WHITE & CASE

Client**Alert**

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New York Court of Appeals Holds That State Law Cannot Reach a Purely Foreign Antitrust Conspiracy

In a decision that may reverberate beyond the antitrust context, New York's highest court—the Court of Appeals—held that the state's antitrust statute lacks the extraterritorial scope to reach a purely foreign alleged antitrust conspiracy. The decision could have broad implications for substantive claims brought under New York state law and could even affect how judgments are enforced under New York law.

The *Global Re* Decision

In *Global Reinsurance Corp. US Branch v. Equitas Ltd.*, the New York branch of a German reinsurance company ("Global Re") alleged that a group of UK entities (collectively known as Equitas) violated New York's Donnelly Act, the state analogue to the federal Sherman Act, by conspiring to restrain trade in the global reinsurance market.[1] The Equitas entities were formed by Lloyd's of London ("Lloyd's") in 1996 for the purpose of handling certain pre-1993 non-life reinsurance-related liabilities—for example, claims for environmental or other catastrophic damages that may surface long after an insurance policy is signed.[2] The creation of Equitas was approved by the United Kingdom Department of Trade and Industry, and by the European Commission.[3] Nonetheless, Global Re alleged in New York state court that the centralization of decision making in Equitas suppressed competition because, unlike the individual Lloyd's syndicates that had competed with each other for so-called retrocessionary reinsurance customers prior to 1996, Equitas had no incentive to attract prospective business or offer customer-oriented claims management.[4]

Under New York's Donnelly Act,[5] an antitrust claim must allege (i) concerted action by at least two entities, which causes (ii) a restraint of trade within an identified product market arising from the conspirators' market power.[6] In this way, a Donnelly Act claim is similar to a federal claim under Section 1 of the Sherman Act.[7] The lower court dismissed the case, but was reversed by the Appellate Division, which reinstated the Donnelly Act claims.[8] The Court of Appeals reversed, dismissing the complaint.[9]

The Court assumed for purposes of deciding Defendants' motion to dismiss that Global Re had alleged a conspiracy because Equitas was created to engage in activity in which multiple, independent Lloyd's syndicates had previously engaged.[10] The Court went on to determine, however, that Global Re had failed adequately to allege that Equitas had "the requisite power within the relevant worldwide market" to sustain a Donnelly Act claim.[11] The Court reasoned that the complaint lacked allegations suggesting that Defendants had "the capacity to impose onerous economic terms without suffering competitive detriment" in the global reinsurance market.[12]

Owen Pell
Partner, New York
+ 1 212 819 8891
opell@whitecase.com

Scott Hershman
Partner, New York
+ 1 212 819 8366
shershman@whitecase.com

Robert A. Milne
Partner, New York
+ 1 212 819 8924
rmilne@whitecase.com

Jack E. Pace III
Partner, New York
+ 1 212 819 8520
jpace@whitecase.com

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

But the Court then went beyond this ruling to reach an independent basis for dismissal, holding that "the Donnelly Act cannot be understood to extend to the foreign conspiracy plaintiff purports to describe."[13] The Court proceeded on the analytical assumption arguendo that "the extraterritorial reach of the Donnelly Act is as extensive as that of its federal counterpart, the Sherman Act."[14] The Foreign Trade Antitrust Improvements Act ("FTAIA") of 1982 provides that for non-import trade or commerce, the Sherman Act lacks extraterritorial reach unless the conduct "has a direct, substantial, and reasonably foreseeable effect" on domestic [US] commerce, and "such effect gives rise to a [Sherman Act] claim."[15] Applying the FTAIA's limits, the Court found that the Sherman Act would not provide "a jurisdictional predicate" for Global Re's claim where the "only harm to competition alleged is within a particular London reinsurance marketplace" with "no particular New York orientation and occasioning injury here only by reason of the circumstance that plaintiff's purchasing branch happens to be situated here."[16] Significantly, it did not matter that Global Re alleged injury through its New York branch office given the wholly foreign nature of the alleged conspiracy.

