

Chinese Vitamin Defendants Prevail Again, Showing Limits of U.S. Antitrust Law's Extraterritorial Reach

AUGUST 17, 2021

Last week, the United States Court of Appeals for the Second Circuit reversed—for the second time—the decision of the United States District Court for the Southern District of New York that awarded treble damages to the plaintiffs in a class action suit alleging that four Chinese exporters of Vitamin C violated U.S. antitrust laws. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, No. 13-4791-cv, Dkt. No. 324-1 (2d Cir. Aug. 10, 2021). The decision shows us that, while U.S. antitrust law has a long reach, there are limits. In this case, the limitation was international comity—an exception that is applicable only in the rarest of cases.

Background

In 2013, a jury found a number of China-based companies liable for coordinating the supply and prices of Vitamin C exported to the United States. The district court entered a trebled damages award of nearly \$150 million. On appeal, the Second Circuit reversed, dismissing the case and holding that the district court was bound to defer to the explanation of Chinese law that was submitted in the lawsuit by the Ministry of Commerce of the People's Republic of China, which said that Chinese law compelled the defendants to engage in the alleged conduct.

Later, the Supreme Court reversed the Second Circuit, concluding that it had afforded too much deference to the Chinese government. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018). The Supreme Court remanded the case to the Second Circuit, instructing it to consider, but not to defer conclusively to, the Ministry's statement.

Recent Second Circuit Decision

Now the Second Circuit has reversed and dismissed the action yet again. The court found again that Chinese law did require the defendants to engage in the conduct at issue. But this time, the court looked beyond the statement that the Ministry submitted in the lawsuit, and considered the evolution of the regulations in the Vitamin C industry in China, including the formation of a Vitamin C Coordination Group, whose members were the exclusive exporters of Vitamin C. The members were obligated to comply with all regulations from the Ministry, including voluntarily

adjusting their production outputs and coordinating on export prices, which were set by the Chamber of Commerce of Medicines & Health Products Importers & Exporters (the Chamber).

The court found that additional Chinese records substantiated that finding, including administrative materials detailing the Chamber's price coordination role in the Vitamin C industry, as well as contemporaneous industry records and notes from the Vitamin C Coordination Group meetings, which all corroborated the finding that Chinese law required coordination on supply and prices.

Finally, the court examined (again) the submissions that the Ministry had made during the case and concluded that they confirmed its finding that Chinese law required the defendants to coordinate and fix prices. All of this resulted in the court's conclusion that it was impossible for the defendants to comply with U.S. antitrust law and Chinese law, and, therefore, a "true conflict" existed—requiring deference to Chinese law under principles of international comity.

Additionally, the court looked at the:

- Nationality of the parties and site of anticompetitive conduct—all in China.
- Effectiveness of enforcement and alternative remedies—the consequences of enforcing the judgment were uncertain and did not impact the court's decision.
- Foreseeable harms to American commerce—the only factor that weighed against dismissal because the harm to American commerce was foreseeable.
- Reciprocity—"the U.S. government would undoubtedly expect the Chinese court to recognize a valid defense that U.S. law required the American exporter's conduct."
- Possible effect upon foreign relations—China was greatly concerned about the case, while the U.S. State Department had not participated or even signaled its view.

Takeaways

While the defendants in the Vitamin C situation are on the winning side of this latest decision, they had to engage in years of expensive and burdensome litigation to get there, with the help of a very narrow and rarely applicable defense, and yet another appeal to the Supreme Court still remains possible.

It is advisable for companies operating abroad who import products to the U.S., or whose products otherwise may make their way into the U.S., to seek guidance of U.S. and home-based counsel before engaging in conduct that is such an obvious violation of U.S. antitrust laws: price-fixing, market allocation, customer allocation, and/or bid-rigging. With appropriate guidance, it may be possible for companies positioned like those in the Vitamin C case to avoid years of litigation trauma and expense by proactively addressing these and similar issues on the front end.

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