

# Empagran:

## THE FIRST STEP IN AVOIDING A U.S. MONOPOLY ON ANTITRUST ENFORCEMENT

By Joseph DiPietro

*[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with the principles of prescriptive comity . . . .<sup>1</sup>*

### Background

**E**CONOMIC GLOBALIZATION brings with it the question of whether domestic regulations should follow businesses abroad. When U.S. laws apply extraterritorially, meaning outside of its borders, issues are raised regarding the appropriateness of applying U.S. jurisdiction over foreign conduct in light of other nations' interests in the method of resolution and the eventual outcome of the matter. This dilemma is especially pressing in the antitrust arena due to the frequency with which foreign plaintiffs are seeking redress in U.S. courts for injuries suffered abroad.

The issue of extraterritorial application of the Sherman Antitrust Act has come before the U.S. Supreme Court several times, most recently in the *Empagran* case. *Empagran* was an international price-fixing antitrust suit against several foreign and domestic vitamin manufacturers and distributors.<sup>2</sup> For analytic purposes, the Court assumed that the injury alleged by the plaintiffs (from Australia, Ecuador, the Ukraine, and Panama) was *entirely* independent of any domestic injury.<sup>3</sup> In an 8 to 0 ruling (Justice O'Connor abstained), the Court held that when a foreign plaintiff solely alleges a wholly foreign injury, U.S. courts lack jurisdiction over the foreign claim.

The Court, however, remanded to the D.C. Circuit the determination of whether the plaintiffs preserved an alternative argument alleging that the adverse domestic effects exacerbated their foreign injury and therefore, should be justiciable in U.S. courts.<sup>4</sup> In this alternative argument, the *Empagran* plaintiffs

claimed that a positive correlation exists in the pricing of foreign and U.S. vitamin markets, and that the correlation links the foreign injury to the domestic effects. That link, according to plaintiffs, suffices for jurisdiction over their foreign claim, despite the fact that the specific conduct and injury giving rise to the claim occurred overseas.<sup>5</sup>

### Extraterritorial Application of U.S. Antitrust Law Prior to 1982

The Sherman Act, which applies to conduct that adversely affects commerce, was first interpreted in the international context in *American Banana v. United Fruit*.<sup>6</sup> In this case, the Supreme Court determined that the Sherman Act did not apply to conduct occurring in foreign nations, even if the alleged antitrust conduct adversely effected U.S. commerce.

In 1927, the Supreme Court permitted jurisdiction over conduct occurring outside of the U.S. which adversely effected domestic commerce.<sup>7</sup> The "effects test," formulated by the Second Circuit in *United States v. Aluminum Company of America*, stated that U.S. jurisdiction over foreign conduct exists if the conduct was intended to effect, and subsequently did effect domestic commerce.<sup>8</sup> The "effects test" shifted the focus from an examination of the territory in which the conduct occurred to an examination of the conduct's effects.

Later, in *Timberlane Lumber v. Bank of America*, the Ninth Circuit expanded the "effects test" by creating a three-prong test for analyzing whether jurisdiction was merited over foreign antitrust claims.<sup>9</sup> The *Timberlane* Court's consideration of foreign interests exemplified a growing trend in recognizing international comity. The circuit courts continued to develop different analyses regarding foreign interests in the antitrust context, leading to the passage of the Foreign Trade Antitrust Improvements Act (FTAIA).

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## FTAIA

In 1982, Congress amended the Sherman Act with the passage of the FTAIA. The FTAIA permits a broad range of anticompetitive conduct under U.S. jurisdiction, including all conduct not involving imports. The FTAIA also creates an exception for certain types of conduct that adversely affect U.S. commerce provided that there is a “direct, substantial, and reasonably foreseeable effect”<sup>10</sup> on export, trade, or domestic commerce. The *Empagran* Court determined that Congressional intent would also include wholly foreign conduct, with the same effects mentioned in the Act’s exception.<sup>11</sup>

### Circuit Split Prior To Empagran

#### *DEN NORSKE STATS OLJESELSKAP V. HEEREMAC VOF (“STATOIL”)*<sup>12</sup>

In *Statoil*, the Fifth Circuit held that foreign plaintiffs alleging a cause of action consisting of a wholly foreign injury lack jurisdiction in U.S. courts. *Statoil* involved a Norwegian oil company seeking damages based on an alleged price-fixing conspiracy orchestrated by British and Dutch companies in the



