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Extending the Rule of Reason to Pendent Jurisdiction: Vespa of America Corp. v. Bajaj Auto Ltd.

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NOTES

Extending the Rule of Reason to Pendent Jurisdiction: *Vespa of America Corp. v. Bajaj Auto Ltd.*

Under the principle of comity, courts of a foreign state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect.[1] Where the full faith and credit clause of the U.S. Constitution[2] does not apply, the doctrine of comity must be implemented to ensure that decisions in one country are effective and enforceable in another.[3] This doctrine has come to play a major role in determining the existence of U.S. jurisdiction in transnational cases,[4] particularly in the internationally sensitive areas[5] of antitrust and business regulation.[6]

In *Vespa of America Corp. v. Bajaj Auto Ltd.*,[7] an Italian corporation and its U.S. distributor brought suit in the U.S. District Court for the Northern District of California against an Indian corporation and its American distributor, alleging patent infringement under the Lanham Act[8] and appending four state law claims: breach of contract, conver-

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[1] Brown v. Babbitt Ford, Inc., 571 P.2d 689, 696 (1977).

[2] U.S. CONST. art. IV, § 1, cl. 1, reads:

> Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state.

[3] Vespa of America Corp. v. Bajaj Auto Ltd., 550 F. Supp. 224, 227 (N.D. Cal. 1982).

[4] While it is true that U.S. law extends over some conduct in other nations and encompasses foreign activities of aliens as well as U.S. citizens, at some point U.S. interests are too weak and foreign interests too strong to justify extraterritorial assertion of jurisdiction. A comity test, originally developed by the Ninth Circuit to set the jurisdictional boundaries of U.S. antitrust law, is useful in determining that point. *See infra* text accompanying notes 27-36.

In actual litigation, extraterritorial jurisdiction seldom has been found lacking. Up to May 1973, the Department of Justice filed some 248 foreign trade antitrust cases, and not one was lost on jurisdictional grounds. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973). *Vespa* is a private action, but reported dismissals on jurisdictional grounds are infrequent in private actions as well. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), an early case casting doubt on the extraterritorial application of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), that is considered largely obsolete. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)(the "Alcoa" case).

[5] *Alcoa*, 148 F.2d 416.

[6] *Id.* (citing Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)).

[7] 550 F. Supp. 224 (N.D. Cal. 1982).

[8] 15 U.S.C. §§ 1051-1127 (1974). For the Legislative History of the Lanham Act, see Act of July 5, 1946, U.S. CODE CONG. SERVICE 1274; 1962 Pub. L. No. 87-772, 1962 U.S. CODE CONG. & AD. NEWS 2844; 1974 Pub. L. No. 93-597, 1974 U.S. CODE CONG. & AD. NEWS 7113.

sion, unjust enrichment, and unfair competition. Under the doctrine of pendent jurisdiction, state law claims for which there is no independent federal jurisdiction may be appended to a substantial federal claim.[9] The issue in *Vespa* centered upon whether pendent jurisdiction was an appropriate basis for asserting U.S. authority over a related but wholly foreign cause of action.[10] The court held that in this case, assertion of U.S. jurisdiction over state and foreign law causes of action arising between two foreign corporations, surrounding overseas conduct, was wholly inappropriate.[11] The decision furnishes an important judicial interpretation of the role of comity in asserting U.S. jurisdiction over foreign conduct. Just as the notion of comity is addressed in direct assertions of federal jurisdiction in antitrust and patent cases, it must now be addressed in the context of pendent jurisdiction. As a procedural consequence, the decision closes the loophole of which Vespa Corporation had taken advantage in appending its state law claims.

Vespa of America Corporation (Vespa) is the U.S. distributor of Vespa vehicles, designed and manufactured by an Italian corporation, Piaggio. In 1960, Piaggio licensed Bachraj Trading Corporation, an Indian corporation and Bajaj Auto Ltd's (Bajaj's) corporate predecessor, to manufacture component parts and assemble both Vespa scooters and three-wheeled commercial vehicles.[12] Under Indian law, the Indian government maintained a high level of involvement in the licensing agreement.[13] Piaggio and Bajaj executed or extended license agreements in

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Plaintiffs in *Vespa* alleged jurisdiction under §§ 1121, 1125(a). "The district and territorial courts of the United States shall have original jurisdiction and the court of appeals of the United States shall have appellate jurisdiction of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties." *Id.* § 1121. For a discussion of the jurisdiction of the federal courts in trademark infringement and unfair competition claims, see WRIGHT, MILLER & COOPER, JURISDICTION § 3582.

