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Antitrust Law
The Empagran Decision

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Can an Australian pig farm that purchased price-fixed products in Australia recover treble damages under the U.S. antitrust laws? The U.S. Supreme Court recently held that it cannot. On June 14, the Supreme Court, in an 8-0 decision, ruled that under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), the Sherman Antitrust Act could not be used by foreign purchasers to police anti-competitive actions when the plaintiff's actions, and the injuries, were wholly foreign, effectively limiting the reach of U.S. antitrust laws. *F. Hoffman-LaRoche Ltd. v. Empagran*, 2004 WL 1300131 (2004).

The decision restricts the ability of foreign plaintiffs to bring private treble-damages actions under U.S. antitrust law when the adverse foreign effects were wholly independent of any adverse domestic effects. The court held that the members of a global vitamin cartel that had engineered a worldwide price-fixing scheme raising vitamin prices both in the United States and internationally could not be held liable under U.S. antitrust law when the relevant "transactions occurred entirely outside U.S. commerce."

The Foreign Trade Antitrust Improvements Act

Congress passed the FTAIA in 1982 to clarify and limit the extraterritorial reach of U.S. antitrust laws, effectively making clear that U.S. law does not follow U.S. firms as they do business in global markets. Petitioner's Opening Brief at 8, *Empagran* (No. 03-724). The FTAIA states that the Sherman Act does not apply to (nonimport) activity involving foreign commerce outside the United States, except when such conduct both sufficiently affects U.S. commerce *(i.e.*, it has a "direct, substantial, and reasonably foreseeable effect") and has an effect of the kind the antitrust rules are intended to prohibit (*i.e.*, the action must give rise to a Sherman Act claim). 15 U.S.C. 6a.

The FTAIA's purpose was to level the international playing field so that U.S. firms doing business abroad were similarly situated compared to their global counterparts. The FTAIA provides that U.S. exporters and firms doing business abroad are not liable for anti-competitive activities under the Sherman Act if those activities are

wholly foreign in nature.

In 2000, the plaintiffs, five foreign vitamin purchasers based in Australia, Ecuador, Panama and Ukraine, filed a class action in the U.S. District Court for the District of Columbia against large drug manufacturers, alleging a "massive and long-running conspiracy" to fix and artificially inflate vitamin prices worldwide in violation of U.S. antitrust laws. *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003). In related criminal proceedings, the defendants pleaded guilty to antitrust violations, paid criminal fines totaling more than $900 million and settled virtually all other U.S. civil claims for amounts exceeding $2 billion. They also paid substantial fines in both the European Union and Canada.

The plaintiffs claimed that the defendants "engaged in an over-arching worldwide conspiracy to raise, stabilize, and maintain the prices of vitamins; that this cartel operated on a global basis and affected virtually every market where [they] operated . . . ; and that [their] unlawful price-fixing conduct had adverse effects in the United States and in other nations that caused injury to [plaintiffs] in connection with their foreign purchases of vitamin products." Id. at 342.

The defendants moved to dismiss for lack of subject-matter jurisdiction because their conduct toward these plaintiffs occurred entirely outside of the United States and because none of the plaintiffs suffered injuries as a result of their participation in U.S. commerce.

The district court granted the motion and dismissed the suit primarily because the conspiracy's effect on U.S. commerce was not the cause of the foreign plaintiffs' injuries. The plaintiffs appealed to the U.S. Circuit Court for the District of Columbia, contending that the district court misapplied the FTAIA. They argued that Congress intended a less restrictive view of the FTAIA. They also asserted that U.S. commerce was implicated directly by the cartel's conspiracy to raise vitamin prices worldwide for the purposes of maintaining equilibrium in U.S. prices. The D.C. Circuit agreed and held that the cartel's desire to maintain prices in the United States was a direct cause of the plaintiffs' injuries despite the fact that their purchases occurred outside the United States.

