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*FTAIA Limits Availability of U.S. Courts to Foreign
Antitrust Plaintiffs: F. Hoffman-LaRoche, Ltd. V.
Empagran, S.A.*

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Abstract. When the Supreme Court decided *F. Hoffman-LaRoche, Ltd. v. Empagran, S.A.* (542 U.S. 155 (2004)), it narrowed the degree to which the Federal Circuits were split concerning the availability of U.S. courts to foreign plaintiffs seeking relief for violations of U.S. antitrust laws; it also lessened the concern of foreign governments, global commercial entities and U.S. antitrust enforcement officials that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) could be a vehicle for extending the reach of U.S. antitrust laws. A unanimous Court ruled that the FTAIA's general Sherman Act non-applicability to foreign commerce "other than import trade or ... commerce" is not necessarily displaced by the act's exception for anticompetitive conduct that has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, and that "gives rise to a [Sherman Act] claim." Where a foreign plaintiff's claim arises independently of the harm to U.S. commerce, even though the underlying conduct may have had such a harmful effect, the Court said, U.S. courts may not be used to pursue a Sherman Act claim, even if a U.S. plaintiff might have a valid Sherman Act claim arising out of the conduct's effect on U.S. commerce.

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FTAIA Limits Availability of U. S. Courts to Foreign Antitrust Plaintiffs: F. Hoffman-LaRoche, Ltd. v. Empagran, S.A.

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Summary

When the Supreme Court decided *F. Hoffman-LaRoche, Ltd. v. Empagran, S.A.* (542 U.S. 155 (2004)), it narrowed the degree to which the Federal Circuits were split concerning the availability of U.S. courts to foreign plaintiffs seeking relief for violations of U.S. antitrust laws; it also lessened the concern of foreign governments, global commercial entities and U.S. antitrust enforcement officials that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) could be a vehicle for extending the reach of U.S. antitrust laws. A unanimous Court ruled that the FTAIA's general Sherman Act non-applicability to foreign commerce "other than import trade or ... commerce" is not necessarily displaced by the act's exception for anticompetitive conduct that has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, and that "gives rise to a [Sherman Act] claim." Where a foreign plaintiff's claim arises independently of the harm to U.S. commerce, even though the underlying conduct may have had such a harmful effect, the Court said, U.S. courts may not be used to pursue a Sherman Act claim, *even if* a U.S. plaintiff might have a valid Sherman Act claim arising out of the conduct's effect on U.S. commerce.

Background

The Foreign Trade Antitrust Improvements Act of 1982 was enacted as part of P.L. 97-290,¹ a measure directed at encouraging American exports. Title III of the larger measure authorizes the establishment of export trading companies and outlines the procedure for obtaining assurance that the resulting entity will be immune to Government

¹ FTAIA, Title IV of P.L. 97-290, is codified, with respect to the Sherman Act (15 U.S.C. §§ 1-7), at 15 U.S.C. § 6a; and, with respect to section 5 of the Federal Trade Commission Act (FTCA), at 15 U.S.C. § 45(a)(3). FTAIA as it amends the Federal Trade Commission Act states that that act "shall not apply to unfair methods of competition" For purposes of this Report, we shall refer to FTAIA as codified at 15 U.S.C. § 6a, and which references the Sherman Act.

prosecution and most civil suits under the antitrust laws.² Title IV (FTAIA) mandates that the Sherman Act³ “shall not apply to conduct involving trade or commerce with foreign nations (other than import ... commerce).” But that broad mandate contains an exception for otherwise-immunized conduct that

- (1) has a direct, substantial, and reasonably foreseeable effect [on the U.S. market, U.S. import trade or commerce, or U.S. exporters] *and*
- (2) such effect gives rise to a claim under [the Sherman Act].⁴

The FTAIA language, and the legislative history that produced it, have been inconsistently interpreted by various federal courts of appeals. In *Den Horske Stats Oljeselskap As v. HeereMac Vof*, for example, the U.S. Court of Appeals for the Fifth Circuit held that FTAIA did not authorize a suit in U.S. courts by a Norwegian Oil Company asserting that it had been overcharged for heavy-lift barge services in the North Sea, even though a global antitrust conspiracy among providers of oil platform services had resulted in inflated prices -- including prices in the United States -- for those services.⁵

... Statoil has sufficiently alleged that the defendants’ conduct -- that is, the agreement among heavy-lift service providers to divide territory, rig bids, and fix prices -- had a direct, substantial, and reasonably foreseeable effect on the United States market. ... the agreement compelled Americans to pay supra-competitive prices for oil. These allegations are sufficient to satisfy the first requirement of the FTAIA. [*But*] Statoil fails to show that this effect ... in any way ‘gives rise’ to its antitrust claim.⁶

The U.S. Court of Appeals for the Second Circuit, on the other hand, found that FTAIA did sanction the use of U.S. courts by a non-U.S. person to pursue an antitrust claim where the defendants’ conduct adversely impacted U.S. commerce, notwithstanding that the adverse effect on domestic commerce was not “the basis for ... plaintiff’s injury.”⁷ Opting for an interpretation of FTAIA that focuses on the act’s deterrent effect on violations of U.S. antitrust law (as had the dissent in *Den Norske* in the Fifth Circuit), the Second Circuit ruled that

Our markets suffer when the foreign scheme is not deterred because the domestic scheme may have greater chance of success when it is supplemented by the foreign

² The Export Trading Company Act of 1982 is Title III of P.L. 97-290, codified at 15 U.S.C. §§ 4001- 4021. 15 U.S.C. § 4016 confers immunity against civil and all criminal antitrust suits on properly certified Export Trading Companies; private plaintiffs may sue for injunctive relief or actual damages on account of conduct specified in a certificate if that certificate was improperly procured.