North Sea.<sup>13</sup> The British and Dutch companies provided heavy-lift barge services, and there were only seven heavy-lift barges in existence at the time.<sup>14</sup> Heavy-lift services also existed in Asia and an American company provided the services in the Gulf of Mexico. The conspiracy theory alleged that the British, Dutch, and American providers divided the markets and subsequently set price above the competitive level.<sup>15</sup>

The plaintiff claimed injuries suffered in the North Sea and based its claim for U.S. jurisdiction on the domestic

injuries in the Gulf of Mexico.<sup>16</sup> The plaintiff contended that the domestic injury suffered gave rise to its cause of action, notwithstanding the injuries occurring in separate markets, because the conduct originated from the same conspiracy.<sup>17</sup>

No dispute existed over whether a domestic plaintiff had jurisdiction based on an injury suffered in the Gulf of Mexico. However, the Fifth Circuit refused to infer a connection from the domestic injury to the injury in the North Sea.<sup>18</sup> The court rejected the concept of one plaintiff’s jurisdiction giving rise to another and held that a foreign plaintiff injured in a transaction with no domestic effect may not seek redress in U.S. courts.<sup>19</sup>

#### *KRUMAN V. CHRISTIE’S INTERNATIONAL*<sup>20</sup>

In a contrary decision, the Second Circuit granted jurisdiction to a class of foreign plaintiffs claiming wholly foreign injuries. The *Kruman* court theorized a nexus between the domestic and foreign effects of anticompetitive conduct.<sup>21</sup> The court held the FTAIA and the Sherman Act provided jurisdiction over the foreign plaintiffs’ claims despite all transactions occurring outside of the U.S.<sup>22</sup>

The Second Circuit declared that its ruling deters price-fixing cartels operating in two markets from maintaining domestic price-fixing arrangements,<sup>23</sup> and facilitates global competition.<sup>24</sup> The court reasoned that not granting foreign

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plaintiffs jurisdiction may harm domestic consumers because the overall, the negative effect of the price-fixing increases.<sup>25</sup> However, the court did not consider the harm of its decisions on amnesty programs for international cartel members.<sup>26</sup>

#### *F. HOFFMAN-LA ROCHE V. EMPAGRAN*

In *Empagran*, the D.C. Circuit granted jurisdiction over foreign plaintiffs’ claims based on a domestic consumer’s cognizable injury.<sup>27</sup> Thereafter, the Supreme Court granted certiorari,<sup>28</sup> and held that the FTAIA exception was inapplicable to a foreign plaintiff seeking jurisdiction in U.S. courts for a wholly foreign injury that had no effect on U.S. commerce.<sup>29</sup> The Court, however, remanded the case on the issue of whether the inflated price the plaintiffs paid necessarily depended on inflated prices in the U.S., due to the difficulty of keeping prices higher in one market than in another.<sup>30</sup> The plaintiffs argued that the U.S. market served as a benchmark for their industry’s prices set around the globe.<sup>31</sup>

## The *Empagran* Holding

THE SUPREME COURT'S HOLDING in *Empagran* seemingly resolved the issue of extraterritorial application of the Sherman Act. The Court created a simple rule; if a foreign plaintiff sues in a U.S. court for an injury suffered abroad and the effects causing such injury arise independently of domestic effects, there is no jurisdiction.<sup>32</sup> This ruling eliminates many suits by foreign plaintiffs, however, it does not address the amount of linkage to domestic effects that would be required to obtain jurisdiction. For analytical purposes, the Court assumed the injuries alleged were independent.<sup>33</sup> Thus, the *Empagran* decision permits foreign plaintiffs to argue that U.S. courts have jurisdiction over every plausible nexus between their injury and the domestic injury. What remains to be seen is the standard by which U.S. courts will determine whether that nexus is sufficient to establish jurisdiction.

Foreign plaintiffs who are attracted by treble damages,<sup>34</sup> recoverable attorney fees, the expertise of U.S. judges, and sophistication of the U.S. legal system, try to circumvent their legal systems and their available remedies by attempting to bring wholly foreign claims into U.S. courts. Therefore, the analysis of jurisdiction over foreign claims must consider the detrimental effects of U.S. jurisdiction on foreign antitrust enforcement systems.

