# How Foreign is Too Foreign? Extraterritorial Limits on the Recovery of Fraudulent Transfers

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## Introduction

Section 550(a)(2) of the US Bankruptcy Code allows a trustee to recover property that is the subject of an avoided transfer from 'any immediate or mediate transferee' of an initial transferee. Whether this power to recover extends to property that was transferred from a foreign initial transferee to a foreign subsequent transferee has long been an unresolved question. In recent years, several courts have weighed in on the question, clarifying and refining the framework for answering it with respect to individual transfers in specific cases. While the recent case law has provided more guidance to litigants, several open questions remain. In this chapter, we discuss the current landscape with respect to the application of section 550(a)(2) to foreign-to-foreign transfers, the questions that remain unanswered, and how an appeal currently pending before the Second Circuit could alter the terrain dramatically.

## The basic question: how do code sections 550(a)(2) and 541 interact?

Under Code section 541, 'property of the estate' is defined expansively to include certain categories of property 'wherever located and by whomever held'. These categories of property include '[a]ny interest in property that the trustee recovers under [section 550]'. Section 550(a)(2) allows a trustee to 'recover, for the benefit of the estate', property transferred to 'any immediate or mediate transferee' of an initial transferee, 'to the extent that [the] transfer is avoided' under one of several avoidance sections provided elsewhere in the Code.

Trustees in a number of bankruptcy proceedings have argued that their recovery powers under section 550(a)(2) extend to property that was the subject of an overseas (or 'foreign-to-foreign') transaction. To support this argument, these trustees have generally either relied on the broad definition of 'property of the estate' in section 541, or on the notion that this type of transaction, in certain instances, should be considered 'domestic', so that recovery of the assets transferred would not require extraterritorial application of the Code section in the first place.

## The pre-Madoff framework: Maxwell, French and Morrison

### In re Maxwell[2]

The seminal *Maxwell* case cemented comity and a presumption against extraterritoriality as the twin principles guiding US courts addressing the extraterritorial reach of US insolvency law. The case involved an English debtor corporation and centred on a series of transfers by foreign transferors to foreign recipients that were otherwise avoidable under section 547. The Bankruptcy Court for the Southern District of New York declined to permit recovery of these transfers, reasoning that 'neither the language nor legislative history of section 547 or the bankruptcy code as a whole evinced Congress's intent to apply section 547 to conduct occurring outside the borders of the US' On appeal, the district court endorsed the bankruptcy court's analysis but held that, separate and apart from the presumption against territoriality, principles of international comity counselled against extraterritorial application of the US Bankruptcy Code.

The district court began by recognising that the presumption against extraterritoriality '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'. The presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord'. The court articulated a 'two-fold inquiry' for application of the presumption: 'First, a court must determine if the presumption applies at all'; in other words, the court must determine whether the 'conduct [at issue] occurred outside of the borders of the US'. If the court determines that the presumption applies, it must then determine whether 'Congress intended to extend the coverage of the relevant statute to such extraterritorial conduct'.

The court determined that the transactions at issue 'clearly' occurred overseas, but it declined to rest this decision solely on the basis that the transfers were made from and to bank accounts located outside of the US. It noted that 'such a limited conception of "transfer" for purposes of an extraterritoriality analysis would have potentially dangerous implications' because a creditor seeking to have a transfer characterised as extraterritorial 'could simply arrange to have the transfer made overseas'. Instead, the court noted, the analysis requires a consideration of 'all component events of the transfers'.

In performing the analysis, the court determined that the transferors and transferees were all foreign entities whose relationships were 'centered in England'. The debts underlying the payments had been made and maintained in England, and were governed by English law. The only connection to the US was that the payments represented proceeds from a sale of US assets, a sale that depleted the bankruptcy estate. The court dismissed the importance of this connection, however, holding that the sale was 'more appropriately characterized as a preparatory step to the transfers'.

The court implicitly left open the possibility that the presumption might not apply to foreign defendants who subjected themselves to the equitable claims adjustment process by submitting a proof of claim. It declined to make such a finding in this case because, although the foreign defendants had submitted proofs of claim, they had done so only in a parallel proceeding in England.

