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Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.: An Unjustifiable Expansion of Subject Matter Jurisdiction in a Transnational Securities Fraud Case

In transnational securities fraud cases heard by United States courts, the principle commonly applied in determining whether subject matter jurisdiction exists is that of territoriality.¹ The two variations of the territorial principle are commonly known as the effects and conduct tests.² In general, the effects test grants jurisdiction over an act that causes foreseeable and substantial consequences within the territorial

¹ See Note, *Extraterritorial Application of the Federal Securities Code*, 11 VAND. J. TRANS. L. 711, 721 (1978). In the area of economic regulation there are three principles of jurisdiction in international law: (1) nationality jurisdiction; (2) passive personality jurisdiction; and (3) territorial jurisdiction. *Id.* at 720. The nationality principle allows a state to exercise jurisdiction over its nationals wherever they may be. *Id.* Common law countries rarely use this principle as the sole basis for exercising jurisdiction. *Id.* at 720, 721. The passive personality principle allows a state to exercise jurisdiction in cases involving its own nationals as victims of the crime. *Id.* at 725. But this principle is rarely used and is no longer recognized as a basis of jurisdiction. *Id.*

² *Continental Grain (Australia) Pty. Ltd. v. Pacific Oil Seeds, Inc.*, 592 F.2d 409, 416 (8th Cir. 1979).

No official body exists which promulgates rules governing the issue of subject matter jurisdiction in an international setting. Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 554 (1976) [hereinafter cited as HARVARD Note]. The courts often refer to the *Restatement* for guidance in deciding the jurisdictional issue. *Id.* The *Restatement* does not limit congressional power, for Congress may extend jurisdiction beyond the *Restatement's* principles so long as due process is not violated. *Id.* Nonetheless, the courts presume that Congress did not intend to violate international law standards. *Id.* Thus, the *Restatement* principles are often used to define the maximum scope of extraterritorial jurisdiction. *Id.* at 555.

Also known as the "objective territorial principle," the effects test is set forth as follows, in § 18 of the *Restatement*:

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

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(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 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.

limits of the state, regardless of the situs of the act.³ The conduct test grants jurisdiction when sufficient conduct occurs in the territory.⁴ In *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*,⁵ the Eighth Circuit held that subject matter jurisdiction existed under the conduct test where the defendants' conduct in the United States furthered a securities fraud scheme and where the conduct significantly contributed to the perpetration of the fraud.⁶

This note will suggest that the holding in *Continental Grain* represents an unjustifiably expansive application of the conduct test. Recognizing the Second Circuit's expertise in the securities law area, this note will critically examine the case of that circuit, concluding that the Second Circuit would not have found jurisdiction under the conduct test on the facts of *Continental Grain*.⁷ Next, *SEC v. Kasser*,⁸ a Third Circuit case relied upon by the court in *Continental Grain*, will be criticized as an unwarranted expansion of the conduct test. Unwarranted or not, *Kasser* also could have been distinguished on a number of grounds.⁹ Finally, a critical analysis will be made of the policies relied upon by the court in *Continental Grain*.¹⁰

RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) [hereinafter cited as RESTATEMENT].

The conduct test is also known as the "subjective territorial principle" and is set forth, as follows, in § 17 of the *Restatement*:

A state has jurisdiction to prescribe a rule of law

- (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and
- (b) relating to a thing located, or a status or other interest localized, in its territory.

Id. at § 17. The effects test was initially applied in *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *rev'd in part and remanded*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969). The conduct test was initially applied in *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

Not all the courts have applied the territorial principle in the same way. For example, some courts have required that both the conduct and effects tests be satisfied before subject matter jurisdiction would be found, while other courts have required that only one of the tests be satisfied. *See Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975).

³ *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d at 416 (8th Cir. 1979).

⁴ *Id.*

⁵ 592 F.2d 409 (8th Cir. 1979).

⁶ *Id.* at 415, 421.

⁷ *See* text accompanying notes 20-51 *infra*.

⁸ 548 F.2d 109 (3d Cir.), *cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. SEC*, 431 U.S. 938 (1977).

⁹ *See* text accompanying notes 52-79 *infra*.

