The United States Law Week

INSIGHT: Fifth Circuit 'Home Cooking' Ruling Harms Future U.S. Trade Partners

By Thomas M. Wolf and Joseph M. Rainsbury
March 6, 2020, 4:00 AM

A Fifth Circuit ruling that failed to enforce a roughly $123 million Moroccan judgment against haircare and liquor tycoon John Paul DeJoria harms trade relations between the U.S. and foreign nations. The authors, attorneys at Miles & Stockbridge, say foreign businesses may choose not to trade with American companies if they cannot reliably enforce valid foreign judgments in American courts. The U.S. Supreme Court will soon decide whether to review the decision.

The U.S. often touts the "rule of law" as its most important export. But a recent federal appellate decision reveals to foreign countries that America does not practice the principles it espouses.

The opinion in *DeJoria v. Maghreb Petroleum Exploration S.A.* (5th Cir. 2019) (*DeJoria II*), shows that, with enough money and influence, an American judgment debtor can change the law retroactively to avoid having to pay a huge overseas judgment.

John Paul DeJoria—the multi-billionaire founder of the Paul Mitchell line of hair products and the Patrón Spirits Company—started an oil company in Morocco. When the company went belly up, investors cried fraud and sued DeJoria in Moroccan commercial court.

Although properly served, DeJoria declined to participate in the suit. The Morocco court heard the evidence and entered a $123 million judgment against him. The investors then sought to enforce their judgment in the U.S.

In the federal district court, DeJoria asserted five reasons why, under controlling Texas law, the court should not recognize the Morocco judgment. The district court agreed with one of them—finding that the judgment against DeJoria had not been rendered under a legal system with procedures compatible with due process. It credited DeJoria's claims that Morocco's King, Mohammed VI, may have pressured the Morocco court to render judgment in the plaintiffs' favor.

On appeal, a unanimous panel of the Fifth Circuit reversed. *DeJoria v. Maghreb Petroleum Exploration S.A.* (5th Cir. 2015) (*DeJoria I*). Procedurally, it refused to defer to the district court's factual findings, noting that the matter had been submitted on documentary evidence alone, which an appellate court could review as easily as a trial court.

Substantively, it held that the district court had improperly analyzed the fairness of DeJoria's particular case (which is *not* a ground for non-recognition), rather than whether Morocco's judicial system as a whole adhered to standards of due process (which is). *DeJoria I* also addressed—and rejected—DeJoria's other four arguments for non-recognition.

If at First You Don't Succeed, Change the Law

In any ordinary case, that would be the end of the line. The only thing left for the district court to do on remand was enter judgment for the plaintiffs.

But this was no ordinary case and DeJoria was no ordinary judgment debtor. Unable to convince the Fifth Circuit that his case fit within Texas's foreign-judgment-recognition statute, he spent a small fortune to persuade the Texas Legislature to change the statute to fit his case. Retroactively. Even though the Texas Constitution forbids retroactive legislation.

Shockingly, the scheme worked. The district court sat on the remanded case for months. In the interim, the Texas Legislature adopted DeJoria's lobbyists' revisions to the foreign-judgment-recognition law. Thereafter, the district court applied the new law and refused to recognize the Morocco judgment.

The matter was appealed to the Fifth Circuit a second time. This time, however, the Fifth Circuit affirmed, retroactively applying the new law to the preexisting record. Unlike his oil company, DeJoria's lobbying efforts turned out to be a great investment.

Mirror Image Decisions—Reversal of Reason

The Fifth Circuit's decision in *DeJoria II*—once again, unanimous—was a mirror-image of *DeJoria I*. *DeJoria II* applied federal law to determine the standard of review, whereas *DeJoria I* had applied state law.

- *DeJoria II* applied a highly deferential plain-error standard of review, whereas *DeJoria I* had used a *de novo* standard.
- *DeJoria II* found that the record supported DeJoria's claim that he could not obtain Moroccan counsel to represent him in the Moroccan proceedings, whereas *DeJoria I* had made exactly the opposite finding.
- *DeJoria II* credited DeJoria's arguments that the King of Morocco may have improperly influenced his case, whereas *DeJoria I* had determined that there was no factual basis for this claim.

Seldom has a single appellate court reversed itself on so many factual and legal issues in a single case.

Harm to Trade With U.S.

Although the *DeJoria II* panel provided rationales for its whipsawing on the facts and on the law, the case is likely to fuel cynicism about the ability of foreign judgment creditors reliably to obtain relief in American courts. That, in turn, will harm trade between the U.S. and foreign countries.

Consistent enforcement of validly obtained judgments is essential to the rule of law; it is the bedrock on which all contracts rest. Without the ability to enforce a judgment, a contract is just a piece of paper. Unfortunately, *DeJoria II* creates uncertainty about whether a judgment obtained in a foreign country can, as a practical matter, be enforced in American courts.

To an outside observer, *DeJoria II* makes the foreign-judgment-recognition process in America looks arbitrary, unpredictable, and subject to money influence. Even the same court—a U.S. Court of Appeals, no less—can reach opposite decisions in the same case on the same set of facts.

Decreased confidence in the ability to reliably enforce foreign judgments will increase the cost for American firms to do business with foreign counterparts. Foreign companies are likely to demand a litigation premium to offset the risk that they may not be able to enforce a valid foreign judgment in American courts. Or they will simply do business with firms from countries other than the U.S.

In *DeJoria II*, the Fifth Circuit acknowledged that the "whiff of home cooking … pervades the Texas side of this case" and that there was "deep irony in allowing DeJoria to contend he was denied due process in Morocco when it was his lobbying efforts that changed the rules of the game midway through the proceedings in the United States." But this was not just "deep irony," it was hypocrisy.

The DeJoria case is not over. The matter has been appealed to the U.S. States Supreme Court, which is currently reviewing the Moroccan investors' petition for writ of certiorari. Time will tell whether it will condone this unseemly case of "home cooking."

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Author Information

Thomas M. Wolf is a trial lawyer and principal at Miles & Stockbridge where he heads the firm's Richmond, Va., office. He focuses on complex business litigation, particularly in cases involving construction law, intellectual property, and international law.

Joseph M. Rainsbury is of counsel at Miles & Stockbridge in Richmond, Va., and focuses on appeals.

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