Thus, the Court found that the "established presumption against the extraterritorial operation of New York law" could not be "overcome in a situation where the analogue federal claim would be barred by congressional enactment."[17] But in concluding, Chief Judge Lippman's majority opinion[18] clarified that the Court's holding was not based solely on the FTAIA because the extraterritorial reach of New York's Donnelly Act cannot stretch as far as federal law. According to the Court, "[e]ven if the Sherman Act could reach the purported conspiracy, it would not follow that the Donnelly Act should be viewed as coextensive."[19] The Court went on to explain that "[i]t would be a very great, and we think unwarranted, supposition that the authors of the Donnelly Act intended to allow…the sort of highly intrusive international projection of state regulatory power now proposed."[20]

Limits on the Reach of New York Law

The decision in *Global Re* recalls the US Supreme Court's recent decision in *Morrison v. National Australia Bank*, which held that the Securities Exchange Act of 1934 could not be applied extraterritorially because statutes that lack an express congressional intent to apply extraterritorially are presumed to not so apply.[21] Federal courts have relied on *Morrison* to restrict the extraterritorial reach of the federal securities laws, as well as other federal statutes, such as the Racketeer Influenced and Corrupt Organizations (RICO) Act. [22]

Faced with limits on the reach of federal law, plaintiffs asserting transnational claims would have turned to New York state courts in an effort to evade *Morrison* and its progeny. But, after *Global Re*, defendants will argue that New York law carries the same limitations as federal law. As such, the decision could have important implications for securities actions brought under New York's Martin Act [23] or New York's "baby RICO" statute[24] where claims are principally premised on alleged foreign-based conspiracies. Moreover, it is not clear that New York common law should have a greater scope than laws codified by the Legislature, such that *Global Re* could become a limit on the scope of non-statutory causes of action under New York law.

Strengthening the "Separate Entity" Doctrine

In *Koehler v. Bank of Bermuda*, a closely divided New York Court of Appeals held that the home office of a non-New York bank, which stipulated to its presence in New York, could be ordered to produce in New York pledged share certificates physically held by the bank outside New York.[25] Some federal courts have suggested that *Koehler* effectively overruled the longstanding New York "separate entity" rule, under which branches of a bank are considered separate entities for purposes of judgment enforcement remedies like attachment and execution.[26] New York state courts applying *Koehler* as well as other federal courts, however, have held that the separate entity doctrine remains good law.[27] As noted in *Koehler*, the New York statute governing the post-judgment garnishment of assets contains "no express territorial limitation."[28] Under *Global Re*, there is now a formal presumption against extraterritorial application which should bolster the reasoning of those courts that have affirmed the continued vitality of the separate entity doctrine. After *Global Re*, it may be very hard for judgment creditors to use service on the New York branches of banks to reach deposit and other accounts (or even information on those accounts) located outside New York State. Thus *Global Re* would appear to recognize that the mere existence in New York of a foreign financial institution's branch office should not, without more, enable the "highly intrusive international projection of state regulatory power"[29] which occurs when an account is subject to attachment and execution.

Global Re will be an important decision, and in the coming years there is likely to be additional litigation regarding the scope of the decision and its application to other New York statutes and to common law claims under New York law in cases premised on non-New York conduct.

Max Shterngel, an Associate in the New York office, assisted in the preparation of this Client Alert.

1 *Global Reinsurance Corp.—US Branch v. Equitas Ltd.*, No. 53, 2012 WL 995268, at *6 (N.Y. Mar. 27, 2012). A copy of this decision is linked to this alert.

2 *Id.* at *2-4.

3 *Id.* at *3.

4 *See id.* at *6-7.

5 *See* N.Y. General Business Law § 340.

6 *Global Reinsurance*, 2012 WL 995268, at *10-13.

7 *See* 15 U.S.C. § 1; *see also State of N.Y. v. Mobil Oil Corp.*, 38 N.Y. 2d 460, 463 (1976).

8 *Global Reinsurance*, 2012 WL 995268, at *8-9.

9 *Id.* at *10.

10 *Id.* at *10-11.

11 *Id.* at *13-15.

12 *Id.* at *13.

13 *Id.* at *15.

14 *Id.* at *16.

15 *Id.* (citing 15 U.S.C. § 6a; *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004)).

