New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 259—NO. 88

TUESDAY, MAY 8, 2018

ANTITRUST TRADE AND PRACTICE

Expert Analysis

SCOTUS Hears Arguments On Vitamin C Conspiracy

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It is rare for defendants to admit in federal court that they formed a cartel with the goal of raising prices, let alone escape antitrust liability for it. And yet, that improbable circumstance came to bear nearly two years ago when the Second Circuit immunized a self-professed Chinese vitamin C cartel from antitrust scrutiny. According to the Second Circuit, the vitamin C manufacturers were required by Chinese law to coordinate prices, creating a "true conflict" between regulations issued by China's Ministry of Finance and the Sherman Act. In such a situation, the Second Circuit found, "principles of comity" required the defendants be granted immunity from any potential antitrust liability.

As we reported last year, the Second Circuit's decision was instantly polarizing. Indeed, this January, the U.S. Supreme Court granted plaintiffs' petition for certiorari challenging the decision. The court heard oral argument on the matter two weeks ago; a decision is expected this summer. In the balance hangs a $153.3 million jury verdict against the manufacturer defendants. More broadly, the court's decision will help clarify whether the Sherman Act can be used to police anticompetitive behaviors that were supposedly compelled by foreign law.

> The court's decision will attract considerable attention and detailed examination from practitioners, governments, and businesses alike.

Background

In 2005, a group of American vitamin C purchasers sued four Chinese vitamin C manufacturers in the Eastern District of New York alleging violations of §1 of the Sherman Act. According to plaintiffs, the manufacturer defendants formed a price-fixing cartel in 2001, which, in turn, led to four-fold increases in global vitamin C prices. The manufacturers were able to successfully raise prices, plaintiffs alleged, because of their considerable market power. In 2001, the manufacturers accounted for nearly 60 percent of all global vitamin C sales and nearly 100 percent of all sales made by manufacturers capable of producing vitamin C for cheaper than $4.5-$5 per kilogram.

From the outset of litigation, it was clear the manufacturers intended to employ a novel defense strategy. In both their motion to dismiss and

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summary judgment motion, the manufacturers admitted that they had conspired to fix prices. Despite this, they argued they should escape liability because their behaviors were required by Chinese law. As such, they sought immunity under three affirmative defenses: the act of state doctrine, the foreign sovereign compulsion doctrine, and the doctrine of comity.

Central to each of these defenses was the assertion that the Chinese government required the defendants to restrict supply, coordinate prices, and maintain price-floors. In support of this claim, defendants submitted an amicus brief filed by the Chinese government in which it stated that, under Chinese law, each manufacturer was required to have all of its vitamin C export contracts approved by a state-run trade association. If the price of an export contract fell beneath a predetermined price floor, the association had the right to rescind that manufacturer's export license. Relying on the Supreme Court's decision in *United States v. Pink,* the defendant manufacturers argued the district court was required to accept the Chinese government's characterization of its own laws.

Plaintiffs disagreed, citing Rule 44.1 of the Federal Rules of Civil Procedure, which states that courts "may consider any relevant material or source" when determining the laws of a foreign country. While plaintiffs acknowledged the district court could look to the Chinese government's statement for guidance, they argued it was not required to blindly accept the Chinese government's claims because they were not credible. For example, plaintiffs offered evidence that the association's "minimum price floor" was set at $3.5 per kilogram, whereas defendants had coordinated selling at much higher prices. Plaintiffs also pointed to previous statements in which the Chinese government claimed it played no role in setting the export price for vitamin C.

The district court denied the defendants' motions for dismissal and summary judgment, holding that Rule 44.1 superseded *United v. Pink*'s general rule that foreign government statements must automatically be taken at face-value. Instead, the district court endorsed its previous finding in *Karaha Bodas* that a foreign government statement was "entitled to substantial deference, but would not be taken as conclusive evidence of compulsion." The district court found that the evidence provided reason to believe the defendant manufacturers voluntarily engaged in the price-fixing scheme. As such, the district court ruled that the manufacturers could be held liable for violating American antitrust laws and allowed the case to proceed to trial. After a three-week trial, a jury found the manufacturer defendants guilty of all charges and awarded damages of $54.1 million ($153.3 million after trebling and reduction of prior settlements).

