Due Process, Proper Jurisdiction

Enforcing U.S. Judgments

by Brett Harrison

It may come as a surprise to hear that, although the United States and Canada have entered into a number of bilateral agreements, there is no agreement that requires Canadian courts to enforce U.S. judgments. Until 1990, this meant that Canadian courts would not enforce a U.S. judgment unless a Canadian defendant had attorned (*i.e.*, voluntarily submitted) to the U.S. court's jurisdiction or was in the U.S. during the proceedings.

All this changed dramatically in 1990 when the Supreme Court of Canada ruled that Canadian courts *should* enforce foreign judgments—including default judgments—in any case where the foreign court has acted in accordance with due process and exercised proper jurisdiction over the case under its own rules.

Explaining this dramatic reversal, the Supreme Court observed that "[t]he business community operates in a world economy... Accommodating the flow of wealth, skills and people across state lines has now become imperative." Since then, Canadian courts faced with U.S. judgments have consistently found that the issuing U.S. courts have acted in accordance with due process.

Thus, the only issue that typically arises in enforcing a U.S. judgment is whether the U.S. court appropriately exercised jurisdiction. When a Canadian defendant has neither attorned to a U.S. court's jurisdiction nor been in the U.S. during the proceedings, Canadian courts ask whether there exists a "real and substantial connection" between the U.S. jurisdiction and the proceedings. In applying this test, Canadian courts consider, among other factors, the connection between the jurisdiction and the parties, the matters in issue, and the damages.

This means that where a defendant is not actively involved in pursuing business in the U.S. jurisdiction, a real and substantial connection between the litigation and the foreign jurisdiction may not be found. Suppose a contract between a British Columbia party and an Ohio party is executed and performed in B.C.; the B.C. court may be reluctant to enforce a judgment from an Ohio court.

The Supreme Court has advised Canadian courts against mechanically applying these factors. Instead, courts are to view the factors as indicative of an overarching "order and fairness" requirement. Because "real and substantial connection" and "order and fairness" are inherently ambiguous concepts, this test continues to evolve through the case law.

Canadian courts will not enforce a U.S. judgment unless the judgment is final in the originating jurisdiction, but this does not mean that all appeals must be exhausted. However, it should be noted that if the foreign judgment remains subject to appeal, Canadian courts are likely to stay enforcement of its own judgment pending resolution of the U.S. appeal. A Canadian defendant is free to appeal the U.S. judgment in the U.S. even after the Canadian enforcement proceedings have begun. Consequently, plaintiffs are wise to wait until after all appeal periods have lapsed before seeking enforcement in Canada.

Although Canadian courts will not retry a matter on its merits, a Canadian defendant may raise a number of defenses regarding the U.S. judgment in the Canadian enforcement proceedings. These include:

- *The judgment was obtained by fraud.* In this very limited defense, the defendant usually must prove that the facts relied on to establish fraud were not available to the originating court.
- *The judgment was obtained in contravention of principles of natural justice.* Here, the defendant must establish some procedural irregularity. An example might be that the defendant was not notified that the U.S. proceeding had been commenced.
- *Enforcing the judgment would be contrary to public policy.* The defendant must establish that the foreign law underlying the judgment violates "essential morality" by contravening a fundamental principle of justice, the prevalent conception of good morals, or deep-rooted tradition. This argument would not likely succeed against a U.S. judgment.
- *The defendant was not a party to the foreign suit.* This simple factual question highlights the importance of ensuring that the party you are seeking enforcement against is the same entity you sued.

In addition to the above, British Columbia courts have refused to enforce foreign judgments that exhibit a manifest error. However, this exception is used infrequently. It should also be noted that due to Quebec's separate legal system based on the Civil Code, Quebec courts apply a slightly different regime for enforcing foreign judgments.

The lack of a reciprocal enforcement agreement between the U.S. and Canada requires plaintiffs to initiate a separate proceeding in the courts of the Canadian province where the defendant's assets are located to enforce the U.S. judgment. To do so, the plaintiff issues a Statement of Claim for the amount of the U.S. judgment, plus interest and costs. The Canadian court then grants a judgment enforceable against the Canadian assets. Although Canada's Constitution has no explicit "full faith and credit" provision comparable to the U.S. Constitution,

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company must make certain that its reps are aware of the pertinent regulations and new developments in the law and enforcement arena.

- Establish an effective system for tracking, compiling, and reviewing information about sales and marketing activities.
- Hire a full time compliance officer with the appropriate authority, funding, staff, and resources to perform his or her duties fully.
- Establish a compliance committee to oversee the compliance program.
- Have in place effective forms of communication, such as telephone hotlines, e-mails, suggestion boxes, newsletters, or other reporting mechanisms, where employees and non-employees can make anonymous, confidential reports to the compliance officer of violations of the company's policy and procedures by its sales representatives.
- Establish protocols for prompt documentation and investigation of reported matters to determine their veracity and the scope of the underlying problem.
- Implement an effective employee exit interview program designed to solicit information from departing employees with respect to potential misconduct and violations of company policy and procedures.

