Broad Discovery of Wholly-Foreign Activities Upheld in U.S. Antitrust Price Fixing Action

Magistrate Judge James O'Hara of the U.S. District Court for the District of Kansas recently ordered defendants in the *In re Urethane* multidistrict price-fixing litigation to produce documents in response to discovery requests even if the documents relate exclusively to foreign commerce.* Judge O'Hara's decision is the latest in a series of antitrust rulings permitting discovery pursuant to Federal Rule of Civil Procedure 26(b)(1) of materials pertaining to foreign conduct that, by itself, would not support a claim under the Sherman Act. *In re Urethane* is a cautionary reminder that the Sherman Act's jurisdictional limitations, codified by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), do not delimit the broad scope of discovery permitted under the federal rules.

Background and Ruling

The *In re Urethane* litigation involves an alleged conspiracy to fix the prices of Polyether Polyol products in the United States. The class plaintiffs sought discovery not only of material relating to U.S. commerce, but also of information concerning solely non-U.S. markets. Under the Supreme Court's 2004 interpretation of the FTAIA in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, the Sherman Act's reach is limited to conduct that both (i) has a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce; and (ii) gives rise to the plaintiff's injury. Therefore, at least some of the "foreign" discovery the plaintiffs sought concerned conduct that itself could not give rise to a Sherman Act claim. Invoking *Empagran*, defendants objected to discovery, contending that "documents that reflect matters clearly outside of U.S. or global commerce are not relevant and are not reasonably calculated to lead to the discovery of admissible evidence." (*p.* 20).

Judge O'Hara rejected defendants' *Empagran*-based relevancy argument, observing that discovery under Rule 26 is not limited to conduct that can form the basis of a claim. Rather, Judge O'Hara explained, Rule 26 broadly permits discovery "'regarding any non-privileged matter that is relevant to any party's claim or defense.'" (*p.* 22). Wholly-foreign conduct, even if not reached by the Sherman Act, might be relevant to an actionable Sherman Act claim. For example, material relating solely to non-U.S. markets might help plaintiffs demonstrate (i) defendants' joint commitment to fix prices in the U.S.; (ii) defendants' ability to engage in domestic price fixing or the mechanisms employed by defendants to fix prices; (iii) the identity of conspirators; (iv) the dates of collusive behavior; and/or (v) the identity and location of other persons having discoverable information (*pp.* 25-28). As illustrated by Judge O'Hara: "a document showing a foreign meeting between representatives of two defendants held shortly before defendants each announced a U.S. price increase of Polyether Polyol products could be used by plaintiffs as circumstantial evidence of the conspiracy, even if the face of the document indicates that the subject of the meeting was a discussion of urethane sales to markets in Africa." (*p.* 29).

Judge O'Hara also rejected defendants' assertion that *Empagran's* restrictions on the Sherman Act's application to foreign conduct applied with equal force to discovery, explaining that "nothing in the FTAIA or *Empagran* precludes discovery of documents or information related to foreign commerce that are relevant to antitrust claims alleging a domestic injury." (*pp.* 30-32). As Judge O'Hara noted, his ruling comported with those issued by other courts since *Empagran*. Moreover, according to Judge O'Hara, recognizing the potential relevance of wholly-foreign conduct is consistent with the justifications for

*The citation for this case is *In re Urethane Antitrust Litig.*, No. 04-1616, 2009 U.S. Dist. LEXIS 71135 (D. Kan. Aug. 11, 2009), and specific references to it will be indicated by page numbers in parentheses at the end of a sentence or quote.

permitting broad discovery in price-fixing cases: "Broad discovery is permitted because direct evidence of an anticompetitive conspiracy is often difficult to obtain, and the existence of a conspiracy frequently can be established only through circumstantial evidence, such as business documents and other records." (*p.* 24; internal quotations omitted). Having rejected defendants' *Empagran* argument, Judge O'Hara also rejected defendants' undue burden objection to discovery as supported only by "conclusory allegations," and defendants' overbreadth argument as without basis.

