

WHEN CONSUMER FRAUD CROSSES THE INTERNATIONAL LINE: THE BASIS FOR EXTRATERRITORIAL JURISDICTION UNDER THE FTC ACT[†]

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INTRODUCTION

Over the past decade, the globalization of commerce and the Internet in particular have exponentially accelerated a process that began more than a century ago: the bridging of the commercial gap between buyers and sellers from far-flung points of the globe.¹ As transactions between businesses and consumers increasingly span borders, the pool of potential victims for perpetrators of consumer fraud has likewise expanded.² Indeed, both fraud against U.S. consumers by foreign businesses and fraud against foreign consumers by U.S. businesses have risen dramatically over the past decade, with the Internet playing a growing role in cross-border fraud.³ At the same time, U.S. courts disagree about whether transnational fraud is within the reach of the consumer fraud statutes that have been enforced for over half a century by the Federal Trade Commission (“FTC”), the United States’ principal consumer protection agency.

Though the technology has changed, modern consumer frauds bear a striking resemblance to those of the past, relying, as always, on misrepresentation and deception. Recent examples of cross-border fraud include an American company that operated a “massive illegal pyramid scheme,” conning consumers around the world out of \$175 million with false promises of quick riches through work-at-home business opportunities;⁴ a Swiss company that sold U.S. consumers dietary supplements and electronic devices, claiming that these products would cure terminal cancers and AIDS;⁵ and a British operation that sold Internet domain names with bogus suffixes such as “.usa” and “.brit” to consumers around the world, in a fraudulent effort to capitalize on increased patriotic sentiment after September 11th.⁶ In a more

¹ See KEVIN H. O’ROURKE & JEFFREY G. WILLIAMSON, GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH CENTURY ATLANTIC ECONOMY 1–4, 269–87 (1999); Jeremy C. Bates, Comment, *Home Is Where the Hurt Is: Forum Non Conveniens and Antitrust*, 2000 U. CHI. LEGAL F. 281, 317–18.

² FEDERAL TRADE COMMISSION, CROSS-BORDER FRAUD TRENDS: JANUARY–DECEMBER 2004, at 7 (Mar. 9, 2005), available at <http://www.ftc.gov/bcp/online/edcams/crossborder/PDFs/Cross-BorderCY-2004.pdf> [hereinafter FTC, CROSS-BORDER FRAUD]. In cooperation with the FBI, U.S. Secret Service, and other law enforcement agencies in the U.S. and abroad, the FTC developed Consumer Sentinel, a consumer complaint database. In 2004, Consumer Sentinel received 61,744 complaints about cross-border fraud, compared to 46,767 in 2003, 12,208 in 2000, and 1,127 in 1996. *Id.* at 4.

³ See *id.* at 5–8.

⁴ Press Release, FTC, Court Appoints Temporary Receiver over International Pyramid Operation (June 18, 2001), <http://www.ftc.gov/opa/2001/06/sky.htm>; see also *FTC v. SkyBiz.com*, No. 01-CV-0396-EA (N.D. Okla. Jan. 2, 2002).

⁵ Press Release, FTC, Swiss Company Charged by FTC with Making Unsubstantiated Health Claims (Jan. 27, 2003), <http://www.ftc.gov/opa/2003/01/drclark.htm>. Dr. Clark’s products included “Dr. Clark’s New 21 Day Program for Advanced Cancers” and the “Super-Zapper Deluxe.” *Id.*; see also *FTC v. Dr. Clark Research Ass’n*, Civ. No. 1:03CV0054 (N.D. Ohio Nov. 18, 2004).

⁶ Press Release, FTC, Court Shuts Down Website Selling Bogus Domain Names “.USA,” “.BRIT,” Deceptively Marketed as Useable (Mar. 11, 2002), <http://www.ftc.gov/opa/2002/03/tld.htm>; see also *FTC v. TLD Network Ltd.*, No. 02C 1475 (N.D. Ill. Feb. 28, 2002).

elaborate scheme, a Canadian company targeted U.S. residents with offers for pre-approved credit cards with credit limits of \$2,000 or \$2,500, in exchange for an advance fee of \$189 to \$219.⁷ The victims, most of whom had poor credit history, agreed to have the money debited from their bank accounts, but never received the promised credit cards.⁸

In November 2005, the FTC brought suit against a Costa Rican operation that used “Voice over Internet Protocol (VoIP) services, shell corporations, aliases, and shells to con U.S. consumers into investing in a bogus business opportunity.”⁹ Promoting their coffee display rack franchises through classified ads and the Internet, the defendants claimed that, for a set fee ranging from \$15,000 to \$85,000, they would provide prospective franchisees with everything needed to set up a franchise, including pre-arranged retail locations at which to set up their coffee display racks. From their base in Costa Rica, the defendants used VoIP technology to make it appear as if they were operating out of Las Cruces, New Mexico, where their website claimed they had been in business since 1994.¹⁰

Since 1938, the Federal Trade Commission Act (“FTC Act”) has prohibited “unfair or deceptive acts or practices in or affecting commerce,” and has charged the FTC with preventing and remedying consumer fraud.¹¹ The consumer fraud provisions of the FTC Act provide the American public with essential protections from deceptive practices such as false claims in product marketing, Internet auction fraud, credit repair fraud, advance fee loan fraud, and other forms of telemarketing and Internet fraud.¹²

As evidenced by the examples discussed above, transnational consumer frauds, involving both foreign victims of U.S. businesses and U.S. victims of foreign businesses, are increasingly common targets of FTC enforcement.¹³ In each of these cases, the FTC obtained one or more of the remedies it typically seeks in consumer fraud cases: a temporary restraining order (“TRO”) or preliminary injunction against the fraudulent opera-

⁷ Press Release, FTC, Canadian Company Targets U.S. Citizens with Phony Credit Card Offers for an Advance Fee (Oct. 22, 2002), <http://www.ftc.gov/opa/2002/10/firstcap.htm>.

⁸ *Id.*; see also FTC v. 1492828 Ontario, Inc., No. 02C 7456 (N.D. Ill. Oct. 17, 2002).

⁹ Press Release, FTC, FTC Halts Bogus Business Opportunity Scam: Foreign Nationals Used Technology to Make it Appear They Were Based in the U.S. (Nov. 16, 2005), <http://www.ftc.gov/opa/2005/11/usabeverage.htm>.

¹⁰ *Id.*

¹¹ The Wheeler-Lea Act of 1938, Pub L. No. 75-447, § 3, 52 Stat. 111 (1938), amended section 5 of the FTC Act, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45(a) (2000)), to include these prohibitions.

¹² See generally FTC, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY (Aug. 2004), available at <http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf>.

¹³ See *supra* notes 4–10 and accompanying text; see also FTC, CROSS-BORDER FRAUD, *supra* note 2.

tions, as well as other equitable relief, such as freezing the defendants' assets.¹⁴

There is disagreement, however, among the U.S. Courts of Appeals as to whether the FTC Act may be applied outside the territorial borders of the United States. Although a majority of the circuits that have considered the issue agree that the antifraud provisions of the FTC Act apply to cross-border commerce,¹⁵ the Eleventh Circuit held in *Nieman v. Dryclean USA Franchise Co.* that the FTC Act does not provide for extraterritorial jurisdiction.¹⁶ The *Nieman* decision has potentially drastic implications for the FTC's antifraud enforcement efforts: if the Eleventh Circuit's analysis of the FTC Act were broadly adopted by the federal courts, the FTC would have no legal basis upon which to prosecute U.S.-based perpetrators of fraud against foreign consumers, nor foreign-based perpetrators of fraud against U.S. consumers. Unless and until the Eleventh Circuit reverses itself or the Supreme Court directly addresses the issue, this decision is binding precedent on the federal courts of Georgia, Alabama, and Florida. Despite the holding in *Nieman*, a judge in the U.S. District Court for the Southern District of Florida recently enjoined the transnational operations of the Costa Rican coffee franchise defendants discussed above.¹⁷ Indeed, the precedents of the federal courts concerning the extraterritorial reach of the FTC Act are fraught with discord.

This Comment will present the considerable legal basis that exists for extraterritorial application of the consumer fraud provisions of the FTC Act, and will attempt to reconcile inconsistencies in the case law. Part I will provide an overview of the statutory and jurisprudential history of the FTC Act's consumer fraud provisions, which prohibit "unfair or deceptive acts or practices."¹⁸ Part II will detail cases in which the FTC's exercise of extraterritorial jurisdiction under these provisions has survived judicial scrutiny, beginning in 1944 with *Branch v. FTC*,¹⁹ and followed by a number of other district and appellate court decisions.

Part III will discuss *Nieman*, in which the Eleventh Circuit rejected the plaintiff's argument that the FTC Franchise Rule²⁰—a regulation promulgated by the FTC pursuant to the authority granted in the FTC Act—may be

¹⁴ See *supra* notes 4–10 and accompanying text; see also *infra* notes 63–67 and accompanying text.

¹⁵ See *infra* notes 74–101 and accompanying text.

¹⁶ 178 F.3d 1126, 1131 (11th Cir. 1999).

¹⁷ In response to an ex parte motion by the FTC, Judge Lenard issued a TRO and froze the Costa Rican defendants' assets. See *FTC v. USA Beverages, Inc.*, No. 05-61682 (S.D. Fla. Nov. 4, 2005). According to the text of the order, the court was justified in issuing the TRO because of the likelihood that the FTC could prove that the defendants' operation violated the consumer fraud provisions of the FTC Act. See *id.*; see also *infra* note 143.

¹⁸ 15 U.S.C. § 45(a) (2000).

¹⁹ 141 F.2d 31, 35 (7th Cir. 1944).

²⁰ 16 C.F.R. § 436.1 (1998).

applied extraterritorially.²¹ In its analysis, the Eleventh Circuit relied primarily on the *Aramco* decision, in which the Supreme Court reaffirmed the principle known as the presumption against extraterritoriality: “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”²² The Eleventh Circuit held not only that the FTC Franchise Rule fails to overcome the presumption against extraterritoriality, but also that the core consumer protection provisions of the FTC Act fail as well, and are thus unenforceable beyond the territorial borders of the United States.²³

Part IV will establish that, contrary to the Eleventh Circuit’s overly broad holding in *Nieman*, there is ample basis to conclude that the consumer fraud provisions of the FTC Act overcome the presumption against extraterritoriality. In support of that argument, Part IV will also consider the marked similarities between the fraud provisions of the FTC Act and those of the Securities Exchange Act of 1934 (“the Exchange Act”)—particularly in the way each statute addresses foreign commerce.²⁴ Given the unanimity among the circuit courts that the securities fraud provisions of the Exchange Act may be enforced extraterritorially, the parallel language and construction of the two statutes confirms that the FTC Act is also applicable beyond the territorial borders of the United States.

Part V will discuss the “conduct” and “effects” approaches, used in various forms by the U.S. Courts of Appeals to determine not if but when—i.e., under what circumstances—the securities fraud provisions of the Exchange Act apply to extraterritorial transactions. Courts can and should apply both of these approaches to determine whether the consumer fraud provisions of the FTC Act are applicable to the cross-border commerce in a given case.

I. BACKGROUND AND HISTORY OF FTC CONSUMER FRAUD ENFORCEMENT

A. *Origins of the Consumer Fraud Provisions of the FTC Act*

When Congress created the FTC in 1914,²⁵ it provided the agency with the authority to prosecute not consumer fraud generally,²⁶ but only “unfair

²¹ *Nieman*, 178 F.3d at 1129–31.

²² *Id.* at 1129 (quoting Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949))).

²³ *Id.* at 1130–31 (citing *Aramco*, 499 U.S. at 251).

²⁴ Compare Wheeler-Lea Act of 1938, Pub L. No. 75-447, § 3, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a)), with Securities Exchange Act of 1934, Pub L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b)).

