Perspectives on *Empagran*

Editor's Note: *On July 23, 2004, shortly after the Supreme Court decided* Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004), the Sherman Act Section 1 and Sherman Act Section 2 Committees of the ABA Section of Antitrust Law sponsored a Brown Bag luncheon to analyze the Court's decision. Because of the importance of the case and the complexity of the decision, we are publishing the edited presentations of several of the commentators in this issue of* The Antitrust Source*. The commentators are: Edward Swaine, Associate Professor of Legal Studies, the Wharton School, and Associate Professor of Law, University of Pennsylvania Law School; Thomas C. Goldstein; Goldstein & Howe P.C., Counsel for Respondents; and Jonathan S. Franklin, Hogan & Hartson L.L.P., Counsel for Amicus Curiae the Business Roundtable in Support of Petitioners.*

—*Anne Rodgers*

EDWARD SWAINE: The *Empagran* case was a private suit brought by foreign (and, originally, domestic) purchasers of bulk vitamins who claimed that U.S. and foreign vitamin manufacturers and distributors engaged in a price-fixing conspiracy that resulted in higher prices for U.S. and foreign purchasers. As is often the case, there was a government action in the background. One of the co-conspirators sought amnesty and cooperated with the U.S. Department of Justice; that investigation ultimately resulted in plea agreements with twelve corporate defendants and thirteen individual defendants and fines of nearly a billion dollars. Equally substantial fines were imposed overseas, where the matter came before antitrust authorities in the European Union, Canada, Australia, and Korea. U.S. purchasers subsequently began private actions and the settlements reportedly exceeded $2 billion.

Proceedings in *Empagran* itself were framed by several key circumstances—some factual in nature, and one potentially more artificial—relating to geography. The plaintiffs that remained in the suit were all foreign firms. Their transactions took place outside the United States, and their injuries were suffered abroad. To be sure, the price fixing involved was thought to have significant effects both within and outside the United States. But the D.C. Circuit and the Supreme Court each assumed that these effects were independent of one another—that is, that the same conduct led to higher U.S. prices and independently led to higher fixed prices outside the United States—although the plaintiffs offered to show a closer relationship.

Thus framed, the case touched on an unresolved issue involving the Foreign Trade Antitrust Improvements Act (FTAIA). The FTAIA provides generally that the Sherman Act does not apply to conduct involving "trade or commerce . . . with foreign nations." But there is an exception: The Sherman Act *does* apply if conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and such effect "gives rise to a claim" under the Sherman Act. The D.C. Circuit and the Supreme Court grappled with the specific question of whether the plaintiffs' claim must stem from the selfsame U.S. effects, or whether it is enough that some other claims do so, such that "a [U.S. effects-based] claim" enables jurisdiction over independent foreign injury claims. The circuits had split on this question. The Fifth Circuit had held that a foreign injury independent of U.S. effects was not actionable (that is, the U.S. effect had to be the basis for the

claimed injury). The Second Circuit had held that independent foreign injury was actionable. In the decision on review in *Empagran*, the D.C. Circuit weighed in, holding that independent foreign injury was actionable at least so long as the predicate U.S. effects were sufficient to give rise to a private U.S. claim (that is, not simply a governmental enforcement action). The D.C. Circuit based its decision on the language of the FTAIA, its legislative history, and the view that the Sherman Act's purposes would be advanced by permitting a greater recovery.

On review this past Term, the Supreme Court held that the D.C. Circuit was incorrect. The Court held initially that the FTAIA exclusion applied not only to export trade but also to transactions within, between, and among other nations. More significantly, the Court held that, by virtue of the FTAIA, the Sherman Act does not apply to independent foreign injury. Its reasoning was perhaps more surprising than its conclusion. First, it held that ambiguous statutes should be construed so as to avoid unreasonable interference with the sovereign authority of other nations; Congress might have anticipated some impact of U.S. antitrust laws on foreign sovereigns, the Court supposed, but it was presumptively unreasonable to apply U.S. law to claims based on foreign conduct causing independent foreign harm. In the Court's view, it was insufficient to answer that foreign antitrust laws prohibited similar conduct, particularly since nations differ about appropriate remedies. The Court also rejected as too complex any case-by-case approach to assessing the impact of jurisdiction on international comity.

