extraterritorial application in a statute's incorporation by reference of another law that applies extraterritorially than in the kinds of situations to which the statute in question was understood to apply when it was enacted.

The Court appears more prepared to see an implied provision for extraterritorial application in a statute's incorporation by reference of another law that applies extraterritorially than in the kinds of situations to which the statute in question was understood to apply when it was enacted.

Second, in most extraterritoriality cases, determining whether a putative application of a statute seeks extraterritorial effect requires determining *where* the conduct or event regulated by the statute occurred. *See Foley Bros.*, 336 U.S. at 285 (holding that eight-hour statute did not apply to work conducted in Iraq and Iran); *Aramco*, 499 U.S. at 259 (holding that Title VII did not apply extraterritorially to an American company's employment practices in Saudi Arabia); *Morrison*, 561 U.S. at 266–67 (holding that Section 10(b) does not apply to frauds occurring in connection with extraterritorial transactions). But does the presumption also function to limit statutory provisions that do not regulate conduct? *Kiobel* and *RJR Nabisco* provide an answer: yes.

The ATS ''does not directly regulate conduct or afford relief.'' *Kiobel*, 133 S. Ct. at 1664. Instead, it states, ''The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'' 28 U.S.C. § 1350. Nevertheless, the *Kiobel* Court held that ''the principles underlying [this] canon of construction . . . constrain courts considering causes of action that may be brought under the'' ATS. 133 S. Ct. at 1664. Similarly, in *RJR Nabisco* the Court rejected the reasoning of the Second Circuit, which had held that the presumption '' 'is primarily concerned with the question of what *conduct* falls within a statute's purview.' '' *Id.* (quoting 764 F.3d at 151). The Court therefore applied the presumption to RICO's private right-of-action provision, holding that a private plaintiff must show that it suffered a domestic injury (whatever that means). *RJR Nabisco* explained that ''providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct.'' *Id.* at 2106. Although the risk of such friction ''is not a prerequisite for applying the presumption against extraterritoriality, the Court reasoned, ''where such a risk is evident, the need to enforce the presumption is at its apex.'' *Id.* at 2107. Thus, the Court made clear that the presumption applies beyond conduct-regulating provisions, at least where extraterritorial application would risk international friction. Whether there are some provisions to which the presumption might not apply, the Court left to another day. Notably, however, the provisions at issue in *Kiobel* and *RJR Nabisco* were closely tied to the regulation of conduct: the authorization for courts to recognize liability for conduct (*Kiobel*) and a private remedy for violative conduct (*RJR Nabisco*).

These two issues are not unique to the extraterritoriality canon of construction. One way to assess the Court's analysis, whether in the *Morrison* trio or other cases, would be to compare how it has resolved similar problems with respect to other substantive canons. Is the evaluation of contextual evidence for the rebuttal of a statutory presumption consistent, or are there variations? Do some presumptions apply only to conduct-regulating statutes, or to a wider array of statutory provisions? Consideration of such analogies could help courts answer such questions consistently.

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