

# APPELLATE COURTS SPLIT ON THE INTERPRETATION OF THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT: SHOULD THE FLOODGATES BE OPENED?

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## I. INTRODUCTION

January 17, 2003, may well come to be a watershed date in U.S. antitrust history. It was the date the U.S. Court of Appeals for the D.C. Circuit issued a decision in *Empagran S.A. v. F. Hoffman-LaRoche (Empagran)*.<sup>1</sup> Taking an expansive view of the way U.S. antitrust laws apply to foreign claims, the court ruled that international purchasers of vitamins, whose injury stems solely from their non-domestic transactions, are free to bring claims under the 1890 Sherman Act, where the defendants have engaged in global price-fixing of vitamin sales and there is harm to a private party in the United States. Central to the ruling was an interpretation of the 1982 Foreign Trade Antitrust Improvements Act (FTAIA), which amended the Sherman Act.<sup>2</sup> The court determined that the FTAIA allows claims by foreign plaintiffs even when the specified domestic injury does not give rise to their respective claim. Put another way, as long as at least one party in the United States suffers an injury as a result of the global price-fixing, foreign purchasers can bring their claims before U.S. federal courts. This is true even though the injury to foreign plaintiffs is rooted entirely in transactions external to the United States. Implicit in this newly extended right are the additional privileges of injunctive relief, treble damages, jury trial and lawyers' fees. The court buttressed its legal reasoning with a tolerant reading of the FTAIA's legislative history, as well as with relevant public policy arguments.

While the predictions of increased U.S. antitrust suits brought by foreign plaintiffs may hold true, possibly crowding federal dockets, judgment should be reserved until other developments have run full course. Two months after *Empagran*, the Department of Justice (DOJ)<sup>3</sup> and the Federal Trade

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

2. *Sherman Act*, 15 U.S.C.S. § 6a (1982).

3. *See generally* United States Department of Justice homepage at <http://www.usdoj.gov/> (last visited Apr. 10, 2004).

Commission (FTC)<sup>4</sup> submitted a joint amicus brief to the D.C. Circuit, calling for an en banc rehearing of *Empagran*. The impact of *Empagran* is not to be underestimated, but it remains to be seen if the case will stand as is.

## II. BACKGROUND

*Empagran* breaks new legal ground with its liberal interpretation of the FTAIA. Prior to 2002, the general understanding was that foreign plaintiffs could not bring claims under U.S. antitrust law for injuries suffered as a result of their non-domestic transactions, regardless of whether domestic trade or commerce was affected. The 2001 case coming out of the Fifth Circuit Court of Appeals, *Den Norske Stats Oljeselskap As v. HeereMac v.o.f. (Den Norske)*,<sup>5</sup> went far in bolstering this belief. It held that the "plain language" of the FTAIA requires foreign plaintiffs who wish to sue under U.S. antitrust law to have a claim arising specifically from a domestic injury.<sup>6</sup> In other words, the plaintiff could be foreign, but the injury and the claim arising from it could not.

This was the generally held view, but this area of the law was hardly the most settled; it took American courts the better part of a century to reach this modest stance. As early as 1909, in *American Banana Co. v. United Fruit Co. (American Banana)*,<sup>7</sup> the Supreme Court was asked to consider the reach of U.S. antitrust law. Although *American Banana* stated that the Sherman Act had no application external to the United States, subsequent cases, reflecting the increased importance international trade began to have on American markets, evinced a more relaxed reading of the jurisdictional elements of the Sherman Act. In 1945, the scope of U.S. antitrust law spread further. In *United States v. Aluminum Company of America (Alcoa)*,<sup>8</sup> the Second Circuit introduced the "effects test," which established domestic jurisdiction over foreign conduct that intended to or did in fact have an effect on U.S. trade or commerce. The effects test achieved gradual acceptance in the majority of federal courts, albeit in various forms. One case in the 1970s<sup>9</sup> and another in the 1980s<sup>10</sup> introduced to the already loosely interpreted "effects test" a balancing test where the principle of comity was taken into account. The most recent development in U.S. antitrust jurisdiction came in the 1993 case *Hartford Fire Insurance Co. v. California (Hartford)*, which reconfirmed that

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4. See generally Federal Trade Commission for the Consumer homepage at <http://www.ftc.gov> (last visited Apr. 10, 2004).