### Comity & Cooperation Programs

“Congress designed the FTAIA to clarify, perhaps to limit, but not to *expand* in any significant way, the Sherman Act's scope as applied to foreign commerce.”<sup>35</sup> Moreover, the “[Supreme] Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authorities of other nations.”<sup>36</sup> Foreign plaintiffs choose U.S. forums because successful actions provide generous damage awards. They are not restrained by principles of comity, and do not consider the harmful effects of their actions on the international antitrust enforcement system.

Cooperation programs are an essential part of U.S. and international antitrust enforcement systems. In an amicus brief filed in *Empagran*, the U.S. Department of Justice (DOJ) noted that catching international cartels requires cooperation among all nations.<sup>37</sup> It explained that the cooperation program in the U.S. alone, “crack[ed] more international cartels than all of the Division's search warrants, secret audio or videotapes, and FBI interrogations combined.”<sup>38</sup> Australia, France, Germany,

Hungary, Ireland, South Korea, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the European Union, to name a few, have all initiated cooperation programs. This demonstrates the potential geographic reach of the adverse effects on cooperation programs.<sup>39</sup>

Actions by foreign plaintiffs are usually brought after government or enforcement agency action, and government actions heavily depend on the success of cooperation programs. For example, in *Empagran*, 855 million (nearly one billion U.S. dollars at the time) in fines were levied by the European Union against the vitamin cartel prior to the civil action.<sup>40</sup>

Many countries, including the U.S., have entered into agreements that limit the overreaching application of antitrust laws in order to facilitate the success of cooperation programs.<sup>41</sup> An example of a foreign government's action in opposition to U.S. overreaching is the U.K.'s enactment of a statute preventing its courts from enforcing judgments resulting in “multiple dam-

ages.” This statute signifies the U.K.'s disapproval and rejection of the Sherman Act's transatlantic reach.<sup>42</sup>

Jurisdiction in U.S. courts must be reserved for participants in U.S. commerce. Although the modern economy transcends geographic borders, it contains sovereign participants with their own governmental plan for antitrust enforcement

### Does an Injury Truly Depend on Domestic Effects?

IF A FOREIGN PLAINTIFF SUED IN A U.S. COURT, how large must the domestic effect be to allow a foreign plaintiff to bring a claim linked to those effects? In its amicus brief in *Empagran*, the DOJ provided the following example: “[A]n international price-fixing cartel . . . had annual foreign sales of \$2 billion to 50 foreign customers, and annual sales in the United States of \$1 million to one customer.”<sup>43</sup> Thus, after *Empagran*, a plaintiff could file a similar suit and allege that the domestic effects gave rise to an injury. However, the issue of whether a domestic injury permits jurisdiction over a foreign claim remains unclear. A court must also determine whether an injury's effect on domestic commerce must be substantial or whether the entire injury itself is substantial.<sup>44</sup>

Another question is whether a foreign plaintiff's cause of action is moot if the domestic injury has already been litigated. Allowing a foreign plaintiff to bring such an action makes little sense. It would flood the courts with determinations of standing even before the issue of antitrust injury is addressed.

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Moreover, courts would be inundated with calculated lawsuits filed by plaintiffs who merely follow government enforcement.

## Looking Forward

ANY COURT COULD UNDERTAKE THE BURDENSOME and time-consuming task of answering these questions and entertaining claims by foreign plaintiffs in U.S. courts. However, courts are not equipped to make such determinations, and these suits do not facilitate competition in either domestic or foreign markets. Foreign plaintiffs must seek redress in courts where their injury occurred because they submitted to those jurisdictions when they chose to conduct business there.

The jurisdiction of U.S. courts over foreign conduct allows for forum-shopping by foreign plaintiffs, and creates an opportunity to circumvent antitrust enforcement systems in foreign countries. A corporation operating within a foreign

country is bound by that country's laws, and therefore, should be limited the remedies available under those laws.

The Court's ruling eliminates matters that do not belong in U.S. courts. The issue of whether to grant jurisdiction when there is an appropriate connection between domestic effects and wholly foreign injuries remains undecided. All wholly foreign injuries should be litigated in legal systems where the parties transacted their business because this allows the continued growth and success of worldwide antitrust enforcement systems. **BLB**

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## ENDNOTES: Joseph DiPietro

<sup>1</sup> F. Hoffman-La Roche, Ltd. v. Empagran, 124 S.Ct. 2359 (2004) (quoting United States v. Aluminum Co., 148 F.2d 416, 443-44 (2d Cir. 1945)).