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—Edward Swaine

Second, the Court took the view, based on the language of the FTAIA and its legislative history, that Congress did not want to expand the Sherman Act's scope with respect to foreign commerce. In this connection, it reviewed pre-1982 judicial precedents and held that they failed clearly to establish any right to relief to private plaintiffs under comparable conditions. The Court also rejected the plaintiffs' textual arguments that the FTAIA speaks generally in terms of "conduct"—and does not, consequently, support distinctions based on particular transactions, nor on the type of plaintiff—and that the FTAIA demanded only that conduct's domestic effect give rise to "a claim," not to "the plaintiff's claim." Even if the plaintiffs might have shown the more natural reading of the statute, the Court added, the basic intent of Congress was otherwise, and policy considerations—like the need to encourage defendants to seek government amnesty—at least mitigated the argument in favor of enhancing private deterrence.

The Court concluded by remanding for further proceedings, noting that the plaintiffs offered to show that higher price effects in the U.S. were in fact necessary to maintain international price fixing. Subsequently, the D.C. Circuit ordered briefing on the question of whether this alternate theory had been preserved and whether there was in fact sufficient linkage between the domestic and the foreign effects.

Although my primary purpose here is to provide a brief background on the controversy in *Empagran*, let me also offer briefly three reasons for why I think the Court's opinion, regardless of whether its basic result is right, was poorly done. First, it endorsed—without explanation—an approach to international comity that was facially inconsistent with the majority opinion in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), and even with this Term's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004). Second, it eschewed a focus on statutory language for a rather non-conventional (to the modern ear, at least) attention to congressional intent and legislative history—but without coming to grips with the detailed arguments presented by both sides on those questions.

Third, it failed to resolve any but the most extreme and easiest instances of foreign claims—that is, those claims that are completely estranged from U.S. effects, on which it is easiest to reach a view—and licensed a standardless inquiry into the relationship between antitrust markets. This will

likely bedevil the lower courts and, more significantly, defeat the objectives the Court identified: namely, reassuring foreign nations that their sovereign interests (in *reducing* antitrust enforcement, at least) will be respected, and clarifying for wrongdoers their potential liability (by *reducing* that potential liability, as it happens) and thus facilitating the Justice Department's amnesty program. When lower courts must decide, according to their own lights, whether there is a sufficient link in any given case, in any given set of markets, between foreign and domestic claims, any ehanced certainty is purely a fortuity. For these reasons, among others, *Empagran* will likely have far less impact, for better or for worse, than will the recently enacted Antitrust Criminal Penalty Enhancement and Reform Act, which increased the Justice Department's leverage against potential defendants. It may be regretted, however, that the Court's analysis provides little room for taking such developments into account, and does so little to ensure the proper balance between U.S. and foreign antitrust efforts.

THOMAS C. GOLDSTEIN: I argued the case on behalf of the plaintiffs.

I will give my bottom-line sense of what I think is up with the case and where the courts will go. I'll then talk briefly about procedure, and then get into slightly more detail about what it is that I think the Supreme Court was trying to do and what it accomplished.

The bottom line is that the case has good things for a defendant and good things for some plaintiffs. I think it did good things for defendants in that there is now a categorical rule that eliminates the least tenable cases under the FTAIA and the Sherman Act: the ones that describe no relationship between injuries in the United States and the foreign injury. That is to say, those cases allege that there was an international conspiracy and then that's good enough to bring claims that arise overseas in the United States.

