The $24 Billion Judgment Against China in Missouri's COVID Suit

This article was written by Prof. William S. Dodge (George Washington University Law School) and first published on Transnational Litigation Blog. The original version can be found at Transnational Litigation Blog. Reposted with permission.

On March 7, 2025, Judge Stephen N. Limbaugh, Jr. (Eastern District of Missouri) entered a default judgment for more than $24 billion against the People's Republic of China and eight other Chinese defendants for hoarding personal protective equipment (PPE) during the early days of the COVID pandemic in violation of federal and state antitrust laws. The Eighth Circuit had previously held that the Foreign Sovereign Immunities Act (FSIA) barred most of Missouri's claims but that the hoarding claim fell within the act's commercial activity exception.

Missouri now has the judgment against China that it wanted. But Missouri may find that judgment hard to enforce. As discussed below, there appear to be significant procedural problems with the judgment that at least some defendants might raise. More broadly, the properties of foreign states and their agencies or instrumentalities are entitled to immunity from execution under the FSIA. Immunity from execution is broader than immunity from suit, and it is not clear that any of the defendants have property in the United States that can be used to satisfy the judgment.

The Defendants and the Claims

On April 21, 2020, Missouri brought four COVID-related claims against nine Chinese defendants: the People's Republic of China, the Chinese Communist Party, the National Health Commission, the Ministry of Emergency Management, the Ministry of Civil Affairs, the People's Government of Hubei Province, the People's Government of Wuhan City, the Wuhan Institute of Virology, and the Chinese Academy of Sciences. The original complaint asserted four claims under Missouri tort law: (1) public nuisance, (2) abnormally dangerous activity, (3) breach of duty by allowing the transmission of COVID, and (4) breach of duty by hoarding PPE. The district court initially held that all the claims were barred by

the FSIA, but the Eighth Circuit reversed on the hoarding claim.

The FSIA governs the immunity of foreign states and their agencies and instrumentalities from suit in federal and state courts, as well as the immunity of their properties from execution to satisfy judgments. Some of the FSIA's provisions distinguish between foreign states and their political subdivisions on the one hand and their "agencies or instrumentalities" (including "organs" and majority state-owned companies) on the other. Other provisions extend the same immunities to both categories.

Of the nine defendants, the Eighth Circuit held that seven of them were part of the Chinese state. China itself is clearly a foreign state, and its National Health Commission, Ministry of Emergency Management, and Ministry of Civil Affairs are part of the state. The People's Government of Hubei Province and the People's Government of Wuhan City fall into the same category because they are political subdivisions. "The Chinese Communist Party may look like a nongovernmental body at first glance," the court of appeals wrote, but it is "in substance" the same body that governs China and therefore properly considered part of the state. The remaining two defendants, the Wuhan Institute of Virology and the Chinese Academy of Sciences, are legally separate from the Chinese government "but still closely enough connected" to qualify as "organs" and thus as "agencies or instrumentalities" of a foreign state covered by the FSIA.

Under the FSIA, all nine defendants are immune from suit in the United States unless an exception to immunity applies. The Eighth Circuit found that only one exception applies—the commercial activity exception in 28 U.S.C. § 1605(a)(2)—and that it applies only to Missouri's claim for hoarding PPE. The court reasoned that hoarding was the kind of activity that private parties can engage in and that the complaint sufficiently alleged that the hoarding had a direct effect in the United States.

After the Eighth Circuit's decision, I pointed out some of the difficulties that Missouri would face on remand trying to prove its tort claims, including whether Missouri law applied under Missouri choice-of-law rules, whether Missouri law established a duty of care for these defendants, whether the defendants breached any such duty of care, and whether any such breach was the actual and proximate cause of Missouri's damages. I don't know whether Missouri's attorney general reads TLB, but on the eve of trial Missouri changed the legal basis for its

hoarding claim from common-law tort to federal and state antitrust law. Antitrust claims are not subject to state choice-of-law rules.