²⁵ The FTC was created by Congress with the enactment of the FTC Act, Pub. L. No. 63-203, § 1, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 41 (2000)).

methods of competition in commerce.”²⁷ Justice Brandeis—who, prior to his appointment to the Supreme Court, had been involved in drafting the FTC Act²⁸—commented that Congress created the FTC “largely with a view to regulating competition,” in response to the widely-held public perception that past antitrust legislation “had been largely ineffective.”²⁹

Today, the term “unfair methods of competition” generally denotes anticompetitive conduct within the rubric of antitrust law.³⁰ Initially, however, the FTC sought to apply this broad term³¹ to a wider range of conduct, including deceptive sales practices.³² In 1922, for example, the FTC sought to enforce its order prohibiting a defendant’s practice of labeling underwear “Natural Wool,” which falsely suggested that the product was made primarily of wool when in fact it contained very little, and thus violated section 5 of the FTC Act.³³ Ruling in favor of the FTC, the Supreme Court held that because “a substantial part of the public was . . . misled by the use of the labels which the [defendant] employed, the public had an interest in stopping the practice as wrongful.”³⁴ The Court noted, however, that the FTC was both “justified in its conclusion that the practice constituted an unfair method of competition” and “authorized to order that the practice be discontinued,” because the “business of its trade rivals who marked their goods truthfully was necessarily affected” by the defendant’s practice.³⁵ Thus, while upholding the agency’s authority, the Court rejected the FTC’s broad consumer-focused interpretation of the FTC Act. Instead, the Court implied that, absent injury to competitors, the defendant’s deceptive prac-

²⁶ See FTC Act §§ 1–11, Pub. L. No. 63-203, 38 Stat. 717–724 (1914) (current version at 15 U.S.C. §§ 41–58 (2000)).

²⁷ See *id.* § 5, 38 Stat. at 719.

²⁸ See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 241 (1972).

²⁹ *FTC v. Gratz*, 253 U.S. 421, 433–34 (1920) (Brandeis, J., dissenting).

³⁰ See Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 393 n.201 (1987) (observing that, “[a]s used in Section 5 [of the FTC Act], ‘unfair methods of competition’ refers primarily to practices that violate the spirit, if not the letter, of the antitrust laws and not simply to conduct that the Commission might view in some broad sense to be ‘unfair’”).

³¹ Indeed, the term was deliberately broad, as Congress “explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase ‘unfair methods of competition’ by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply.” *Sperry*, 405 U.S. at 239–40.

³² As noted by the Sixth Circuit in 1930:

It is apparent . . . that the Commission does not take this limited view of its jurisdiction, but that it believes itself authorized to issue its “desist and refrain” orders in any case where it concludes that sales methods may mislead a substantial part of the purchasing public, in a way and to an extent that, in the judgment of the Commission, is injurious to the purchaser.

Raladam Co. v. FTC, 42 F.2d 430, 436 (6th Cir. 1930), *aff’d* 283 U.S. 643 (1931).

³³ *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 490 (1922).

³⁴ *Id.* at 494.

³⁵ *Id.*

tice would not constitute an “unfair method of competition,” regardless of its harm to consumers.

In 1931, the Court expressly confirmed this restrictive interpretation of “unfair methods of competition.”³⁶ In *FTC v. Raladam*, the Court unanimously held that “one of the facts necessary to support jurisdiction . . . is the existence of competition.”³⁷ This meant that the unfair or outright deceptive practices of a business with no competitors (i.e., a monopoly) or a business “in an industry . . . where all members of the trade used equally reprehensible selling tactics” were not within the jurisdiction of the FTC.³⁸

In response to the Court’s decision in *Raladam*, the FTC lobbied Congress for a legislative amendment; in 1938, Congress added a prohibition against “unfair or deceptive acts or practices” to section 5 of the FTC Act, omitting the need to show an adverse competitive effect.³⁹ The legislative history of the amendment confirms that Congress intended to “make the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.”⁴⁰

B. Deceptive Versus Unfair Practices

Section 5’s prohibition against “unfair or deceptive acts or practices” is the centerpiece of the FTC’s consumer protection and antifraud enforcement authority. The linguistic breadth of the phrase—much like that of “unfair methods of competition”⁴¹—has meant that these six words encompass a vast spectrum of conduct. The FTC has brought actions under section 5 for conduct ranging from egregiously “deceptive” schemes, such as the cross-border frauds described above,⁴² to the “unfair” depiction in a television beer commercial of passengers on a schooner holding bottles of beer and not wearing lifejackets.⁴³

³⁶ See *FTC v. Raladam Co.*, 283 U.S. 643, 654 (1931).

³⁷ *Id.*

³⁸ See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 992 (D.C. Cir. 1973) (discussing the implications of *Raladam*, 283 U.S. 643).

³⁹ *Id.*

⁴⁰ See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (quoting H.R. REP. NO. 75-1613, at 3 (1937)).

⁴¹ See *supra* notes 27–40 and accompanying text.

⁴² See *supra* notes 4–10 and accompanying text.

⁴³ See *In re Beck’s North America, Inc.*, No. C-3859, 1999 FTC LEXIS 40, at *1–2 (Mar. 25, 1999). According to the FTC’s complaint, the television commercial had “depicted boating passengers as drinking Beck’s beer while engaged in activities that require a high degree of alertness and coordination to avoid falling overboard.” *Id.* Because these television depictions were allegedly “likely to cause substantial injury to consumers” and were “not reasonably avoidable by consumers,” the commercials constituted “unfair act[s] or practice[s].” *Id.* at *2–3.

As is evident from the distinct plain language meaning of each word, “unfair” and “deceptive” are independent but related concepts.⁴⁴ Accordingly, courts have generally interpreted each term independently in the context of the FTC Act,⁴⁵ though the FTC sometimes applies both to the same conduct. Intuitively, conduct that is deceptive is almost always unfair. The Supreme Court recognized as early as 1934 that, in the context of the FTC Act, deceptive practices exceed some threshold level of dishonesty and fraudulence that unfair practices do not.⁴⁶

After the amendment of section 5 to encompass “unfair or deceptive acts or practices,” the FTC utilized this provision in a number of enforcement actions to target false product claims. For example, in *In re Rugs of the Blind, Inc.*, the FTC ordered that the defendant cease and desist its practice of falsely representing that its rugs were made by blind persons, stating that this constituted a deceptive practice.⁴⁷ Later the same year, the FTC brought an action against two defendants operating a catalog business under the name “Natural Foods Institute,” who, among other deceptive practices, claimed that their “Chic Tablets” would cause weight loss, and that their “Grape Cure” would cure cancer.⁴⁸ Half a century later, deceptive claims may reach their victims through more technologically advanced media; but as evidenced by the examples discussed above, contemporary consumer frauds bear a striking resemblance, in form and concept, to those of the past.⁴⁹

In addition to enforcing the statutory prohibitions against “unfair or deceptive acts or practices” of section 5,⁵⁰ the FTC may, pursuant to the authority granted in the FTC Act, promulgate and enforce implementing rules and regulations.⁵¹ The FTC Franchise Rule⁵² is of particular interest here

⁴⁴ See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1981).

⁴⁵ Compare Patricia M. Bailey et al., *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849, 872–76 & n.112 (1984) (discussion by two former FTC Commissioners regarding the FTC’s definition of the term “deceptive,” and the body of law surrounding the term), with Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1960–69 (2000) (discussion by a former General Counsel of the FTC regarding the meaning of “unfair” under the FTC Act).

⁴⁶ See *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 309 (1934); *FTC v. Standard Education Soc’y*, 302 U.S. 112, 113 (1937) (noting that the FTC “not only found the [defendant’s] practices to be ‘unfair’ but also ‘false, deceptive and misleading’”).

⁴⁷ 50 F.T.C. 117 (July 26, 1953).

⁴⁸ *In re Barnard*, 50 F.T.C. 434 (Nov. 18, 1953).

⁴⁹ See *supra* notes 4–10 and accompanying text.

⁵⁰ 15 U.S.C. § 45(a) (2000).

⁵¹ See, e.g., 15 U.S.C. § 45(m) (2000). Indeed, the FTC has issued a multitude of consumer protection regulations, including a number of rules that expressly define certain practices to be violations of section 5’s prohibition against unfair or deceptive practices. Among these are rules regarding telemarketing, see 16 C.F.R. § 310.1 (2000), distance education schools, see *id.* § 254.1, and the use of endorsements and testimonials in advertising, see *id.* § 255.0, as well as the labeling of tobacco products, see *id.* § 307.6, and automobile fuel, see *id.* § 306.10.

⁵² 16 C.F.R. § 436.1 (2000).

because the extraterritoriality of that regulation was at issue in *Nieman*.⁵³ The Franchise Rule imposes numerous requirements on franchisors, particularly in their dealings with prospective franchisees.⁵⁴ As with many FTC promulgated rules, a violation of the Franchise Rule constitutes a violation of section 5 of the FTC Act's prohibition against unfair practices.⁵⁵

C. FTC Antifraud Enforcement Methods

In 1914, Congress provided that, in "the interest of the public," the FTC could conduct its own administrative proceedings to investigate and prohibit violations of the FTC Act.⁵⁶ If convinced that a defendant's practices violated the FTC Act, the FTC could issue an order requiring the defendant to cease and desist the unlawful behavior.⁵⁷ If a defendant failed to comply, however, the FTC itself could not enforce the order.⁵⁸ Rather, the FTC would have to petition the appropriate U.S. Court of Appeals to enforce the order.⁵⁹ Throughout numerous amendments to the FTC Act, this administrative enforcement scheme has, for the most part, remained intact, with only minor revisions to the original statutory text.⁶⁰ Nonetheless, the administrative enforcement process proved to be largely ineffective in combating consumer fraud, as defendants would often continue their deceptive practices while administrative proceedings were pending.⁶¹ Moreover, the defendants could retain the ill-gotten gains obtained through their deceptive conduct, even after the FTC had issued an order.⁶²

Thus, in 1973, Congress amended section 13(b) of the FTC Act to empower the FTC to bring suit in federal district court to enjoin the violation of any law enforced by the FTC.⁶³ Pursuant to section 13(b), the FTC can obtain, for example, an *ex parte* TRO against both the defendant business and the principal individuals, including freezing the defendants' business

⁵³ *Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126, 1129 (11th Cir. 1999); *see also infra* notes 122–42 and accompanying text.

⁵⁴ *See* 16 C.F.R. § 436.1; *see also infra* note 124 and accompanying text.

⁵⁵ *See* 16 C.F.R. § 436.1.

⁵⁶ FTC Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719–20 (1914) (current version at 15 U.S.C. § 45(b) (2000)).

⁵⁷ *Id.*

⁵⁸ *Id.* at 720.

⁵⁹ *Id.*

⁶⁰ *See* 15 U.S.C. § 45 (2000).

⁶¹ *See* David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 18, <http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf> (published on the FTC's website in conjunction with the FTC's 90th Anniversary Symposium on "Injunctions, Divestiture, And Disgorgement: The Evolution of FTC Remedies," Sept. 23, 2004).

⁶² *See id.*

⁶³ *See* Trans-Alaska Pipeline Act, Pub. L. No. 93-153, 87 Stat. 576, 592 (amending FTC Act § 13, codified at 15 U.S.C. § 53). This legislation provides that the FTC may seek temporary restraining orders, preliminary injunctions, and permanent injunctions. *Id.*

and personal assets.⁶⁴ Thus, instead of providing a defendant with months or years of notice and the opportunity to continue defrauding consumers until an FTC-issued cease and desist order is enforced by the appellate court, section 13(b) allows a district court to grant temporary equitable relief even before the defendant has notice of the FTC's inquiry.⁶⁵

Not surprisingly, over the past three decades, the FTC has largely shifted to filing its cases directly in federal court, particularly when prosecuting consumer fraud.⁶⁶ The modern FTC thus generally bypasses its own administrative tribunal in favor of the swifter and more potent equitable relief available through the section 13(b) enforcement procedure.⁶⁷

In 1975, Congress further amended the FTC Act by adding section 19, which provides the FTC with the ability, in certain cases, to seek redress in federal district court on behalf of consumers.⁶⁸ The FTC may not bring an action under section 19, however, merely for a violation of section 5's prohibition against unfair or deceptive practices. Rather, Congress limited the use of the section 19 enforcement procedure to cases where either (1) the defendant has violated an FTC rule, such as the Franchise Rule, promulgated under the "unfair or deceptive act or practices" prohibition of section 5, or (2) the defendant has violated a final cease and desist order issued pursuant to the FTC's administrative proceedings.⁶⁹

With respect to the second scenario, Congress elaborated that "[i]f the Commission satisfies the court that the [unfair or deceptive] act or practice . . . is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief."⁷⁰ Although section 19 is seldom invoked,⁷¹ Congress recognized in this statu-

⁶⁴ See, e.g., *FTC v. Skybiz.com, Inc.*, No. 01-CV-396-K(E), 2001 WL 1673645, at *8 (N.D. Okla. Aug. 31, 2001), *aff'd*, 57 F. App'x 374 (10th Cir. 2003).

⁶⁵ See, e.g., *SkyBiz.com*, 57 F. App'x at 375.