¹⁰ *See* text accompanying notes 80-92 *infra*.

THE FACTUAL SETTING OF *CONTINENTAL GRAIN*

Continental Grain, an Australian corporation wholly-owned by an American corporation, purchased from American and foreign defendants an Australian company, Pacific Seeds, the primary asset of which was a supply of hybrid seedstock.¹¹ Shortly after the purchase, Pacific Seeds lost the lease to its supply of seedstock.¹² The American defendants, owners of 49% of Pacific Seeds stock, never made direct contact with Continental Grain but acted through their Australian agent, the managing director of the corporation that owned the remaining 51% of Pacific Seeds stock. Continental Grain then filed a securities fraud action under Rule 10b-5¹³ alleging that the defendants negotiated the purchase without revealing that Pacific Seeds would shortly lose its primary asset. The district court dismissed the action for lack of subject matter jurisdiction.¹⁴

On appeal to the Eighth Circuit, Continental Grain contended that subject matter jurisdiction should be granted under the effects or conduct test. The court granted jurisdiction under the conduct test, finding that the defendants' conduct within the United States consisted primarily of use of the mail and telephones.¹⁵ The court reasoned that the defendants' conduct was in furtherance of a securities fraud scheme and significant with respect to its accomplishment.¹⁶ In support of its holding, the court referred to Second Circuit precedent,¹⁷ the Third Circuit decision of *SEC v. Kasser*,¹⁸ and various policy reasons.¹⁹

THE SECOND CIRCUIT: A LESS EXPANSIVE CONDUCT TEST

In securities cases many federal courts have recognized the expertise and authority of the Second Circuit.²⁰ Indeed, one Supreme Court Justice has called the Second Circuit the "Mother Court" of securities

¹¹ 592 F.2d at 411.

¹² *Id.*

¹³ 17 C.F.R. § 240.10b-5 (1979). Most transnational securities fraud cases are brought under Rule 10b-5 and § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976).

¹⁴ 592 F.2d at 413.

¹⁵ *Id.* at 415.

¹⁶ *Id.* at 421.

¹⁷ See text accompanying notes 22-45 *infra*.

¹⁸ See text accompanying notes 52-53 *infra*.

¹⁹ See text accompanying notes 80-83 *infra*.

²⁰ On the issue of subject matter jurisdiction in transnational securities fraud cases, Second Circuit decisions have been cited as authority by other circuits. See, e.g., *United States v. Cook*, 573 F.2d 281, 284 (5th Cir. 1978); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 136 (9th Cir. 1977); *Straub v. Vaisman & Co.*, 540 F.2d 591, 595 (3rd Cir. 1976); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 524 (8th Cir. 1973).

law.²¹ It is no surprise, then, that the first case to apply the conduct test in a transnational securities case, *Leasco Data Processing Equipment Corp. v. Maxwell*,²² arose there.

In *Leasco*, an American corporation claimed that the defendants made fraudulent misrepresentations about the defendants' stock prices causing the plaintiff to buy the defendants' stock at inflated prices in violation of Rule 10b-5 and section 10(b) of the 1934 Securities Act.²³ An agreement was signed in New York City for the sale of stock. Before the agreement was closed, however, the plaintiff purchased the stock on the London Stock Exchange.²⁴ The court held that jurisdiction existed largely because the defendants' conduct in the United States, consisting mainly of meetings in New York, was an essential link in the securities fraud, which induced the plaintiff to purchase the stock.²⁵

In dictum, the court disputed section 17 of the *Restatement (Second) of the Foreign Relations Law of the United States*,²⁶ which requires extraterritorial conduct to be related to some interest within the territory in order for jurisdiction to vest.²⁷ The court stated that significant conduct alone would be sufficient to vest jurisdiction.²⁸ Although this language suggests that the court required only "significant conduct" within the territory for jurisdiction to vest, the plaintiff was a resident American corporation, unlike the nonresident corporate plaintiff in *Continental Grain*. Hence, it remains a question how the *Leasco* court would have decided the issue of jurisdiction had the plaintiff been a non-resident foreign corporation.