[9] 28 U.S.C. § 1338(b) provides that federal courts have original jurisdiction over claims for unfair competition "when joined with a substantial and related claim under . . . the trademark laws." This was originally a codification of the Hurn v. Oursler, 289 U.S. 238 (1938), restrictive view of pendent jurisdiction, under which state law claims are appropriate for federal court if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. United Mine Workers v. Gibbs, 383 U.S. 715 (1966), broadened the doctrine of pendent jurisdiction to include state and federal claims derived from a common nucleus of operative facts that plaintiff would ordinarily try as a whole, and subsequent decisions have updated the statutory interpretation to include *Gibbs*. *See, e.g.*, Thompson Tool Co. v. Rosenbaum, 443 F. Supp. 559 (D. Conn. 1977).

A majority of cases in which jurisdiction is pendent involve actions based on patent, copyright, and trademark law in which a nonfederal claim of unfair competition is joined with a federal claim. *See* Annot., 5 A.L.R. 3d, 1040 (1966). The federal court's power to hear such claims is derived from the notion that the relationship between the state and federal claims is such that they comprise but one constitutional case. 550 F. Supp. at 227 (quoting *Gibbs*, 383 U.S. at 725).

[10] 550 F. Supp. at 227.

[11] *Id.* at 230.

[12] *Id.* at 225.

[13] *Id.* at 226. The court citing as the government's rationale its need to safeguard and promote Indian economic independence. *Id.*

1960, 1964, and 1968.[14] Under the agreements, Bajaj received from Piaggio all plans and specifications necessary to construct Vespa vehicles. When the contract expired in 1971, however, Bajaj did not return the plans and specifications and continued to manufacture the vehicles, eventually becoming the world's second largest manufacturer of scooters—second only to Piaggio. As of 1982, the Indian manufacturer was selling scooters in 171 countries and through its distributor, Vespa, had sold approximately 1,300 scooters in the United States since its entry into the American market in 1977.[15]

In 1980, nine years after the alleged breach of contract and after Bajaj had achieved its current world-market status, the Italian patent holder brought action against its Indian competitor to recover under the Lanham Act[16] and under its appended state law claims. Piaggio claimed that since 1971 Bajaj has manufactured scooters and three-wheeled vehicles illegally.[17] In its answer, Bajaj contended that the 1968 licensing agreement was executed with the express understanding that its rights to produce the vehicles would survive the agreement.[18] Piaggio conceded that its claim under the Lanham Act extended only to those 1,300 vehicles sold in the United States which directly affected interstate commerce.[19] Its pendent claims, however, sought damages resulting from the sale of 800,000 vehicles world-wide which took place outside U.S. borders and over which no overseas interference with international U.S. sales was claimed.[20] The action came before the court on defendant's motion to dismiss all of plaintiff's non-domestic claims.

By excluding from its Lanham Act cause of action claims for damages resulting from all transnational sales of vehicles, Piaggio successfully avoided the application of comity principles in determining the existence of jurisdiction under the Act. The court found, however, that this "tactical concession"[21] did not eliminate the jurisdictional problems presented in the complaint. In its discretion, the court declined to exercise pendent jurisdiction over any of the wholly foreign-based claims raised in Piaggio's complaint, and granted defendant's motion to dismiss plaintiff's breach of contract and conversion claims, as well as the extraterritorial elements of the unfair competition and unjust enrichment claims.[22] The court focused its analysis on three areas. First, it emphasized the growing

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[14] The record indicated that the first license was executed in 1960. It had to be rewritten to include certain provisions required under Indian law, and was subsequently approved as amended on March 22, 1961. In 1964, the Indian ministry approved an extension of the agreement as requested by the parties. The litigation focused on the final agreement, approved by the Indian government in 1968. *Id.*

[15] *Id.* Bajaj does not market its three-wheeled vehicles in the United States. *Id.*

[16] 15 U.S.C. § 1125(a).

[17] 550 F. Supp. at 226.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 230.

[21] *Id.* at 226.