Having determined that the transfers at issue were extraterritorial, the court next turned to the second step of its inquiry: whether Congress intended section 547 of the Bankruptcy Code to apply extraterritorially. It stated that a statute will not be applied extraterritorially 'unless the affirmative intention of the Congress to apply the law extraterritorially is clearly expressed in the statute' and that 'any ambiguity in the statute must be resolved in favor of refusing to apply the law to events occurring outside US territory'.

The court declined to find Congressional intent to apply section 547 of the Bankruptcy Code extraterritorially. First, it rejected an argument that extraterritoriality was implied by the words 'any

transfer' in section 547, explaining that this type of 'boilerplate language' is 'insufficient to overcome the presumption against extraterritoriality' and noting that the parties had not pointed to any legislative history that would alter this conclusion. Next, it rejected an argument that the definition of 'property of the estate' in section 541 (to include property 'wherever located') mandated extraterritorial application, reasoning that property is not 'property of the estate' until after it has been recovered.

Having concluded that section 547 could not be applied extraterritorially, the court offered comity as a separate and independent ground to block recovery of the transfers at issue in the case. It noted that '[c]omity is wholly independent of the presumption against extraterritoriality and applies even if the presumption has been overcome or is otherwise inapplicable'. Since the transfers at issue 'occurred in England on account of debt incurred there' and 'most creditors [of the overseas transferor] are English', the court held that 'the effect on US creditors of the transfers is outweighed by the effects of the transactions in England'.

### In re French[3]

A decade later, the Court of Appeals for the Fourth Circuit in *In re French* applied the analysis laid out in *Maxwell* to the transfer of real estate located in the Bahamas, but reached the opposite conclusion:

- recovery of the property at issue, although its transfer took place abroad, did not require extraterritorial application of the recovery statute;
- in any event, Congress intended the recovery statute to be applied extraterritorially; and
- comity did not bar recovery of the transferred property.

The subject property was a house in the Bahamas that had been transferred by the debtor to her children as a gift at a time that the debtor was already insolvent.[4] The court noted that both the debtor and her children were located in the US; that the decisions to transfer the property and to make the transfer a gift had also been made there; and that recordation of the deed in the Bahamas was 'at most incidental' to the conduct regulated by the fraudulent-transfer statute. The court concluded that the transfer of the house was therefore a domestic transfer, so that its recovery did not require extraterritorial application of any Bankruptcy Code section.

The court did recognise that the Bahamas had a 'powerful interest' in real property within its boundaries – an interest that 'perhaps merits special weight in the balancing test'. However, the court determined that it did not need to 'resolve this slippery question' because even if recovery of the property required extraterritorial application of the Bankruptcy Code, there was sufficient evidence of Congressional intent favouring such application that the presumption against extraterritoriality was rebutted. Acknowledging the existence of a circuit split regarding the question, the court sided with Fifth Circuit precedent to hold that the 'property of the estate' includes property that would have been 'property of the estate' but for the fraudulent transfer. It then reasoned that the definition of 'property of the estate' in section 541 (which includes property 'wherever located') 'demonstrated an affirmative intention [by Congress] to allow avoidance of transfers of foreign property that, but for a fraudulent transfer would have been property of the debtor's estate'.

Finally, the court determined that comity would not block recovery of the Bahamian property. It rested this decision on a determination that it would be more appropriate to apply US law to the transfer than Bahamian law: most activity surrounding the transfer took place in the US, almost all the parties with an interest were located in the US, and the debtor had a strong connection to the US. In addition, because no parallel insolvency proceedings were taking place in the Bahamas, there was no risk of conflicting judicial opinions. The court concluded that 'applying Bahamian law here would undercut the purpose of the United States Bankruptcy Code by withdrawing its protections from those it is intended to cover, while simultaneously failing to protect any Bahamian residents.'