The companion cases of *IIT v. Vencap, Ltd.*²⁹ and *Bersch v. Drexel*

²¹ *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting). There has been a notable lack of Supreme Court cases involving the issue of subject matter jurisdiction in this area.

²² 468 F.2d 1326 (2d Cir. 1972).

²³ *Id.* at 1330.

²⁴ *Id.* at 1332.

²⁵ *Id.* at 1335. The court inferred from § 10(b) a congressional intent to protect against fraud in the sale or purchase of securities whether or not traded in the United States. *Id.* at 1336. As § 10(b) was meant to apply to foreign as well as domestic markets, the court saw no reason why § 10(b) would not apply to foreign as well as domestic issuers of securities. *Id.*

²⁶ RESTATEMENT, *supra* note 2, at § 17.

²⁷ 468 F.2d at 1334. The court implies that jurisdiction would not vest where two foreigners met in the United States for convenience and one of the foreigners fraudulently induced the other to buy foreign stock on a foreign stock exchange. *Id.* at 1338. The court never defined "convenience." But in view of the court's jurisdictional requirement that territorial conduct be essential to the fraud, *see* text accompanying note 25 *supra*, it seems that conduct not essential to the fraud would be insufficient for the exercise of jurisdiction.

²⁸ 468 F.2d at 1334.

²⁹ 519 F.2d 1001 (2d Cir. 1975).

*Firestone, Inc.*³⁰ refined the conduct test. In *IIT*, the plaintiff's purchase of shares was fraudulently induced, and the plaintiff and defendants were foreign entities.³¹ This opinion is often cited for the proposition that, *ceteris paribus*, Congress favored jurisdiction in transnational securities cases as a means of preventing the United States from being used "as a base for manufacturing fraudulent securities devices for export. . . ."³² The court noted, however, that this interpretation of congressional intent went beyond that found in any prior case.³³ Moreover, *IIT* limited extraterritorial jurisdiction by holding that jurisdiction would not extend to mere preparatory acts where the bulk of the activity was performed in foreign countries.³⁴

In *Continental Grain*, the fraudulent scheme was devised in the United States.³⁵ Nonetheless, to posit that the fraud was devised in the United States does not automatically warrant a finding of jurisdiction under the conduct test. The fraud was based on an omission of material fact and, as the Eighth Circuit acknowledged, "the assignment of a situs to an omission . . . is a very difficult task."³⁶ Having difficulty assigning a situs to the omission, the court focused on the defendants' conduct in the United States in devising the fraud.³⁷ It is noteworthy that had the fraud been one of misrepresentation, rather than of omission, the situs of the fraud would have been assigned to Australia, since all the direct negotiations between Continental Grain and the sellers of Pacific Seeds occurred there.³⁸ In such a case, the *IIT* court probably would have considered the defendants' conduct within the United States as merely preparatory, with the bulk of the activity taking place

³⁰ 519 F.2d 974 (2d Cir.), *cert. denied sub nom.* Bersch v. Arthur Anderson & Co., 423 U.S. 1018 (1975).

³¹ 519 F.2d at 1004-05.

³² *Id.* at 1017.

³³ *Id.* at 1018.

³⁴ *Id.*

³⁵ 592 F.2d at 412.

³⁶ *Id.* at 420 n.17. One commentator suggests that even where there is a United States situs, a fraud action should be adjudicated abroad if the situs was merely fortuitously chosen or the defendant induced the plaintiff into believing that United States law would govern. Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT'L L.J. 137, 152 (1978) [hereinafter cited as CORNELL Note].

³⁷ 592 F.2d at 420.