⁶⁶ In mid- to late-2005, for example, the FTC had 101 FTC-initiated cases pending in federal district court compared to only 6 cases before FTC administrative law judges. Office of the Gen. Counsel et al., *FTC, Quarterly Federal Court Litigation Status Report No. 84* (June 30, 2005); *FTC, Status of Adjudicative Proceedings Pending Before Administrative Law Judges, Quarterly Report, Oct. 1, 2005*, available at <http://www.ftc.gov/os/2005/10/051003adjproquarterrpt.pdf>; see also FitzGerald, *supra* note 61, at 2 (noting that, in mid-2004, the FTC had 86 cases pending in federal district court, compared to less than a dozen before its own administrative law judges).

⁶⁷ See FitzGerald, *supra* note 61, at 1–2.

⁶⁸ Magnuson-Moss Warranty Act (Federal Trade Commission Improvement Act), Pub. L. No. 93-637, 88 Stat. 2183, 2201–02 (1975) (codified at 15 U.S.C. § 57b (2000)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Because courts have "construed the FTC's power to obtain preliminary and permanent injunctions under section 13(b) to include ancillary equitable relief such as rescission and restitution," the FTC has largely ignored section 19, "instead seeking injunctions and restitutionary relief under the broad equitable powers . . . found by the courts in section 13(b)." Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1143 (1992).

tory text that some deceptive acts and practices may be objectively dishonest or fraudulent, even without consideration of a particular defendant's intent.⁷² In this language, Congress also acknowledged that those practices that are, on their face, objectively dishonest or fraudulent may warrant more robust enforcement measures and remedies. Courts considering whether to grant injunctive relief pursuant to a section 13(b) action often employ similar notions of objectively fraudulent conduct, without regard to a defendant's actual intent.⁷³

II. CASES IN WHICH THE FTC HAS EXERCISED EXTRATERRITORIAL JURISDICTION

Nearly every federal court to consider whether the FTC Act may be applied beyond U.S. territorial borders has answered in the affirmative.⁷⁴ *Branch v. FTC*⁷⁵ is perhaps the earliest and best-known appellate court decision to address the issue. While concluding as a matter of statutory construction that the FTC Act may be applied extraterritorially, the Seventh Circuit suggested that the antifraud provisions of section 5 were primarily intended to protect competition rather than consumers.⁷⁶ *Branch* thus left some ambiguity as to the scope and contours of the FTC Act's extraterritoriality. Subsequent cases in other jurisdictions, however, have confirmed the breadth of extraterritorial jurisdiction under the FTC Act, upholding the application of section 5 to U.S. defendants' fraudulent sales to foreign consumers even where there was no implication of harm to domestic competitors.⁷⁷

⁷² While Congress did not define "dishonest or fraudulent," there is no indication that conduct must rise to the level of criminal liability to be considered objectively dishonest or fraudulent. Rather, a Senate Conference Report explicitly observed that "[i]t is not intended that the court in applying the statutory standard must find that a reasonable man under the circumstances would have considered such act or practice to be criminal." *FTC v. Macmillan, Inc.*, No. 81 C 6053, 1983 WL 1858, at *3 (N.D. Ill. July 29, 1983) (quoting S. REP. NO. 93-1408, at 41 (1974), as reprinted in 1974 U.S.C.C.A.N. 7755, 7773). This observation thus "eliminates the need for the court to find the defendant's act or practice to be criminal." *Id.*

⁷³ See, e.g., *FTC v. Skybiz.com*, No. 01-CV-396-K(E), 2001 WL 1673645, at *11 (N.D. Okla. Aug. 31, 2001), *aff'd*, 57 F. App'x 374 (10th Cir. 2003). For example, a district court may grant a TRO and freeze the assets of individual defendants in a consumer fraud case based on the fact that they merely "(1) had actual knowledge of material misrepresentations; (2) [were] recklessly indifferent to the truth or falsity of a misrepresentation; or (3) had an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* (citations omitted).

⁷⁴ See, e.g., *FTC v. Skybiz.com*, 57 F. App'x 374, 377 (10th Cir. 2003); *FTC v. Magui Publishers*, No. 91-55474, 1993 WL 430102, at *5 (9th Cir. Oct. 22, 1993); *Branch v. FTC*, 141 F.2d 31, 35-36 (7th Cir. 1944); *FTC v. Commonwealth Mktg. Group*, 72 F. Supp. 2d 530, 545 (W.D. Pa. 1999); *FTC v. Vacation Travel Club*, No. 8-219-CIV-FTM-21D, 1996 WL 557831, at *5 (M.D. Fla. Jan. 24, 1996). *But see Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126, 1129-31 (11th Cir. 1999).

⁷⁵ 141 F.2d 31.

⁷⁶ *Id.* at 35.

⁷⁷ See, e.g., *Skybiz.com*, 57 F. App'x 374; *Magui*, 1993 WL 430102.

A. Branch v. FTC

In *Branch*, the defendant, who lived and worked in Chicago, operated what he represented to be a correspondence school for residents of foreign nations.⁷⁸ Advertising through newspapers and leaflets in “various Central and South American Countries,” the defendant claimed that (1) he “maintain[ed] an institute of engineering and science in Chicago, where it was founded in 1910”; (2) “[t]he diplomas and degrees awarded by this worthy Institute [we]re signed and sealed by the Officials of [the] Institute, acknowledged before a Notary Public, certified by the County Court Clerk and authenticated by the Secretary of the State of Illinois, U.S.A.”; and (3) it was “the only officially recognized University in accordance with the laws of United States for extension courses (by correspondence).”⁷⁹ The FTC found these assertions to be false and fraudulent, and ordered the defendant to cease and desist operating what the appellate court would later characterize as a “diploma mill.”⁸⁰ The defendant challenged the order on the ground that the FTC did not have jurisdiction over his business operations, much of which were conducted outside of the United States.⁸¹

The Seventh Circuit began its discussion of the case by noting that “[t]he right of the United States to control the conduct of its citizens in foreign countries in respect to matters which a sovereign ordinarily governs within its own territorial jurisdiction has been recognized repeatedly.”⁸² In light of this principle, the court reasoned that “Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.”⁸³

The central question the court faced was thus not whether Congress had the power to authorize extraterritorial application of the antifraud provisions of the FTC Act, but whether Congress had chosen to exercise that power.⁸⁴ Before addressing this question, the court first considered whether the business dealings between the defendant’s correspondence school and its customers constituted “commerce” within the meaning of the FTC Act.⁸⁵ Because the Supreme Court had previously held the “intercourse between a correspondence school and its customers in different States to be interstate

⁷⁸ 141 F.2d at 33.

⁷⁹ *Id.*

⁸⁰ *Id.* at 33–34.

⁸¹ *Id.*

⁸² *Id.* at 35 (citing *Blackmer v. United States*, 284 U.S. 421, 436–38 (1932)). In *Blackmer*, the Court stated that “[w]hile the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.” 284 U.S. at 437.

⁸³ *Branch*, 141 F.2d at 35.

⁸⁴ *Id.*

⁸⁵ *Id.* at 34

commerce,” the court concluded that the defendant’s business dealings with foreign consumers constituted foreign commerce within the meaning of the FTC Act.⁸⁶

Moreover, the *Branch* court declared that the prohibitions of section 5 are “not merely a partial grant of some of the power which Congress has to prevent such practices.”⁸⁷ Rather, “[t]his grant embraces such power as is necessary to prevent all such practices, including the practices of the [defendant], although his acts were consummated outside the territorial limits of the United States while he remained in the United States.”⁸⁸ Finally, the court also confirmed that enforcement of the FTC Act’s consumer fraud provisions against the defendant would neither exceed the territorial jurisdiction of the United States nor compromise the sovereignty of any foreign country.⁸⁹

The *Branch* court thus addressed three critical issues in determining whether the antifraud provisions of the FTC Act apply to cross-border transactions. First, the court considered whether, as a matter of statutory construction, the prohibitions of section 5 of the FTC Act may be applied outside of the territorial borders of the U.S.⁹⁰ Second, the court analyzed whether the defendant’s particular conduct, though it extended beyond the territorial jurisdiction of the United States, was subject to the antifraud provisions of the FTC Act.⁹¹ Third, the court contemplated whether a U.S. court’s exercise of such authority would offend established principles of international law.⁹²

While *Branch* clearly concerned fraud against consumers, the court nonetheless discussed the FTC’s authority in terms of protecting the defendant’s domestic competitors from his unfair practices.⁹³ Most notably, the court remarked that the FTC “does not assume to protect the [defendant’s] customers in Latin America. It seeks to protect the [defendant’s] competitors from his unfair practices, begun in the United States and consummated in Latin America. It seeks to protect foreign commerce.”⁹⁴ On their face, the court’s comments might seem to suggest that, absent harm to U.S. competitors (or U.S. consumers), the FTC Act would not provide for extraterritorial

⁸⁶ *Id.* (citing *Int’l Textbook Co. v. Pigg*, 217 U.S. 91, 106, 107 (1910)).

⁸⁷ *Id.* at 35.

⁸⁸ *Id.*

⁸⁹ *Id.* As the court explained, “[t]he exercise by the United States of its sovereign control over its commerce and the acts of its resident citizens therein is no invasion of the sovereignty of any other country or any attempt to act beyond the territorial jurisdiction of the United States.” *Id.*

⁹⁰ *Id.* at 34–35.

⁹¹ *Id.*

⁹² *Id.* at 35.

⁹³ *Id.*

⁹⁴ *Id.* The court also noted, “That the persons deceived were all in Latin America is of no consequence. It is the location of the [defendant’s] competitors which counts.” *Id.* at 34–35.

torial jurisdiction over a U.S. business defrauding foreign consumers.⁹⁵ More likely, however, the court's focus on protecting competitors was merely the result of the outdated judicial precedent available at the time. Until 1938, section 5 prohibited only "unfair methods of competition" and was thus understood to require a showing of harm to competitors.⁹⁶ *Branch* was decided in 1944, only six years after section 5 was amended to include prohibitions against "unfair or deceptive acts or practices."⁹⁷ At the time, existing Supreme Court precedent had addressed only the pre-1938 version of the statute, and still regarded the FTC Act as a statute intended to protect competitors rather than consumers.⁹⁸ Indeed, the Supreme Court did not formally adopt a "more expansive view of the FTC's consumer protection role" until 1972.⁹⁹

Thus, the *Branch* court's remarks do not necessarily constrict the breadth of the court's central holding that, as a matter of statutory construction, the FTC Act may be applied to conduct and commerce beyond U.S. territorial borders. Rather, these comments may merely reflect the Seventh Circuit's deference to the most recent (though out-of-date) Supreme Court precedent then available, which interpreted section 5 to require a showing of harm to competition.

Although the Supreme Court has never considered the extraterritorial reach of the FTC Act, the Court has twice cited *Branch* to support the notion that federal statutes may reach conduct that occurs outside of the United States.¹⁰⁰ In *Steele v. Bulova Watch*, for example, the Court relied in part on *Branch* as evidence that "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."¹⁰¹ The Supreme Court has thus

⁹⁵ Though the presumption against extraterritoriality is a tenet of international law, *see infra* note 224 and accompanying text, there is no corresponding doctrine under which a statute is presumed to protect only U.S. citizens, and not to benefit foreigners at the expense (however just) of U.S. defendants. *Cf. Stone v. Export-Import Bank of the U.S.*, 552 F.2d 132, 136 (5th Cir. 1977). In *Stone*, for example, the court considered the plaintiff's argument that Congress's intent in enacting the Freedom of Information Act was to "protect only American citizens." *Id.* In rejecting the claim, the Fifth Circuit noted that the plaintiff "point[ed] to no legislative history disclaiming an intention to protect non-Americans" but instead "relied on the absence of legislative history expressly embracing such an intention." *Id.*

⁹⁶ *See supra* notes 25–36 and accompanying text.

⁹⁷ Wheeler-Lea Act of 1938, Pub L. No. 75-447, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1) (2000)).

⁹⁸ *See supra* notes 25–36 and accompanying text.

⁹⁹ John Harrington, Note, *Up In Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising*, 47 FED. COMM. L.J. 593, 598 (1995) (discussing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)).

¹⁰⁰ *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (citing *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944)) (confirming that anticompetitive activity "is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952) (citing *Branch*, 141 F.2d 31).

¹⁰¹ 344 U.S. at 282 (citing *Branch*, 141 F.2d 31).

implicitly endorsed the broader holding of the Seventh Circuit's decision in *Branch*.