[22] *Id.* at 225.

role of comity in determining U.S. jurisdiction over foreign conduct. Second, it analyzed Vespa's complaint in light of a 1976 Ninth Circuit decision, *Timberlane Lumber Co. v. Bank of America*,[23] in which the court developed a comity test to determine jurisdiction in antitrust actions involving foreign activities and foreign nationals. Third, the court discussed its own broad discretion to grant or deny pendent jurisdiction.

Regarding the role of comity in asserting U.S. jurisdiction over foreign conduct, the court reasoned that if principles of res judicata are to ensure that decisions in one country will be effective and enforceable in another, assertions of jurisdiction must be governed by respect for the basic laws and policies of other countries.[24] Thus, absent constitutional

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[23] 549 F.2d 597 (9th Cir. 1976).

[24] 550 F. Supp. at 227. The court noted that the Restatement of Foreign Relations Law of the United States suggests the following specific limitations on a court's jurisdiction to prescribe and apply its law:

> § 403. Limitations on Jurisdiction to Prescribe
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> (1) Although one of the bases for jurisdiction under § 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.
>
> (2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:
>
> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
>
> (b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation in 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;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
>
> (e) the importance of regulation to the international political, legal or economic system;
>
> (f) the extent to which such regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity;
>
> (h) the likelihood of conflict with regulation by other states.
>
> (3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2).
>
> (4) Under the Law of the United States:
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> (a) a statute, regulation or rule is to be construed as exercising jurisdiction and applying law only to the extent permissible under § 402 and this section, unless such construction is not fairly possible; but
>
> (b) where Congress has made clear its purpose to exercise jurisdiction which may be beyond the limits permitted by international law, such exercise of jurisdiction, if within the constitutional authority of Congress, is effective as law in the United States.

550 F. Supp. at 227-28 n.3 (*quoting* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (Tent. Draft No. 2, 1981)).

Section 402 of the Restatement enumerates the following bases of jurisdiction:

prohibition or a clear expression of congressional intent, the courts must develop appropriate standards of restraint.[25] According to the court, the Ninth Circuit developed such standards for antitrust cases in *Timberlane*, and extended the criteria to extraterritorial application of the Lanham Act in *Wells Fargo Co. v. Wells Fargo Express Co*.[26] The criteria, according to the court, are: some effect, actual or intended, on U.S. foreign commerce; an effect sufficiently large to present cognizable injury to plaintiffs; and an interest by the United States, in relation to the interest of other countries, sufficiently strong to justify assertion of extraterritorial authority.[27] If these three criteria are met, the principle of comity is satisfied to the extent that the United States may assert jurisdiction.

The *Vespa* court cited the third criterion, the strength of the interest of the United States, as its main concern. To assess this strength, the court further analyzed the facts in light of the Ninth Circuit's *Timberlane* decision. In *Timberlane*, the plaintiff alleged conspiracy under the Sherman Act[28] by certain foreign citizens and foreign corporations to interfere with the exportation of Honduran lumber to the United States and Puerto Rico. The defendants moved to dismiss, based upon the act of state doctrine,[29] under which the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[30] The district court granted the motion and plaintiff appealed.

The circuit court found the application of the act of state doctrine

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Subject to § 403, a state may, under international law, exercise jurisdiction to prescribe and apply its law with respect to

(1)(a) conduct a substantial part of which takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory which has or is intended to have substantial effect within its territory;

(2) the conduct, status, interests or relations of its nationals outside its territory; or

(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a certain state interest.

Id.

[25] The court noted that it is ultimately the task of Congress to set the jurisdictional boundaries of a particular statute. *See Alcoa*, 148 F.2d 416 (cited at 550 F. Supp. at 228).

The tendency, however, seems to be for federal regulatory statutes to contain sweeping jurisdictional language. For example, the Sherman Act reaches every contract in restraint of, and every person who shall monopolize or attempt to monopolize, any part of trade or commerce among the several states or with foreign nations. 15 U.S.C. §§ 1, 2. The comparable jurisdictional grant in the Lanham Act is at 15 U.S.C. § 1114(1)(a) and (b), and at § 1127.

[26] 556 F.2d 406 (9th Cir. 1977). *See infra* text accompanying notes 57-61.

[27] 550 F. Supp. at 228 (citing *Timberlane*, 549 F.2d at 613).

[28] 15 U.S.C. §§ 1, 2.