³⁸ *Id.* at 411. Assigning the situs of the fraud to Australia may appear to be incorrect since the fraud was devised in the United States. Yet, the Second Circuit implied that where the fraud is devised is irrelevant to the jurisdictional inquiry. Bersch v. Drexel Firestone, Inc., 519 F.2d at 987. What is important is where the fraudulent misrepresentations occurred. *Id.* See note 44 and accompanying text *infra*. See also Recaman v. Barish, 408 F. Supp. 1189, 1199-1200 (E.D. Pa. 1975) (conduct test not satisfied by foreign plaintiffs where misrepresentations were communicated abroad).

in Australia.³⁹

*Bersch v. Drexel Firestone, Inc.*⁴⁰ is a transnational securities fraud case that involved both foreign and American plaintiffs. *Bersch's* significance lies in its treatment of the territorial principle of subject matter jurisdiction with respect to transnational securities cases. The court integrated the effects and conduct tests by holding that the anti-fraud provisions of the federal securities laws:

- (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
- (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
- (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.⁴¹

It is clear, then, that one must determine the type of plaintiff before applying the *Bersch* test. In *Continental Grain* the plaintiff was a foreign corporation, thus, according to *Bersch*, jurisdiction vests only if the defendants' conduct within the United States directly caused the plaintiff's securities losses.

Unlike *Bersch*, *Continental Grain's* treatment of the territorial principle of jurisdiction did not distinguish among resident American plaintiffs, non-resident American plaintiffs, or non-resident foreign plaintiffs. Although *Bersch* involved more conduct within the United States, the Second Circuit did not grant jurisdiction in the case of the non-resident foreign plaintiff, even though, as was true in *Continental Grain*, there was use of the mails and the facilities of interstate commerce.⁴²

Moreover, *Continental Grain* did not integrate the effects and conduct tests, holding instead that jurisdiction should be exercised where

³⁹ The court in *Continental Grain*, itself, admitted that its facts presented a substantially foreign transaction. 592 F.2d at 421.

⁴⁰ 519 F.2d 974 (1975).

⁴¹ *Id.* at 993. Some commentators have noted that the three classifications of the *Bersch* holding raise constitutional problems. See CORNELL Note, *supra* note 36, at 146 n.67; HARVARD Note, *supra* note 2, at 569; Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1376-77 (1973) [hereinafter cited as PENN Note]. The distinction between Americans and foreigners may violate the equal protection clause. See HARVARD Note, *supra* note 2, at 569. No case, however, has to the author's knowledge faced the constitutional issue in this area. Application of the *Bersch* rule to the facts of *Continental Grain* would appear to present less of a constitutional problem than where the plaintiff was a foreign individual, because the plaintiff in *Continental Grain* was a foreign corporation. See, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

⁴² 592 F.2d at 420.

either the effects or conduct tests were satisfied.⁴³ Finally, *Continental Grain* construed the conduct test as requiring only "significant conduct with respect to the fraud."⁴⁴ With respect to foreign plaintiffs, *Continental Grain's* threshold of conduct is lower than *Bersch's* "direct causation" threshold. Therefore, *Continental Grain's* application of the conduct test will inevitably grant jurisdiction more frequently than the Second Circuit in the case of the non-resident foreign plaintiff.⁴⁵

The most recent Second Circuit application of the conduct test is contained in *Fidenas AG v. Compagnie Internationale pour L'Informatique CII Honeywell Bull S.A.*⁴⁶ The plaintiffs alleged that the parent corporation of one of the defendants had a main office in the United States that was aware of a cover-up of the securities fraud.⁴⁷ In dismissing the complaint for lack of subject matter jurisdiction, the court found the above allegation conclusory.⁴⁸ The court went on to state that even if the allegation were true, jurisdiction would not vest because the cover-up phase of the fraud was insufficient conduct in view of the predominantly foreign plaintiffs and transactions.⁴⁹

Fidenas also reaffirmed the *Bersch* holding which limited extraterritorial jurisdiction in cases involving non-resident foreign plaintiffs to situations where the territorial conduct directly caused the fraud.⁵⁰ Despite *Continental Grain* and *SEC v. Kasser*, the Second Circuit is continuing to apply the *Bersch* test⁵¹ and, in so doing, would likely deny jurisdiction on facts resembling those in *Continental Grain*.

THE DECISION IN *SEC v. KASSER*

Continental Grain's holding and analysis draw heavily from *SEC v. Kasser*. Not only does *Continental Grain* cite *Kasser* as support for its holding,⁵² but the former also engages in a lengthy analysis of *Kasser* and an outright adoption of three policy grounds stated in *Kasser* in

⁴³ *Id.* at 417.