B. Post-Branch Decisions

Since *Branch*, a number of courts have confirmed the breadth of extraterritorial jurisdiction under the FTC Act, upholding the application of section 5 to cross-border transactions in a variety of contexts.¹⁰² In *FTC v. SkyBiz.com*, a federal district court found that the U.S. defendants' marketing of a pyramid scheme in various countries throughout the world could constitute deceptive practices under section 5.¹⁰³ The court thus granted a preliminary injunction and froze the defendants' assets.¹⁰⁴ On appeal, the defendants challenged the scope of this injunctive relief, arguing that the district court had improperly enjoined their overseas activities.¹⁰⁵ The Tenth Circuit, upholding the extraterritorial application of the FTC Act, noted that the U.S. defendants' sales to foreign consumers were "in or affecting commerce among the several states or with foreign nations," as required by the FTC Act.¹⁰⁶

In *FTC v. Magui Publishers*, the defendants distributed to consumers in the U.S. and abroad a series of "limited edition etchings and lithographs which reproduced works by Salvador Dali . . . on paper which Dali had purportedly pre-signed."¹⁰⁷ Included with each work was "a Certificate of Authenticity . . . which identified the artist as 'Salvador Dali.'"¹⁰⁸ In fact, these products had no connection to Dali.¹⁰⁹ After a bench trial, the district court ordered the defendants to pay \$1.96 million in restitution, and permanently enjoined their deceptive practices.¹¹⁰

Defendant Magui challenged the lower court's calculation of restitution, arguing that it improperly included sales to foreign consumers.¹¹¹ In so doing, it relied upon the language of the Foreign Trade Antitrust Improvements Act ("FTAIA") of 1982,¹¹² which amended section 5 of the FTC Act.¹¹³ As noted by the court, however, the FTAIA restricted extraterritorial application of only the antitrust ("unfair methods of competition")—and not

¹⁰² See *supra* note 74 and accompanying text.

¹⁰³ No. 01-CV-396-K(E), 2001 WL 1673645, at *7–11 (N.D. Okla. Aug. 31, 2001), *aff'd*, 57 F. App'x 374 (10th Cir. 2003); see also *supra* note 4 and accompanying text.

¹⁰⁴ *Skybiz.com*, 2001 WL 1673645, at *7–11.

¹⁰⁵ *Skybiz.com*, 57 F. App'x at 376.

¹⁰⁶ *Id.* at 377 (citing 15 U.S.C. § 44 (2000)).

¹⁰⁷ No. 91-55474, 1993 WL 430102, at *1 (9th Cir. Oct. 22, 1993).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at *5.

¹¹² *Id.*

¹¹³ Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 45(a)(3) (2000)).

the consumer protection (“unfair or deceptive acts or practices”)—provisions of section 5.¹¹⁴ The Ninth Circuit thus rejected the defendant’s argument, affirming that the FTC Act’s consumer protection provisions confer jurisdiction over foreign sales.¹¹⁵

In *FTC v. Commonwealth Marketing Group*, defendants made a similar argument against extraterritorial jurisdiction based on the FTAIA’s amendments to section 5.¹¹⁶ As in *Magui*, the court rejected these arguments as without merit.¹¹⁷ The defendants’ reliance on the FTAIA in both *Magui* and *Commonwealth* was particularly misplaced because, as discussed below, the language of the FTAIA actually tends to support the extraterritorial application of section 5 of the FTC Act.¹¹⁸

In *FTC v. Vacation Travel Club*, the defendants again challenged the FTC’s authority to obtain redress on behalf of foreign consumers.¹¹⁹ The court rejected the defendants’ arguments on the basis of the plain meaning of the FTC Act, noting that the Act prohibits deceptive acts and practices “in or affecting commerce” and “defines commerce to include commerce ‘with [a] foreign nation.’”¹²⁰ The court also cited *Branch*, noting that in that case the FTC “had jurisdiction over defendants’ deceptive sales, which originated in the United States and affected citizens of various Latin American countries.”¹²¹ The *Vacation* court thus drew upon the Seventh Circuit’s precedent in *Branch*, but reframed the Seventh Circuit’s perception that section 5 is primarily intended to protect competitors rather than consumers. *Vacation* therefore supports the inference that the analysis and outcome in *Branch*—finding that the FTC Act’s prohibition against deceptive conduct is applicable beyond the territorial borders of the United States—would be equally valid if the *Branch* court had properly viewed section 5 in terms of consumer (rather than merely competitor) protection.

III. NIEMAN: THE ELEVENTH CIRCUIT’S WHOLESALEREJECTION OF THE EXTRATERRITORIALITY OF THE FTC ACT

Despite decisions by numerous courts affirming the extraterritoriality of section 5, the Eleventh Circuit took a drastically different perspective in *Nieman v. Dryclean USA Franchise Co.*¹²² *Nieman* concerned the private

¹¹⁴ *Magui*, 1993 WL 430102, at *5; see also *infra* notes 157–60 and accompanying text (discussing the statutory construction of the FTAIA).

¹¹⁵ *Magui*, 1993 WL 430102, at *5.

¹¹⁶ 72 F. Supp. 2d 530, 545 (W.D. Pa. 1999) (citing 15 U.S.C. § 45(a)(3)).

¹¹⁷ *Id.*

¹¹⁸ See *infra* notes 157–60 and accompanying text.

¹¹⁹ No. 89-219-CIV-FTM-21D, 1996 WL 557831, at *5 (M.D. Fla. Jan. 24, 1996).

¹²⁰ *Id.* (citing 15 U.S.C. §§ 44, 45 (2000)); see also discussion *infra* Part IV.A.

¹²¹ *Vacation Travel Club*, 1996 WL 557831, at *5 (citing *Branch v. FTC*, 141 F.2d 31, 34–35 (7th Cir. 1944)).

¹²² 178 F.3d 1126, 1129–30 (11th Cir. 1999).

enforcement of an FTC regulation, the Franchise Rule,¹²³ which requires, *inter alia*, that franchisors make certain disclosures to prospective franchisees.¹²⁴ A violation of the rule constitutes “an unfair or deceptive act or practice within the meaning of section 5” of the FTC Act.¹²⁵

Nieman was an Argentine citizen who had been in negotiations with the defendant, Dryclean USA, to open dry-cleaning franchises in Argentina.¹²⁶ The parties signed an agreement pursuant to which Nieman provided “a \$50,000 non-refundable deposit in exchange for [Dryclean USA’s] agreement not to negotiate with others regarding the Argentine master franchise agreement for sixty days.”¹²⁷ As the Eleventh Circuit viewed it, “Nieman bought a sixty-day option to purchase the master franchise agreement,” during which he intended to arrange financing.¹²⁸ Sixty days later, Nieman had failed to raise sufficient capital, and Dryclean USA kept his \$50,000 deposit.¹²⁹

Nieman sued Dryclean USA for the return of his deposit under the Florida Deceptive and Unfair Trade Practices Act, which provides a state cause of action for the violation of any rule promulgated pursuant to the FTC Act.¹³⁰ Dryclean USA argued that the Franchise Rule has no extraterritorial application, and thus did not apply to a transaction that had taken place in Argentina.¹³¹ After the district court granted summary judgment for Nieman, Dryclean USA appealed to the Eleventh Circuit.¹³²

Holding that Congress did not intend the FTC Act to apply extraterritorially, the Eleventh Circuit reversed.¹³³ In its analysis, the court cursorily rejected the possibility that *Branch* had any relevance, noting that “the *Branch* court found a basis for FTC jurisdiction based on the effect of the unfair trade practices on domestic competition, not on foreign customers.”¹³⁴ The *Nieman* court relied primarily on the Supreme Court’s decision

¹²³ *Id.* at 1128.

¹²⁴ 16 C.F.R. § 436.1 (2006). These mandatory disclosures, which must be made in writing at the first personal meeting with a potential franchisee, range from a “factual description of the franchise offered to be sold by the franchisor,” *id.* § 436.1(a)(6), to whether or not the franchisor or any of its directors, officers, or parent firms have been convicted of a felony within the past seven fiscal years, *id.* § 436.1(a)(4)(i). Of perhaps most concern in *Nieman*, the FTC Franchise Rule requires that the franchisor disclose the fact that any fees or deposits are non-refundable. *Id.* § 436.1(a)(7).

¹²⁵ *Id.* § 436.1.

¹²⁶ *Nieman*, 178 F.3d at 1128.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1128–29 (citing the Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN. § 501.203(3)(a) (West 1994)); *see also infra* note 141.

¹³¹ *Nieman*, 178 F.3d at 1128.

¹³² *Id.*

¹³³ *Id.* at 1131.

¹³⁴ *Id.* at 1130.

in *Aramco*, which reaffirmed the presumption against extraterritoriality.¹³⁵ In *Aramco*, the Court held that Title VII of the Civil Rights Act of 1964¹³⁶ did not overcome the presumption against extraterritoriality, despite “boilerplate language” in the statute that might suggest the legislation applied to foreign commerce.¹³⁷ Noting similarities between the definition of “commerce” in Title VII and the FTC Act, the *Nieman* court concluded that, following *Aramco*, Congress did not intend section 5 of the FTC Act to apply extraterritorially.¹³⁸

The Eleventh Circuit could have decided the case on much narrower grounds. The court noted that, even if Congress had intended for the FTC Act to apply extraterritorially, the FTC had not exercised that authority when it promulgated the FTC Franchise Rule.¹³⁹ Rather, the court found that the FTC itself did not intend for the regulation to apply to foreign franchisees.¹⁴⁰

Thus, while *Nieman* concerned a somewhat unusual scenario—a private plaintiff’s suit under a Florida state statute to enforce an FTC-promulgated federal regulation¹⁴¹—the court’s holding is overly broad. Until this precedent is overruled—either by the Eleventh Circuit sitting en banc or by the Supreme Court—*Nieman* may effectively prevent the FTC from obtaining relief for consumers from the federal courts of Georgia, Alabama, and Florida, in cases involving cross-border consumer fraud.¹⁴² It

¹³⁵ *Id.* at 1129 (reaffirming that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949))).

¹³⁶ 42 U.S.C. §§ 2000e to 2000e-17 (2000).

¹³⁷ *Aramco*, 499 U.S. at 251, 259.

¹³⁸ *Nieman*, 178 F.3d at 1130–31 (citing *Aramco*, 499 U.S. at 249–51). *But see infra* notes 174–83 and accompanying text (discussing the marked dissimilarities of these statutes’ respective definitions of “commerce”).

¹³⁹ *Nieman*, 178 F.3d at 1131.

¹⁴⁰ *Id.*

¹⁴¹ Neither the statutory provisions of the FTC Act nor the regulations promulgated by the FTC are generally enforceable through a private right of action. *See, e.g.*, *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987–89 (D.C. Cir. 1973) (finding that the FTC Act does not “confer upon private individuals, either consumers or business competitors, a right of action to enjoin the practices prohibited by the Act or to obtain damages following the commission of such acts”); *cf. Jeter v. Credit Bureau*, 760 F.2d 1168, 1174 n.5 (11th Cir. 1985) (noting that “a private right of action . . . does not exist under the FTC Act”). *Nieman* thus brought his case under the Florida Deceptive and Unfair Trade Practices Act (DUTPA), FLA. STAT. ANN. §§ 501.201–501.211 (West 1994), which provides a private cause of action for the violation of any rule promulgated pursuant to the FTC Act. *Nieman*, 178 F.3d at 1128–29. Nonetheless, the fact that this case was brought under DUTPA had no apparent effect on the Eleventh Circuit’s analysis of the FTC Act. *See id.*

¹⁴² Since *Nieman*, the federal district courts of the Eleventh Circuit have not yet published (i.e., in the Federal Supplement, or on the Westlaw or LexisNexis electronic databases) an opinion that addresses whether the consumer fraud provisions of the FTC Act may be applied extraterritorially. *Nieman*’s holding has been followed, however, in a consumer fraud case by an FTC administrative law judge, who observed that “implicit in [the *Nieman* court’s] finding that the franchise rule did not apply

remains to be seen how, if at all, the Eleventh Circuit will address the *USA Beverages* case, discussed above, in which the U.S. District Court for the Southern District of Florida granted a TRO against the defendants' Costa Rica-based operations and froze their assets.¹⁴³

The degree to which *Nieman* has engendered confusion about extraterritorial application of the FTC Act is particularly evidenced by the US SAFE WEB Act of 2005 (the "Safe Web Act"),¹⁴⁴ a recent legislative proposal to Congress by the FTC.¹⁴⁵ Although the bulk of the proposed legislation is directed at adding new statutory tools to the FTC's antifraud arsenal,¹⁴⁶ there is also language in the bill¹⁴⁷ that would address the "lack of clarity in . . . the law" concerning the FTC's extraterritorial authority in cross-border matters.¹⁴⁸ This amendment would expressly clarify that the

extraterritorially was a finding that the FTC Act also did not apply extraterritorially." *FTC v. Telebrands Corp.*, No. 9313, 2004 WL 817051 (FTC Feb. 25, 2004).