³ 15 U.S.C. §§ 1-7.

⁴ 15 U.S.C. § 6a(1)(A), 6a(1)(B), 6a(2).

⁵ 241 F.3d 420 (5th Cir. 2001).

⁶ *Id.* at 426, 427 (emphasis added). In a prior note, the court had rejected plaintiff’s argument that the exception was satisfied if “the domestic effect give[s] rise to *any* antitrust claim, not necessarily the plaintiff’s claim.” Footnote 19 at 426 (emphasis in original).

⁷ *Kruman v. Christie’s International Plc*, 284 F.3d 384, 400 (2d Cir. 2002).

scheme. ... A course of conduct in the United States ... would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic.⁸

The Empagran Case

Foreign plaintiffs, who claimed that a global cartel to fix vitamin prices sufficiently affected the prices they paid for vitamins purchased abroad to bring their claim within the FTAIA exception (see the argument accepted by the Second Circuit in *Kruman v. Christie's*, *supra*), were not successful at the district court level:

Plaintiffs argue that Congress intended only to limit recovery under the FTAIA to conduct that had some domestic effect and that it did not intend to limit the Court's jurisdiction to cases where plaintiffs' injuries involved those domestic effects. Plaintiffs may indeed have a remedy against these defendants abroad. *However, the issue here is not whether these defendants are in fact guilty of the conduct alleged, but whether this Court has jurisdiction over the[se] plaintiffs' claims.*⁹

That “critical question” was answered by the district court in the negative. Moreover, as the court noted, there is not yet any “customary international law of antitrust” that was violated by defendants’ conduct.¹⁰

Reversing, the U.S. Court of Appeals for the District of Columbia Circuit held that it is sufficient, for FTAIA purposes, if the anticompetitive conduct violates the Sherman Act “and the conduct’s harmful effect on United States commerce ... give[s] rise to ‘a claim’ by someone, even if not the foreign plaintiff who is before the court.”¹¹ The Fifth Circuit’s view in *Den Norske* was “overly rigid,” the court stated, but the Second Circuit’s opinion in *Kruman v. Christie’s* “seems to reach too far,” it opined. Nevertheless, the D.C. Circuit acknowledged that its ruling was probably “somewhat closer to the latter than the former.”¹² The appeals court relied as well on the legislative history of FTAIA to support its “middle ground,” albeit fairly liberal, jurisdictional interpretation of the act. It noted, in support of its position, that the House Report had mentioned with approval the Supreme Court opinion in *Pfizer, Inc. v. Government of India*,¹³ which found that allowing foreign governments to sue for treble damages would further the deterrent effect of the antitrust laws’ damage provision.¹⁴ And, although the court admitted of possible alternative interpretations of the Report’s language concerning “Imports and Purely Foreign Transactions,” it found

⁸ *Id.* at 403.

⁹ *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360 at *4 (D.C.D.C. June 7, 2001) (emphasis added); opinion not reported in F. Supp. 2d.

¹⁰ After the district court dismissed the foreign plaintiffs’ claims, the domestic claimants who had been a part of the original suit, transferred their claims to another suit pending before the district court.

¹¹ *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003).

¹² *Id.*

¹³ 434 U.S. 308 (1978).

¹⁴ H.Rept. 97-686 (hereinafter referred to as “House Report”) at 10; the damage provision in the antitrust law is found at 15 U.S.C. § 15.

additional support for its position in language in the “Type of Domestic Effect” section of the Report: “the domestic effect that may serve as the predicate for jurisdiction ... must be of the type the antitrust laws prohibit.”¹⁵

In the Supreme Court, Justice Breyer, for a unanimous Court,¹⁶ continued to “focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that *independently causes separate foreign injury*.”¹⁷ Although the court of appeals had, in effect, said that it does not matter whether plaintiffs’ harm is wholly independent of the domestic effect -- in this case, higher domestic prices for vitamins, the Supreme Court decision stands for the proposition that it *does* matter.¹⁸ Justice Breyer quotes from the House Report to emphasize that FTAIA’s general non-applicability to U.S. export commerce, indeed, extends to “transactions within, between, or among other nations”:

Such foreign transactions [*i.e.*, transactions “between two foreign firms”] should, for the purposes of this legislation, be treated in the same manner as export transactions -- that is, there should be *no* American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.¹⁹

Concurring with the district court opinion, and therefore, the interpretation given FTAIA by the Fifth Circuit in *Den Norske*, the Court concluded that “the exception does not apply where the plaintiff’s claim rests solely on the independent foreign harm,”²⁰ and reversed the court of appeals ruling.