[29] "Every sovereign state is bound to respect the independence of every other state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). *See also American Banana*, 213 U.S. 347 (applying the act of state doctrine to a foreign trade antitrust case). The leading modern statement of the act of state doctrine appears in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), which concludes that the doctrine results not from international or constitutional law, but derives from the judiciary's concern for a separation of powers between it and the political branches of the government.

[30] *Underhill*, 168 U.S. at 252.

by the district court erroneous. On the other hand, it noted that the Sherman Act does not limit its own reach,[31] nor does international law define that point at which one country's interests are too weak to justify the exercise of extraterritorial jurisdiction. Moreover, the circuit court found the district court's reliance on a direct and substantial effect on U.S. foreign commerce as a jurisdictional prerequisite to be misplaced.[32] "What we prefer," the *Timberlane* court concluded, "is an evaluation and balancing of the relevant considerations in each case." The court called such a balancing of interests a "jurisdictional rule of reason."[33] It then remanded the case to determine the relative interests of Honduras and the United States.

The importance of the *Timberlane* decision to the *Vespa* court was the ready-made framework[34] that the case provided for balancing comparative interests between countries—the third criterion in the comity test, and the *Vespa* court's main concern. The *Vespa* court read *Timberlane* as creating a jurisdictional rule of reason based on six factors: first, the degree to which assertion of U.S. jurisdiction would create conflict with foreign law or policy; second, the principal places of business of the parties; third, the extent to which enforcement could be expected to achieve compliance; fourth, the relative significance of the effect of a decision on the United States as compared with its effect elsewhere; fifth, the extent to which there was an explicit purpose to harm or affect U.S. commerce and the foreseeability of such effect; and last, the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[35] The *Vespa* court analyzed Piaggio's claim in terms of these factors, and found that: (1) any determination by the United States of the Piaggio-Bajaj contract's validity and scope could conflict with the Indian government's policy of promoting industrial independence; (2) Piaggio and Bajaj were both foreign-based corporations and their U.S. distributors had only a tangential interest in the foreign claims; (3) a judgment rendered in California against an Indian corporation under Indian law, or under California state law concepts of unfair competition, ran a high risk of unenforceability; (4) the interest in the litigation was necessarily greater in Italy and India, where both manufacturing and a large portion of the sales occur, than in the United

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[31] 549 F.2d at 609. *See supra* note 25. "Although it may be 'evident from the text of the antitrust statutes' that '*some* . . . effect on our foreign commerce is a prerequisite to jurisdiction,' . . . the statutory terms themselves are not precise or limited enough to provide additional guidance to the courts." 549 F.2d at 609, n.14 (emphasis in original) (quoting Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108-13 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972)).

[32] 549 F.2d at 609.

[33] *Id. See* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958). *See also* W. FUGATE, FOREIGN COMMERCE & THE ANTITRUST LAWS (2d ed. 1973); Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L. Q. 295, 304-06 (1959).

[34] 550 F. Supp. at 229.

[35] *Id.* at 229-30.

States, into which the vehicles were exported; (5) the argument that Bajaj intended or could have foreseen an impact on U.S. markets is tenuous; and (6) Bajaj's domestic conduct was insignificant compared with its conduct overseas.[36] After a factor by factor analysis, the court concluded that assertion of U.S. jurisdiction was inappropriate.

Finally, the *Vespa* court exercised its option to decline jurisdiction at its own discretion. It declined on the grounds of judicial inefficiency, inconvenience to the litigants, and jury confusion. The court noted that allowing certain pendent claims to proceed in federal court may not always serve the goals which justify economy and convenience of the parties.[37] The court further noted that should Piaggio obtain a favorable judgment, that judgment would likely breed more litigation in India, where it must be enforced.[38] The contract dispute arose over a decade ago, and most accessible evidence and witnesses would be in India or Italy.[39] The court noted as well that jury confusion is likely to result from the disparity between Piaggio's pendent claim for damages resulting from the sale of 800,000 vehicles world-wide and its federal Lanham Act claim which covered the sale of less than 2,000 scooters.[40]

Prior to *Timberlane*, courts for the most part cited the effect on U.S. foreign commerce to support extraterritorial jurisdiction. Judge Learned Hand set the course when he declared, "Any state may impose liabilities even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[41] While foreign commentators have stated that this assertion conflicts with comity and international law,[42] U.S. courts, nevertheless, continued to apply the effects test as a prerequisite to jurisdiction in Sherman Act cases without stating whether other factors were relevant.[43] [44] Application of the effects test led courts to formulate such

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[36] *Id.*

[37] *Id.* at 230. *See Gibbs*, 383 U.S. 715, 726.