16 *Id.* at *15, 17.

17 *Id.* at *17-18 (citing McKinney's Consolidated Laws of N.Y., Book 1, Statutes, § 149).

18 All seven of the Court's judges voted to dismiss the action on the basis of the limited extraterritoriality of the Donnelly Act, but two judges joined a concurring opinion expressing reservations about the majority opinion's unnecessary discussion of federal antitrust law. *See id.* at 1-2 (Smith, J., concurring).

19 *Id.* at 19.

20 *Id.*

21 *Morrison v. Nat'l Aust. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

22 *See, e.g., Cedeño v. Castillo*, No. 10-cv-3861, 2012 WL 205960, at *1 (2d Cir. Jan. 25, 2012); *Norex Petroleum Ltd. v. Access Industries, Inc.,* 631 F. 3d 29, 33 (2d Cir. 2010).

23 *See* Martin Act, New York General Business Law, article 23-A, §§ 352-353 (authorizing the Attorney General to "investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York"). The New York Court of Appeals recently held that the Martin Act does not preempt private securities actions for breach of fiduciary duties and negligence, but the extent to which *Global Re* may apply to such common law claims is, as of yet, unclear. *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment, Management, Inc.*, 2011 NY Slip Op 9162, 2011 WL 6338898 (N.Y. Dec. 20, 2011).

24 *See* Organized Crime Control Act (OCCA), N.Y.P.L. § 460.

25 12 N.Y. 3d 533, 541 (2009).

26 *See, e.g., Eitzen Bulk v. Bank of India*, No. 09-cv-10118, 2011 WL 4639823, at *6 (S.D.N.Y. Oct. 5, 2011); *Gucci America, Inc. v. Weixing Li*, 10-cv-04974, at *5 n.6 (S.D.N.Y. Aug. 23, 2011); *JW Oilfield Equipment LLC v. Commerzbank*, 764 F. Supp. 2d 587, 595 (S.D.N.Y. 2011). *Koehler* did not squarely raise the separate entity issue because service on the bank had been effected by service in New York on a wholly owned subsidiary and the bank then stipulated that the parent company was present in New York for purposes of the case. Thus, the majority decision made no mention of nor did it purport to overrule longstanding New York law on the separate entity doctrine.

27 *See, e.g., Global Tech., Inc. v. Royal Bank of Canada*, No. 150151/2011, 2012 WL 89823 *12-13 (N.Y. Sup. Jan. 11, 2012); *Parbulk II AS v. Heritage Maritime SA*, 935 N.Y.S.2d 829, 832 (Sup. Ct. N.Y. Cty. 2011); *Samsun Logix Corp. v. Bank of China*, 929 N.Y.S.2d 202, 2011 WL 1844061, at *5-7 (Sup. Ct. N.Y. Cty. May 12, 2011); *Levin v. Bank of New York*, No. 09-cv-5900, 2011 WL 812032, at *12 (S.D.N.Y. Mar. 4, 2011); *Hamid v. Habib Bank Ltd.*, No. 11-cv-920, 2012 WL 919664, at *6-7 (S.D.N.Y. March 14, 2012); *John Wiley & Sons, Inc. v. Kirtsaeng*, No. 08-cv-7834, 2009 WL 3003242, at *4 n.9 (S.D.N.Y. Sept. 15, 2009). *See also* White & Case Client Alert, *New York Supreme Court Determines That Banks Still Have the Protection of the "Separate Entity" Doctrine After Koehler* (May 2011), at .http://www.whitecase.com/files/Publication/e6fa4971-0a3e-4c8a-884d-0e9907466a41/Presentation/PublicationAttachment/ed2bd8b5-c33e-4e4f-8b6c-1995727e0ba2/alert_NYSC_Separate_Entity_Doctrine_After_Koehler.pdf.

28 *Koehler*, 12 N.Y. 3d at 539 (discussing C.P.L.R. § 52). Also relevant is New York's statute governing pre-judgment attachment of assets. *See* C.P.L.R. § 6201; *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 312 (2010) (citing *Koehler*).

29 *Global Reinsurance*, 2012 WL 995268, at *19.