The District Court's Judgment

The Chinese defendants decided not to appear and defend against Missouri's claims. Section 1608(e) of the FSIA provides: "No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This provision is supposed to ensure that the U.S. court does not simply accept the plaintiff's allegations and instead tests the evidence to make sure that judgment is warranted. Some courts have held, however, that they may accept as true a plaintiff's "uncontroverted evidence." That is what Judge Limbaugh did here.

Relying on the plaintiff's evidence, the district court concluded that "China engaged in a deliberate campaign to suppress information about the COVID-19 pandemic in order to support its campaign to hoard PPE from Missouri and an unsuspecting world." The court noted that local officials closed schools and quarantined doctors and patients in December 2019, while at the same time other officials were denying that COVID could be spread between human beings. The district court further concluded that "Defendants engaged in monopolistic actions to hoard PPE through both the nationalization of U.S. factories [in China] and the direct hoarding of PPE manufactured or for sale in the United States." The court pointed to evidence that China stopped exporting PPE and started importing a lot of it.

The court found the evidence sufficient to establish liability for monopolization under federal antitrust law. Pursuant to 15 U.S.C. § 15c, Missouri's attorney general was also permitted to bring a federal antitrust claim *parens patriae* on behalf of the citizens of Missouri. The court also found the evidence sufficient to establish liability for monopolization under Missouri antitrust law, which the court noted is to be construed "in harmony with" federal antitrust law.

Relying on an expert report on damages submitted by Missouri, the court found

that between 2020 and 2051 Missouri either had lost or would lose $8.04 billion in tax revenue because of the impact of China's hoarding of PPE on economic activity. The court further found that hoarding caused Missouri to spend an additional $122,941,819 on PPE during the pandemic. The court added these amounts and multiplied by three—because federal and state antitrust laws permitted treble damages—for a total damages award of $24,488,825,457.

Problems with the District Court's Analysis

I see a number of problems with the district court's analysis. First, the court treated the defendants as an undifferentiated group, seemingly following Missouri's supplemental brief, which refers simply to the nine defendants collectively as "China." But the individual defendants in this case knew different things and did different things (and Missouri does not appear to have argued that there was a conspiracy allowing the acts of one defendant to be attributed to the others). The fact that local officials seem to have been aware that COVID could be transmitted from human to human, for example, does not establish that the central government knew this. Indeed, a U.S. intelligence report in 2020 found that local officials hid information about the virus from Beijing. Similarly, the fact that the central government was nationalizing PPE factories, limiting exports, and buying PPE abroad does not show that the Wuhan Institute of Virology or the Chinese Academy of Sciences was doing so.

Second, the damages calculations seem fanciful. The opinion contains no discussion of causation. How can one disentangle the impact of China's hoarding PPE on Missouri from other factors that contributed to the spread of the pandemic there, for example the fact that Missouri was among the last states to adopt a stay-at-home order? Establishing hoarding's impact on Missouri's economy and derivatively its impact on Missouri's tax revenues is fraught with complications, especially when estimates are projected to the year 2051.

Third, the court failed to consider whether trebling damages is allowed under the FSIA. Section 1606 provides that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." In other words, while the FSIA allows the trebling of damages against the Wuhan Institute of Virology and the Chinese Academy of Sciences, it may not allow the same against

China itself or the other governmental defendants.

But China did not make any of these points, or others that it would undoubtedly have thought of, because it decided not to appear. The China Society of Private International Law did file two amicus briefs, but the district court did not mention them. I can understand China's reluctance to submit to the authority of a U.S. court (including to the discovery of evidence) in a case that it no doubt feels is politically motivated. But the decision not to appear gave Missouri an enormous advantage.

What Happens Now?

So, what happens now? There are probably many possibilities, but I will discuss just three: (1) the possibility that some of the defendants might seek to set the judgment aside for improper service; (2) the possibility of enforcing the judgments against the defendants' property in the United States; and (3) the possibility of similar suits in other states.

A Rule 60(b) Motion Addressing Service of Process?