That kind of case is now completely out of the question; and I think there were cases pending that had allegations like that. As I'll discuss in a second, I think that's how the Supreme Court conceived of the Fifth Circuit *Den Norske* decision. *See Den Norske Stats Oljeselskap As v. HerreMac Vof*, 241 F.3d 420 (2001), *cert. denied*, 534 U.S. 1127 (2002). I don't think anybody seriously thought those claims could be brought. "Anybody" is an overstatement, but I think, based on some doctrines that I'll discuss, that the *Empagran* lawyers certainly never thought that it was sufficient that you simply had the international conspiracy.

And I also said that I think that there are things in the *Empagran* ruling favorable to plaintiffs. I think it's a little too early to tell exactly how pro-plaintiff the ultimate rule will be. But I would certainly say that this decision is favorable to the *Empagran* plaintiffs. "Favorable" is a loose term—that is not to say that we won. We recognize that we didn't, we didn't ask for a judgment, and we're actually paying the defendants' costs in the Supreme Court. We recognize that the word "reverse" has certain negative connotations for the prevailing party. But for reasons that I'll describe—including the fact that we conceded it in both our brief and in oral argument—the rule that the Supreme Court adopted was right. We sincerely believe that our claim fits within the set of cases that the Supreme Court—or the D.C. Circuit—will say are okay.

I said that I would talk about where the case goes from here. There is a briefing order in the D.C. Circuit. We see the case proceeding in three parts. The first is the threshold question that's raised by a sentence in the defendant's reply brief and then a sentence in Justice Breyer's unanimous opinion for the Court: whether or not we've preserved the question of whether we have a claim in which our injury overseas is interrelated with the injury that occurred in the United States. The D.C. Circuit's briefing order goes to the procedural question. Those are relatively short briefs that are due relatively soon.

The second thing that I think will happen is that the D.C. Circuit will conclude that we have preserved that claim. Maybe not, but I think there are an awful lot of arguments that say we have. Then the court will turn to the question of what degree of relationship is required. It is concerned, I think, with whether or not they should decide that question, or whether the district court should decide that question in the first instance. I think our view will be, although we haven't come to a firm conclusion, that the D.C. Circuit ought to decide the question of law. Is it "but for" causation? Is it something else? How intrinsic does the injury to the United States have to be for it to be said that it gave rise to the injury overseas?

Third, once that standard is set (which won't determine if anybody wins or loses), the district court will likely decide as a matter of fact whether or not we satisfy the standards that the court of appeals sets. That is all a prelude to some other things that will happen in the case. No doubt, the defendants will move to dismiss, assuming we get over all that—on forum non conveniens grounds, on personal jurisdiction grounds, and then on the merits—although we think the guilty pleas are a good sign that we'll win the merits.

Now, what did the Supreme Court think it was doing? I personally agree, as a matter of literary criticism, with those who think that the opinion is really kind of weird. But if we look behind it at what it is the Supreme Court thought it was doing, it thought it was resolving a circuit split between the Fifth Circuit's *Den Norske* decision and the D.C. Circuit's ruling that "a claim" meant "any person's claim."

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—Thomas C. Goldstein

You can look at the *Den Norske* decision in a variety of different ways. I should say I represented the plaintiffs in the Supreme Court in *Den Norske*, along with Seth Waxman, unsuccessfully seeking certiorari in that case. There were heavy-lift barges around the world and you don't send a heavy-lift barge from the Gulf of Mexico to the Arabian Peninsula. They sort of stay where they are. They weigh as much as Washington, D.C.; they are stuck there. The Fifth Circuit emphasized that the injury to people in the Gulf of Mexico—that is to say, within the United States—didn't have much to do with the injury that happened to people in Europe. There was an international conspiracy but not an interrelated market.

I believe that the Supreme Court thought that the D.C. Circuit's decision that any person—a characterization of the phrase "a claim"—injured overseas could bring a claim so long as somebody was hurt here was in conflict with the Fifth Circuit's decision, and resolving that conflict is all that the Supreme Court believed it was doing. In that scenario, the Court said that the Fifth Circuit had it right, and what it characterized as the D.C. Circuit's decision was wrong. So the Supreme Court conceived of our case as people in Ecuador or Panama, for example, free riding on the claims of people injured in the United States. So somebody was hurt by this international price-fixing conspiracy by purchasing bulk vitamins in Maryland and that was sufficient for somebody in Ecuador to sue. The Supreme Court said, when you have a complete failure to have a relationship between the U.S. and abroad to support injury, you can't bring such a claim. That's perfectly sensible. Even though, interestingly, Justice Breyer thought that perhaps the D.C. Circuit had "the more natural reading," because either reading was plausible, the defendants' was the better one.

