Boarding a Flight with Foreign Based Discovery for the Holidays

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In the spirit of holiday travel, the Plaintiffs in *Park v. Korean Air Lines Co.,* 2009 U.S. Dist. LEXIS 107647 (C.D. Cal. Nov. 18, 2009) brought a motion to compel discovery regarding tickets purchased in South Korea to show price fixing.

As quickly as you can say "What's your clearance, Clarence?" the parties in *Park* entered the world of foreign-based discovery.

Federal Rule of Civil Procedure Rule 26(b) provides that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Park,* at *4, citing Fed. R. Civ. P. 26(b).

Seeking discovery from foreign parties in electronic discovery can be a minefield when it comes to foreign privacy laws. Luckily, this was not one of those cases.

The Plaintiffs wanted the foreign discovery to help determine when the Defendants' price fixing conspiracy ended. *Park,* at *4-5. Federal case-law vindicates the relevancy of foreign discovery in antitrust litigation for this purpose. Examples include the following:

Documents relating to meetings or communications with competitors outside the U.S. may be relevant to establish conspiracy. *Park,* at *5, citing *In re Urethane Antitrust Litigation,* 2009 U.S. Dist. LEXIS 71135, at *21, *24 (D. Kan. Aug. 11, 2009).

"Evidence of foreign price-fixing among Defendants would also be material to prove that they had the opportunity and ability to engage in domestic price-fixing for automotive refinishing paint." *Park,* at *5, citing, *In re Automotive Refinishing Paint Antitrust Litigation,* 2004 U.S. Dist. LEXIS 29160, *12 (E.D. Pa. Oct. 29, 2004)

Discovery may be relevant to show "how the conspiracy was maintained for the length of time alleged." *Park,* at *5, citing, *In re Vitamins Antitrust Litigation,* 2001 U.S. Dist. LEXIS 8904, at *64 (D.D.C. June 20, 2001).

However, merely showing foreign discovery is relevant is only part of the analysis. The parties have to determine discovery protocols, which might include agreeing on custodians or limiting discovery to individuals with decision-making authority. *Park,* at *6, citing *In re Urethane Antitrust Litigation,* 2009 U.S. Dist. LEXIS 71135 (D. Kan. Aug. 11, 2009) and *In re Vitamins Antitrust Litigation,* 2001 U.S. Dist. LEXIS 8904 (D.D.C. June 20, 2001).

In *Park,* the parties did not meet and confer on these issues. *Park,* at *6.

The Court ordered the parties to meet and confer on the foreign-discovery regarding pricing decision in South Korea and the United States.

The parties were directed to discuss custodians, search terms and ways to reduce the volume of electronically stored information that would be both searched and produced. *Park,* at *7. While it was not stated, the parties should also consider which litigation support software to use with foreign language capabilities.

Bow Tie Thoughts

Holiday travel can be stressful, with long lines and individuals who are not used to airports and flying. Electronic discovery can also cause nightmarish stress with large volumes of email, Excel files and lawyers who are trying to review native files like they were in box of paper one document at a time. Leveraging litigation support software which can sort by custodians, dates and keywords can focus the review on the discovery that matters.

Parties are well served in determining decision makers, custodians, search terms and data reduction strategies in any situation dealing with electronically stored information. Focusing on these issues at the intake of a case reduces costs and control the volume of discovery. Such diligence can also reduce the feeling of being trapped on a runway for 3 hours.