¹⁴³ See *supra* notes 9–10, 17 and accompanying text. Although the TRO was directed at both USA Beverages, Inc. (a Florida corporation and a New Mexico corporation by the same name that the Costa Rican defendants used as shell companies for their U.S. operations) and five individual defendants, the FTC has been unsuccessful in its attempts to serve the four individual defendants who reside in Costa Rica with related documents. *FTC v. USA Beverages*, No. 05-61682-CIV, 2005 U.S. Dist. LEXIS 39075, at *3–5 (S.D. Fla. Dec. 5, 2005). The one individual defendant who has been served, David Mead, lives in the U.S. and has already stipulated to a preliminary injunction for himself and on behalf of the New Mexico corporation. *Id.* at *3. Consequently, the FTC has only moved for a preliminary injunction against the Florida corporation, USA Beverages, which the court granted. *Id.* at *5, *27 ("Because the FTC has been unable to serve the individual defendants, it is only asking the Court to enter a Preliminary Injunction as to USA Beverages (Florida) at this time."). It is thus unlikely that the court would consider the extraterritoriality of the FTC Act until the individual defendants in Costa Rica—the only parties to the case who might raise the issue—are served.

¹⁴⁴ Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers Beyond Borders Act of 2005 (Safe Web Act), S. 1608, 109th Cong. (as introduced in Senate, July 29, 2005).

¹⁴⁵ See generally FTC, THE US SAFE WEB ACT: PROTECTING CONSUMERS FROM SPAM, SPYWARE, AND FRAUD: A LEGISLATIVE RECOMMENDATION TO CONGRESS (June 2005), available at <http://www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf>.

¹⁴⁶ For example, the Safe Web Act would allow the FTC to exchange information and evidence with foreign counterpart agencies. See Safe Web Act §§ 4(a), 6(a).

¹⁴⁷ See *id.* § 3.

¹⁴⁸ FTC, AN EXPLANATION OF THE PROVISIONS OF THE US SAFE WEB ACT (2005), available at <http://www.ftc.gov/reports/ussafeweb/Explanation%20of%20Provisions%20of%20US%20SAFE%20WEB%20Act>. In its own explanation of the Safe Web Act, the FTC elucidates the rationale for this amendment as follows:

The federal courts have construed [the] language [of section 5] as authorizing the Commission to act in cross-border matters

Despite this history and the strong reasons for permitting the FTC to exercise its authority in cross-border cases, legal decisions in a few non-FTC cases have led to a lack of clarity in this area of the law. As a result, the FTC has increasingly faced legal challenges to its authority to take action in cross-border matters The Commission expects that such challenges will continue to mount as the Commission brings more and more cases that have cross-border elements. Congressional action would confirm the FTC's authority to take action in this area.

Id. at 15 (footnotes omitted) (emphasis added). The "few non-FTC cases" which the FTC, in a footnote, identifies as "hav[ing] led to a lack of clarity in this area of the law" are *Aramco* and *Nieman*. *Id.* at 15

antifraud provisions of section 5 overcome the presumption against extraterritoriality¹⁴⁹—a proposition that, as argued below, is already manifest in the present incarnation of the FTC Act.¹⁵⁰

IV. THE FTC ACT OVERCOMES THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Contrary to the Eleventh Circuit's overly broad holding in *Nieman*, there is ample basis to conclude that section 5 of the FTC Act overcomes the presumption against extraterritoriality. First, the plain meaning of the statute provides for the extraterritorial application of its antifraud provisions, and the language of Congress's 1982 amendments¹⁵¹ to the antitrust provisions of section 5 confirms this reading. Second, the Supreme Court's decision in *Aramco*¹⁵² actually tends to support, rather than undermine, the extraterritorial application of the FTC Act. Finally, marked similarities between the antifraud provisions of the Exchange Act¹⁵³—the extraterritoriality of which has been upheld virtually unanimously by the federal courts—and those of the FTC Act further validate the extraterritoriality of section 5.

A. *The Plain Meaning of the FTC Act Provides for Extraterritorial Application*

A plain reading of the statutory text demonstrates that the FTC Act confers jurisdiction over cross-border transactions. Section 5 prohibits “unfair or deceptive acts or practices in or affecting *commerce*.”¹⁵⁴ The FTC Act expressly defines “commerce” to include “commerce among the several States or *with foreign nations*.”¹⁵⁵ Thus, on its face, the FTC Act provides jurisdiction over a U.S. business's sales to foreign consumers or a foreign business's sales to U.S. consumers.¹⁵⁶

n.57 (citing *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 264 (1991); *Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126 (11th Cir. 1999)).

¹⁴⁹ See Safe Web Act § 3. The Safe Web Act would also amend section 5 to provide that “[a]ll remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.” *Id.* This provision would expressly confirm that all of the existing statutory and judicially-fashioned remedies—including rescission and restitution, available under section 13(b)—may be applied in cases involving extraterritorial conduct. See *id.*; see also *supra* Part I.C.

¹⁵⁰ See discussion *infra* Part IV.

¹⁵¹ Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), Pub. L. No. 97-290, § 403, 96 Stat. 1246, 1246 (codified at 15 U.S.C. § 45(a)(3) (2000)).

¹⁵² 499 U.S. 244.

¹⁵³ Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2000).

¹⁵⁴ 15 U.S.C. § 45(a)(1) (2000) (emphasis added).

¹⁵⁵ *Id.* § 44 (emphasis added).

¹⁵⁶ *Cf.* *FTC v. Skybiz.com, Inc.*, 57 F. App'x 374, 377 (10th Cir. 2003) (holding that “the district court did not commit error in issuing a preliminary injunction, and enjoining certain [deceptive] acts and practices of the defendants being committed both inside and outside the United States”); *Branch v. FTC*, 141 F.2d 31, 35 (7th Cir. 1944) (holding that Congress granted the FTC authority to prevent “unfair

Congress's enactment of the FTAIA,¹⁵⁷ which amended the antitrust provisions of the FTC Act, further confirms the extraterritoriality of section 5. Prior to the FTAIA, the FTC Act provided the same broad scope of jurisdiction for the enforcement of the FTC Act's antitrust provisions as for its consumer protection provisions.¹⁵⁸ With the FTAIA amendments, Congress explicitly limited the FTC's authority to enforce the FTC Act's antitrust provisions in matters involving foreign commerce, but did not enact any similar constraints with respect to the FTC Act's consumer protection provisions.¹⁵⁹ The FTAIA requires that, in matters involving foreign commerce, the antitrust provisions of section 5 "shall not apply . . . unless" the anticompetitive activity has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce.¹⁶⁰ Congress's use of the word "unless" indicates that the FTAIA may limit or clarify, but certainly does not expand, the extraterritorial scope of the antitrust provisions of section 5.¹⁶¹ Indeed, the legislative history of the FTAIA makes clear that it "establish[es] a rule for noncoverage, not a rule for coverage . . . a tool for defendants but not for plaintiffs."¹⁶² Thus, in the FTAIA, Congress implicitly affirmed that, as a matter of statutory construction, the provisions of section 5—antitrust as well as consumer protection—already provided for some level of extraterritoriality, and thus overcome the presumption.

B. The Court's Decision in Aramco Tends to Support, Not Undermine, the Extraterritorial Application of the FTC Act

Nieman's conclusion that the FTC Act does not apply extraterritorially relies largely on the Supreme Court's decision in *Aramco*.¹⁶³ As discussed above, *Aramco* reaffirmed the "longstanding principle of American law" that "legislation of Congress, unless a contrary intent appears, is meant to

trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States").

¹⁵⁷ Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), Pub. L. No. 97-290, § 403, 96 Stat. 1246, 1246 (codified at 15 U.S.C. § 45(a)(3) (2000)).

¹⁵⁸ See FTAIA § 403.

¹⁵⁹ *Id.*; see also *FTC v. Magui Publishers, Inc.*, No. 91-55474, 1993 WL 430102, at *5 (9th Cir. Oct. 22, 1993) (finding that "the 1982 amendment to § 5 of the [FTC] Act . . . applies to antitrust enforcement ('unfair methods of competition involving commerce with foreign nations')—not to the FTC's consumer protection jurisdiction").

¹⁶⁰ FTAIA § 403.

¹⁶¹ Cf. Susan E. Burnett, Comment, *U.S. Judicial Imperialism Post Empagran v. F. Hoffmann-La Roche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 EMORY INT'L L. REV. 555, 585 (2004) (noting that the FTAIA circumscribes, rather than expands, the extraterritoriality of the federal antitrust laws).

¹⁶² *Id.* at 585–86 & n.139 (quoting 128 CONG. REC. H18, 953 (daily ed. Aug. 3, 1982) (statement of Rep. McClory)). Representative McClory was one of the two sponsors of the FTAIA bill. *Id.* at 586 n.138.

¹⁶³ *Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126, 1129–31 (11th Cir. 1999) (citing *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248–51 (1991)).

apply only within the territorial jurisdiction of the United States.”¹⁶⁴ The Court’s analysis in *Aramco*, however, tends to support, not undermine, the extraterritorial enforceability of the consumer protection provisions of the FTC Act. Unlike the antidiscrimination provisions of Title VII at issue in *Aramco*, the FTC Act evidences the affirmative congressional intent required to extend the reach of its consumer protection provisions beyond the territorial borders of the United States.

In *Aramco*, the Court considered whether Title VII, which prohibits discrimination by employers on the basis of race, color, religion, sex or national origin,¹⁶⁵ is enforceable by a U.S. citizen against a U.S. employer operating abroad.¹⁶⁶ The Court noted that an employer is subject to Title VII only if it “has employed 15 or more employees for a specified period and is ‘engaged in an industry affecting commerce.’”¹⁶⁷ Under Title VII, “an industry affecting commerce” is defined as “any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce.”¹⁶⁸ “Commerce,” in turn, is defined to include “trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof.”¹⁶⁹

The Equal Employment Opportunity Commission (“EEOC”) argued that the clause “between a State and any place outside thereof” must include areas beyond the territorial limits of the United States.¹⁷⁰ The defendant, *Aramco*, countered that the clause merely provides “‘the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce’ but not ‘to regulate conduct exclusively within a foreign country.’”¹⁷¹ The Court found it unnecessary to choose between these conflicting interpretations, deciding instead that the language relied upon by the EEOC is “ambiguous” and “falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders.”¹⁷² In rejecting the EEOC’s arguments, the Court noted that, if it “were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.”¹⁷³

¹⁶⁴ *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

¹⁶⁵ See 42 U.S.C. §§ 2000e-2 to 2000e-3 (2000).

¹⁶⁶ *Aramco*, 499 U.S. at 249.

¹⁶⁷ *Id.* (quoting 42 U.S.C. § 2000e(b)).

¹⁶⁸ *Id.* (quoting 42 U.S.C. § 2000e(h)).

¹⁶⁹ *Id.* (quoting 42 U.S.C. § 2000e(g)).

¹⁷⁰ *Id.* at 249.

¹⁷¹ *Id.* at 250 (citation omitted).

¹⁷² *Id.* at 249–50.

¹⁷³ *Id.* at 253.

Unlike the employment discrimination provisions of Title VII considered in *Aramco*, the consumer protection provisions of section 5 of the FTC Act unambiguously evidence an affirmative congressional intent to provide extraterritorial jurisdiction. Contrary to the cursory analysis of the Eleventh Circuit in *Nieman*,¹⁷⁴ the FTC Act's "commerce" language bears only marginal resemblance to Title VII's "limited, boilerplate 'commerce' language."¹⁷⁵ First, the FTC Act explicitly covers "commerce among the several States or *with foreign nations*."¹⁷⁶ On its face, this provision unequivocally provides jurisdiction over a U.S. business's transnational sales to a foreign consumer,¹⁷⁷ and stands in contrast to Title VII's vague definition of commerce as "between a State and *any place outside thereof*."¹⁷⁸ Indeed, the *Aramco* Court noted that its "conclusion [was] fortified," in part, by the fact that Title VII "fails even to mention foreign nations or foreign proceedings."¹⁷⁹

Second, because "commerce"—the marketing of goods and services—is the essential conduct being regulated by section 5 of the FTC Act, the definition of "commerce" is a pivotal element of that legislation.¹⁸⁰ In contrast, "commerce" is only incidental to the central purposes and prohibitions of Title VII, which is fundamentally concerned with employment practices.¹⁸¹ "[E]ngage[ment] in an industry affecting commerce" is just one of multiple conditions required to place a company within the jurisdiction of Title VII's antidiscrimination provisions.¹⁸² Under section 5 of the FTC Act, however, "unfair or deceptive acts or practices in or affecting commerce" are not merely jurisdictional prerequisites, but statutory violations in and of themselves.¹⁸³

¹⁷⁴ See *Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126, 1130–31 (11th Cir. 1999). As the court explained:

Title VII defined commerce as "trade . . . among the several States; or between a State and any place outside thereof," while the FTC Act defines commerce as "commerce among the several states or with foreign nations." Given the similarity of these definitions, the scope of the statutes should be interpreted similarly.