The interesting thing about the case, and why I think it ultimately accomplishes very little (except that, for reasons I'll describe at the end, it may be regarded as pro-plaintiff), is that everybody agreed on the outcome in the scenario that the Supreme Court described. At oral argument, we affirmatively agreed that those claims were not cognizable, indeed to the point of saying that if that's all that the Supreme Court read the D.C. Circuit to hold, that we would lose and the case would be remanded.

Our position was that those claims should be resolved in two ways that the Supreme Court did not adopt. We had said that those claims should be knocked out in ways that wouldn't require reversing the D.C. Circuit's judgment. The first one I still think is right—and that is, those people have antitrust standing. We said antitrust standing means that your claim has to be one that furthers the interest of the United States, and if somebody is hurt in Ecuador and doesn't have anything to do with what's going on here it's impossible to say, except in the most strained way, that allowing such a claim would further the interest of U.S. consumers.

Or we said, second, that following *Hartford Fire* you would knock those claims out on comity grounds. We had read *Hartford Fire* (because it says so, so it wasn't that much of a stretch), that you decide the scope of the statute and then you decide later whether or not comity kicks out some of those cases. That was the fight between Justice Souter and Justice Scalia in *Hartford Fire*. The Supreme Court didn't go for that in *Empagran*. It said no, we're going to read the statute to preclude those claims in the first instance. So this obviously was not that big a concern of ours that this class of cases would be knocked out, because we thought that they inevitably would be knocked out on other grounds.

Now to close, this opinion will be favorable at least to these plaintiffs, and that's true I think for four reasons. The first is I think there is a strong negative inference—particularly to the D.C. Circuit panel that has already ruled for us once—when Justice Breyer says 1, 2, 3, 4, 5, 6, 7 times (and four of the times are in italics) that they're only reaching the question whether or not there is a claim when the injury overseas is completely unrelated to the injury of the United States. The negative pregnant is the suggestion that there is a claim when the facts are otherwise.

Second, I think that this decision strips away the best hypotheticals of the defendants and the government, which argued quite forcefully and persuasively to the Supreme Court that the D.C. Circuit's reading—if taken to its furthest consequence—would mean that somebody who was just hurt in Ecuador could sue here despite the fact that there was no relationship. That argument really did bring on the parade of horribles. The Supreme Court stripped away the parade of horribles.

Third, I think that the now-narrowed scope of the Sherman Act heightens our argument for deterrence. It doesn't undercut it. That is to say, the D.C. Circuit, relying on *Pfizer*, talked about the need to allow claims of persons injured overseas to proceed in order to fully combat illegal cartels. Now when we are going to talk about our claims on remand, this is where there is a direct relationship between the injury here and the injury abroad. That really does emphasize how it is that these foreign claims do enhance deterrence of cartels and therefore protect U.S. consumers.

I would say finally that I think this is going to be resolved by the D.C. Circuit. I think the Supreme Court is going to be loath to step back into this in the short term. You know it's highly possible that a direct sort of conflict would arise again soon. I just find it unlikely. What has to happen on remand is a fairly loosey-goosey kind of case-by-case look at what kind of relationship is required, and it's difficult to characterize that as a direct conflict as a matter of law. So I do think that the Supreme Court is unlikely to do anything in the very short term.