5. *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001).

6. *Id.* at 421.

7. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

8. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

9. *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

10. *American Rice v. Arkansas Rice Growers Coop Ass'n*, 701 F.2d 408 (5th Cir. 1983).

“the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>11</sup>

### III. THE FTAIA

Prior to *Hartford*, U.S. lawmakers tried to elucidate the extraterritorial scope of domestic antitrust law by passing the FTAIA in 1982. The FTAIA amended the Sherman Act such that the latter “shall not apply to conduct” involving non-import trade or commerce with a foreign nation unless:

- (1) “such conduct has a direct, substantial, and reasonably foreseeable effect” on trade or commerce in the United States,<sup>12</sup> and
- (2) “such effect gives rise to a claim” under the Sherman Act.<sup>13</sup>

Unless these two criteria are met, U.S. federal courts lack subject matter jurisdiction over the case. The FTAIA was intended to exempt from antitrust prosecution those transactions that did not have a harmful effect on the U.S. economy.<sup>14</sup> It aimed to do this with its objective three-prong effects test.

### IV. THE INTERPRETATION OF THE FTAIA BY THE APPELLATE COURTS

While the FTAIA was meant to lead to clarity, it has recently led to confusion. Since 2001, three federal circuit courts of appeal have interpreted the aforementioned provisions of the FTAIA in three different ways.

#### A. *Den Norske*

The first and most restrictive interpretation came in the 2001 case *Den Norske*.<sup>15</sup> In this case, a Norwegian oil company, whose business extended no further than the North Sea, brought a U.S. antitrust conspiracy claim against a handful of defendants who provided maritime heavy-lift services.<sup>16</sup> Although the heavy-lift services reached to all parts of the globe, the oil company claimed no specific harm suffered in the U.S.<sup>17</sup> Instead, the oil company made the indirect charge that the heavy-lift providers operated as a

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11. *Hartford Fire Ins. Co. v. California*, 509 U.S. 769, 796 (1993).

12. 15 U.S.C.S. § 6a (1)(A).

13. 15 U.S.C.S. § 6a (2).

14. *See* H. R. Rep. No. 97-686, pp. 2-3, 9-10 (1982).

15. *Den Norske*, 241 F.3d 420.

16. *See id.* at 421.

17. *Id.*

worldwide cartel; their stranglehold on barge-borne heavy-lift services led to inflated prices not only in the North Sea (where the oil company was affected) but also in the United States. U.S. trade was, therefore, affected under the Sherman Act.<sup>18</sup>

The Fifth Circuit did not agree with the plaintiff's argument, however, and dismissed the case for lack of subject matter jurisdiction.<sup>19</sup> The court ruled that a "plain language" reading of section 6a (2) of the FTAIA unavoidably led to the conclusion that foreign plaintiffs whose injury is rooted solely in foreign conduct should be barred from bringing claims under the Sherman Act.<sup>20</sup> It was immaterial that the conduct may harm U.S. trade as well.<sup>21</sup> To put the issue in the context, even if it were true that the defendants in *Den Norske* had engaged in a conspiracy to fix global heavy-lift prices and that this conspiracy had harmed U.S. trade, the Fifth Circuit ruled that the injured Norwegian oil company could not bring a claim to U.S. federal court under domestic antitrust laws. In this situation, only an injured domestic plaintiff could bring a claim.

