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Foreign Conduct and U.S. Antitrust Laws

March 18, 2013

On March 14, 2013, a U.S. district court jury in Brooklyn, NY returned a $54 million verdict for price-fixing against two Chinese vitamin C producers, Hebei Welcome Pharmaceutical Company Ltd ("Hebei Pharmaceutical") and North China Pharmaceutical Group Corp. ("North China Pharmaceutical").[1] Damages were trebled to $162 million, as required by U.S. antitrust law. The verdict is significant for at least four reasons:

First, it is the first time that Chinese companies, subject to the jurisdiction of United States courts, have been held liable for violations of the U.S. antitrust laws. ***Second***, it is noteworthy because these Chinese companies were held liable even though they asserted that a foreign sovereign (the Chinese government) had compelled their actions. ***Third***, it highlights the important differences between trial practice and the use of evidence in United States and Chinese courts. ***Finally***, it is a stark reminder that a civil jury trial adds another layer of complexity for foreign companies in U.S. antitrust cases because ordinary citizens are asked to determine the legal and economic issues of a business when deciding whether or not the defendant companies engaged in and are liable for the allegedly illegal conduct.

Background

Hebei Pharmaceutical, North China Pharmaceutical and three other Chinese pharmaceutical producers make approximately 80 percent of the world's supply of vitamin C. In 2005, Plaintiffs brought a class action lawsuit alleging that these five Chinese producers (collectively "Defendants")

conspired to fix prices of Vitamin C. The class consisted of vitamin C purchasers. The Defendants moved, unsuccessfully, to dismiss the case.

In August 2009, Defendants moved for summary judgment, asserting that they could not be held liable for the conduct at issue because they had been compelled to set prices by the Chinese government. Specifically, they claimed that China's complex regulatory system, through informal directives given by governmental agencies to "chambers" of Chinese companies, required the Defendants to take actions that allegedly violated U.S. antitrust laws.

To escape liability under the foreign sovereign compulsion doctrine, defendants must demonstrate that they were actually compelled by a foreign government to violate U.S. law, and as a result, there was no way they could have complied with both U.S. and foreign law.[2] In addition, the challenged action must have taken place outside the United States, and the foreign government must have been acting in its governmental capacity when it compelled the defendant to act as it did.

For the first time in a U.S. judicial proceeding, in 2006 the Chinese Ministry of Commerce filed an amicus brief in this vitamin C litigation (supporting Defendants' arguments) in which it offered its own analysis of Chinese legal requirements, to show that the Chinese trade policy compelled the Defendants to set prices and coordinate production. Nonetheless, in September 2011, U.S. District Judge Brian M. Cogan denied the motion because he concluded that, although Chinese government officials observed and/or had knowledge of discussions between the vitamin C manufacturers, the Chinese government had not actually ordered Defendants to fix prices.

In January 2012, Judge Cogan certified a class of Plaintiffs who had purchased vitamin C in the United States. In May 2012, one Defendant, Aland (Jiangsu Jiangshan) Nutraceutical Co., settled for $10.5 million. In September 2012, the four remaining Defendants moved to dismiss the price-fixing claim that had been brought under Section 1 of the Sherman Act by foreign purchasers within the Plaintiffs class. Defendants argued the foreign purchasers lacked jurisdiction because the contracts, under which vitamin C would be shipped to the U.S., were negotiated and entered between foreign buyers and sellers outside of the U.S. Judge Cogan rejected Defendants' argument by holding that Defendants' actions were directed at the U.S. import market because the contracts specifically provided for delivery into the U.S.

Jury Trial

On February 25, 2013, a jury trial began in the Eastern District of New York, in Brooklyn. The four remaining Defendants reasserted the foreign compulsion doctrine. According to news reports of the trial, Defendants' key witness was Mr. Qiao Haili, a retired Chinese Ministry of Commerce official who used to oversee vitamin C exports.[3] Remarkably, this was the first time a Chinese official had testified in a U.S. court.

Qiao told the jurors that he was responsible for implementing a "verification and chop" system whereby the vitamin C producers who complied with the restriction on minimum prices would receive a "chop," or official stamp that the Defendants needed in order to export their products. Qiao's testimony was undermined during the cross examination, however, by a July 2003 memo (which Qiao authored) stating that the export regulations were merely a "formality that only honest fellows will follow," and by contracts showing that Defendants had exported vitamin C without a chop.

On March 13, 2013, shortly before the jury began their deliberation, two Defendants -- Weisheng Pharmaceutical Co Ltd and China Pharmaceutical Group -- reached settlements for a total of $22.5 million. The jury deliberation only took half of a day, and on March 14, 2013, the jury returned a verdict in favor of the Plaintiffs for the full amount of damages that they had sought, a total of $162 million after trebling.[4]

Practical Significance

The case serves as a reminder to Chinese multinational companies, whether state-owned or state-directed, of the serious legal consequences that can flow from violations of the U.S. antitrust laws:

First, a foreign company's conduct taken abroad may still be subject to the reach of the U.S. antitrust laws because the relevant jurisdictional inquiry is, generally speaking, whether the alleged anticompetitive behavior was directed at and substantially affected the U.S. market, not where the challenged agreement was made.

Second, even foreign companies that engage in conduct exclusively outside of the U.S. will not necessarily find that the foreign sovereign compulsion doctrine renders their actions immune from U.S. antitrust liability.

Third, the U.S. trial system is fact-specific in ways that are different from the normal operation of the Chinese legal system: in the United States, discovery of evidence, the evidentiary burdens and the nature of trial practice are all more hospitable to the introduction of documentary evidence and its use on cross-examination.

Finally, in the U.S., antitrust class actions are tried to a jury of local area citizens who are empaneled to reach a verdict on the defendants' liability, thus reinforcing the importance of being represented by outstanding antitrust trial lawyers.

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[1] *In re Vitamin C Antitrust Litigation*, No. 06-md-1738 *(E.D.N.Y. 2013) (internal alterations omitted).
[2] For a more detailed analysis of the foreign sovereign compulsion doctrine and other similar defenses, *see* Benjamin Bradshaw, Julia Schiller and Ramesh Nagarajan, *Foreign Sovereignty and U.S. Antitrust Enforcement: Is "The State Made Me Do It" a Viable Defense?*, ABA

Antitrust Magazine (Summer 2012).

[3] Jan Wolfe, *Vitamin C Buyers Win Price-Fixing Trial Against Chinese Companies*, Litigation Daily (Mar. 14, 2013), **Click here**; Jessica Dye, *Vitamin C Buyers Question Chinese Official's Control Over Exports*, News & Insight (Mar. 7, 2013), Click **here.**

[4] Typically, an award such as this will be increased by the amount of the Plaintiffs' reasonable attorneys' fees and costs devoted to pursuing the case (an amount likely to total several million dollars) and decreased by the total amount of the prior settlements the Plaintiffs achieved (here, at least $33 million). Therefore, absent relief from the court on post-trial motions, the judgment that will be entered may be approximately $135 million.