[38] 550 F. Supp. at 230.

[39] *Id.*

[40] *Id.*

[41] *Alcoa*, 148 F.2d at 443.

[42] *See, e.g.,* Haight, *Comment to Miller,* 111 U. PA. L. REV. 117, 118-20 (1963); Ellis, *Comment to Miller,* 111 U. PA. L. REV. 1129, 1129-32 (1963).

[43] An assertion of jurisdiction based on internal consequences has been described as the "objective territorial" principle of jurisdiction. *See* W. FUGATE, *supra* note 33, at 35-39.

[44] *See, e.g.*, United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957)(the existence of a direct and substantial effect satisfied jurisdictional requirements). *See also* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (Tent. Draft No. 2, 1981), which reads in part:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
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> (a) the conduct and its effect are generally recognized as consitituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
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> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a

standards as: A direct and substantial effect on U.S. foreign commerce;[45] an intention to affect imports and exports that actually has some effect on them;[46] a conspiracy which affects U.S. commerce;[47] a direct and influencing effect on trade;[48] and any effect that is not both insubstantial and indirect.[49] Because most of the litigated cases have involved relatively obvious offenses with clear and significant effects on foreign or interstate commerce, the effects test has remained broad and is not widely discussed within the cases themselves. As one commentator noted, "Findings that an American effect was direct, substantial, and foreseeable, or within the scope of congressional intent, have little independent analytic significance. Instead, cases appear to turn on a reconciliation of American and foreign interests in regulating their respective economies and business affairs . . . ."[50]

The *Timberlane* court reasoned that the effects test by itself was incomplete because it failed to consider the interests of other nations. While the term "substantial" may be broadened by an individual court to include comity and regard for the prerogatives of other nations, "it is more likely they will be overlooked or slighted in interpreting past decisions and reaching new ones."[51] The *Timberlane* court noted that the substantial effects test may have been imported into foreign commerce analysis from interstate antitrust analysis, where it is more appropriate.[52] In interstate antitrust analysis the substantial effects test helps to distinguish state burdens from federal burdens under the commerce clause.[53] No comparable constitutional problem exists in defining the scope of congressional power over foreign commerce.[54] The court also noted that the act of state doctrine[55] was inapplicable in private suits. *Timberlane*, therefore, set down its jurisdictional rule of reason, which balanced the competing interests of the countries involved, to govern the extraterritorial reach of the Sherman Act.

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direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

The "direct" and "substantial" requirements are contained in (b)(ii) and (iii).

[45] *See, e.g.*, Thomsen v. Cayser, 243 U.S. 66, 88 (1917) ("the combination affected the foreign commerce of this country").

[46] *Alcoa*, 148 F.2d at 444.

[47] United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504, 592 (S.D.N.Y. 1951).

[48] United States v. Timkin Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), *modified and aff'd*, 341 U.S. 593 (1951).

[49] Occidental Petroleum v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

[50] Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 563 (1976).

[51] 549 F.2d 597, 612.

[52] *Id.*

[53] U.S. CONST. art. 1 § 8, cl. 3. "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States."

[54] 549 F.2d 597, 612.

[55] *See supra* text accompanying note 29.

A year later, the Ninth Circuit was faced with a similar case, this time under the Lanham Trademark Act.[56] In *Wells Fargo Co. v. Wells Fargo Express Co.*,[57] the owner of a registered trademark pertaining to the words "Wells Fargo" brought an action against a Nevada corporation and a Liechtenstein corporation for trademark infringement under the Lanham Act and unfair competition abroad. Without benefit of the Ninth Circuit's *Timberlane* decision, the district court held that it did not have in personam jurisdiction over the foreign defendant, a Liechtenstein corporation with U.S. subsidiaries. The court dismissed those portions of the suit concerning activities in foreign countries for lack of subject matter jurisdiction.[58] On appeal, the Ninth Circuit held that the court may be able to reach the defendant both as to its foreign and domestic activities, and that subject matter jurisdiction and a cause of action may exist for the defendant's foreign activities under the Lanham Act.[59] The *Fargo* court adopted the following language from *Timberlane* as expressive of the Ninth Circuit's jurisdictional rule of reason of comity and fairness:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of American citizens and businesses residing there, they primarily care about their own nationals. Having assessed the conflict, the court should then determine whether, in the face of it, the contacts and the interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.[60]