### Morrison and Nabisco

The extraterritoriality question reached the US Supreme Court in 2010. In *Morrison v National Australia Bank*,[5] a securities fraud case, the Court proceeded from the principle that there exists a presumption against extraterritorial application of statutes. It outlined a two-step approach for determining whether in a given case this presumption blocks recovery of property involved in an avoided foreign-to-foreign transfer: first, the court is to determine whether the presumption has been rebutted, by examining whether Congress intended the statute to apply extraterritorially; second, if the presumption against extraterritoriality has not been rebutted, the court is to determine whether the litigation involves extraterritorial application of the statute.[6] The court emphasised that the presumption against extraterritoriality is not a 'clear statement rule' – a court can look beyond the words of the statute and review the statute in context, but it made it clear that in seeking to overcome the presumption, 'uncertain indications do not suffice'.

In the subsequent *Nabisco* decision, in which the Supreme Court was called upon to apply the *Morrison* test in a RICO context,[7] the first step of this inquiry was phrased as follows: 'If the statute is not extraterritorial then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus".'

## The Madoff cases: divergent application of the Morrison test to section 550

Two of the first opinions applying the *Morrison* test to recovery of fraudulent transfers reached diametrically opposite conclusions. Interestingly, both opinions were rendered in adversary proceedings arising out of the Bernard Madoff Ponzi scheme and involved offshore 'feeder funds' that pooled capital from investors worldwide for investment in Madoff Securities. The feeder funds had received distributions from Madoff Securities, which they transferred to their foreign customers.

### BLI[8]

In what is commonly referred to as the *BLI* matter, the trustee for the Madoff Securities estate sought to recover certain transfers received by foreign entities including the Taiwanese Bureau of Labor Insurance (BLI) via one of the largest feeder funds for Madoff Securities.

The US Bankruptcy Court for the Southern District of New York (SDNY) applied the *Morrison* steps in reverse order.[9] First, it determined that the 'focus' of the avoidance and recovery sections in the Bankruptcy Code is on the initial transfer, from the bankruptcy estate to an initial transferee, since it is this initial transfer that depletes the estate. The court explained that 'if the acts or objects upon which the statute focuses are located in the United States, application of the statute is domestic and the presumption against extraterritoriality is not implicated, even if other activities or parties are located outside the United States'. Because Madoff Securities was located in New York, the court held that the relevant transfers were domestic and application of section 550 to recover transferred assets would not be extraterritorial, even if the recovery involved a subsequent transferee located abroad.

Second, although the court found that recovery of the transferred assets in this case did not call for extraterritorial application of the avoidance provisions, it determined that the statutory context showed Congress's intent to allow such application. Congress demonstrated this intent through 'interweaving terminology and cross-references': by:

- defining 'property of the estate' in section 541 to include all property worldwide;
- incorporating the language 'interest of the debtor in property' in avoidance sections 544, 547, and 548; and
- explicitly authorising recovery of all avoided transfers in section 550.

The court added that disallowing recovery of assets fraudulently transferred abroad would 'render hollow the avoidance and recovery provisions of the Code, an outcome clearly unintended by Congress'. It distinguished the SDNY's findings in *Maxwell* on the basis that the *Maxwell* debtor was located outside the US, so that depletion of the estate in that case occurred abroad.

Finally, the court held that considerations of comity did not bar recovery of the transferred assets, distinguishing the *Maxwell* court's comity decision as having 'no applicability to the instant case' because BLI was not involved in parallel liquidation proceedings in a foreign country.

## ET – District Court[10]

In a different adversary proceeding emanating from the Madoff Securities bankruptcy, the District Court for the Southern District of New York reached the opposite conclusion from the BLI court.

Applying a *Morrison/Nabisco* analysis, the court first determined that recovery of the transfers at issue would require extraterritorial application of section 550. The 'focus' of the section, according to the court, was on 'the property transferred and the fact of its transfer', not on the debtor. Applying the 'component events' test articulated in Maxwell, the court observed that the transfers and transferees involved in the proceeding were predominantly foreign, and that the funds' origination at Madoff Securities in New York was insufficient to render them domestic. The court also rejected the argument that the use of correspondent banks in the US to execute the transfers would render the transfers domestic.