Id. (citing *Aramco*, 499 U.S. at 251; 15 U.S.C. § 44 (2000)).

¹⁷⁵ See *Aramco*, 499 U.S. at 252.

¹⁷⁶ 15 U.S.C. § 44 (emphasis added).

¹⁷⁷ Or, likewise, a foreign business's transnational sales to a U.S. consumer.

¹⁷⁸ 42 U.S.C. § 2000e(g) (2000) (emphasis added); see *Aramco*, 499 U.S. at 249.

¹⁷⁹ 499 U.S. at 255–56.

¹⁸⁰ See 15 U.S.C. § 45 (2000).

¹⁸¹ See 42 U.S.C. §§ 2000e-2 to 2000e-3 (2000). Congress's inclusion of the term "commerce," which is defined to include "commerce among the several states," *id.*, brings Title VII within the purview of the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the authority "[t]o regulate Commerce . . . among the several States"); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 367 (1978) (Brennan, J., concurring in judgment in part and dissenting in part) (noting that "Title VII was enacted," in part, "pursuant to Congress' power under the Commerce Clause").

¹⁸² *Aramco*, 499 U.S. at 249 (quoting 42 U.S.C. § 2000e(b) (2000)).

¹⁸³ 15 U.S.C. § 45(a)(1).

Third, *Aramco* dealt with a situation in which none of the relevant conduct took place within the United States nor had any apparent direct effects on individuals or commerce within the United States.¹⁸⁴ The FTC Act, on the other hand, is generally only applied to cross-border transactions where either the consumer victims or the targets of the FTC's enforcement have a substantial physical presence in the United States.¹⁸⁵

C. An Apt Analog: The Antifraud Provisions of the Exchange Act

Though overlooked by the Eleventh Circuit in *Nieman*, the Exchange Act,¹⁸⁶ unlike Title VII, is an apt and instructive analog to the FTC Act. The statutory text of each Act's antifraud provisions, enacted within four years of one another, are conspicuously similar—especially with respect to the way each addresses foreign commerce.¹⁸⁷ The extraterritoriality of section 5 of the FTC Act is thus bolstered by the fact that section 10(b) of the Exchange Act is broadly recognized to apply to extraterritorial transactions.¹⁸⁸

Section 10(b) of the Exchange Act prohibits fraud “by the use of any means or instrumentality of interstate commerce . . . in connection with the purchase or sale of any security.”¹⁸⁹ This provision resembles the language of the FTC Act's core antifraud provision, section 5, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”¹⁹⁰ Moreover, the Exchange Act defines the term “interstate commerce” to include “commerce . . . among the several States, or between any foreign country and any State.”¹⁹¹ This definition of “commerce”—unlike that of Title VII—is, in relevant part, nearly identical to that of the FTC Act, which includes “commerce among the several States or with foreign nations.”¹⁹²

In determining whether or not Title VII overcomes the presumption against extraterritoriality, the *Aramco* Court treated the question strictly as a matter of statutory construction.¹⁹³ In light of the Court's approach, simi-

¹⁸⁴ See *Aramco*, 499 U.S. 244.

¹⁸⁵ See *supra* notes 4–10, 102–21 and accompanying text (detailing cases in which the FTC has successfully exercised extraterritorial jurisdiction, all of which involve either U.S. defendants or U.S. victims). Even in *Nieman*, the defendant's conduct with respect to the alleged violation of the FTC Act occurred primarily in the United States. See *Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126, 1128 (11th Cir. 1999) (noting that the defendant both signed the franchise agreement and accepted the plaintiff's \$50,000 deposit at the defendant's offices in Florida).

¹⁸⁶ Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2000).

¹⁸⁷ Compare Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111–14 (codified at 15 U.S.C. § 45(a) (2000)), with Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b) (2000)).

¹⁸⁸ See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 663–66 (7th Cir. 1998) (reviewing cases).

¹⁸⁹ 15 U.S.C. § 78j & (b).

¹⁹⁰ FTC Act § 5, 15 U.S.C. § 45(a)(1) (2000).

¹⁹¹ 15 U.S.C. § 78c(a)(17) (2000).

¹⁹² 15 U.S.C. § 44 (2000).

¹⁹³ See *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991).

larities between the statutory language of the Exchange Act and the FTC Act suggest that the two statutes merit comparable judicial treatment with respect to the question of extraterritoriality.¹⁹⁴ It is well established among the federal courts that the Exchange Act may be applied to cross-border transactions.¹⁹⁵ Thus, decisions under the Exchange Act¹⁹⁶ support the inference that the antifraud provisions of the FTC Act, like those of the Exchange Act, provide for extraterritorial jurisdiction.

V. APPLYING THE “CONDUCT” AND “EFFECTS” APPROACHES TO THE FTC ACT

The case law regarding the extraterritoriality of the FTC Act is far less developed than that regarding the extraterritoriality of the Exchange Act.¹⁹⁷ To date, only a handful of courts have addressed the issue of whether the FTC Act overcomes the presumption against extraterritoriality.¹⁹⁸ In decisions under the Exchange Act, on the other hand, courts have struggled with the question not of whether, but when—i.e., under what circumstances—the antifraud provisions of section 10(b) apply to extraterritorial transactions.¹⁹⁹ As noted by the Seventh Circuit, the question “is a difficult one because Congress has given little meaningful guidance on the issue.”²⁰⁰ Given the similarities between the statutes, existing jurisprudence surrounding the extraterritorial application of the Exchange Act’s antifraud provisions should serve as a template for courts considering this issue in the context of the FTC Act.

The more pertinent question, then, is not whether but when the antifraud provisions of the FTC Act may be applied to a cross-border transac-

¹⁹⁴ See 2B NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 53:01, at 324 (6th ed. 2000) (noting that courts have “a duty to construe statutes harmoniously where that can reasonably be done”); cf. *Aramco*, 499 U.S. at 252–53 (entertaining the EEOC’s argument that extraterritorial application of Title VII is warranted given the similarities between the commerce language of Title VII and that of the Lanham Act, which the Court has long recognized to apply extraterritorially, but ultimately rejecting the EEOC’s argument based on the considerable distinctions between the commerce language in each statute).

¹⁹⁵ See, e.g., *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998); see also cases cited *infra* Part V.

¹⁹⁶ See *supra* note 188 and accompanying text.

¹⁹⁷ Indeed, the cases cited in Part II.B of this Comment represent virtually all of the published case law concerning the extraterritoriality of the antifraud provisions of the FTC Act, and this Author has found no secondary literature directly addressing the issue. With respect to the Exchange Act, on the other hand, dozens of cases, numerous law review articles, and a number of books have considered the issue. See, e.g., sources cited *infra* notes 201–09, 213–32, and 239–43.

¹⁹⁸ See e.g., *FTC v. Skybiz.com, Inc.*, 57 F. App’x 374 (10th Cir. 2003); *Nieman v. Dryclean USA Franchise Co.*, 178 F.3d 1126 (11th Cir. 1999); see also *supra* note 197 and accompanying text.

¹⁹⁹ See *Kauthar*, 149 F.3d at 663.

²⁰⁰ *Id.* at 663–64.

tion. Circuit courts have developed two general tests, or “approaches,”²⁰¹ for determining whether section 10(b) of the Exchange Act may be applied extraterritorially: the “conduct” approach and the “effects” approach.²⁰² Both approaches “focus on whether the activity in question has had a sufficient impact on or relation to the United States, its markets or its citizens to justify American regulation of the situation.”²⁰³ As their names suggest, the conduct approach “focuses on the domestic conduct in question,” while the effects approach “focuses on the domestic effects resulting from the transaction at issue.”²⁰⁴

Generally, the antifraud provisions of the Exchange Act “are applicable if either approach so indicates.”²⁰⁵ Beyond these general parameters, however, the various Courts of Appeals have established somewhat divergent standards for their respective conduct and effects approaches.²⁰⁶ Given the similarities between the FTC Act and the Exchange Act,²⁰⁷ federal courts should employ these approaches under the consumer fraud provisions of the FTC Act.²⁰⁸

A. The “Conduct” Approach

The conduct approach was initially formulated in *Leasco Data Processing Equipment Corp. v. Maxwell* by the Second Circuit,²⁰⁹ widely regarded as the most influential Court of Appeals in the area of securities law.²¹⁰ In *Leasco*, U.S. plaintiffs had purchased British securities through British brokers on the London Stock Exchange.²¹¹ The Second Circuit upheld jurisdiction over the plaintiffs’ fraud claims because “substantial mis-

²⁰¹ In *Kauthar*, the Seventh Circuit noted its preference for the term “approach” rather than “test” because “‘test’ is too inflexible a term to characterize the present state of the case law.” *Id.* at 665.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 665 n.8.

²⁰⁶ *Id.* at 665. As the Seventh Circuit noted, the disparity among the approaches of the various circuits is “to some degree doctrinal and to some degree attitudinal, as the courts have striven to implement, in Judge Friendly’s words, ‘what Congress would have wished if these problems had occurred to it.’” *Id.* (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975)).

²⁰⁷ See discussion *supra* Part IV.C.

²⁰⁸ *Cf. Tamari v. Bache & Co. S.A.L.*, 547 F. Supp. 309, 311 (N.D. Ill. 1982), *aff’d* 730 F.2d 1103, 1107–08 (7th Cir. 1984) (applying the conduct and effects tests developed in the “substantial body of . . . case law defining the transnational scope of the Securities Act of 1933 and the Securities Exchange Act of 1934” to the similar antifraud provisions of the Commodity Exchange Act).

²⁰⁹ 2 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 14.10[2][a] (7th ed. 2004) (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336–37 (2d Cir. 1972)).

²¹⁰ The Second Circuit has been referred to as the “Mother Court” in the area of securities law. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

²¹¹ 468 F.2d at 1330.

representations were made in the United States.”²¹² Thus, the court established that the Exchange Act applies extraterritorially if at least some of the fraudulent conduct occurred within the United States.

Since *Leasco*, the U.S. Courts of Appeals have diverged in terms of the requisite level of domestic conduct needed to support jurisdiction. At the most restrictive end of the spectrum, the D.C. Circuit requires that the domestic conduct itself constitute a violation of the Exchange Act’s antifraud provisions.²¹³ At the other extreme, the permissive approaches of the Third, Eighth and Ninth Circuits allow for jurisdiction where, for example, “at least some activity designed to further a fraudulent scheme occurs within this country.”²¹⁴ As the Ninth Circuit quipped, “the jurisdictional hook need not be large to fish for securities law violations.”²¹⁵

In between these extremes lie the approaches adopted by the Second, Fifth and Seventh Circuits, which generally require “a higher quantum of domestic conduct” than the Third, Eighth and Ninth Circuits, but less than the D.C. Circuit.²¹⁶ In *Kauthar*, the Seventh Circuit articulated this intermediate standard:

[F]ederal courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff’s alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success. This conduct must be more than merely preparatory in nature; however, we do not go so far as to require that the conduct occurring domestically must itself satisfy the elements of a securities violation.²¹⁷

²¹² *Id.* at 1337. The court expressed doubt that the “impact on an American company and its shareholders would suffice to make the statute applicable if the misconduct had occurred solely in England.” *Id.*

²¹³ *See, e.g., Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (Bork, J.). In *Zoelsch*, the court further expressed “doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors.” *Id.* at 32. This doubt apparently stems from the court’s suspicion that Congress never actually “thought about and conferred” such jurisdiction. *Id.* The D.C. Circuit thus seems to suggest that, despite the multitude of courts that have held otherwise, the Exchange Act does not overcome the presumption against extraterritoriality. Nonetheless, in deference to “the Second Circuit’s preeminence in the field of securities law, and [their] desire to avoid a multiplicity of jurisdictional tests,” the D.C. Circuit allowed for extraterritorial jurisdiction in narrow circumstances. *Id.*

²¹⁴ *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); *see also* *Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 418–19 (8th Cir. 1979) (citing *Kasser*, 548 F.2d at 114); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983) (citing *Continental Grain*, 592 F.2d 409); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 666 (7th Cir. 1998) (describing the permissive approaches adopted by the Third, Eighth and Ninth Circuits).

²¹⁵ *See Grunenthal*, 712 F.2d at 424 (quoting *SEC v. United Fin. Group, Inc.*, 474 F.2d 354, 357 (9th Cir. 1973)).