⁴⁴ 519 F.2d at 985 n.24. Not only were there telephone calls and mailings from the United States as in *Continental Grain*, but there was also the involvement of the SEC, a New York law firm, and American accountants in the preparation of the allegedly misleading prospectuses. *Id.* The *Bersch* court explained its holding by noting that none of the misrepresentations were communicated in the United States. *Id.* at 987.

⁴⁵ See notes 80-92 and accompanying text *infra*.

⁴⁶ 606 F.2d 5 (2d Cir. 1979).

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 9-10.

⁵¹ *Id.*

⁵² 592 F.2d at 416.

order to justify its expansive reading of the conduct test.⁵³

In *Kasser*, the Securities and Exchange Commission sought an injunction against certain defendants who had allegedly committed securities fraud.⁵⁴ The victim of the fraud was the Manitoba Development Fund, a Canadian corporation owned by the Province of Manitoba.⁵⁵ The court found that jurisdiction existed based on various conduct by the defendants in the United States including: (1) use of instrumentalities of interstate commerce in furtherance of the fraud; (2) various negotiations and the execution of one of the investment contracts; (3) transmittal of the proceeds from the alleged fraudulent transactions; and (4) incorporation or maintenance of offices by one of the defendants in the United States.⁵⁶ The court held that the conduct test was satisfied "where at least some activity designed to further a fraudulent scheme occurs within this country."⁵⁷ As the court in *Continental Grain* noted, *Kasser's* holding "extended the boundaries of the necessary domestic conduct required to find subject matter jurisdiction as defined in *Bersch-IIT*."⁵⁸

In expanding the scope of jurisdiction under the conduct test, *Kasser* appeared to rely blindly on an earlier Third Circuit decision, *Straub v. Vaisman & Co.*⁵⁹ The court in *Straub* found jurisdiction where an American defendant engaged in fraudulent sales of securities to non-resident foreigners, the securities having been traded on an American stock exchange.⁶⁰ Citing *Leasco*, the *Straub* court stated that "conduct within the United States is alone sufficient from a jurisdictional standpoint to apply the federal securities statutes . . ."⁶¹ This citation, however, was taken out of its original context.⁶² The *Leasco* court did not mean that *any* conduct within the United States was sufficient from the standpoint of jurisdiction; rather the court found that, in some cases, conduct alone may be sufficient to vest jurisdiction. If the

⁵³ *Id.* at 418-22.

⁵⁴ 548 F.2d at 112.

⁵⁵ *Id.* at 111.

⁵⁶ *Id.*

⁵⁷ *Id.* at 114.

⁵⁸ 592 F.2d at 418. The *Bersch* and *IIT* holdings have generally been followed. See Comment, *Jurisdiction in Transnational Securities Fraud Cases—SEC v. Kasser*, 548 F.2d 109 (3rd Cir. 1977), 7 DEN. J. INT'L L. & POL'Y 279, 287 (1978) [hereinafter cited as DENVER Comment]. *Kasser*, however, liberalized the territorial conduct requirement for jurisdiction. *Id.* at 295-96. Moreover, *Kasser* ignored the qualitative tests of jurisdiction applied in *Bersch* and *IIT*, applying instead a quantitative test. *Id.* at 295.

⁵⁹ 540 F.2d 591 (3d Cir. 1976). See CORNELL Note, *supra* note 36, at 149, n.77.

⁶⁰ 540 F.2d at 595.

⁶¹ *Id.*

⁶² See text accompanying notes 26-28 *supra*.

Leasco court did mean that "any" conduct was sufficient, then it would not have held that conduct essential to the fraud was necessary for jurisdiction to vest.⁶³

In further support of its expansive holding, *Kasser* pointed to the Second Circuit cases of *IIT v. Vencap, Ltd.*⁶⁴ and *Bersch v. Drexel Firestone, Inc.*⁶⁵ In what the *Continental Grain* court itself referred to as a "cryptic" passage,⁶⁶ *Kasser* stated that there was far more domestic conduct in *Kasser* than in *Bersch*,⁶⁷ that the defendants' intranational actions were substantial,⁶⁸ that it is questionable whether the defendants' acts did not directly cause any extraterritorial losses,⁶⁹ and that defendants' conduct within the United States was essential to the fraud.⁷⁰ In view of these considerations, the court concluded that there was "little in *Bersch* which stands against jurisdiction in [*Kasser*] . . . even in spite of the fact that the sole victim of the fraud was a Canadian corporation."⁷¹ Moreover, the court heavily weighed the *IIT* dictum that Congress did not intend the United States to be used as a manufacturing base for the export of securities fraud.⁷²