The *Fargo* court remanded the case for development of these additional jurisdictional facts to be balanced under the *Timberlane* comity test.[61]

In light of *Timberlane* and *Fargo*, the district court's refusal in *Vespa* to assert jurisdiction over Piaggio's breach of contract and conversion

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[56] 15 U.S.C. § 1051-1127 (1974). *See supra* note 8.

[57] 556 F.2d 406 (9th Cir. 1977).

[58] *Id.* at 431. The court also based its decision on the doctrine of forum non conveniens, the power of the court to decline jurisdiction if it appears that for the convenience of litigants and witnesses and in the interests of justice, the action should have been instituted in another forum where it might have been brought. *See* 28 U.S.C. § 1404.

In *Vespa*, defendant Bajaj raised the issue of forum non conveniens and the court ruled that had the case not been dismissed on jurisdictional grounds it would have been appropriate to decline under forum non conveniens, on the condition that Bajaj waive any statute of limitations problems in a more convenient forum. 550 F. Supp. at 231.

[59] 556 F.2d at 431.

[60] 549 F.2d at 614-15.

[61] 556 F.2d at 431.

claims, or over the extraterritorial aspects of Piaggio's unfair competition and unjust enrichment claims, was not unexpected. Piaggio was aware that the *Timberlane* comity test precluded federal jurisdiction under the Lanham Act over its transnational claims. It therefore brought a single cause of action extending only to the relatively small number of sales which affected U.S. commerce. As the court noted, however, this concession did not cure the jurisdictional problems presented by appending state and foreign law claims.[62] What the court scrutinized was Piaggio's obvious attempt to circumvent *Timberlane* and *Fargo* by the use of pendent jurisdiction.[63]

The *Vespa* court emphasized that findings of jurisdiction turn on balancing U.S. and foreign interests and regulating their respective commercial activities. Foreseeable, direct, or substantial effects on U.S. commerce are no longer watchwords in determining jurisdiction, be it direct assertions of federal jurisdiction in antitrust and patent cases, or pendent jurisdiction of state and foreign law claims. The questions that remain do not lessen the significance of the *Vespa* decision.

Because the result would be the same under either interpretation, *Vespa* does not address whether the *Timberlane* analysis is a test for subject matter jurisdiction, or a method for determining assertion of jurisdiction once the presence of subject matter jurisdiction is assumed.[64] Moreover, the decision does not suggest what would happen if a plaintiff like Piaggio appended its independent state law claims to a federal claim more substantial than that raised in *Vespa*. Presumably, the court would still need to look closely at the third element of the *Timberlane* test[65] which balances the interests of various nations in a dispute.

With *Timberlane* and *Fargo*, *Vespa* is part of a series of decisions bringing the courts closer to a consensus on the limits of U.S. jurisdiction. Significantly, *Vespa* applies the jurisdictional rule of reason in response to essentially political concerns rather than economic or business considerations. Judge Learned Hand wrote, "We should not impute to Congress an intent to punish all whom its courts can catch."[66] In that spirit, the *Vespa* court exercised jurisdictional forbearance in a transnational context in response to comity and fairness rather than national power. In doing so, the court did not isolate a single factor and make its existence or nonexistence crucial, but made a total appraisal of the reasonableness of the claim, taking into account any relevant facts.

The *Vespa* court exercised judicial restraint by applying the rule of reason to pendent jurisdiction. By refusing to assert jurisdiction, the court stated that the imposition of the risk of liability upon foreigners for

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[62] 550 F. Supp. at 226.

[63] *Id.*

[64] Some courts have assumed the latter. *See, e.g.*, Industrial Investment Development Corp. v. Mitsui, 671 F.2d at 884-85 n.7 (cited at 550 F. Supp. at 227 n.2).

[65] See *supra* text accompanying note 27.

[66] *Alcoa*, 148 F.2d at 444.

related, but purely foreign, conduct is subject to stringent limitations which will not be increased or avoided by invoking the doctrine of pendent jurisdiction.

—TRACY KENYON LISCHER