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Case Digest

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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories, and references are given for further research.

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I. ALIENS AND CITIZENSHIP

CONSTITUTIONALITY OF THE IMMIGRATION MARRIAGE FRAUD AMENDMENTS UPHELD OVER CHALLENGE BY DEPORTABLE ALIEN AND UNITED STATES SPOUSE—*Anetekhai v. Immigration and Naturalization Service*, 876 F.2d 1218 (5th Cir. 1989).

In 1986 the Immigration and Naturalization Service (INS) discovered that Paul Anetekhai, an alien who had entered the United States on a nonimmigrant student visa, was employed without authorization. The INS commenced deportation proceedings against him. In January 1987 Anetekhai married a United States citizen. Believing that his marriage to a United States citizen would make the deportation proceedings unnecessary, Anetekhai moved to dismiss the proceedings. The immigration judge denied the motion and found Anetekhai deportable.

The Anetekhais subsequently brought suit in the United States District Court for the Eastern District of Louisiana seeking declaratory and injunctive relief. The couple claimed that section 5(b) of the Immigration Marriage Fraud Amendments (IMFA), 8 U.S.C. § 1154(h) (1986), which imposes a two-year nonresidency requirement for aliens who marry United States citizens while subject to deportation proceedings, was unconstitutional. The couple argued that section 5(b) violated the couple's rights to equal protection and due process under the fourteenth amendment as well as their first amendment rights to privacy and association. The Anetekais also asserted that section 5(b) violated the ninth and tenth amendments by purporting to regulate Louisiana marriages. The district court dismissed the complaint and entered judgment in favor of the INS, holding that section 5(b) was constitutional and that imposing such a requirement was within Congress plenary power.

The Fifth Circuit Court of Appeals *Held*: *Affirmed*. The court found that Congress had enacted the IMFA to ferret out sham marriages entered into by aliens for the purpose of avoiding deportation. Through marriage to United States citizens, these aliens seek to qualify for "immediate relative" status, which would exempt them from statutorily imposed immigration quotas under the Immigration and Nationality Act, 8 U.S.C. § 1101 (1982). The court held that the IMFA does not violate the equal protection or due process rights of aliens because Congress had a legitimate interest in deterring fraudulent marriages and could rationally have concluded that the statute would reduce marriage fraud. The court stated that the process due Anetekhai was limited to fair procedures to determine whether the statute was properly invoked and that the statute did not unconstitutionally purport to regulate state marriages. *Significance*—In this decision, the court defers to Congress broad discretion in the area of immigration and upholds the constitutionality of section 5(b) of the Immigration Marriage Fraud Amendments, which imposes special requirements on an alien in the process of being deported even though the alien is married to a United States citizen.

II. ANTITRUST

STANDING GRANTED TO CHALLENGE HOSTILE TAKEOVER BETWEEN FOREIGN FIRMS UNDER UNITED STATES ANTITRUST AND SECURITIES LAWS—*Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2nd Cir. 1989).

Consolidated Gold Fields PLC (Gold Fields), a British corporation with $2.4 billion in assets, half of which were located in the United States, was the target of a hostile tender offer by Minorco, S.A. (Minorco), a Luxembourg corporation with a 29.9% interest in Gold Fields. United States held 2.5% of the outstanding shares of Gold Fields. Gold Fields and three entities under its control sought a preliminary injunction under sections 16 and 7 of the Clayton Act against the takeover in the United States District Court for the Southern District of New York. In addition, the plaintiffs alleged that the tender offer violated the antifraud provisions of the federal securities laws by making false and misleading statements about the extent to which Minorco was controlled by South African corporations and individuals.

The district court granted a preliminary injunction, which prevented Minorco, along with co-defendants Anglo American Corporation of South Africa, Ltd. and De Beers Consolidated Mines, Ltd. from proceeding with the tender offer. The district court found that two of the plaintiffs, Newmont Mining Corporation, a United States corporation in which Gold Fields held a 49.3% stake, and its subsidiary, Newmont Gold Company, had proved a likelihood of success on their claim that the takeover of Gold Fields would violate section 7 of the Clayton Act. The court, however, refused to grant standing to Gold Fields and its wholly-owned United States subsidiary, Gold Fields Mining Corporation (GFMC). In addition, the district court dismissed the claim of securities fraud for lack of subject matter jurisdiction.