²¹⁶ *Kauthar*, 149 F.3d at 665–66 (reviewing differences among circuits in standards for the conduct approach).

²¹⁷ *Id.* at 667.

Thus, the intermediate approach does not allow for jurisdiction where only some incidental part of the alleged fraudulent conduct occurred in the United States. However, it may provide for jurisdiction even if the domestic conduct in its own right does not constitute a violation of the Exchange Act's antifraud provisions.

In *Kauthar*, the foreign plaintiff alleged that the U.S. defendants (1) prepared "documents containing fraudulent misrepresentations and omissions" in the United States, (2) "had meetings and phone conversations in the United States to discuss the deceptive information contained in the prospectus," and (3) "received in the United States the fraudulently solicited payment for the securities—the final step in the alleged fraud."²¹⁸ Because the defendants' conduct in the United States "form[ed] a substantial part of the alleged fraud and [was] material to its success," the court held that the defendants' cross-border transactions were within the purview of the U.S. antifraud securities statutes.²¹⁹

Commentators have noted that "[i]nherent in the conduct test is the notion that the United States should not be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."²²⁰ Indeed, in *Kauthar*, the court's decision relied in part on the finding that the defendants utilized the United States "as a base of operations from which to launch [their] fraudulent scheme."²²¹

The notion of preventing the United States from becoming a safe haven for fraud against foreign individuals should be of paramount concern with respect to the FTC Act's antifraud provisions. As the Eighth Circuit remarked in the context of securities fraud, "We are reluctant to conclude that Congress intended to allow the United States to become a Barbary Coast, as it were, harboring international securities pirates."²²² Consumer fraud, as evidenced by the examples discussed above, is a crime made possible by the geographic and legal inaccessibility of the perpetrators to their victims, and international borders only serve to enhance this advantage.²²³

The intermediate standard of the conduct approach would provide disciplined limits on the extraterritoriality of the FTC Act while ensuring that the United States is not used as a safe harbor for fraud against foreign consumers. Moreover, application of the intermediate conduct approach would not offend the quintessential principle of international law upon which

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ GREENE ET AL., *supra* note 209, § 14.10[2][a] (internal quotation marks omitted).

²²¹ *Kauthar*, 149 F.3d at 667. The court warned that, "[W]e would do serious violence to the policies of these statutes if we did not recognize our Country's manifest interest in ensuring that the United States is not used as a 'base of operations' from which to 'defraud foreign securities purchasers or sellers.'" *Id.* (quoting *SEC v. Kasser*, 548 F.2d 109, 116 (8th Cir.), *cert. denied*, 431 U.S. 938 (1977)) (emphasis added).

²²² *Kasser*, 548 F.2d at 116 (internal quotation marks omitted).

²²³ *See supra* notes 4–10 and accompanying text.

Nieman purported to rely—the presumption against extraterritoriality.²²⁴ By requiring that a “substantial part of the alleged fraud” occur in the United States,²²⁵ the intermediate conduct approach ensures that a U.S. court’s jurisdiction is based on more than merely incidental domestic conduct. Thus, in applying the conduct approach to determine the extraterritoriality of the antifraud provisions of the FTC Act, the intermediate standard of the Second, Fifth and Seventh Circuits is most promising. Indeed, the FTC’s proposed amendments to section 5 in the Safe Web Act would expressly provide for a conduct test comparable to this standard.²²⁶

Moreover, the FTC Act may merit a less restrictive conduct test than the Exchange Act, even within the same circuit, given that the FTC Act is only enforceable by government plaintiffs. Whereas suits for violations of section 10(b) of the Exchange Act may be brought by both government agencies and private plaintiffs,²²⁷ the FTC Act provides no private right of action, nor have courts implied one.²²⁸ As a government plaintiff, the FTC has inherently broader authority (and, arguably, greater legitimacy) than a private plaintiff to protect the public and obtain redress for consumers.²²⁹ Even the D.C. Circuit, in establishing the most restrictive conduct test under

²²⁴ See *supra* notes 135–38 and accompanying text; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987); GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 506 (3d ed. 1996) (“[T]he primary and least controversial jurisdictional basis under international law remains the ‘territoriality principle,’ which derives from states’ sovereignty over national territory.”).

²²⁵ *Kauthar*, 149 F.3d at 667.

²²⁶ See Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers Beyond Borders Act of 2005 (Safe Web Act), S. 1608, 109th Cong. § 3 (as introduced in Senate, July 29, 2005); see also *supra* notes 144–49 and accompanying text. Specifically, the proposed amendment would define the phrase “unfair or deceptive acts or practices” in section 5 to “include[] such acts or practices involving foreign commerce that . . . involve material conduct occurring within the United States.” See Safe Web Act § 3.

²²⁷ See, e.g., *Superintendent of Ins. v. Bankers Life & Cas.*, 404 U.S. 6, 13 n.9 (1971) (“It is now established that a private right of action is implied under § 10(b).” (citing 6 LOUIS LOSS, SECURITIES REGULATION 3869–73 (1969); 3 LOUIS LOSS, SECURITIES REGULATION 1763 (2d ed. 1961))).

²²⁸ See *supra* note 141 and accompanying text.

²²⁹ See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170–71 (2004). In *Empagran*, an international price-fixing case, the Supreme Court held that private foreign plaintiffs could not obtain damages under U.S. antitrust laws for harms that were suffered entirely outside of the U.S., unless that foreign harm itself had a direct effect on U.S. commerce. *Id.* at 163–70. In arriving at this conclusion, the Court expressly distinguished three other Supreme Court decisions cited by the foreign plaintiffs in which the plaintiff was the U.S. government and sought remedies that “might have helped to protect those injured abroad.” *Id.* at 170. The Court explained that

[a] Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief. This difference means that the Government’s ability, in these three cases, to obtain relief helpful to those injured abroad tells us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.

Id. at 170–71 (emphasis added) (citations omitted).

the Exchange Act, suggested that a government agency deserves much broader latitude than a private plaintiff in matters implicating extraterritorial jurisdiction:

The SEC, while an independent agency, is a responsible governmental agency and will surely take into account in framing its enforcement actions any foreign policy concerns communicated to it by the Department of State. A private individual need not and often will not. A court can feel more comfortable asserting jurisdiction if it knows that foreign policy concerns can be accommodated by the plaintiff and are not left entirely to the court's untutored evaluation.²³⁰

Judge Bork's language in *Zoelsch v. Arthur Andersen & Co.* suggests that the D.C. Circuit may have applied a substantially more permissive test if the plaintiff in that case were the SEC rather than a private plaintiff.²³¹ Given the close resemblance of the FTC to the SEC, in terms of both organizational features and the antifraud provisions enforced by each agency,²³² the FTC would presumably merit a comparable level of deference. Thus, even within the D.C. Circuit, which applies the most restrictive conduct test under the Exchange Act, a conduct test more akin to the intermediate standard of the Second, Fifth and Seventh Circuits may be appropriate under the FTC Act, which can only be enforced by the FTC.

B. The "Effects" Approach

The effects approach generally considers whether "actions occurring in foreign countries ha[ve] caused foreseeable and substantial harm to interests in the U.S."²³³ Unlike the conduct approach, which was originally formulated in the context of securities law, the effects approach was initially developed to address the extraterritoriality of antitrust laws.²³⁴ The Second Circuit introduced the effects approach in *Alcoa*, where it held that anti-competitive agreements between foreign corporations "were unlawful, though made abroad, if they were intended to affect imports and did affect them."²³⁵

The Second Circuit was also the first court to apply the effects approach to the antifraud provisions of the Exchange Act.²³⁶ In *Schoenbaum v. Firstbrook*, a Canadian corporation had allegedly defrauded a U.S. investor by selling its shares to corporate insiders at a price unfairly below their

²³⁰ *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 n.3 (D.C. Cir. 1987) (Bork, J.).

²³¹ *See id.*

²³² *See discussion supra* Part IV.C.

²³³ *Kauthar v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998) (alteration in original) (internal quotation marks omitted) (quoting *Mak v. Wocom Commodities Ltd.*, 112 F.3d 287, 289 (7th Cir. 1997)).

²³⁴ *See United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945).

²³⁵ *Id.*

²³⁶ *See GREENE ET AL.*, *supra* note 209, § 14.10[2][b] (citing *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968)).

true market value.²³⁷ The Second Circuit held that section 10(b) of the Exchange Act “reaches beyond the territorial limits of the United States and applies when a violation of the Rules is injurious to United States investors.”²³⁸

In general, the antifraud provisions of the Exchange Act “may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States.”²³⁹ In *Consolidated Gold Fields PLC v. Minorco*, for example, the court considered “a tender offer involving two foreign corporations and occurring on foreign soil, where only a small percentage of the . . . shareholders [were] American residents.”²⁴⁰ Because the tender offer documents were forwarded (by British nominees as required by British law) to shareholders and American Depository Receipt (“ADR”) depository banks in the United States, the Second Circuit upheld jurisdiction over the foreign transaction.²⁴¹

To confirm that the domestic effects of a transaction are sufficiently substantial, courts also typically consider the statistical representation of the U.S. victims, both as a relative percentage of the global total and in terms of their absolute holdings.²⁴² In *Minorco*, for example, the Second Circuit placed weight on the fact that U.S. residents composed 2.5% of the shareholders, collectively owning 5.3 million shares that had a market value of \$120 million.²⁴³

Realistically, however, the complex web of legal relationships that exists in transnational securities transactions—and which makes it more difficult to ascertain the existence of a substantial U.S. effect—is unlikely to be present in a consumer fraud case brought under section 5 of the FTC Act. Transnational securities frauds often involve more than simply the U.S. victim and the foreign perpetrator. Between these two principal parties, there may be a host of third parties, including foreign brokers trading on foreign exchanges,²⁴⁴ foreign nominees,²⁴⁵ and foreign trusts in which the U.S. victims are only investors.²⁴⁶ Cross-border consumer frauds against U.S. vic-

²³⁷ 405 F.2d at 204.

²³⁸ *Id.* at 206.

²³⁹ *E.g.*, *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989); *see also* GREENE ET AL., *supra* note 209, § 14.10[2][b].

²⁴⁰ 871 F.2d at 254.

²⁴¹ *Id.* at 262.

²⁴² *See, e.g.*, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 991 (2d Cir. 1975) (giving weight to the finding that 41,936 shares were sold to 22 U.S. residents); *Minorco*, 871 F.2d at 262.

²⁴³ *See* 871 F.2d at 262.

²⁴⁴ *See, e.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336–37 (2d Cir. 1972).

²⁴⁵ *See, e.g.*, *Minorco*, 871 F.2d at 262.

²⁴⁶ *See, e.g.*, *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (holding that extraterritorial jurisdiction did not exist under the effects test where the U.S. victims were merely the holders of a trust located

tims, on the other hand, are likely to be carried out without intermediaries and without requiring victims to leave their homes.²⁴⁷ In the vast majority of consumer frauds by foreign perpetrators against U.S. victims, the existence of substantial U.S. effects is practically a foregone conclusion.

The effects test thus provides a well-developed framework for determining whether a foreign business's transactions with U.S. consumers fall within the jurisdiction of section 5 of the FTC Act. Indeed, the FTC's recently proposed amendments to section 5, if adopted, would expressly provide for an approach comparable to the effects test established by the Second Circuit in *Schoenbaum*.²⁴⁸

Nonetheless, the effects test, more so than the conduct test, may raise genuine concerns of international law. The conduct test specifically requires some degree of conduct within the United States, and thus appeals to the broadly accepted principle of territorial jurisdiction.²⁴⁹ The effects test, on the other hand, may provide for jurisdiction over persons who have never set foot on U.S. soil and over conduct that took place entirely outside of the United States.²⁵⁰ Assertions of extraterritorial jurisdiction on this basis have in some cases led to "vigorous and repeated protest[s]" from foreign states.²⁵¹

To address these issues, international law has developed a doctrine known as "prescriptive comity" or, more commonly, "international comity," which refers to "the respect sovereign nations afford each other by limiting the reach of their laws."²⁵² The Supreme Court has suggested that the principle of international comity may limit extraterritorial application of U.S. laws, even where Congress has provided for extraterritorial application of the statute at issue and the effects test is satisfied.²⁵³ In *Hartford Fire*

in and organized under the laws of Luxembourg, as the fraud was against the trust, not the trust's investors).

²⁴⁷ See *supra* notes 4–10 and accompanying text.

²⁴⁸ See Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers Beyond Borders Act of 2005 (Safe Web Act), S. 1608, 109th Cong. § 3 (as introduced in Senate, July 29, 2005); see also *supra* notes 145–49 and accompanying text. Specifically, the proposed amendment would define the phrase "unfair or deceptive acts or practices" in section 5 to "include[] such acts or practices involving foreign commerce that . . . cause or are likely to cause reasonably foreseeable injury within the United States." Safe Web Act § 3.