> At this stage, it appears that the justices themselves do not have a clear view of what the right rule should be or how it will be formulated.

The Second Circuit Reverses

On appeal, the Second Circuit focused its analysis on whether the principle of comity prevented the district court from exercising jurisdiction over the case at the motion to dismiss stage. The Second Circuit explained that the answer depended on the "degree of conflict between the U.S. and foreign law." If a "true conflict" existed—meaning the manufacturers could not simultaneously comply with American and Chinese law—the district court should have abstained from the case on comity grounds.

To determine whether a "true conflict" existed, the Second Circuit needed to determine how much weight to give to the Chinese government's amicus submission. The Second Circuit disagreed with the district court's interpretation of Rule 44.1, because it "explicitly focuses on what a court may consider when determining foreign law,

but it is silent as to how a court should analyze the relevant material or sources." Because the Second Circuit interpreted *United States v. Pink* to prioritize a foreign government's official interpretation of its own law over all other sources, it held the district court should have deferred to the Chinese government's amicus brief. The amicus demonstrated a "true conflict" existed between U.S. and Chinese law, therefore the Second Circuit reversed and remanded the case back to the district court for dismissal on the grounds of international comity.

On to SCOTUS

Plaintiffs successfully petitioned the Supreme Court for certiorari. In addition to the parties' briefs, the court received amicus filings from both the Chinese and American governments.

The court held arguments on April 24, 2018, during which the justices focused extensively on the implications of allowing district court judges to interpret foreign law without limiting principles. As Justice Breyer noted, "the characteristic of a federal judge is he knows very little, if anything, about the law of 192 countries." With that in mind, he questioned what standard "900 judges … [would] follow when they get submissions form the highest legal authorities … without producing some kind of international chaos?" Likewise, Justice Alito suggested a ruling for plaintiffs would either create a standard where district courts would give "respectful consideration to [a foreign government's] submission … [but] will decide what the law is" or a standard where the district court would "determine whether the submission is reasonable, and if it is reasonable, [would] regard it as conclusive." Counsel for the plaintiffs and the State Department—appearing as amicus curiae—did not propose a standard, but maintained the district court needed to exercise some discretion in interpreting foreign government submissions.

Despite this, many justices appeared to agree with plaintiffs' position. For example, after inquiring whether any other governments provided the United States with complete deference in its interpretation of American law, Justice Kagan pointedly asked counsel for the Chinese government, also appearing as amicus curiae, "How can you say that the only thing that shows respect to foreign governments is to do something that we don't know that any other foreign nation does?" Likewise, Justice Kennedy questioned whether *United States v. Pink* actually required absolute deference to foreign government submissions. The *Pink* court's decision to accept the Russian government's findings, Justice Kennedy noted, came after a "careful assessment that the [Russian government's] position [was] reliable and accurate." Importantly, he observed, the *Pink* court "didn't say accept it every time."

Conclusion

At this stage, it appears that the justices themselves do not have a clear view of what the right rule should be or how it will be formulated. As Justice Breyer candidly admitted, "I'm having a serious problem, as you could tell, as to what words to put in this opinion." Given Justice Breyer's long-held belief that the court should look to foreign law in a variety of contexts, his difficulty likely speaks to a broader uncertainty among the Justices regarding how sweeping or narrow their decision should be.

Regardless of what words he and his colleagues settle on, the court's decision will attract considerable attention and detailed examination from practitioners, governments, and businesses alike. Indeed, the implications of the decision reach well beyond the confines of antitrust doctrine. In an era of increasing global commerce, *Animal Science Products v. Hebei Welcome Pharmaceutical Co. Ltd.* may set the ground rules for a broad range of cross-border disputes for years to come.

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