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SECOND CIRCUIT REVIEW

Expert Analysis

Recent Decisions Limit Application Of U.S. Law to Foreign Jurisdictions

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Two recent decisions by the U.S. Court of Appeals for the Second Circuit demonstrate the court's increasing hesitation to apply U.S. law to foreign jurisdictions. In *Waldman v. PLO*, Nos. 15-3135-cv, 15-3151-cv, 2016 WL 4537369 (2d Cir. Aug. 31, 2016, and *In re Vitamin C Antitrust Litigation*, No. 13-4791-cv, 2016 WL 5017312 (2d Cir. Sept. 20, 2016), the court relied upon recent Supreme Court jurisprudence to continue the trend of narrowing the extension of U.S. law to foreign jurisdictions. In each case, the court vacated a nine-figure jury award, relying on jurisdictional precedents and international comity to limit the reach and application of U.S. law.

'Waldman v. PLO'

In *Waldman*, the Second Circuit held that the district court lacked personal jurisdiction over the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA) for claims brought under the Anti-Terrorism Act (ATA) for various terror attacks in Israel between 2002 and 2004 that killed or wounded the American plaintiffs or their family members. The district court had reached a different conclusion, holding that the activities of the PLO's mission in Washington, D.C.—which consisted of maintaining an office in Washington, promoting the Palestinian cause in speeches and media appearances, and retaining a lobbying firm—provided "a sufficient basis to exercise general jurisdiction over the defendants."

> The court relied upon recent Supreme Court jurisprudence to continue the trend of narrowing the extension of U.S. law to foreign jurisdictions.

The district court also held that "traditional notions of fair play and substantial justice" were satisfied by the "strong inherent interest of the United States and plaintiffs in litigating ATA claims in the United States" and the inability of defendants to "identify an alternative forum where plaintiffs' claims could be brought, and where the foreign court could grant a substantially similar remedy." And in denying the PLO's and PA's motions for reconsideration, to certify the jurisdictional issue for an interlocutory appeal, and for summary judgment, the district court rejected arguments that the Supreme Court's decision in *Daimler v. Bauman*, 134 S. Ct. 746 (2014), compelled a different result. The court found that this action presented an "exceptional case" where general personal jurisdiction was appropriate. At trial, the jury found the PLO and the PA liable and awarded the plaintiffs damages of $218.5 million, which was automatically trebled under the ATA to a total award of $655.5 million.

On appeal, the Second Circuit concluded that the district court had misread the Supreme Court's Daimler ruling with respect to the federal courts' general jurisdiction. In *Daimler*, the Supreme Court considered whether a California federal court had general personal jurisdiction over claims against Daimler, a German corporation, arising from the activities of an Argentina-based subsidiary. Although Daimler had an indirect U.S. subsidiary that engaged in continuous activities in California, Daimler was not incorporated in California and did not have its principal place of business there. The Supreme Court thus concluded that Daimler could not be considered "at home in California" and subject to general jurisdiction there.

Applying this "fairly regarded as at home" standard articulated in *Daimler*, the Second Circuit in *Waldman* concluded that the PLO and PA are "at home" in the Palestinian territory where they govern. The Second Circuit also held

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that the district court "erred in placing the burden on defendants to prove that there exists an 'alternative forum'" where claims could be brought against them. Rather, the court noted that "it is the plaintiff's burden to establish that the court has personal jurisdiction over the defendants."

The Second Circuit also held that there was not specific jurisdiction over the defendants. Although the attacks that underlay the plaintiffs' claims were "unquestionably horrific," the court noted that the attacks occurred entirely abroad and that the "indiscriminate violence" was not targeted specifically at Americans. As a consequence, the court concluded that there was not a "sufficient connection…of these torts by these defendants…to this jurisdiction."

Antitrust Litigation

In *In re Vitamin C Antitrust Litigation*, the Second Circuit took a somewhat different path to limiting the jurisdictional reach of federal courts to hear claims against foreign defendants. In that case, U.S. vitamin C purchasers alleged that two Chinese-incorporated vitamin C manufacturers had conspired "to fix the price and supply of vitamin C sold to U.S. companies on the international market in violation of Section 1 of the Sherman Act and Sections 4 and 16 of the Clayton Act." The defendants moved to dismiss the complaint on the basis that they were required by Chinese law to coordinate price and limit supply of vitamin C to the international market and thus the principle of international comity required the district court to abstain from exercising jurisdiction in this case.

Their motion was supported by an amicus brief filed by the Ministry of Commerce of the People's Republic of China, which asserted that Chinese law required the defendants to "set prices and reduce quantities of vitamin C sold abroad." This filing was unprecedented—the Chinese government had never before presented its interpretation of its own laws and regulations as an amicus.

Nevertheless, the district court denied the defendants' motion to dismiss because it did not credit the Chinese government's interpretation of its own laws as definitive and permitted discovery to proceed into whether Chinese laws compelled the defendants to take the actions that plaintiffs alleged violated the federal securities laws. The defendants subsequently moved for summary judgment on the same grounds; the district court denied that motion as well, choosing to credit the testimony of plaintiffs' Chinese law expert, who contradicted the Chinese Ministry of Commerce's interpretation of Chinese law and testified that Chinese law did not compel defendants to coordinate price and limit supply.

After a trial in March, 2013, a jury found defendants liable for violating Section 1 of the Sherman Act, and the district court awarded plaintiffs approximately $147 million in damages and permanently enjoined defendants from further anti-competitive conduct in the vitamin C market.

The court in 'In re Vitamin C Antitrust Litigation' concluded that, because "defendants could not comply with both U.S. antitrust laws and Chinese law regulating the foreign export of vitamin C, a true conflict exists between the applicable laws of China and those of the United States" and the district court must abstain from asserting jurisdiction on comity grounds.

On appeal, the Second Circuit focused its analysis on whether there was, in fact, a conflict between Chinese law and policy, and the U.S. antitrust laws. Given the concrete position staked out by the Chinese government as amicus curiae, this question largely turned on "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 held that "when a foreign government…directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements."

Thus, the court concluded that, because "defendants could not comply with both U.S. antitrust laws and Chinese law regulating the foreign export of vitamin C, a true conflict exists between the applicable laws of China and those of the United States" and the district court must abstain from asserting jurisdiction on comity grounds. The court was careful, however, to note that plaintiffs may still seek relief from the executive branch, "which is best suited to deal with foreign policy, sanctions, treaties, and bi-lateral negotiations."

Conclusion

In *Waldman* and *Vitamin C*, the Second Circuit vacated respective judgments of $655 million and $147 million and ordered the cases be dismissed. These decisions reflect judicial appreciation for the delicacy of matters that directly implicate foreign regulatory regimes and diplomacy. For litigants, they serve as a stark reminder that careful consideration should be given when dealing with litigation in which U.S. laws may be applied to foreign parties.