²⁴⁹ See *supra* note 224 and accompanying text.

²⁵⁰ See, e.g., *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945).

²⁵¹ BORN, *supra* note 224, at 507 (noting that "[t]he target of much criticism has been the effects doctrine").

²⁵² Layne E. Kruse & Rebecca H. Benavides, *Subject Matter Jurisdiction in Federal Court in International Cases*, in *INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS* 133, 149–50 (David J. Levy ed., 2003) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993)).

²⁵³ See *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798 (1993). The notion that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" was espoused by the Supreme Court as early as 1804, in the case of *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). As noted by Justice Scalia in his

Insurance Co. v. California, the Court considered “whether certain claims against British reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct.”²⁵⁴ The Court noted that the defendants’ conduct clearly fell within the jurisdiction of the statute at issue (an antitrust provision)²⁵⁵ and that their conduct had “a direct, substantial, and reasonably foreseeable effect on domestic or import commerce.”²⁵⁶ The “only substantial question” that the Court faced was “whether there [was] in fact a true conflict between domestic and foreign law.”²⁵⁷ The defendants and the British Government, appearing as *amicus curiae*, contended that applying the Sherman Act to the British reinsurers “would conflict significantly with British Law.”²⁵⁸ The gravamen of this argument was that the defendants were unfairly facing liability in a U.S. court for conduct that took place in Britain and “was perfectly consistent with British law and policy.”²⁵⁹

The Court, in an opinion written by Justice Souter, soundly rejected the defendants’ argument, holding that “[n]o conflict exists . . . where a person subject to regulation by two states can comply with the laws of both.”²⁶⁰ Thus, where a court has otherwise properly asserted jurisdiction over extra-territorial conduct under the effects test, the Supreme Court established a high threshold for invoking concerns of international comity.²⁶¹ In other words, international comity is only relevant to the extent that the law of a foreign nation requires conduct that is forbidden under U.S. law.²⁶²

Hartford thus sharply limited the possible circumstances in which international comity might require a court to decline to exercise jurisdiction over conduct that occurred in a foreign nation.²⁶³ Even outside the realm of

dissent to *Hartford Fire*, “This canon is wholly independent of the presumption against extraterritoriality.” 509 U.S. at 815 (Scalia, J., dissenting) (internal quotation marks omitted).

²⁵⁴ 509 U.S. at 794–95.

²⁵⁵ The Sherman Act, 15 U.S.C. §§ 1–7 (2000) (as modified by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), Pub. L. No. 97-290, § 402, 96 Stat. 1246 (codified as amended at 15 U.S.C. § 6a (2000))). As discussed above, *see supra* notes 114–18, 157–64 and accompanying text, the FTAIA amended not only the Sherman Antitrust Act, but also the antitrust provisions (“unfair methods of competition”) of section 5 of the FTC Act, 15 U.S.C. § 45(a) (2000).

²⁵⁶ *Hartford Fire*, 509 U.S. at 796 n.23 (internal quotation marks omitted) (citing 15 U.S.C. § 6a(1)(A)).

²⁵⁷ *Id.* at 798.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 798–99.

²⁶⁰ *Id.* at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. e (1987)).

²⁶¹ See Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT’L L. 750, 754 (1995).

²⁶² See *id.*

²⁶³ See Kramer, *supra* note 261, at 758. Some commentators, as well as Justice Scalia, writing for the dissent, have criticized the Court’s analysis of the issue of international comity and argued that the majority oversimplified and misconstrued the Restatement of Foreign Relations Law. See *Hartford Fire*, 509 U.S. at 818–21 (Scalia, J., dissenting); Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J.

antitrust, *Hartford* will “obviously have force when applied to analogous statutes,”²⁶⁴ such as the antifraud provisions of the Exchange Act and thus, in all probability, those of the FTC Act.

Moreover, for those who worry that *Hartford* was imprudently and excessively restrictive in its treatment of international comity, there is reason to believe that the FTC would respect this principle in an extraterritorial consumer fraud case even if it were not mandated by the courts. Indeed, even critics acknowledge that, in the closely-related realm of antitrust,²⁶⁵ government enforcement agencies such as the FTC “routinely consider comity factors in the exercise of their prosecutorial discretion.”²⁶⁶

The implications of *Hartford* for the extraterritorial application of the antifraud provisions of the FTC Act are thus quite significant. Even more so than the allegedly anticompetitive conduct of the British reinsurers in that case, the conduct at issue in an FTC consumer fraud case is especially unlikely to be inconsistent with the law and policy of a foreign country.²⁶⁷ On the contrary, a defendant’s practices in an FTC consumer fraud case—which are generally not only “deceptive,” but also objectively dishonest or fraudulent²⁶⁸—are likely to be illegal, if not criminal, under the laws of a foreign nation.²⁶⁹ It is difficult to imagine that practices that are “deceptive”²⁷⁰ under the FTC Act would ever be compulsory under the laws of a foreign nation, as would be necessary, under *Hartford*, for a court to decline jurisdiction.²⁷¹

Nonetheless, in the context of securities law, some courts and commentators have invoked the principle of international comity as a basis for restricting the extraterritoriality of the antifraud provisions of the Exchange

INT’L L. 42, 49–50 (1995). Other commentators have suggested that *Hartford* is an exemplar of Supreme Court jurisprudence where the Court considered international law and “got the law right.” See Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT’L L. 53, 53 (1995).

²⁶⁴ See Kramer, *supra* note 261, at 758.

²⁶⁵ For a discussion of the intimate and sometimes intertwined relationship between the consumer fraud and antitrust provisions of the FTC Act, see discussion *supra* Part I.A.

²⁶⁶ See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563, 566 (2000). For a related discussion regarding Judge Bork’s comments in *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 n.3 (D.C. Cir. 1987) (Bork, J.), see *supra* notes 230–32 and accompanying text.

²⁶⁷ See *infra* note 269.

²⁶⁸ See *supra* notes 71–73 and accompanying text.

²⁶⁹ See *Riggs v. Palmer*, 115 N.Y. 506, 511–12 (1889) (“No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . or to acquire property by his own crime. These maxims are dictated by public policy, [and] have their foundation in universal law administered in all civilized countries”); George P. Fletcher, *Parochial Versus Universal Criminal Law*, 3 J. INT’L CRIM. JUST. 20, 31 (2005) (noting that “[f]raud, of course, is a universal crime”).

²⁷⁰ See *supra* notes 71–73 and accompanying text.

²⁷¹ See *supra* text accompanying note 262.

Act.²⁷² Otherwise, they have suggested, “foreigners [would] not be on notice as to when stringent federal securities laws may apply,” and “broad jurisdictional tests may deter some corporations from conducting any business in America, whether fraudulent or not, for fear of the application of strict U.S. securities laws.”²⁷³

These arguments are particularly unpersuasive, however, in the context of the antifraud provisions of the FTC Act. They fail to distinguish between, on the one hand, complex affirmative disclosure and registration requirements²⁷⁴ and, on the other hand, straightforward prohibitions against deception. These arguments imply that, because extraterritorial antifraud enforcement might compel certain economic actors to avoid the U.S. markets, Congress or U.S. courts should limit extraterritorial application of an antifraud statute. But this proposition is at odds with itself. Foremost in the international context, section 5 of the FTC Act is used to prohibit objectively dishonest, bad-faith, deceptive conduct that is likely (though not necessarily) criminal under the laws of most nations.²⁷⁵ A business that contemplates running afoul of such prohibitions is one that U.S. laws should seek not to accommodate, but to deter from participating in U.S. commerce. Concerns about the attractiveness of U.S. markets to non-U.S. actors simply are not applicable here.

Moreover, government agencies and the courts have implicitly recognized that this distinction—prohibitions against fraud versus affirmative disclosure and registration requirements—warrants potentially divergent levels of extraterritoriality. For example, under the Sarbanes-Oxley Act,²⁷⁶ the SEC has exempted foreign issuers from certain registration and disclosure requirements, but not the antifraud prohibitions.²⁷⁷ Similarly, the FTC has suggested that it did not intend for the disclosure requirements of the Franchise Rule to apply to foreign franchisees.²⁷⁸ As the Second Circuit commented in *Bersch*, “[i]t is elementary that the anti-fraud provisions of

²⁷² See *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) (Bork, J.) (“considerations of comity and foreign affairs . . . do not weigh heavily in this case but they may in others”); see also W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions*, 74 *FORDHAM L. REV.* 213 (2005).

²⁷³ Patterson, *supra* note 272, at 236 (citing Franklin A. Gevurtz, *The Globalization of Corporate and Securities Law: An Introduction to a Symposium, and an Essay on the Need for a Little Humility When Exporting One’s Corporate Law*, 16 *TRANSNAT’L LAW.* 1, 8 (2002)).

²⁷⁴ Cf. Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 *MICH. J. INT’L L.* 207, 247 (1999) (“[T]he perceived complexity of the U.S. regulatory system, coupled with concerns about the level of disclosure required, have made the U.S. securities markets somewhat less attractive to foreign issuers.”).

²⁷⁵ See *supra* note 269 and accompanying text.

²⁷⁶ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

²⁷⁷ See Kenji Taneda, Survey, *Sarbanes-Oxley, Foreign Issuers and United States Securities Regulation*, 2003 *COLUM. BUS. L. REV.* 715, 716.

²⁷⁸ See *supra* note 140 and accompanying text.

the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets."²⁷⁹

The Second Circuit reaffirmed this principle in *Minorco*, stating emphatically that, "the antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements."²⁸⁰ In addition to Second Circuit precedent, the *Minorco* court relied on a comment to section 416 of the Restatement of Foreign Relations Law, which notes that:

The reasonableness of the exercise of jurisdiction depends not only on the territorial links of a given activity with the United States, but also on the character of the activity to be regulated. Thus, an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.²⁸¹

This distinction is equally applicable in the context of the FTC Act. The consumer fraud prohibitions of section 5 thus warrant broader extraterritorial application than, for example, the disclosure and registration requirements of the Franchise Rule at issue in *Nieman*. While this principle might justify the ultimate outcome in *Nieman*—invalidating the extraterritorial application of the Franchise Rule—it certainly does not support the Eleventh Circuit's overly broad analysis in that case. Moreover, this principle confirms the soundness of applying the antifraud provisions of the FTC Act to foreign defendants' foreign conduct in cases where U.S. victims are defrauded, as would be permitted under the effects test.

CONCLUSION

More than six decades ago, the Seventh Circuit affirmed that the FTC Act provides jurisdiction for a federal district court to enjoin the operations of a U.S.-based operation victimizing consumers in Central and South America. More recent decisions, such as *Nieman*, have introduced significant and unnecessary confusion about whether the FTC Act may be applied to transnational transactions; but the *Branch* court's affirmative answer to that question in 1944 is no less applicable to the cross-border frauds of today.

The more challenging issue is not whether the consumer fraud provisions of the FTC Act may be applied to cross-border transactions, but under what circumstances. The conduct and effects approaches, developed by the U.S. Courts of Appeals in the context of securities fraud, provide a sound

²⁷⁹ See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir. 1975) (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1335–37 (2d Cir. 1972)).

²⁸⁰ *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989) (citing *Bersch*, 519 F.2d at 986; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416 cmt. a, n.2 (1987)).

²⁸¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416 cmt. a (citation omitted).

approach for determining whether a particular transnational matter falls within the jurisdiction of the consumer fraud provisions of the FTC Act. These approaches are particularly amenable to use under the antifraud provisions of the FTC Act, which (1) unlike those of the Exchange Act, are enforceable only by government plaintiffs, and not through a private right of action, and (2) prohibit deceptive practices, rather than compelling affirmative conduct, as does the FTC Franchise Rule at issue in *Nieman*. Indeed, if the *Nieman* court had given proper weight to these factors, the Eleventh Circuit could have arrived at the same ultimate outcome—invalidating the extraterritorial application of the Franchise Rule to a foreign franchisee—without imprudently rejecting the possibility that the statutory provisions of section 5 may ever be applied beyond the territorial borders of the United States.

Thus, the conduct and effects approaches developed to determine whether the antifraud provisions of the Exchange Act provide for jurisdiction over cross-border transactions should also be applied under the consumer fraud provisions of the FTC Act. Even if Congress were to pass the Safe Web Act as recently proposed by the FTC—and thus expressly provide in section 5 for statutory tests comparable to the conduct and effects approaches—courts should look to the well-developed precedents under the securities laws to guide their application of these provisions.