China could move to set aside the judgment under Rule 60(b)(4) on the ground that the judgment is void for lack of subject matter jurisdiction. The factors that made China decide not to appear in the first place would likely dissuade it from raising all the issues that it could raise in a 60(b) motion. But it might make sense for some of the defendants to raise service of process in such a motion, particularly the Wuhan Institute of Virology and the Chinese Academy of Sciences, which, as explained below, are likely to be the most vulnerable to enforcement of the judgment.

The FSIA has rules for serving foreign states and their agencies or instrumentalities. For foreign state and their subdivisions, Section 1608(a) lists four means of service that must be tried in order. In this case, the first three were not available. (China refused to execute a request for service under the Hague Service Convention on the ground that doing so would infringe its sovereignty, as Article 13 of the Convention allows it to do.) So, the district court ordered service through diplomatic channels, which was then made on all the defendants except

the Chinese Communist Party, the Wuhan Institute of Virology, and the Chinese Academy of Sciences. I see no defects in service here.

With respect to the remaining three defendants, the district court authorized service by email pursuant to Rule 4(f)(3). There are three problems with this. First, the district court treated the Chinese Communist Party as a non-governmental defendant for purposes of service, but the Eighth Circuit later held that it is instead a foreign state for purposes of the FSIA. After the Eighth Circuit's decision, Missouri argued that its service on China through diplomatic channels should count as service on the Chinese Communist Party as China's alter ego. Judge Limbaugh seems to have accepted this assertion without discussion, but the Communist Party could certainly raise the issue in a Rule 60(b) motion.

The second problem is that Rule 4(f)(3) allows a district court to order alternative means of service only if those means are "not prohibited by international agreement." As Maggie Gardner and I have explained repeatedly, the Hague Service Convention prohibits service by email, at least when the receiving state has objected to service through "postal channels" as China has done. District courts are divided on this, however, and Judge Limbaugh cited a number of district court cases holding (wrongly) that email service is permitted. A Rule 60(b) motion raising this point would be unlikely to convince him, but it might succeed on appeal to the Eighth Circuit.

The third problem is that service by email in this case is inconsistent with the FSIA. For agencies and instrumentalities, like the Wuhan Institute of Virology and the Chinese Academy of Sciences, Section 1608(b)sets forth the permitted means of service. It appears that the first two were not available and that the district court relied on Section 1608(b)(3)(C), which allows service "as directed by order of the court *consistent with the law of the place where service is to be made*" (emphasis added). But Chinese law does not permit private parties to serve process by email.

When this issue arose after the Eighth Circuit's decision, Missouri argued that the language of Section 1608(b)(3)(C) "is nearly identical to Federal Rule of Civil Procedure 4(f)(3), which Missouri previously invoked in its request to serve WIV and CAS by email." This was misleading. Rule 4(f)(3) refers to means of service that are "not prohibited by international agreement," whereas Section

1608(b)(3)(C) refers to means of service that are "consistent with the law of the place where service is to be made," that is Chinese law. Even if service by email were permitted by the Hague Convention—which, as discussed above, it is not—that would not establish that service by email is consistent with Chinese law. Judge Limbaugh did not address this issue in his judgment and might be open to persuasion on a Rule 60(b) motion.

A Rule 60(b) motion limited to service of process issues might have some appeal for China. Although it would require becoming involved in the U.S. litigation, it would not involve arguing the merits of China's actions during the pandemic or submitting to U.S. discovery. China would be able to make purely legal arguments that the Chinese Community Party was not properly served under Section 1608(a) and that the Wuhan Institute of Virology and the Chinese Academy of Sciences were not properly served under Section 1608(b) because email service is prohibited by both the Hague Service Convention and by Chinese law.

Alternatively, defendants could raise the service of process issues, and perhaps other procedural defects, at the enforcement stage if and when Missouri attempts to execute the judgment against any of their properties in the United States. One advantage of waiting for enforcement is that the arguments would be heard by a different judge with no psychological commitment to past decisions. Also, if defendants were to file a Rule 60(b) motion before Judge Limbaugh and lose, they might be precluded from raising the same issues again at the enforcement stage. On the other hand, a successful Rule 60(b) motion could void the judgment once and for all for some of the defendants, whereas saving these arguments for the enforcement stage could require the defendants to raise them anew in multiple enforcement proceedings.