The court next concluded that Congress did not evince 'clear intent' to permit extraterritorial application of section 550. It rejected the relevance of section 541's definition of 'property of the estate', citing Second Circuit precedent for the proposition that 'preferential transfers do not become property of the estate until recovered'.[11] On the basis of this precedent, the court declined to follow *In re French*. In doing so, it noted that *In re French* was distinguishable in any event, since it involved transfer activity that took place in the US as well as parties based in the US. The court brushed aside an argument (endorsed by the *Maxwell* court) that barring extraterritorial application of section 550 would allow debtors and creditors to avoid recovery by arranging for their transfers to occur abroad, reasoning that 'the desire to avoid such loopholes in the law must be balanced against the presumption against extraterritoriality'.

Finally, the court cited comity as an independent ground for disallowing recovery from the foreign transferees. It reasoned that, since many of the feeder funds were involved in foreign liquidation proceedings, investors in foreign funds 'had no reason to expect that US law would apply to their relationships with the feeder funds'. The court added that given the 'indirect relationship between Madoff Securities and the transfers ... foreign jurisdictions have a greater interest in applying their own law than does the United States.'

The court did not dismiss any of the pending claims, instead remanding the case to the bankruptcy court to determine which claims should be dismissed for being 'purely foreign transfers'.

## ET – on remand[12]

Before the bankruptcy court could address the issues left on remand, parties to more than 80 parallel adversary proceedings filed motions to dismiss on, among other things, extraterritoriality grounds, relying on the District Court's decision. The court issued an omnibus decision addressing the motions together.

The judge[13] noted the stark differences between the *BLI* and *ET* decisions, and construed his task narrowly: to review the allegations 'to determine whether they survive dismissal under the extraterritoriality or comity principles enunciated in the *ET* decision'.

The court first examined the claims under principles of comity. Most claims based on transfers originating in feeder funds that were subject to a foreign liquidation proceeding were dismissed on the basis of comity.[14] Although the court noted that a finding of 'comity among nations does not require parallel proceedings', it did not engage in a comity analysis for the remaining transfers.

The court next performed a detailed extraterritoriality analysis, painstakingly analysing the numerous claims one by one to determine 'the critical factor – where the transfer occurred'. The court stated that the *ET* decision 'identifie[d] only four possibly relevant facts to consider in determining whether the Trustee has rebutted the presumption against extraterritoriality: (i) the location of the account from which the transfer was made, (ii) the location of the account to which the transfer was made; (iii) the location or residence of the subsequent transferor and (iv) the location or residence of the subsequent transfer.'

The following table summarises the claims that were dismissed and upheld as a result of this analysis:

| The court dismissed transfers | The court declined to dismiss transfers |
|---|---|
| from foreign funds where there was no allegation that the transfer was made to or from a US account | by foreign corporations with a principal place of business in New York, where the transfers were made from and to US-based accounts |
| by foreign corporations that were alleged to 'conduct daily business' in the US, where the corporations were not registered in the US and there were no allegations that the transfer occurred domestically | by a foreign entity to a US correspondent bank account, where the only connection to the United States was the residence of the recipient |
| made and received by foreign entities, neither of whom maintained offices in the US, where the recipient sometimes used US bank accounts to facilitate money transfers | by a foreign entity, controlled by a US citizen resident in the US, transferred from US bank accounts, where information about the recipient bank account had not been provided |
| by a foreign entity, controlled by a US citizen resident in the US, where there was no allegation that the transfer was made to or from a US account | by a foreign entity registered to do business in New York, from a New York bank account, where there was no information about the location where the transfers were received |
| from a New York account, where the trustee had supplied conflicting information about the recipient account and the amount of the transfer | by a foreign entity resident in the US, from and to US bank accounts, where there was no allegation that the bank accounts used were not correspondent bank accounts |

## Madoff appeal and outstanding questions

The Madoff Securities trustee filed a petition for leave to appeal the *ET* district court decision and the subsequent decision on remand to the Court of Appeals for the Second Circuit,[15] presenting the court with two questions:

- whether the Bankruptcy Code and the Securities Investor Protection Act 'permit the recovery of property fraudulently transferred by the debtor when it has been subsequently transferred in transactions with allegedly extraterritorial components; and
- '[w]hether the comity of nations independently bars recovery of such property.'