<sup>2</sup> See *Empagran* 124 S.Ct. 2359; see generally *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001) (holding that there is not jurisdiction when a foreign plaintiff alleges a foreign injury not directly flowing from U.S. effects); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002) (determining that there was jurisdiction when a foreign plaintiff alleges a foreign injury not directly effecting U.S. commerce because a foreign injury in the context of the global market necessarily means there was a domestic injury which gives rise to the foreign plaintiff's claim even though the injury is separate); *Empagran*, 315 F.3d 338 (finding foreign plaintiffs bringing this type of cause of action do have standing).

<sup>3</sup> See *Empagran*, 124 S.Ct. at 2366-67.

<sup>4</sup> *Id.* at 2372.

<sup>5</sup> See *id.*

<sup>6</sup> *American Banana. v. United Fruit*, 213 U.S. 347 (1909).

<sup>7</sup> See *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927).

<sup>8</sup> See *United States v. Aluminum Company of America*, 148 F.2d 416 (2nd Cir. 1945).

<sup>9</sup> See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (Listing the three prongs as "(1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness . . ."); see also Steven Richman, *Extra-Territorial Effect of Antitrust Laws*, NEW JERSEY LAWYER, THE MAGAZINE, June, 2004, at 11 (offering a brief look at the extraterritorial application of U.S. antitrust laws and a look at the European Union as well).

<sup>10</sup> See *Empagran*, 124 S.Ct. at 2364-66.

<sup>11</sup> See *id.*

<sup>12</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001).

<sup>13</sup> *Id.* at 422.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *Id.*

<sup>18</sup> See *Id.* at 431.

<sup>19</sup> See *Id.*

<sup>20</sup> *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002).

<sup>21</sup> See *Id.*

<sup>22</sup> See *Kruman*, 284 F.3d at 396-401.

<sup>23</sup> *Id.* at 403.

<sup>24</sup> See *Kruman*, 284 F.3d at 403.

<sup>25</sup> See *id.*

<sup>26</sup> See e.g. [ABA Section of Antitrust Law, *Competition Laws Outside the United States* 1:13, 2:13-14, 3:16-17, 9:11, 10:10 (2001); *Global Competition Review, Cartel Regulation, Getting the Fine Down in 25 Jurisdictions Worldwide* (2002); *Global Competition Review, Private Antitrust Litigation in 16 Jurisdictions Worldwide* (2004)]. This information was taken from note 7 of the Brief for the United States as Amicus Curiae Supporting Petitioners, filed by the DOJ to the Supreme Court in *Empagran*.

<sup>27</sup> See *supra* note 5.

<sup>28</sup> *Empagran*, 124 S.Ct. at 2364.

<sup>29</sup> *Id.* at 2369-70.

<sup>30</sup> *Id.* at 2372.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 2370-72.

<sup>33</sup> See *id.* at 2366.

<sup>34</sup> The Sherman Act provides for treble damages, meaning a successful suit brought under the Act allows for recovery of damages of three times the amount of the actual injury.

<sup>35</sup> *Empagran*, 124 S.Ct. at 2369 (emphasis in original).

<sup>36</sup> *Id.* at 2366 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

<sup>37</sup> See Brief for the United States in Support of Petitioners, 2004 WL 234125 at \*20, 38 *Id.*

<sup>39</sup> See OECD (Organisation for Economic Cooperation and Development), Policy Brief: Using Leniency to Fight Hard Core Cartels at 2 (September 2001), available at <http://www.oecd.org/dataoecd/60/8/21554908.pdf>.

<sup>40</sup> Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, 2004 WL 226388 at \*2.

<sup>41</sup> See [http://www.oecd.org/document/59/0,2340,en\\_2649\\_37463\\_4599739\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html)

<sup>42</sup> See *infra* note 40 at n. 11.

<sup>43</sup> See Brief for the United States in Support of Petitioners, 2004 WL 234125 at \*13.

<sup>44</sup> Lindsay DeMoss, Editor-in-Chief of the *Business Law Brief*, contributed to the articulation of this point.