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RULINGS INVITE ANTITRUST SUITS IN U.S. BASED ON OVERSEAS CONDUCT

by
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Multinational companies' exposure to treble damages under U.S. antitrust law has been expanded dramatically by the recent decisions of the U.S. Courts of Appeals for the District of Columbia Circuit and the Second Circuit in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd. et al.*, 315 F.3d 338 (D.C. Cir. 2003), and *Kruman v. Christie's Int'l Plc.*, 284 F.3d 384 (2d Cir. 2002).

These decisions should concern all companies that sell products or services both in the United States and in other countries, because they throw open the doors of the U.S. courts to foreign plaintiffs suing over conduct relating to foreign commercial transactions. Under the *Empagran* and *Kruman* decisions, if a multinational company engages in allegedly anticompetitive conduct that harms both U.S. and foreign customers, the foreign customers may sue in U.S. courts for treble damages under U.S. antitrust law *based on their purchases outside the United States*.

The *Empagran* case involves an alleged international cartel accused of selling vitamin products at inflated prices around the world. The *Kruman* plaintiffs allege that prominent auction houses conspired to fix the prices of their services as auctioneers. Price fixing and cartel conduct are subject to criminal prosecution in the United States, and are increasingly condemned by competition laws in foreign countries. In addition, under settled law in the United States, both U.S. and foreign customers of such cartels would have a cause of action under U.S. law for damages, based on their purchases at non-market prices in the United States.

At issue in these cases, however, are claims by foreign customers for antitrust damages based on their purchases of goods and services *outside the United States*. Key to the cases is a vaguely-worded statute known as the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. §6(a), which provides that U.S. antitrust law applies to conduct involving non-import foreign commerce only if "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic commerce *and* "such effect gives rise to a claim under" U.S. antitrust law.

The *Empagran* and *Kruman* courts held that, under FTAIA, foreign plaintiffs can sue for antitrust injuries related to their non-U.S. purchases—so long as the defendants' alleged conduct also harmed some

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U.S. customer somewhere (who need not be a plaintiff in the suit). In other words, to establish U.S. jurisdiction, the *Empagran* and *Kruman* courts required only that the defendants' alleged conduct had *an* effect on U.S. commerce that gave rise to *a* claim in the United States—but not necessarily the *plaintiffs'* claims.

The U.S. government is on record as opposing such an expansive interpretation of FTAIA. In an *amicus curiae* brief filed at the U.S. Supreme Court, the Federal Trade Commission and the Solicitor General (on behalf of the Antitrust Division of the Department of Justice) instead endorsed a narrower interpretation adopted by the U.S. Court of Appeals for the Fifth Circuit in *Den Norske Stats Oljeselskap AS v. Heeremac V.o.f.*, 241 F.3d 420 (5th Cir. 2001) ("*Statoil*"), *cert denied*, 534 U.S. 1127 (2002). The Fifth Circuit held in *Statoil* that FTAIA does not permit claims by foreign plaintiffs based on antitrust injuries suffered outside the United States as a result of the overseas effects of the defendants' alleged anticompetitive conduct. The government has also filed an *amicus* brief opposing the D.C. Circuit's FTAIA interpretation, and supporting a petition for *en banc* review of the *Empagran* decision.

This split of authority in the Circuits, together with the U.S. government's position opposing the expansion of FTAIA, raises some hope for further review and even reversal of at least one of these decisions. The *Kruman* case recently settled while a petition for a writ of *certiorari* was pending at the Supreme Court, leaving the Second Circuit decision standing as a binding precedent in New York, Connecticut and Vermont, and as a citeable precedent for other courts. The *Empagran* defendants, however, are presently seeking *en banc* rehearing by the full D.C. Circuit with the support of the Justice Department and FTC. Whatever the outcome at the D.C. Circuit, the losing party in *Empagran* is likely to seek Supreme Court review based on the circuit split. The *Empagran* case thus represents a possible vehicle for obtaining a decisive ruling by the Supreme Court that reins in FTAIA in the near term; its progress will be watched closely.

Unless and until such reversal efforts are successful, however, global commercial actors need to be aware of the serious harmful implications of the Second Circuit and D.C. Circuit decisions. First and foremost, global companies' exposure to U.S. antitrust litigation now extends not only to their U.S. transactions, but also to their sales around the world. This means expanded exposure not only to liability under U.S. antitrust law, but also to all of the onerous and controversial features of U.S. antitrust litigation—including treble damages, class actions, extensive discovery, and jury trials—that can pressure defendants to settle even when they may have good defenses.

In addition, multinationals may face overlapping and duplicative suits and judgments in the United States and the foreign jurisdictions in which the overseas sales take place. Alternatively, they may face claims under U.S. antitrust law for conduct that is *not* illegal in the foreign jurisdictions in which the alleged antitrust injuries occur. This is because U.S. antitrust law can be broader than competition laws in other countries. It is worth emphasizing that these cases extend the territorial reach of U.S. law for the entire range of conduct that is subject to the Sherman Act—not just for cartel and price-fixing conduct.

Any company making sales both in the United States and abroad should be concerned about this expansion of the antitrust jurisdiction of the U.S. courts. The Second Circuit and D.C. Circuit have issued an invitation to foreign plaintiffs and plaintiffs' counsel to use the U.S. courts and U.S. antitrust law to seek recovery for alleged anticompetitive behavior around the globe. Other courts of appeals should refuse to second that invitation, and the Supreme Court should rescind it altogether.

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