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ANTITRUST PRACTICE GROUP

AUGUST 2008

Ninth Circuit Court of Appeals Affirms Dismissal of Foreign Purchaser Claims under the Sherman Act

by Joshua Stambaugh

Despite the broad jurisdictional sweep of U.S. antitrust laws, they are not unbounded. Since the enactment of the Foreign Trade Antitrust Improvement Act ("FTAIA") in 1982,[1] one of the primary restraints on the scope of the Act[2] has been its inapplicability to claims based solely upon conduct taking place in foreign commerce with no direct relationship to the domestic effects of that conduct. While it is undisputed that both private and governmental foreign litigants may sue for treble damages under the Sherman Act,[3] it is equally clear that plaintiffs may not sue under the Act for conduct in foreign commerce that causes "purely foreign injury."[4] In dismissing claims by a foreign purchaser of dynamic random access memory ("DRAM") in foreign commerce against DRAM manufacturers and distributors, the Ninth Circuit has joined two other circuits in sharing the view that there must be a proximate causal relationship between the domestic effects of the defendants' conduct and the plaintiffs' foreign injury.[5] Kaye Scholer LLP represented Infineon Technologies AG and Infineon Technologies North America Corp. in the case, and Michael Blechman (Partner, Litigation, New York Office) argued the appeal on behalf of all prevailing defendants.

The FTAIA first excludes from the reach of the Sherman Act all foreign injury resulting from conduct in foreign commerce, and then provides an exception to the general rule for foreign injury meeting two conditions. The FTAIA requires that the plaintiff first demonstrate that alleged conduct in foreign commerce have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce,[6] and then show that the domestic effect of the conduct "gives rise to a claim" under the Act.[7] Thus, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,[8] the U.S. Supreme Court ruled that the FTAIA would not apply to "anti-competitive price-fixing activity that is in

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1 15 U.S.C. § 6a.

2 15 U.S.C. §§ 1-7.

3 *See* 15 U.S. § 7 (defining "persons" able to sue under the Act to include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country"); *Pfizer, Inc. v. Gov. of India*, 434 U.S. 308 (1978).

4 *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

5 *In re Dynamic Random Access Memory Litig. (Centerprise Int'l, Ltd. v. Micron Technology, Inc.)*, Case No. 06-15636, Slip. Op. (9th Cir., August 14, 2008) (hereafter "*Centerprise*").

6 15 U.S.C. § 6a (1).

7 15 U.S.C. § 6a (2)

8 542 U.S. 155 (2004).

significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury," because there was no requisite link between the domestic injury (effects) caused by the conduct, and the plaintiffs' injury (claim) suffered exclusively in foreign commerce.[9] Based upon principles of comity, the Supreme Court denied recovery for claims in foreign commerce if they "rest solely on the independent foreign harm."[10]

On remand in *Empagran*, the DC Circuit Court of Appeals considered the plaintiffs' argument that they had satisfied the FTAIA standard by alleging a global price-fixing conspiracy in which "the [defendants'] product (vitamins) was fungible and globally marketed, [and] they were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well."[11] Thus, the plaintiffs argued that "the super-competitive pricing in the United States 'gives rise to' the foreign super-competitive prices from which the [plaintiffs] claim injury."[12] The DC Circuit disagreed and affirmed the dismissal of plaintiffs' claims, holding that the "gives rise to" language in FTAIA requires more than mere but-for causation between the domestic effects of the conduct and the plaintiffs' injury suffered in foreign commerce. Instead, "[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 [plaintiffs] advanced in their brief."[13]

The plaintiff in *Centerprise* was likewise a foreign entity who purchased DRAM in foreign commerce, but argued that it met the "domestic injury exception" to the FTAIA because "[t]he United States prices were the source of, and substantially affected the worldwide DRAM prices."[14] The District Court, however, found that the plaintiff had alleged "no more than the plaintiffs in *Empagran*" and dismissed the claims for lack of subject matter jurisdiction.[15] Thus, even though the plaintiff was "required to track the DRAM prices in dollars, which was the only available measure due to Defendants' sales and distribution practices" and the fact that "defendants used th[e] supra-competitive prices of DRAM in the United States to raise prices worldwide," the lower court held that these allegations were nothing more than the but-for causation that had been rejected by the *Empagran* decisions.[16]

In a case of first impression for the Ninth Circuit, the panel upheld this dismissal and joined the DC Circuit and the Eighth Circuit in holding that the "gives rise to" language in the FTAIA requires proximate causation, as opposed to mere "but-for" causation.[17] The court further rejected plaintiffs' arguments that "a direct correlation"

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9 *Id*. at 158.

10 *Id*. at 159.

11 *Empagran S.A. v. F. Hoffmann-La-Roche*, 417 F.3d 1267 (D.C. Cir. 2005).

12 *Id*. at 1270.

13 *Id*. at 1271. Last year, the Eighth Circuit echoed this view of the FTAIA, and held that the proximate cause standard was more "consistent with general antitrust principles, which typically require a more direct causation standard." *In re: Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535, 538-39 (8th Cir. 2007). The court affirmed the dismissal of claims on behalf of foreign purchasers of monosodium glutamate because "[a]lthough United States prices may have been a necessary part of the [defendants'] plan, they were not significant enough to constitute the direct cause of the [plaintiffs'] injuries, as they constituted merely one link in the causal chain." *Id*. at 540.

14 *Centerprise,* Slip. Op. at pg. 10658.

15 *In re Dynamic Random Access Memory Antitrust Litig. (Centerprise Int'l, Ltd. v. Micron Technologies, Inc.)*, 2006 U.S. Dist. LEXIS 8977, 12 (N.D. Cal. Mar. 1, 2006).

16 *Id*. at 13.

17 *Centerprise,* Slip. Op. at pg. 10656.

between the prices paid by both domestic purchasers and foreign purchasers demonstrated that the payment of higher prices in the U.S. proximately caused the foreign plaintiff's injury.[18] Although the plaintiff's complaint suggested that "super-competitive DRAM prices in the United States may have *facilitated* the defendants' scheme to charge super-competitive prices abroad," a tighter causal relationship was required between the domestic effects of the conduct and the plaintiff's injury before jurisdiction would attach.[19] Plaintiff's claims therefore did not satisfy the FTAIA's "domestic injury exception," and were dismissed with prejudice.

By following the clear trend and interpreting the FTAIA to require proximate causation between domestic harm and foreign injury, the Ninth Circuit honored the principles of prescriptive comity recited by the Supreme Court in the *Empagran* decision. "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs."[20] Requiring plaintiffs to demonstrate a more immediate relationship between the harm to domestic consumers and their foreign injury greatly decreases the chances that application of the Sherman Act to their claim will "interfere[] with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders."[21] As the Ninth Circuit explained, the FTAIA "clarifies that U.S. antitrust laws concern the protection of '*American* consumer and *American* exporters, not foreign consumers or producers.'"[22]

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[18] *Id.* at 10659.

[19] *Id.* at 10658 (emphasis added).

[20] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

[21] *Empagran S.A. v. F. Hoffmann-La-Roche*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

[22] *Centerprise,* Slip. Op. at pg. 10652 (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 272i, pg. 87 (3d. ed. 2006)).