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To Understand US v. Microsoft, Consider 'Acme v. Shamrock'

The upcoming Supreme Court case could recalibrate the balance between discovery and comity that informs discovery disputes in a variety of international civil litigation.

By Peter B. "Bo" Rutledge and Amanda W. Newton

The Feb. 27 Supreme Court argument in *United States v. Microsoft Corp.* raises profound questions about issues of executive power, corporate governance, technology, judicial power and international affairs. At stake for the government is the scope of its investigative authority to obtain information located in a foreign country, irrespective of that country's laws. At stake for Microsoft is its ability to organize its international corporate affairs and the predictability of the laws that will govern those affairs.

While certainly profound, these issues are hardly new. Long before the advent of the digital age and the emergence of modern supranational bodies like the European Union, with its robust Data Protection Directive, courts debated whether to order the production of documents located in another country and worked to resolve clashes between the law of the country seeking information and the law of the country where it is sought. For instance, in 1947 the Southern District of New York subpoenaed the production of documents located in Canada from a Canadian paper company because the company was doing business in New York. Afterward, Quebec passed legislation to prohibit the removal of corporate records in response to a subpoena from a foreign jurisdiction. Close attention to such historical guideposts can foreshadow *Microsoft's* most significant implications, not just for government investigators and lawyers for multinational corporations, but also for lawyers involved in garden-variety commercial litigation that simply happen to involve documents located abroad.

To understand what is familiar and what is exceptional, in the *Microsoft* case, it is helpful to strip out some of the nuance and examine how issues of this sort would be resolved in a simple commercial case between two entities. Suppose that Acme, a Georgia-based corporation, sued Shamrock, an Ireland-based corporation, in federal court in Georgia. Suppose further that jurisdiction is not at issue and, during discovery, Acme propounds document requests on Shamrock requiring the production of documents located in Ireland. What now?

It is unquestionable that the federal court in Georgia has the power to order the production of those documents. For over a century, courts consistently have held that, once their jurisdiction over another party is established, that jurisdiction includes the power to compel the production of information. An entirely different question is whether and to what extent that power should be exercised. Sometimes, parties such as Shamrock will object to the burdensomeness of such a request, an argument that a court will analyze no differently than a "burden" argument in domestic litigation. In other cases, parties such as Shamrock will argue that compliance with the discovery request will affirmatively violate foreign law, typically the law of the country where the information is produced.

This is where jurisprudence governing international discovery disputes has undergone the greatest evolution. At one time, courts presumed that, absent express Congressional authorization, discovery orders should not be construed so as to violate foreign law. This

approach was dominant during the first half of the 20th century, until an onslaught of antitrust litigation in the late '70s and early '80s prompted federal courts to begin weighing the interests of both domestic entities and foreign governments before determining whether to issue discovery orders in violation of foreign law. More recently, Section 443 of the Restatement (Third) of Foreign Relations Law adopted a modified balancing test that utilizes the same basic balancing framework for international discovery disputes.

Against this backdrop, what distinguishes *Microsoft* or makes it especially challenging? For one thing, the information located in Ireland is operated by a wholly-owned Microsoft subsidiary. Lower courts have consistently applied Rule 34, which authorizes parties to request the production of documents in the "possession, custody or control" of a corporate entity, regardless of their extraterritoriality, to corporate subsidiaries. Nevertheless, Microsoft argues that, because the information sought is stored exclusively in a foreign country and cannot be accessed domestically, it is not under Microsoft's "control" for the purposes of Rule 34.

A second distinguishing feature of *Microsoft* is that the information is being sought through a warrant authorized under the federal Stored Communication Act (SCA). In the wake of the Supreme Court's recent extraterritoriality jurisprudence in *Morrison v. United States*, a case about Congress' prescriptive jurisdiction, *Microsoft* tackles whether and how the presumption against extraterritoriality applies to the warrant provisions of the SCA or other discoverylike enactments.

A third and final feature distinguishing *Microsoft* is the type of entity seeking the information. In the *Acme v. Shamrock* setting, it may be entirely appropriate for a court to weigh the need for information against the desire for comity because the U.S. government does not generally address the foreign policy implications of garden variety discovery disputes. When the government is seeking the information or bringing the suit, however, it has a strong claim that comity considerations should be heavily discounted because the executive branch has already undertaken a balancing test in deciding to seek the information.

Seen in this light, *Microsoft* has several important implications for civil litigators. First, the bar should watch how the court grapples with the implications of its *Morrison* extraterritoriality jurisprudence in the context of a discovery (as opposed to liability) rule. Second, consider how the court wrestles with the balancing test in Section 443 of the Restatement. The court could weigh heavily the presence of the executive branch, or it could express its displeasure with the test altogether (given, among other things, the inherent unpredictability of balancing tests). That too could, once again, recalibrate the balance between discovery and comity that informs discovery disputes in a variety of international civil litigation.

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