The opinion accorded much weight to the practice of interpreting “ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” presuming that Congress did not intentionally act in violation of the “customary international law” that discourages the “unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State.”²¹ U.S. courts have held, at least since the opinion in *United States v. Aluminum Company of America*,²² that application of U.S. antitrust laws where foreign conduct has adverse effects on U.S. commerce does no violence to principles of prescriptive, jurisdictional comity, according to the Court. But it “can find

¹⁵ House Report at 11, *quoted* at 315 F.3d 353.

¹⁶ The decision was 8-0, Justice O’Connor not participating.

¹⁷ *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, ___, 124 S.Ct. 2359,2363 (2004), (emphasis added): “[plaintiffs] have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce, and the relevant ‘transactions occur(ed) entirely outside U.S. commerce.’” 124 S.Ct. at 2364.

¹⁸ “We can find no good answer to the ‘basic’ question,” “Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiffs’ claim?*” 124 S.Ct. at 2367 (emphasis in original).

¹⁹ 124 S.Ct. at 2365, *quoting*, House Report at 9, 10.

²⁰ *Id.* at 2363.

²¹ *Id.* at 2366.

²² 148 F.2d 416 (2d Cir. 1945); the Second Circuit was designated to hear the case by the Supreme Court because the Court did not have a quorum.

no good answer” to why American law should apply to conduct that causes no harm to U.S. commerce or exporters.²³ It cited, and quoted with approval, a respected treatise’s critical summary of the court of appeals opinion as one that would effectively allow United States courts to “provide worldwide subject matter jurisdiction,” irrespective of any harm caused by a challenged transaction to U.S. commerce: “It does not seem excessively rigid to infer that Congress would not have intended that result.”²⁴

In addition, for practical reasons, the Court did not agree with plaintiffs that there is “minimal” likelihood that affirmance of the court of appeals decision would unduly interfere with other nations’ interests. First, with the possible exception of statutes prohibiting price fixing, there is not yet anything like universal agreement concerning either practices to be made unlawful under competition laws, or appropriate remedies for those practices deemed to be illegal. Second, several foreign nations filed briefs with the Court to underscore their assessments that extending the reach of U.S. antitrust law in the way envisioned by the court of appeals would “upset ... a balance of competing considerations that their own domestic antitrust laws embody.”²⁵ Third, even the United States filed a brief in opposition to the decision below, arguing that serious damage would be done to the amnesty program (and, therefore, to antitrust deterrence) under which the Department of Justice offers substantial immunity to members of antitrust conspiracies who come forward to expose unlawful activities, if those entities were exposed to potential, private treble-damage liability.

Finally, the Court dismissed as inapplicable all six of the cases plaintiffs (respondents in the Supreme Court) cited in their attempt to illustrate that courts have, in fact, found jurisdiction to hear cases similar to this one. In three, the Court noted, the plaintiff was the Government; and in the three involving private plaintiffs, either the issue of harm to foreign plaintiffs independent of harm to U.S. commerce was not discussed, or the court specifically found a nexus between the foreign harm and injury to U.S. commerce:

The upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume.²⁶

The Court noted that although its opinion and reasoning assumed the independence of plaintiffs’ foreign harm from harm to U.S. commerce, plaintiffs’ contrary assertion²⁷ was never addressed by the appeals court. Accordingly, while it vacated the lower court opinion, the Court remanded the case so that the D.C. Circuit could consider that issue. On June 28, 2005, the appeals court rejected that argument, affirming the original district court opinion (*supra*, page 3).²⁸

²³ 124 S.Ct. at 2367.

²⁴ *Id.*, citing and quoting P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶ 273.

²⁵ 124 S.Ct. at 2368.

²⁶ *Id.* at 237.

²⁷ Empagran argued that “because vitamins are fungible and easily transportable, without an adverse domestic impact (i.e., higher prices in the U.S.), the sellers could not have maintained their international price-fixing arrangement and [that they, the foreign plaintiffs in this case] would not have suffered their foreign injury.” 124 S.Ct. 2372.

²⁸ The D.C. Circuit opinion, written by the dissenter in that court’s prior decision, rested upon
(continued...)

Justice Scalia, joined by Justice Thomas, concurred specifically to emphasize that the Court’s interpretation of FTAIA is the only one “consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories.”²⁹

²⁸ (...continued)

the proposition that although Empagran’s “but for” argument (set out in note 26, *supra*) was “plausible,” it was “simply not sufficient to bring [foreign] anti-competitive conduct within the FTAIA exception” that allows claims based on certain U.S. foreign trade activity that “gives rise to” a Sherman Act claim. Basing its conclusion on “principles of ‘prescriptive comity,’” the D.C. Circuit held on remand that “[t]he statutory language -- ‘gives rise to’ -- indicates a *direct causal relationship*, that is, *proximate causation*, and is not satisfied by the mere but-for ‘nexus’ the appellants advanced” *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, __ F.3d __, slip opinion at 7 (emphasis added).

²⁹ 124 S.Ct. at 2373.