

1982

Federal Civil Procedure-Discovery Procedure-  
Conflict with Foreign Law (Securities and  
Exchange Commission v. Banca Della Svizzera  
Italiana)

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## RECENT DECISIONS

FEDERAL CIVIL PROCEDURE—DISCOVERY PROCEDURE—CONFLICT WITH FOREIGN LAW—*Securities and Exchange Commission v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

The Securities and Exchange Commission (SEC) brought an action against Banca Della Svizzera Italiana (BSI) and other unnamed parties alleging violations of the insider trading provisions of the Securities Exchange Act of 1934. BSI refused to comply with the SEC's discovery request for the names of those who, along with BSI, were involved in insider trading on the grounds that such disclosure would have subjected it to criminal liability in Switzerland, its state of incorporation. Instead, BSI suggested a variety of alternative means by which the SEC could secure the information. In light of the uncertain possibility of success of these alternatives and BSI's refusal to comply voluntarily, the SEC brought this action to secure an order, pursuant to Fed. R. Civ. P. 37, directing BSI to comply with the discovery order.

The district court began its discussion by reviewing the Second Circuit's treatment of similar cases in which a foreign national was required to violate the law of its home nation in order to comply with a discovery order of a United States court. Although the district court took note of the fact that early cases from the Second Circuit had viewed foreign law prohibitions as an absolute bar to the discovery proceedings, it based its decision upon the test set forth in the Restatement (Second) of Foreign Relations Law of the United States § 40. Instead of adopting a *per se* rule that viewed these foreign prohibitions as absolute bars to ordering disclosure, the Restatement test employed a balancing of competing factors. Included among the factors to be considered by a court in determining whether or not to order disclosure are: conflicting national interests; the nature of the burden placed upon the person required to disclose; where and to what extent the conduct is to occur; the nationality of the person ordered to disclose; and the degree to which compliance will be achieved by each state's enforcement of its law.

After balancing these factors, the most significant of which was the necessity of protecting the integrity of the United States securities market, the court held in favor of the SEC and ordered BSI to comply with the disclosure order even though such disclosure might result in criminal charges being brought against BSI in Switzerland.