Implications

In re Urethane is an important reminder that the breadth of discovery under Rule 26 is informed by, but not coterminous with, the Sherman Act's substantive scope. As long as material relating solely to foreign markets is relevant to proving an actionable Sherman Act conspiracy, even materials relating to "wholly foreign" activities potentially can be discoverable. As Judge O'Hara explained, it is fairly straightforward to hypothesize how activities occurring entirely outside of U.S. commerce might be relevant to proving a conspiracy that gives rise to in-U.S. anticompetitive effects. *In re Urethane* thus illustrates the critical importance of countering discovery of foreign activities with persuasive arguments of undue burden. Although the *In re Urethane* defendants made only "conclusory allegations" of undue burden, the scope of permissible discovery is not limitless. Future defendants are well advised to take up the court's invitation to "present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request" (*pp.* 10), when objecting to discovery of foreign activity. And of course, proposals to limit discovery based on undue burden should result in a net decrease, not increase, in the burdens associated with production.

In addition to arguments based on undue burden, parties confronted with discovery directed to foreign conduct might have other defenses—for example, based on the relationship between the entity that is subject to suit and the entity that holds material to which discovery is directed. To the extent plaintiffs seek discovery of materials held by an *affiliate* of the defendant that is located outside of the United States, a common scenario, a defendant potentially might object to production by arguing that the sought-for materials are not within defendant's "possession, custody, or *control*" (Fed. R. Civ. P. 45(a); emphasis added). The consensus among U.S. courts is that "control" equates to the legal right to obtain documents on demand. Accordingly, in most circumstances, courts may order foreign affiliates of U.S. companies to produce documents only to the extent the U.S. corporation/defendant would itself have the legal right to demand the documents from the affiliate. Evidence of that "legal right" to demand documents might include the existence of "an ownership interest, a binding contract, a fiduciary duty, or some other legally enforceable arrangement" (*Micron Technology, Inc. v. Tessera, Inc.* (N.D. Cal. 2006)), and such discovery is proper only if documents normally flow freely between parent and subsidiary.

Courts are split on the circumstances under which a subsidiary may "control" its parent. Some courts will undertake a fact-intensive analysis and ask only whether the U.S. subsidiary has a legal right to demand documents from its parent. For instance, in *Micron Technology, Inc. v. Tessera, Inc.*, the court ignored the existence of overlapping management teams and an assertion that the U.S. defendant would "in the ordinary course of business have access to the documents" being sought, emphasizing instead that the subsidiary and parent were "separate legal entities" and that "[t]here is no evidence of any contract between the two companies that gives [defendant] the right to demand documents" from the parent.

If a legal right of access does *not* exist, a number of courts conduct an additional inquiry that asks whether the affiliate could as a practical matter obtain access to the sought material. Depending on the nature of the subsidiary-parent relationship involved, a defendant considering such an objection thus should be prepared to introduce evidence that the companies are contractually or otherwise prohibited from exchanging the sought material, any agreements or other facts highlighting the independence of the companies, and/or any evidence tending to show that, as an operational matter, the companies do not exchange the sought material.

Conclusion

The breadth of discovery recognized by *In re Urethane* does not expand the conduct that can form the basis of a Sherman Act claim. Nonetheless, given the ease with which plaintiffs can articulate the theoretical relevance of wholly foreign conduct to conduct that causes in-U.S. anticompetitive effects—as illustrated by the court's order—*In re Urethane* places relatively more weight on other arguments for limiting discovery, including among others undue burden and lack of control over foreign affiliates. Accordingly, firms that operate in multiple jurisdictions and that potentially are subject to discovery in U.S. antitrust actions should be prepared to develop and deploy these more nuanced arguments to seek to confine discovery, rather than rely on the Sherman Act's applicability only to conduct that causes direct, substantial, and reasonably foreseeable effects on U.S. commerce.

For more information, please contact an attorney from Ropes & Gray's Antitrust Group or your existing Ropes & Gray attorney.