JONATHAN S. FRANKLIN: Among the panel members, I am in some ways the odd person out. While I did prepare an amicus brief in the *Empagran* case together with my colleagues Jan McDavid, Jeff Blattner, and Will Johnson, I was not litigating the case in the trenches. In addition, I'm not an antitrust lawyer, and I don't pretend to be one. Like Tom Goldstein, I'm an appellate lawyer, which means that I handle pretty much any case that comes in the door in any area of law. Just by comparison, some of my recent Supreme Court cases have involved the ownership of submerged lands in Alaska, the Clean Air Act, the Foreign Sovereign Immunities Act, Megan's Laws, and the

constitutionality of ballot labels imposed on candidates. But not being an expert on an area of law has never stopped me from speaking before, and it won't here either. My goal today is to try to focus briefly on the bigger picture and to speak from the perspective of where I see this case fitting in—or maybe not fitting in—with some of the other cases of this Term in the Supreme Court.

My colleagues and I prepared an amicus brief in *Empagran* on behalf of the Business Roundtable, which is a well-known and prestigious association of major companies and their chief executives. But while I did represent the Roundtable in the case, I'm speaking here solely for myself and not my client or my firm. Nevertheless, I will try to give a perspective on why the Business Roundtable got involved in this case, how they saw the case, and where I see the case going in the future. The first reason the Roundtable got involved in *Empagran* was that the case was viewed as important to the business community in general. One of the perspectives I often have urged on the Supreme Court—sometimes successfully, sometimes not—is that the business community values certainty in legal applications, perhaps sometimes even above correct results. And in this case, the D.C. Circuit's decision was viewed as both incorrect and also as spawning a degree of uncertainty that was seen as intolerable by the business community. In addition, the Roundtable was actually involved in the legislative process that led to the FTAIA and believed strongly that there was a clearly discernible intent of Congress, even though the legislative language may have turned out to be somewhat inscrutable. And that intent—which I'm glad to say was picked up by the Supreme Court in its opinion—was that Congress above all was concerned about narrowing the scope of U.S. antitrust jurisdiction, not expanding it. The business community in general viewed the D.C. Circuit's decision as contrary to that intent because it worked an expansion of antitrust jurisdiction, rather than a narrowing, as Congress had intended. The "I" in the statute's acronym is for "improvements," and the D.C. Circuit's decision was not viewed as an improvement by the business community. I'm happy to say that the Supreme Court did bring a certain degree of certainty to the statute by making clear that the D.C. Circuit's rationale was incorrect: one cannot simply point to some hypothetical plaintiff somewhere in the United States and say that the existence of that hypothetical plaintiff, in combination with an international conspiracy, means that persons injured in wholly foreign transactions are able to sue in the United States.

The Court also made clear that there is a cooperative international antitrust enforcement regime and that expanding the scope of U.S. jurisdiction to areas that are deemed to be the province of foreign governments will disrupt that process. Businesses in particular are vitally interested in knowing which legal regimes are governing their conduct and in not having potentially inconsistent regimes governing them in foreign countries.

I would also like to touch briefly on where I think this case fits—or doesn't fit—into the Court's Term. This was an interesting Term in one respect because of the large number, relative to other Terms, of cases that involved international issues, particularly the extent to which U.S. laws might apply in places other than the United States. In addition to this case, there was the *Intel* case, which also involved antitrust issues—specifically, the question of whether U.S. proceedings could be invoked to assist plaintiffs who were prosecuting an action in Europe. But there were also other international cases that came up at the same time. The Guantanamo Bay case, as well, was ultimately about whether U.S. courts are going to have the authority to intervene in a place that was at least asserted to be outside the United States. There was also the *Sosa* case, involving the Alien Tort Statute, which was a very important case considering whether international human rights cases can be brought by foreign nationals in this country. And there was also the *Altmann* case, in which I was also involved in an amicus capacity. That case involved the Foreign Sovereign Immunities Act and a Holocaust-era claim brought against the country of Austria by a woman who

asserted that she was unable to bring her claim in Austria and decided instead to sue Austria here in the United States. The *Empagran* case actually ended up being an outlier in the sense that in all of the other cases that I mentioned the Supreme Court essentially came down on the side of saying that U.S. jurisdiction could extend more broadly than some had hoped it would. In *Sosa*, the Court announced a very narrow and limited holding—that only certain kinds of claims could be brought—but the Court did open the door to some extent to claims brought under the Alien Tort Statute involving events occurring entirely abroad.

