Three Antitrust Cases To Be Heard by High Court

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It's shaping up to be a busy term for antitrust issues at the U.S. Supreme Court. The Court on January 12 decided to review a third antitrust case.
In the context of a price fixing action against foreign vitamin C manufacturers, the Court will consider "whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law" or must defer to the foreign government's legal statement. Earlier this term, the justices agreed to weigh in on the appealability of a denial of state action immunity, and consider a joint state effort to challenge so-called "anti-steering" rules that prohibited merchants who accepted American Express cards from directing customers to alternative credit card brands.

Foreign compulsion, comity. The most recent issue to be taken up by the Court involves a Second Circuit decision that vacated a district court judgment against Chinese vitamin C manufacturers for fixing prices. Animal Science Products and other U.S. purchasers of vitamin C alleged that Hebei Welcome Pharmaceutical and other Chinese manufacturers and exporters of vitamin C conspired to fix the price and supply of vitamin C sold to U.S. companies on the international market in violation of the Sherman Act. The federal district court in New York City rejected the defendants' motion for judgment as a matter of law, ruling that that the doctrines of act of state and international comity did not bar plaintiffs' suit. After a jury trial, the court entered judgment, awarding the plaintiffs approximately $147 million in damages and enjoining the defendants from engaging in future

anticompetitive behavior.

In September 2016, the U.S. Court of Appeals in New York City vacated the judgment and reversed the order denying the manufacturers' motion to dismiss. It said that the case presented the question of what laws and standards control when U.S. antitrust laws are violated by foreign companies that claim to be acting at the express direction or mandate of a foreign government. The appellate court addressed how a federal court should respond when a foreign government, through its official agencies, appears before that court and represents that it has compelled an action that resulted in the violation of U.S. antitrust laws.

The Second Circuit concluded, that because the Chinese government had filed a formal statement in the district court asserting that Chinese law required the defendants to set prices and reduce quantities of vitamin C sold abroad and because the manufacturers could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case.

Animal Science petitioned the Supreme Court for review, arguing that the Chinese government had mischaracterized its own law in asserting that the Chinese companies' anti-competitive behavior was required by Chinese law. The petitioners pointed to statements that the manufacturers' anti-competitive agreement was self-regulated and voluntarily adopted without government intervention.

The petition presented three questions for the Supreme Court: (1) whether the Second Circuit, in conflict with decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. §1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits; (2) whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit); and (3) whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.

The Court said that it would consider the second question presented. The U.S.

Solicitor General filed an amicus brief in November 2017, arguing that the Court should grant the petition solely on the question of whether a federal court determining foreign law under Fed. R. Civ. P. 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law. The Solicitor General argued that a foreign government's characterization of its own law is entitled to substantial weight, but was not conclusive. The government said that the case raised an important and recurring issue (*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, Dkt. 16-1220).

State action immunity. The Supreme Court also agreed to review of a decision of the U.S. Court of Appeals in San Francisco rejecting an interlocutory appeal of a federal district court order denying a motion to dismiss monopolization charges on state action immunity grounds because the collateral order doctrine did not allow immediate appeal of such an order as it was not considered a final decision.

The petition for *certiorari* asks whether orders denying state action immunity to public entities are immediately appealable under the collateral-order doctrine and highlights a split among the circuits on this issue. The Fifth and Eleventh Circuits have held that state action immunity is an immunity against suit rather than a mere defense against liability, and concluded that if a denial of state action immunity cannot be appealed immediately, then in effect it cannot be appealed at all. The Fourth and Sixth Circuits, and the Ninth Circuit in this case, have held that the interlocutory denial of state action immunity to a public entity is not immediately appealable (*SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District*, Dkt. 17-368).

Anti-steering rules. In October 2017, the Court granted a petition brought by 11 states seeking a review of a Second Circuit ruling that the Department of Justice and the states failed to prove that "anti-steering" rules that prohibited merchants who accepted American Express cards from directing customers to alternative credit card brands violated Section 1 of the Sherman Act.

In 2010, the Justice Department and 17 states filed suit against the country's three largest credit and charge card transaction networks. A February 2015 decision of the federal district court in Brooklyn, New York, in favor of the Justice Department and the states, and an order prohibiting American Express (AmEx) from enforcing these nondiscriminatory provisions (NDPs) in contracts with merchants, were reversed and remanded by the Second Circuit in September 2016, with instructions

to enter judgment in favor of AmEx.

The petition asked: “Under the ‘rule of reason,’ did the government’s showing that AmEx’s anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift the burden of establishing any procompetitive benefits from the provisions?”

The Justice Department declined to participate in the appeal and initially asked the Supreme Court to reject the states’ petition, arguing that the case does not satisfy the Court’s traditional *certiorari* standards. While the Justice Department agreed with the states that the district court’s findings established a *prima facie* case that the anti-steering rules unreasonably restrain trade, and that the Second Circuit had erred in holding otherwise, it nevertheless argued against the Supreme Court taking the cases. Specifically, the Justice Department argued that the decision was based almost entirely on the “two-sided” nature of the credit-card industry, and neither the Supreme Court nor any other circuit had squarely considered the application of the antitrust laws to two-sided platforms, as such.

After the Court agreed to hear the case, the Justice Department filed a brief, contending that the Court should vacate the judgment holding that the government failed to establish a prima facie case. On remand, the appellate court could consider any challenges that Amex properly preserved to the district court’s holding that Amex failed to establish
sufficient procompetitive justifications for the anti-steering rules, according to the Justice Department.

The case is set for argument on February 26, 2018 (*State of Ohio v. American Express Company*, Dkt. 16-1454).