Conclusion

The federal government's unprecedented crackdown on alleged fraud and abuse in the pharmaceutical industry, as evidenced by criminal indictments of companies and individuals, hundreds of millions of dollars in fines and penalties, and multi-year corporate integrity agreements, has been a loud wake-up call for the industry regarding its sales and marketing activities. This crackdown has also startled the medical device industry, which is now, too, under increased scrutiny for alleged fraudulent and abusive practices in its sales and marketing activities. With every passing quarter, additional pharmaceutical manufacturers are disclosing in SEC filings that they are under civil and/or criminal investigation. This should come as no surprise as the Justice Department, the FBI and the Department of Health and Human Services have all identified fraud and abuse in the pharmaceutical and medical device industries as one of their top enforcement priorities.

The rapid onslaught of federal fraud and anti-check investigations should alert sales and marketing executives, compliance officers, and corporate counsel to the need for an in-depth understanding of those controls their companies can put in place to manage risk. In this dynamic environment of regulatory enforcement, questionable practices can trigger an investigation or prosecution by the government. The pharmaceutical industry must not soon forget the effect of the TAP litigation. **FD**

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presented a number of Outstanding Service Awards to board members and committee chairs for their devotion and hard work on behalf of the OADC. Honored were Michael Keester, Jacqueline Haglund, Cindy Sparling, John Sparks, Phil Richards, Karen Grundy, and Rusty Hendrickson. Finally, Mr. Starr recognized George F. Short with the Lifetime Achievement Award. Mr. Short, lead partner in the Oklahoma City law firm of Short, Wiggins, Margo & Butts, was honored for his many years of valuable service to the OADC and to the Oklahoma defense bar generally.

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Just imagine: an election without a meeting... no hotel negotiations, no menu planning, no no-show speakers, no complaining sponsors, no bills or refunds. Heaven!

And that is just what the **Oregon Association of Defense Counsel** experienced when it elected its new leaders by e-mail. The officers who began their terms on January 1 are James Edmonds of Clark, Lindauer, Fetherston, Edmonds & Lippold in Salem (president), Martha Hodgkinson, of Hoffman, Hart & Wagner in Portland (president-elect), and Mark Clarke of Frohnmayer, Deatherage, Pratt, Jamieson, Clarke & Moore in Medford (secretary-treasurer).

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Texas always goes first-class! The **Texas Association of Defense Counsel** January board meeting dinner was held at the Headliner's Club in Austin. Taking advantage of being in the capital, the board invited the members of the Texas Supreme Court to be its guests for the evening. Justices Craig Enoch, Stephen Smith, and Nathan Hecht, along with Attorney General Greg Abbott joined the TADC directors at the top of the Bank One Tower to enjoy the club's panoramic view of Austin, to exchange civilities, and to discuss the challenges facing the Texas legislature. **FD**

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Accident Reconstruction

When defending a motor vehicle collision case in which there has been a minimal impact, the defense attorney must reconstruct the accident and understand the forces that were generated. Defense counsel may be able to establish that the forces were not sufficient to reach the threshold values necessary for MTBI. This can be very persuasive evidence.

Most defense attorneys have, at one time or another, employed an accident reconstruction expert to assist in understanding how the motor vehicle accident happened. Accident reconstruction, along with biomechanics or the occupant kinematics, is important in cases involving traumatic brain injury, whether open head injury or close head injury. When the plaintiff claims brain injury as a result of a diffuse axonal injury (typically resulting from a rear end impact), evaluation as to the forces involved in the accident becomes essential.

Accident reconstruction is often overlooked in the defense of MTBI cases, especially if it is a clear case of liability such as a rear impact motor vehicle accident. However, it is a critical component of the defense of these cases and often can be the most crucial testimony.

Conclusion

The defense of mild traumatic brain injury claims requires a thorough understanding of the facts of the accident, medical records, neuropsychological tests, a review of the medical literature, and a reliance on good, helpful experts. Counsel will have to evaluate each case separately to determine whether a defense medical/psychological examination would be helpful. The reconstruction of the accident and the biomechanics can often be an important part of the defense of these cases. **FD**

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most Canadian provinces have enacted reciprocal enforcement legislation. These laws allow U.S. plaintiffs granted judgment in one province to enforce the judgment in other provinces without initiating separate proceedings.

Although most U.S. judgments are likely to be enforced by Canadian courts, U.S. plaintiffs who know that a Canadian defendant has significant assets in Canada might wish to consult Canadian counsel to develop an effective overarching litigation strategy before commencing proceedings in the U.S. **FD**