Soon after the district court granted the preliminary injunction, the British Secretary of State for Trade and Industry referred the Minorco bid to the Monopolies and Mergers Commission (MMC) for investigation of the acquisition's potential anticompetitive effect in the United Kingdom with respect to strategic metals. British law prohibited Minorco from proceeding with the tender offer during the MMC's investigation. The MMC concluded that the acquisition would not operate against the British public interest, but Minorco stated that it would not purchase shares pursuant to a tender offer unless the injunction issued by the United States District Court was vacated or modified.

The Court of Appeals for the Second Circuit *Held: Affirmed in Part, Reversed in Part and Remanded.* The court affirmed the lower court's grant of a preliminary injunction for relief, finding that the plaintiffs had demonstrated a likelihood of success on the merits of their claim under sections 7 and 16 of the Clayton Act. The court reversed the district court's denial of standing to Gold Fields and GFMC, holding that they had demonstrated a threat of antitrust injury. The court stated that the acquisition would eliminate Gold Fields' ability to compete independently in the gold production market and that GFMC would be threatened with a curtailment of its production. The court also held that the four plaintiffs had demonstrated a threat of irreparable harm because because the merger was likely to enable the Minorco group to dominate the strategically important world gold market and Gold Fields & its associated entities would cease to be viable competitors in the market.

The court concluded that the district court should have asserted subject matter jurisdiction over the fraud claims. According to the court, the tender offer had sufficient effects within the United States to warrant the application of United States securities laws. The Securities and Exchange Commission supported subject matter jurisdiction over the fraud claims but urged the court to direct the district court to abstain from granting a remedy for reasons of international comity. The court declined this suggestion, however, and remanded the fraud claims to the district court for further proceedings to determine whether an appropriate remedy consistent with international comity principles could be fashioned. *Significance*—In a case involving a tender offer between two foreign corporations and occurring on foreign soil when only a small percentage of the target's shareholders were United States residents, the court granted standing to a target company to challenge a hostile takeover under United States antitrust laws and allowed an assertion of subject matter jurisdiction over a claim of securities fraud.

III. Trademark

LANHAM ACT BARS IMPORTATION OF FOREIGN FIRMS' GOODS WHICH ARE DIFFERENT PHYSICALLY FROM THE GOODS OF UNITED STATES AFFILIATE, BUT HAVE IDENTICAL TRADEMARKS—LEVER BROTHERS CO. v. U.S., 877 F.2d 101 (D.C. Cir. 1989).

Lever Brothers Company (Lever US), a domestic corporation, sought a preliminary injunction in the United States District Court for the District of Columbia to direct the United States Customs Service to exclude a third party's importation of goods manufactured by a foreign affiliate of the plaintiff under the same trademark as some of the parent's goods. Lever US and Lever Brothers Ltd. (Lever UK), an English corporation, were affiliates using the same words, "Shield" and "Sunlight," as trademarks for products differing materially in the two countries. Third parties directly or indirectly acquired the UK Shield and Sunlight products and imported them to the United States over the objection of Lever US. Despite requests by Lever US, the Customs Service would not halt the importation because the trademarks were used abroad by an affiliate of Lever US. Lever US claimed that Customs was bound to seize such imports because section 42 of the Lanham Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1124 (1982), provides that no imported merchandise which copies or simulates a registered trademark shall be admitted by Customs. Lever US contended that where affiliated domestic and foreign firms produce goods which bear the same trademark but differ in physical content, the foreign products simulate the domestic trademark so that section 42 forbids their importation, notwithstanding the fact of affiliation.

The Customs Service argued that the regulation calling for the seizure of foreign-made articles bearing a trademark identical with one owned and recorded by a United States corporation, 19 C.F.R. § 133.21(c) (1988), includes an exception for affiliates. According to Customs, based on the affiliate exception, goods are genuine and do not simulate a domestic trademarked good when they bear trademarks valid in their country of origin and when the foreign manufacturer is affiliated with the domestic trademark holder.