Kasser's reliance on those cases seems misplaced. Both cases required intranational or territorial conduct to be the direct cause of the fraud where the plaintiff was a non-resident foreigner.⁷³ *Kasser*, however, only required "some activity designed to further a fraudulent scheme" for jurisdiction to vest.⁷⁴ Thus, it is unlikely that the Second Circuit would have granted jurisdiction on *Kasser's* facts.

In view of the tenuous ground upon which *Kasser* stands, *Continental Grain* is also weakened. In any event, *Continental Grain* could have distinguished *Kasser* and thus not adopted such an expansive interpretation of the conduct test. First, *Kasser* involved a plaintiff that

⁶³ See text accompanying note 25 *supra*. See HARVARD Note, *supra* note 2, at 555.

⁶⁴ 519 F.2d 1001 (2d Cir. 1975).

⁶⁵ 519 F.2d 974 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Anderson & Co.*, 423 U.S. 1018 (1975).

⁶⁶ 592 F.2d at 419.

⁶⁷ 548 F.2d at 115.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 113-14.

⁷³ 519 F.2d at 993. Although *IIT* does not explicitly adopt the *Bersch* test, it is reasonable to assume this adoption because *IIT* is *Bersch's* companion case.

⁷⁴ 548 F.2d at 114. *Kasser* may be interpreted to stand for a more stringent standard of jurisdiction than merely "some activity," for the court deemed the defendants' conduct substantial, significant, and essential to the fraud. See DENVER Comment, *supra* note 58, at 297.

was a subdivision of a foreign government.⁷⁵ Since one of the policy reasons for granting jurisdiction in *Continental Grain* was to preclude reciprocal responses by foreign nations,⁷⁶ *Kasser* provided a stronger case for granting jurisdiction. Second, there was more conduct within the United States in *Kasser* than in *Continental Grain*.⁷⁷ Finally, *Continental Grain* involved a private cause of action, not an SEC injunction.⁷⁸ The Supreme Court has limited private rights of action, but not SEC injunction actions, under Rule 10b-5.⁷⁹ Therefore, one would expect a court to grant jurisdiction more readily in *Kasser* than in *Continental Grain*.

POLICY ARGUMENTS

Noting that the facts presented a substantially foreign transaction, the court in *Continental Grain* admitted that its decision to exercise jurisdiction was largely based on policy grounds.⁸⁰ Without any critical discussion the court adopted three policy rationales *in toto* from *Kasser*: (1) the deterrence of those who desire to defraud foreign buyers or sellers of securities from using the United States as a base of operations;⁸¹ (2) the encouragement of effective anti-fraud enforcement internationally;⁸² and (3) the fulfillment of congressional intent, as reflected in the anti-fraud provisions of the federal securities laws, to raise the standard of conduct in securities transactions.⁸³

The first of the three policies appears to be no more than a restatement of dictum in *IIT*, *i.e.*, Congress did not intend "to allow the United States to be used as a base for manufacturing fraudulent securities devices for export."⁸⁴ The *IIT* court, however, weakened the force of this dictum by limiting jurisdiction under the conduct test to "the perpetration of fraudulent acts . . . not . . . to mere preparatory activities . . . where the bulk of the activity was performed in foreign coun-

⁷⁵ 548 F.2d at 111.

⁷⁶ 592 F.2d at 421.

⁷⁷ See text accompanying notes 13-14 and 56 *supra*.

⁷⁸ 592 F.2d at 413.

⁷⁹ See *Sante Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977).