The petition was granted on 27 September 2017.[16]

As the petition points out, there is substantial ground for difference of opinion on these questions, as demonstrated by the 'perfectly opposed' decisions rendered in *BLI* and *ET*. Both courts based their analysis on the Supreme Court's *Morrison* test and both courts provided detailed, carefully reasoned and lengthy opinions in support of their decisions. Two additional decisions have recently addressed these questions in the Second Circuit: in *In re Lyondell Chemical Company*,[17] the Bankruptcy Court for the Southern District of New York followed the reasoning of *In re French* to allow extraterritorial recovery of transferred assets. In *In re Ampal-American Israel Corporation*,[18] a different judge for the same court sided with *Maxwell* and *ET* to decline to apply section 547 of the bankruptcy code extraterritorially.[19]

Since considerable authority exists for both approaches, it is hazardous to predict how the Second Circuit will rule, but it is almost certain that any decision rendered by the court will significantly alter the landscape in this area. If the court follows the *Maxwell/ET* line of reasoning, it will solidify a split between the Second Circuit and the Fourth Circuit (which, in *In re French*, adopted the opposite reasoning and conclusions) and limit the ability of bankruptcy trustees to recover assets transferred to overseas recipients. If, on the other hand, the court sides with the *In re French/BLI* decisions, we expect to see an uptick in litigation against foreign recipients of fraudulently transferred assets, not only in the Second Circuit but nationwide.

## Notes

1 The authors express appreciation to Edith Beerdsen and Jennifer Prevete for their significant assistance in the preparation of this chapter.

2 *In re Maxwell Commc'n Corp. plc*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd sub nom. In re Maxwell Commc'n Corp. plc* by Homan, 93 F.3d 1036 (2d Cir. 1996).

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

4 Unlike the transfers at issue in *Maxwell* and the other recovery cases discussed in this chapter, the transfer in *In re French* was an 'initial transfer,' made directly by the debtor to a transferee, and recoverable under section 550(a)(1) of the Bankruptcy Code.

5 561 US 247 (2010).

6 As described below, the two-step Morrison test is often applied in reverse order.

7 *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016).

8 *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC ('BLI')*, 480 B.R. 501 (Bankr. S.D.N.Y. 2012).

9 Before performing the Morrison analysis, the court determined that it had personal jurisdiction over BLI through a 'minimum contacts' analysis.

10 *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC ('ET')*, 513 B.R. 222 (S.D.N.Y. 2014).

11 *ET*, 513 B.R. at 228-230, citing *In re Colonial Realty Co.*, 980 F.2d 125, 131 (2d Cir. 1992)).

12 *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. AP 08-01789 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016), *petition for direct appeal docketed*, No. 17-1341 (2d Cir. April 28, 2017).

13 The omnibus decision on remand from *ET* was written by Judge Bernstein. The *BLI* decision had been written by Judge Lifland.

14 Claims against three of these defendants were upheld because the court had not received sufficient information about the foreign liquidation proceedings to reach a conclusion.

15 Pet. Of Appellant Irving H. Picard for Permission to Appeal Pursuant to 28 USC. § 158(d)(2)(A), Case No. 17-1341 (2d Cir. April 28, 2017).

16 Docket No. 388 (Order), Case No. 17-1294 (2d Cir. Sept. 27, 2017).

17 543 B.R. 127 (Bankr. S.D.N.Y. 2016)

18 562 B.R. 601 (Bankr. S.D.N.Y. 2017)

19 The decision in *In re Ampal* was authored by Judge Bernstein, who also issued the *ET* decision on remand.

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Mr Graulich has received a number of recent honours, including being named as one of *Turnarounds & Workouts*' 'Outstanding Restructuring Lawyers', and recognition in *Chambers* and *New York Super Lawyers*. Mr Graulich is a frequent author, lecturer and panellist on a broad range of bankruptcy topics. He is an INSOL Fellow, co-chair of the American Bankruptcy Institute 2017 NYC Bankruptcy Conference, and co-chair of the IBA Insolvency Section's Legislation and Policy Subcommittee.

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