Immunity from Execution

Defendants also have the option of asserting that any property Missouri attempts to seize is immune from execution. As a general matter, federal court judgments are enforceable against a judgment debtor's assets anywhere in the United States. But judgments against foreign states and their agencies or instrumentalities are subject to the FSIA's rules on immunity from execution.

Specifically, Section 1610(a)(2) provides that "[t]he property in the United States of a foreign state … used for a commercial activity in the United States, shall not

be immune … from execution, upon a judgment entered by a court of the United States or of a State … if … (2) the property is or was used for the commercial activity upon which the claim is based." This means that the properties in the United States of China, its ministries and subdivisions, and the Chinese Communist Party are immune from execution unless those properties were used to hoard PPE. I find it hard to imagine a situation in which that would be true.

The immunity for properties owned by agencies or instrumentalities is not as broad. Section 1610(b)(2) permits execution against "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States" if the judgment was rendered under the FSIA's commercial activities exception (as this judgment was) "regardless of whether the property is or was involved in the act upon which the claim is based." This means that the properties in the United States of the Wuhan Institute of Virology and the Chinese Academy of Sciences would be subject to execution if those defendants are engaged in commercial activities in the United States even if the properties themselves were not used to hoard PPE. Thus, these two defendants, unless they can get the judgment set aside for improper service as discussed above, are potentially more exposed to execution than the others.

It is worth emphasizing the district court's judgment against these nine defendants is enforceable *only against properties owned by these nine defendants*. Missouri cannot execute its judgment against property in the United States simply because the property is Chinese owned. This is clear from the Second Circuit's decision in *Walters v. Industrial & Commercial Bank of China* (2011), another case involving a default judgment against China under the FSIA, in which the court of appeals held that plaintiffs could not use assets belonging to agencies or instrumentalities of China to satisfy a judgment against China itself.

Walters relied on the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*) (1983). As Ingrid Brunk has explained, *Bancec* stands for the proposition that U.S. courts must generally respect the corporate separateness of foreign states and their agencies or instrumentalities. Indeed, the Supreme Court in *Bancec* quoted the FSIA's legislative history, which says specifically that the FSIA "will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality."

If a judgment against an agency or instrumentality of a foreign state cannot be executed against the property of another agency or instrumentality of that foreign state, it necessarily follows that the judgment cannot be executed against property *not* belonging to any agency or instrumentality of that foreign state. For example, Smithfield Foods is a major pork producer operating in Missouri. Its property cannot be seized to satisfy this judgment. Smithfield Foods is owned by a private Chinese conglomerate, but Smithfield Foods was not a defendant in this action, and so its property is not subject to execution.

Copycat Cases

In addition to Missouri's efforts to enforce this judgment, it is likely that the defendants will face copycat cases in other states. Mississippi filed a similar complaint against the same defendants in May 2020. Again, the defendants chose not to appear. On February 10, 2025, Judge Taylor B. McNeel (Southern District of Mississippi) held an evidentiary hearing. It remains to be seen whether Judge McNeel will scrutinize Mississippi's arguments more carefully than Judge Limbaugh did.

Conclusion

$24 billion is a big number. But it seems highly unlikely that Missouri will ever see a penny of it, given the FSIA's rules on immunity from execution. Missouri may, nevertheless, be able to harass these defendants—and potentially other Chinese parties holding property in the United States—by filing actions to execute the judgment even if those actions ultimately prove unsuccessful.

Last week, friend-of-TLB Ted Folkman had this to say about the Missouri judgment over at Letters Blogatory:

> *When we think about these cases, we have to think about what it would be like if the shoe were on the other foot. In 2021, the US and other western countries were accused of hoarding the COVID vaccine. Should the United States have been amenable to suit in China or elsewhere because it prioritized the public health needs of its own people? The technical term for taking seriously the question, "what if the shoe were on the other foot?" is comity. We need more of it.*