

“We’re Safe As Long As We Meet Outside The U.S.” And Other Fairy Tales About The Scope Of The U.S. Antitrust Laws

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When participants in a long-running price-fixing conspiracy met in the early 1990’s, they assured each other that they would escape attention from U.S. antitrust officials and avoid violations of the U.S. antitrust law as long as their meetings were held abroad. The conspirators could not have been more wrong. Ten years later, the price-fixers have been criminally prosecuted by the Department of Justice, paid a billion dollars in fines into the U.S. Treasury, and been sued in countless civil lawsuits by the customers victimized by their wrong-doing.

The case, *In re Vitamin Antitrust Litigation*, is an MDL Proceeding pending in the U.S. District Court for the District of Columbia. In a series of important rulings for multinational corporations, Chief Judge Thomas F. Hogan has systematically dismantled the notion that companies headquartered outside of the United States can violate the antitrust laws with impunity by simply conducting their conspiratorial activities abroad while targeting U.S. markets and customers.

Judge Hogan’s rulings, while well grounded in statutory and case law

authority, might come as a surprise to unsuspecting companies that operate abroad and assume that disputes they have with customers or competitors in foreign countries cannot be addressed in U.S. courts. The fact is that as companies go “global” they will increasingly find themselves subject to U.S. jurisdiction and thus U.S. discovery rules and procedures in international antitrust litigation.

Minimal Jurisdictional Nexus is Required

Plaintiffs and defendants located in the United States are accustomed to the fact that they may sue or be sued in the U.S. for conduct that occurs here. The federal antitrust laws expand the reach of federal jurisdiction to conduct occurring solely or primarily abroad as long as the conduct has a direct and demonstrable impact on U.S. commerce.

In the Vitamins Antitrust case, Judge Hogan has ruled that various European and Japanese corporations are subject to U.S. jurisdiction even though they have no operations of their own here, are not alleged to have committed acts in furtherance of the conspiracy in the United States, and may not have even sold vitamins in this country during the conspiracy. Judge Hogan also has

held that there is federal jurisdiction over the “foreign purchase” claims of U.S.-based corporations. This means that corporations that can demonstrate that their vitamin purchases abroad were either part of a “global purchasing strategy” or resulted in injury in the U.S. in the form of financial losses on the domestic corporations’ financial statements, they can sue for damages on those foreign purchases in federal district court.

In light of these rulings, U.S. corporations that do business abroad may have significant protections under U.S. law from the activities of foreign antitrust conspirators, and should consider whether they can establish the minimal nexus needed to bring their foreign disputes before a U.S. court. Foreign corporations doing business with companies like these should be prepared to litigate antitrust disputes here in the U.S. where there is some minimal connection between their conduct and U.S. consumers.

Foreign Companies Subjected to U.S. Discovery Rules and Procedures

It may not exactly be revolutionary for foreign corporations to be hauled into U.S. court to answer for injuries caused to domestic corpora-

tions, either in the U.S. or abroad. But, Judge Hogan has taken the somewhat unprecedented step of imposing the Federal Rules of Civil Procedure ("Federal Rules") on foreign defendants in the Vitamins Antitrust case.

In the Vitamins Antitrust case, the foreign defendants argued that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention") should govern the taking of jurisdictional and merits discovery from them because they are located abroad. Defendants contended that application of U.S. discovery rules, before a first resort to Hague Convention procedures, might offend international comity. Judge Hogan roundly rejected this argument, finding that use of Hague Convention procedures (which require use of letters of request, written deposition questions, and the involvement of consular officials in depositions) would unnecessarily inhibit plaintiffs' evidence-gathering. The court ultimately required the foreign corporations to produce their directors, officers and corporate representatives for depositions in the U.S. and to respond to plaintiffs' written discovery in accordance with the Federal Rules.

Again, these rulings have important ramifications for foreign corporations. Foreign companies can no longer assume that they will not be subjected to the same invasive, full-scale discovery that is typical in the U.S. If a foreign corporation does business in the U.S. or directs its anticompetitive conduct at U.S. markets or customers, its files and key employees may be open to

discovery under U.S. discovery rules and procedures. Additionally, opposing parties may not be required to avail themselves of the Hague Convention to gather evidence in support of their claims.

Protections Available Abroad May Not Apply

Judge Hogan not only ordered the foreign defendants in the Vitamins Antitrust case to comply with U.S. discovery rules, he rejected almost all of their claims that the unique privileges available in foreign countries insulate their documents from discovery in a civil case pending in the U.S.

The defendants argued, for example, that information they voluntarily provided to foreign antitrust agencies, such as the European Commission, are immune from discovery under foreign law. In the United States, it is undisputed that materials submitted to the Department of Justice in connection with an investigation are discoverable. For this reason, seasoned antitrust counsel in the U.S. will provide oral proffers in response to inquiries from the Antitrust Division but do not put anything in writing that might implicate their clients in wrongdoing. Unlike the Antitrust Division, the European Commission and other foreign antitrust agencies such as the Canadian Competition Bureau typically insist that parties provide written responses to investigative inquiries. While recognizing that the defendants might legitimately have assumed that their submissions to the European Commission would remain confi-

dential and immune from discovery, Judge Hogan nonetheless ordered the production of these submissions to the plaintiffs.

The prospect that a U.S. court will order a foreign corporation to produce materials that are privileged under the laws of their home country thus is a very real one, at least in international antitrust cases. Foreign corporations that sell products either directly or through U.S. subsidiaries to U.S. customers, accordingly, should use great caution in creating documents and assume that their documents (whether privileged or not abroad) will be discoverable if an antitrust dispute is litigated in a U.S. court.

Foreign corporations can no longer count on escaping the attention of U.S. antitrust regulators or avoid being hauled into U.S. courts for anticompetitive activity that injures American customers. Foreign corporations need not only comply with U.S. antitrust laws, they should expect to be treated just like any other party subject to the jurisdiction of the U.S. courts.

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