The district court agreed with the interpretation of section 42 asserted by Customs, and Lever US appealed. The Court of Appeals for the District of Columbia *Held: Reversed and Remanded.* The court held that: (1) section 42 of the Lanham Act bars foreign goods which bear a trademark identical to a valid United States trademark but which differ physically, regardless of the trademarks' genuine character abroad or the affiliation between the producing firms; but (2) the conclusion was provisional since neither party had briefed the legislative history or administrative practice in detail. The court found that the Customs Service relied heavily on "gray market" cases, in which a United States trademark holder and a third party import goods that are physically identical and manufactured by the same foreign firms. The court pointed out, however, that when goods bearing a valid foreign trademark are physically different from United States trademarked goods, courts have been willing to find infringement.

According to the court, a trademark holder cannot infringe its own mark. The court reasoned that to the extent the affiliate exception contained in 19 C.F.R. 133.21(c)(2) extends this principle to goods imported into the United States by companies affiliated with the United States markholder it is unobjectionable. However, the court found it implausible that the affiliation exception should extend to imports by third parties. *Significance*—In this decision, the court provisionally extended the scope of section 42 of the Lanham Act to limit third party importation of foreign goods that bear a trademark identical to a valid United States trademark but which are physically different from the United States product regardless of affiliation between the producing firms.

IV. Air Carrier Liability

Warsaw Convention's Limitation on Air Carrier Liability Not Eliminated by Failure to Provide Adequate Notice of Limitation in Passenger Tickets—*Chan v. Korean Air Lines, Ltd.*, 109 S. Ct. 1676 (1989).

The petitioners brought actions in several federal district courts for the wrongful death of passengers of a Korean Air Lines, Ltd. (KAL) airliner shot down by the Soviet Union over the Sea of Japan. The actions were transferred to the District Court for the District of Columbia. The rights of the parties were governed by the Warsaw Convention, a multilateral treaty governing international air travel. The Convention fixed a per passenger damage limitation for personal injury or death at 8,300 dollars. The Montreal Agreement raised this limit to 75,000 dollars in 1966. The Montreal Agreement also required carriers to give passengers notice of the Convention's damage limitations in print size no smaller than 10-point type print. By motion of partial summary judgment, the petitioners sought a declaration that since the notice of the Convention's liability rules in KAL's tickets appeared in 8-point type, KAL should be deprived of the benefits of the damages limitation.

The District Court for the District of Columbia denied the motion and held that neither the Warsaw Convention nor the Montreal Agreement prescribes the elimination of the damages limitation when the required form of notice is not provided. In its opinion, the district court rejected contrary Second Circuit precedent. On appeal, the United States Court of Appeals for the District of Columbia affirmed.

The Supreme Court *Held: Affirmed.* Justice Scalia, writing for five members of the Court, stated that international air carriers do not lose the benefits of the Warsaw Convention damages limitation if they fail to provide notice of that limitation in passenger tickets. According to the Court, the Montreal Agreement imposes no sanction for failure to comply with its 10-point type requirements. The Court stated that the plain language of Article 3(2) of the Warsaw Convention subjects the carrier to unlimited liability for the nondelivery of a passenger ticket. The Court held, however, that this language could not be construed to include failure to provide an "adequate" notice of a damages limitation as the petitioners had argued, since Article 3(2) specifies that the irregularity of the ticket will not affect the existence or validity of the transportation contract.

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens concurred in the judgment. However, Justice Brennan pointed out that the petitioners' argument had been accepted by virtually every United States court that had considered it and had been consistently adopted by the executive branch. Therefore, the Court should have considered the Convention's drafting history as well as its language. *Significance*—The Court resolved a conflict among the courts of appeals and adopted the minority position that the failure of international air carrier tickets to provide an adequate notice of liability limitation does not eliminate the benefit of the damages limitation in the Warsaw Convention.