⁸⁰ 592 F.2d at 421.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* Even though its policy justifications may be overbroad, *Kasser's* result may have been "correct" because of two considerations. See CORNELL Note, *supra* note 36, at 153. First, a substantial part of the fraud proceeds were transmitted to the United States; hence, swift action by the SEC was necessary to prevent waste of the proceeds. *Id.* Second, a successful Canadian prosecution of the defendants was unlikely. *Id.* These two considerations also may be used to distinguish *Kasser* from *Continental Grain*. See text accompanying notes 75-79 *supra*.

⁸⁴ 519 F.2d at 1017.

tries.”⁸⁵

The second policy listed does not necessarily imply jurisdiction in cases like *Continental Grain*. International anti-fraud enforcement in the securities realm may be discouraged rather than encouraged by vigorous extraterritorial application of the anti-fraud laws.⁸⁶ Observing a vigorous enforcement effort by the United States, other nations may ease their own enforcement efforts. Thus, international enforcement of such laws may suffer a net decrease in effectiveness.

Continental Grain's acceptance of this third policy ground assumes that Congress intended to elevate the standard of conduct in transnational securities transactions via the passage of the anti-fraud provisions of the securities laws. Yet, the court itself indicated that no legislative history exists respecting the extraterritorial application of the anti-fraud provisions.⁸⁷ Thus, ascertaining congressional intent on this point is a speculative venture at best.

Two countervailing policies that the court failed to consider are the conservation of judicial resources and the minimization of vexatious litigation. In *Fidenas*, the court stated that Congress would not have “wished the previous resources of United States courts and law enforcement agencies to be devoted to a case of this nature.”⁸⁸ This policy of judicial economy applies with equal force to *Continental Grain*, where the parties and the transaction were predominantly foreign and the territorial conduct sparse.⁸⁹

The Supreme Court has stated that “litigation under Rule 10b-5 presents a degree of vexatiousness different in degree and in kind from that which accompanies litigation in general.”⁹⁰ One factor aggravating this vexatiousness is that in Rule 10b-5 actions a complaint that apparently has little chance of success at trial has a disproportionate settlement value to the plaintiff so long as he prevents the suit from being dismissed.⁹¹ In fact, the pendency of the suit may delay the de-

⁸⁵ *Id.* at 1018.

⁸⁶ See generally Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. INT'L L. & BUS. 1 (1979).

⁸⁷ 592 F.2d at 416 (citing SEC v. Kasser, 548 F.2d at 114 n.24).

It has been noted that the main purpose of the federal securities laws is to protect American investors or to insure the integrity of the American stock exchanges. PENN Note, *supra* note 41, at 1397. It is doubtful whether either purpose is served by the *Continental Grain* decision since neither American investors nor an American stock exchange were involved.

⁸⁸ 606 F.2d at 10.

⁸⁹ See text accompanying notes 11-14 *supra*.

⁹⁰ *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). See also *Sante Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1979).

⁹¹ *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975).

endant's usual business operations which are totally unrelated to the lawsuit. By expansively interpreting the conduct test, the court in *Continental Grain* has heightened the danger of vexatious litigation in Rule 10b-5 actions brought by non-resident foreign plaintiffs.

CONCLUSION

In holding that significant conduct in furtherance of the securities fraud would be sufficient to vest jurisdiction in transnational securities cases, *Continental Grain* expanded the jurisdictional boundaries of the conduct test established by the Second Circuit. In *Bersch*, the Second Circuit held that with respect to foreign non-resident plaintiffs there must be direct causation between the fraud and the territorial conduct in order for jurisdiction to vest. *Continental Grain* only required significant conduct.

By drawing upon *Kasser* as support for its holding, the *Continental Grain* court erred. First, *Kasser*'s holding is an unwarranted expansion of jurisdiction under the conduct test. Second, *Continental Grain* could have distinguished *Kasser* and thus avoided extending an expansive conduct test to the Eighth Circuit.

Finally, and most importantly, *Continental Grain* placed undue reliance on certain policy arguments. Besides its failure to evaluate these policies critically, the court also failed to consider two significant countervailing policies. That is, by expansively interpreting the conduct test, *Continental Grain* not only approved the use of precious judicial resources in a predominantly foreign dispute, but it also opened the door to more vexatious litigation in the area of transnational securities fraud.

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