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New York's Highest Court Limits the Extra-Territorial Application of New York's Antitrust Laws

In a recent decision that provides clarity as to the limits of the Donnelly Act, New York's antitrust statute, the New York Court of Appeals (New York's highest court) reversed the Appellate Division and affirmed the trial court's dismissal of a complaint based on actions occurring entirely outside the United States.

The Court, in *Global Reinsurance Corp.-U.S. Branch* v. *Equitas Ltd.*, No. 53, 2012 WL 995268 (N.Y. Mar. 27, 2012), rejected a claim by the New York branch of a German reinsurance company that British retrocessionaires (essentially providers of reinsurance for reinsurers) and their common claims handling agent, Equitas, had violated the Donnelly Act by centralizing in Equitas the handling of certain retrocessional non-life claims in the global market, and that this centralization suppressed competition in claims management practice. The Court dismissed the Donnelly Act claim because (1) plaintiff had failed to allege the necessary impact on competition in a global market; and (2) the alleged conspiracy was purely extra-territorial and there was no sufficient nexus between the alleged conspiracy and competition in New York State, and so the Court lacked jurisdiction under the Donnelly Act.

The decision is important for two reasons. First, it shows that New York courts will examine market definition and market power allegations at the pleading stage, notwithstanding prior case law that suggests a reluctance to do so. Second, and perhaps more importantly, plaintiffs will not be able to avoid the territorial limitations on federal antitrust claims by bringing state antitrust claims instead, at least in New York.

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Plaintiff Global Reinsurance Corporation-U.S. Branch ("Global"), the New York branch of a German reinsurance company, had purchased coverage for various risks from British retrocessionaires. This coverage had been issued through the Lloyd's of London insurance marketplace. In the past, Lloyd's had been characterized by significant competition between individual insurance syndicates trying to obtain new business and payment of retrocessionary claims without haggling to encourage clients to sign up. As a result of poor underwriting practices and inadequate assessments of risk in the 1980s, liabilities under this coverage mounted at an alarming rate in the early 1990s. The syndicates proved unable to respond to this impending crisis, in part because of their past claims payment practices and unwillingness to haggle with their customers.

To deal with this crisis, the syndicates proposed the formation of a reinsurer in which they would pool their relevant assets and which would handle already-existing problematic retrocessionary liabilities. This new entity, which would seek no new business, would be in perpetual run-off, and would be free to adopt a more aggressive approach to the handling of claims. This proposal was reviewed by the UK and EU regulatory authorities and found

unobjectionable. (The proposal was also submitted for comment to various US government agencies, including the New York State Department of Insurance, which registered no objection.) The result of the proposal was the creation of defendant Equitas.

The dispute arose when plaintiff Global's coverage for its non-life risks was ceded by Lloyd's syndicates to Equitas. Instead of receiving the easy and straightforward handling of claims Global expected, it faced aggressive handling by Equitas. Global alleged such hardships as Equitas "holding payments due hostage to concessions by plaintiff and imposing extraordinarily onerous documentation requirements."[1] Global commenced an arbitration proceeding against its underwriters and brought this Donnelly Act antitrust claim against Equitas in New York Supreme Court (New York's trial court).[2] At the heart of Global's antitrust claim was the allegation that as a result of the centralization in Equitas, "there ceased to be any competitive disincentive to the adoption of sharp claims management practices" and that this "suppress[ed] competition in the delivery of a crucial component of the retrocessional non-life coverage product, namely, claims management."[3]

The trial court dismissed the Donnelly Act claim because an assertion of market power within a well-defined market was essential to a Donnelly Act claim, Global's complaint failed to allege that retrocession coverage offered through Lloyd's of London was a viable submarket, and Global could not allege defendants had market power within a global market. *Global Reinsurance Corp.-U.S. Branch* v. *Equitas, Ltd*., 24 Misc.3d 264, 876 N.Y.S.2d 325 (Sup. Ct. N.Y. Co. 2009). The Appellate Division reversed, reinstating the Donnelly Act claim with respect to a global market, concluding that, liberally construed, the complaint did allege that Lloyd's syndicates were capable of unilaterally raising prices for retrocession coverage within that global market. *Global Reinsurance Corp.-U.S. Branch* v. *Equitas, Ltd.*, 82 A.D.3d 26, 921 N.Y.S.2d 1 (1st Dep't 2011).

The Appellate Division rejected defendants' alternate argument for dismissal that the New York courts lacked subject matter jurisdiction under the Donnelly Act because the alleged conspiracy did not have sufficient direct effects on the domestic market. 921 N.Y.S.2d at 9. Although the Court was prepared to assume that the federal Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which limits the reach of the federal antitrust laws to foreign conduct having a "direct , substantial and reasonably foreseeable effect" on domestic commerce, applied to Donnelly Act claims also, the Court held plaintiff's allegation that the New York branch had entered into insurance contracts and submitted claims to be sufficient to allege such an effect at the pleading stage.

The Court of Appeals reversed. It concluded that the complaint alleged a global market for retrocessional coverage, there was no legally cognizable submarket confined to Lloyd's underwriters, and there was no allegation of market power within the global market attributable to Lloyd's underwriters. It noted that while it might be true, as the complaint alleged, that Lloyd's might be the most efficient vendor of retrocessional coverage, might set the benchmark for terms of coverage, and might be otherwise desirable, none of these

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[1] *Global Reinsurance Corp.-U.S. Branch* v. *Equitas Ltd.*, No. 53, 2012 WL 995268, slip op. at 5 (N.Y. Mar. 27, 2012).

[2] A claim for tortious interference with contractual relations was dismissed by the Supreme Court.

[3] *Global*, 2012 WL 995268 slip op. at 6-7.

allegations would justify a claim that Lloyd's could at will generally engage in "run-off" style claims management and still retain its business in a global market.

Further, the Court also held that the Donnelly Act does not extend to the alleged foreign conspiracy at question. The Court emphasized the essentially foreign nature of this claim, with the only New York connection that a New York branch of a German reinsurer bought the retrocessional coverage in London.

The Court noted that Global's claim would not be reached by the Sherman Act because of territorial limits contained in the FTAIA.[4] The Court held that the pleadings failed to allege that the conspiracy targeted United States commerce specifically or had a substantial effect on United States commerce, and the pleadings also failed to allege harm to competition in the United States. If the federal Sherman Act could not reach this conduct, then, the Court concluded, neither could New York's Donnelly Act. The Court noted that the federal limits on the Sherman Act would be "undone if states remained free to authorize 'little Sherman Act' claims that went beyond it."[5]

The Court held that even if the Sherman Act could reach the alleged conspiracy, the Donnelly Act still could not, as Global's claims were a "purely extra-territorial conspiracy" and therefore there would "have to be a very close nexus between the conspiracy and injury to competition in this State" to allow an assertion of jurisdiction by New York.[6] The Court was unwilling to assume that New York legislators had meant for the state antitrust law to cause such a "highly intrusive international projection of state regulatory power now proposed."[7]

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum may be addressed to any of the following:

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[4] 15 U.S.C. § 6(a).

[5] *Global*, 2012 WL 995268 slip op. at 17.

[6] *Id.* at 19.

[7] *Id.*

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