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Five Principles of Common Sense Why Foreign Plaintiffs Should be Allowed to Sue Under U.S. Antitrust Laws

By Michael D. Hausfeld*

I want to thank Loyola for creating this forum and you for coming to it. Trial lawyers basically go out of their way to contort themselves to get questions posed in a way that they have to be answered yes or no. I personally prefer the way our moderator, Spencer Waller, entitled this particular discussion, “Foreign Plaintiffs in U.S. Courts.” Why not? And, at that point, I guess I could sit down and just let it ponder.

What I’d like to do is to give you what I call the five principles of common sense. Something I understand that, for either young lawyers and even older lawyers, is anathema to most everyone, but one to which I have a particular affinity. And, it applies, I think, extremely well in response to the question why foreign plaintiffs in U.S. courts.

I. One World Market with One Set of Rules

As many of you may not remember looking around the audience, there used to be a time when there was a corner grocery store and corner pharmacy among the top shoppers, they used to say, where you could go in, buy your goods, not pay, didn’t need a credit card, take out a little piece of paper, write down your name and how much you owed, that would be the end of it. But, as you know, this is a global economy. We’re dealing with global businesses. There is a Wal-Mart mentality to the fact that you can take any business, anywhere, at any time, either through the Internet, through other forms of technology, and you can dump that business globally. In certain industries, in certain markets, the trade is uniform,

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internationally. The conduct is uniform globally.

You will get a number of players from different areas that transcend political boundaries with the sole purpose and intent of affecting trade. And then you have the fact that the condemnations—and I focus on discussion of price fixing cartels—condemnation of price fixing cartels is uniform. It's global. There virtually is no, and the term is "civilized nation," that does not condemn the adverse consumer welfare effects of price fixing cartels.

We are in an integrated world for certain that cannot be disjoined between or by political boundaries. There is no longer a U.S. market, a European market, an Asian market, an African market, for example, in some commodities. There is one world market. In fact, as one of the cartel documents indicated in one particular commodity, there is "one set of rules" for the world. That's the mindset. Principle number 1.

II. Impact

Principle number 2 is impact. By the way, with regard to the one integrated market, there is a recognized equilibrium in that one market so that you cannot fix prices in one subarea of the world market without knowingly impacting prices throughout the remainder of the market. And, to avoid imbalances in their own product market, you, the cartel, not only have to agree on what prices you're going to charge and where, but then you have to adjust prices worldwide to maintain an equilibrium throughout your world market.

Common sense principle number 2—impact. The fact of impact in these global price fixing cartels is uniform. Every purchaser, regardless of where they're located, is impacted by the cartel to some degree. The amounts may differ by application of different principles by the cartel or by foreign exchange rates, but the fact of impact is uniform.

Do you really think that these captains of industry are just looking for nice places to visit and grand hotels to stay in? When they put out their spreadsheets and they lay out the world and say, 'okay, what should the prices be in Asia, in Africa, in South America and Australia and Europe,' they are doing it because they don't intend to impact? And, what do you feel that these captains of industry are doing when they come back the next month or the next quarter and review those charts and say, 'wait a minute, you didn't increase your price in Asia, you didn't increase your price the way we agreed in Africa'? What they are doing is making sure that what was agreed

upon was in fact implemented, so that there was the impact intended globally.

III. Deterrence

Third principal of common sense—the policy consideration of deterrence, and particularly with the U.S. courts. Is there effective deterrence if in fact you either minimize private enforcement and/or isolate U.S. enforcement?

Essentially, to effectively utilize the maximum enforcement of U.S. antitrust laws, they have to deter the cartel conduct. What does the cartel do when it looks at whether or not it may have to pay single, double, triple, whatever damages in the United States if in fact it understands that it has no exposure in the remainder of the world?

An example, in the vitamins cartel, it's estimated that the vitamins market in the United States was only 25 percent of the world market. So, why not as a good business say, okay, I'll take the risk, I'll lose 25 percent of my excess profit or my ill-gotten gains, I'll cap it. If I get caught, I'll pay back in the United States, but I pay 75 percent in the rest of the world and I've kept it for 10 years.

So, if you accept the fact that private enforcement is a complementary mechanism to public regulation, then private enforcement has to be a means by which to affect deterrence. And, if it is a means of affecting deterrence, if it has significant loop holes by, for example, not aggregating the entire cost of the cartel then, in effect, you are subjecting each and every victim of the cartel to the cartel continuing or other cartels beginning because they understand the basic economics, cost benefit analysis, 'I only risk so much if I only have to respond in the United States.'

IV. Judicial Efficiency

Then we have the fourth common sense factor, judicial efficiency. And, you are all looking at me saying, what is he talking about? These are global cartels. When a cartel is prosecuted either by the government in the United States or in private litigation in the United States, it doesn't focus on U.S.-based discovery only. In fact, most of the discovery comes from outside the United States. What does that mean? It means that, for purposes of judicial economy, you have got one court basically compiling and evaluating and adjudicating evidence from outside the United States concerning the existence, nature, scope, and impact of a global conspiracy. Precisely the same four issues for the most part have to be litigated everywhere

else in the world if, in fact, you have to bring litigations everywhere else in the world.

Let's not be naive about this. What the cartels are playing is a shell game, again attempting to reduce their risk. They are saying, 'okay, I'll get caught in the United States and, yes, virtually the same evidence that will be discovered against me in the United States will be necessary in order to establish viability and damage outside the United States. But you know what? Let the plaintiff in each jurisdiction have to sue me. I'll beat them in some; I'll lose in others. Overall, I'll probably benefit.' There is, in essence, a sound judicial management argument on a global basis that exists with regard to a single prosecution of a single cartel that applies its rules of conduct singly throughout the world.

V. The Need for a Single Set of Rules

And, then we have the last principle of common sense. You have been reading lately about the need, in response to globalization, for rules of law. And, for example, in the accounting field, that applies to having every jurisdiction utilize the same principles for measuring whether companies are reported in an accounting method that would be ethical.

Likewise, in mergers and in acquisitions, countries are seeking to try to integrate their principles so that one body of regulators does not differ from any other body in terms of interpreting what are the requirements and elements for the appropriate merger or acquisition. The world is looking, in essence, for a single set of rules that apply to what is generally known now as free trade.

If you are going to have a single set of rules, then why shouldn't there be one set of rules with respect to the operation of price fixing cartels globally? If you do that, in essence, you have leveled the playing field on a competitive market, not at the price fixer's level, but at the level below, because each purchaser, regardless of where they may be purchasing, is on the same competitive level as each other purchaser since they all know they're going to be able to recover the damages caused by the cartel.

VI. Conclusion

Those in my judgment are the five principle, common sense reasons that foreign people should be allowed to sue under the U.S. antitrust laws for the effects of price fixing cartels.