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—Jonathan S. Franklin

Increasingly in my practice, which spans a number of areas, I have seen instances of foreigners coming to the United States to sue because our courts, unlike probably any other courts in the world, are viewed as open to anybody who wants to roll their dice and try their luck. I'm not sure whether that's a great thing for our country, but the trend spans many different areas of law. The trend does not just involve antitrust law, as in *Empagran*, but also encompasses the Alien Tort Statute and Foreign Sovereign Immunities Act cases, and other areas as well. I have been seeing more and more foreign plaintiffs coming into the courts here. I don't know whether this can be viewed as the United States exporting its legal system or importing plaintiffs, but it is certainly an international trade issue that has not been recognized very much.

One possible way to explain the different result in *Empagran*—other than the obvious point that each case involved different statutes and constitutional provisions—is that the Court was concerned in *Empagran* that it would be stepping on the toes of foreign enforcement authorities to some extent if it expanded jurisdiction in the way the plaintiffs had suggested, whereas in the other cases there at least arguably was no ability for the foreign jurisdiction to assert itself over the claims in question. The Court therefore might have felt that there was a need to assert U.S. authority in those cases. I frankly think *Intel* is somewhat inconsistent with *Empagran*, and the fact that Justice Breyer dissented in *Intel* and wrote the majority in *Empagran* is some support for that proposition.

Finally, I'd like to touch briefly on the remand issue. I am not involved in the remand proceedings at this point, but whatever is meant by the remand, the Supreme Court could not have intended for the exception—to the extent there is an exception—to swallow the rule. If it is simply enough to assert that an international conspiracy is at work involving a market that is viewed as a global market—if that is enough to bring the U.S. jurisdiction back into play—then I think much of what the Supreme Court said in its opinion in *Empagran* would have been for naught. And again from the business perspective, companies do not relish the idea of some sort of a wide-ranging factual inquiry that needs to be undertaken in every case before you even get to the point of knowing whether there is U.S. jurisdiction. That was one of the problems with the way the D.C. Circuit resolved the case in the first place, and it certainly ought not to be brought back into the case on remand through this issue of causation.

However the remand is to be conducted, it ought to be conducted in accordance with the basic principles the Supreme Court laid out. And in that regard, it is important that wherever the bar is set on remand, it should be set sufficiently high so it could not be surmounted simply by making conclusory statements or producing some sort of generalized evidence that there is a worldwide market and a worldwide conspiracy. That holding, if it were adopted on remand, would threaten to have the exception swallow the rule. The Supreme Court did not decide that jurisdiction exists simply because someone can allege, or even show facts demonstrating or indicating, that a worldwide conspiracy might fail were it not for the U.S. component of it. Such a holding comes very close to—if not precisely duplicates—the argument that all one needs is a worldwide market, given the size of the U.S. market in many of these instances. I don't think the Supreme Court

focused on this issue because it wasn't briefed to the Court. And because the Supreme Court is generally somewhat cautious, the Court probably wanted to make clear that while it was deciding one issue it was not necessarily expressing a view on the other. But I do think that the remand ought to keep in mind the basic intent of the statute as set forth by the Court in *Empagran*, which was to narrow the scope of U.S. antitrust jurisdiction.

Furthermore, the fact that other countries may have different remedies for antitrust violations is no reason to expand U.S. jurisdiction. The Supreme Court, at least in my reading of the opinion, has rejected that notion. The Court said, in essence, that it knew that different countries are going to do things in different ways. The Court felt that this situation is not a problem but is, in fact, something we want to encourage. The basic thrust of the Supreme Court's analysis was that this international comity is threatened by expanding the scope of U.S. jurisdiction to circumstances involving parties who were injured abroad. Any future proceedings under the statute should also be conducted with that basic principle in mind. ●