According to the court of appeals, as long as a claim was cognizable under the Sherman Act, a jurisdictional nexus existed and any plaintiff, domestic or foreign, may seek relief. Furthermore, the D.C. Circuit held that the FTAIA provided a cause of action for foreign plaintiffs who were injured solely by the effects of anti-competitive conduct on foreign commerce if that conduct violated the Sherman Act and if they could show actual or threatened injury to any persons in the United States, even if those purchasers were not plaintiffs to the case. Simply put, anyone in the world could bring a treble-damages antitrust suit in a U.S. court if the actions alleged would give rise to an antitrust claim by a U.S. purchaser, even if

that purchaser was not the plaintiff currently before the court. This left the door wide open for extensive international use of U.S. courts and U.S. antitrust law.

The Supreme Court granted certiorari to resolve a split among the D.C., 2d and 5th circuits about the application of the FTAIA and the Sherman Act and whether there is a private right of action for treble damages for injuries sustained outside of U.S. commerce. In *Den Norske Stats Oljeselskap A.S. v HeereMac v.o.f.*, 241 F.3d 420, 428 (5th Cir. 2001), the 5th Circuit held that the FTAIA exception does not apply "where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." In contrast, in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2d Cir. 2002), the 2d Circuit, like the D.C. Circuit, held that the "give rise to" language requires only that the domestic effects of the anti-competitive conduct violate U.S. antitrust laws and not that the domestic effects give rise to the specific injury asserted.

Justice Stephen G. Breyer, delivering the opinion for a unanimous court, based the decision on two fundamental considerations, one derived from international comity and the other from the text of the FTAIA and its legislative history. First, the court held that in light of rules of statutory construction and international comity, when confronted with an ambiguous statute, the statute must be construed in a manner that provides the least amount of interference with statutes of other nations. More specifically, in this case, the FTAIA must be interpreted to "avoid unreasonable interference with the sovereign authority of other nations." This is intended to lead to greater harmony and accord among the international community, particularly in international commercial dealings.

Breyer noted that extraterritorial application of U.S. antitrust law is disfavored internationally, and that limiting extraterritorial reach was one of the primary purposes of the FTAIA. Moreover, it was not the intent of Congress that the U.S. legal system supplant the legal systems of other nations. The court held that because the harm occurred wholly outside the United States, this activity was not within the scope that Congress gave to U.S. antitrust laws. If worldwide jurisdiction was provided to U.S. courts for wholly foreign claims, international plaintiffs who were unhappy with the remedy provided by their own legal systems would flock to the United States for redress via claims for treble damages, a result that Congress did not intend.

Relying on the legislative history of the FTAIA

Second, the court relied on the language and the legislative history of the FTAIA to conclude that Congress intended the FTAIA to limit-not expand-the scope and application of the Sherman Act to activities that are deemed to have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. The legislative history and the language chosen by Congress indicate its intention

specifically to exclude activities from the scope of U.S. antitrust laws that caused solely foreign harm.

The court concluded that Congress did not intend that harm caused entirely outside the United States should fall under the scope of the Sherman Act. *Empagran* is a clarification of an essential limitation on a plaintiff's ability to engage in international forum shopping. Moreover, *Empagran* reflects a recent trend in high court decisions, where the court is recognizing the greater global community, considering the international market of ideas and acknowledging the importance of harmony in "today's highly interdependent commercial world." Shortly after the *Empagran* decision, the court held that the Alien Tort Statute does not allow suits in the United States for all human rights violations committed anywhere in the world. *Sosa v. Alvarez-Machain*, 2004 WL 1439873 (2004).

Nevertheless, the *Empagran* court did not entirely close the door to foreign plaintiffs. One loophole may exist when a foreign plaintiff can show that the anti-competitive practices abroad were inextricably linked to and dependent upon the effects of those same practices in the United States. This requires a plaintiff to show "but for" causation, where "but for" the anti-competitive prices or activities in U.S. commerce, the defendants would not have been able to produce harm abroad. The exact scope and meaning of the FTAIA exception was left for the D.C. Circuit to resolve on remand.