The issue before the Fifth Circuit revolved almost entirely around the presence of the minutest of words, "a," in section 6a (2) of the FTAIA.<sup>22</sup> The court believed that "a claim," as it existed in section 6a (2), should be interpreted narrowly to mean "the claim of the plaintiff before the court." The court reasoned that if "a" were interpreted broadly to include both domestic *and* foreign claims, this would open U.S. courts to a flood of international claims. The majority deemed it inconsistent with the controlling statutory language, as well as with the intent of the Congressional drafters, to interpret the FTAIA so expansively as to allow claims from all over the world in U.S. federal courts.

In his dissent, Judge Higginbotham disagreed that a "plain language" understanding of the text necessarily precluded claims by foreign plaintiffs. While he acknowledged that the intent of the Congressional framers was, first,

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18. *Id.*

19. *Id.*

20. *Id.* at 426.

21. *Den Norske*, 241 F.3d 420.

22. The statute reads as follows:

§ 6a. Conduct involving trade or commerce with foreign nations

This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

- (1) such conduct has a direct, substantial, and reasonably foreseeable effect--
  - (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
  - (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- (2) such effect *gives rise to a claim* under the provisions of this Act, other than this section.

Sherman Act, 15 U.S.C.S. § 6a (1982) (emphasis added).

to protect American citizens from anticompetitive behaviour, Judge Higginbotham did not believe that their intent went so far as to “close the door to a foreign company injured by the same illegal conduct.”<sup>23</sup> He maintained that the meaning of the word “a” was clear and simple and should not be construed narrowly.<sup>24</sup> The drafters had the choice to use a definite article (“the”), and they picked an indefinite one instead (“a”); let the interpretation reflect this choice, Higginbotham advocated.<sup>25</sup>

The majority no doubt would have sided with Judge Higginbotham had the situs of the injury suffered by the Norwegian oil company been situated in the United States. The difference between the two views was not the domestic character of the plaintiffs but the domestic character of the situs of the injury. Specifically, there was no domestic character to the situs of the oil company’s injury. The effect and injury were entirely foreign.

In the end, *Den Norske* foreclosed one avenue of redress for injured foreign plaintiffs. The court ruled that although the anticompetitive conduct may have simultaneously injured U.S. consumers, foreign plaintiffs had no federal cause of action under the Sherman Act. The only claims allowed under the court’s interpretation of the FTAIA were those that arose from the anticompetitive effects on the U.S. economy. It should be remembered that the Fifth Circuit certainly did not condone global price-fixing, nor deny that the price-fixing scheme had an effect on domestic trade or commerce. Rather, the Fifth Circuit held in *Den Norske* that the particular plaintiff, the Norwegian oil company, had not suffered an injury recognizable under the jurisdiction requirements of the Sherman Act as amended by the FTAIA.

### B. *Kruman*

In 2002, the Second Circuit issued a decision that agreed with the Fifth Circuit’s *Den Norske* in theory but disagreed in fact. That is, the Second Circuit also adhered to a “plain language” reading of the FTAIA, yet it reached the opposite conclusion of its sister circuit.

In *Kruman v. Christie’s International PLC (Kruman)*,<sup>26</sup> the plaintiffs filed a class action suit under the Sherman Act against Christie’s International PLC and Southeby’s Inc., the world’s largest auction houses for fine art, collectibles, and similar items. The plaintiffs claimed that these two companies (the former a U.K. company, the latter a Michigan corporation) had engaged in global price-fixing of items sold at auction. In brief, the *Kruman* decision held that the effect on U.S. trade or commerce “need not be the basis for a plaintiff’s injury, it only must violate the substantive provisions of the

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23. *Den Norske*, 241 F.3d. at 431.

24. *Id.* at 432.

25. *Id.* at 433-33.

26. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384 (2d Cir. 2002).

Sherman Act.”<sup>27</sup> In other words, the plaintiffs, although their transactions were external to the U.S. economy, could bring antitrust claims because the defendants’ conduct had an effect on U.S. trade or commerce that violated the main strictures of the Sherman Act.

Like its sister circuit, the Second Circuit judged the FTAIA language clear and unambiguous. “Congress used the indefinite article (“a”) rather than the definite article (“the”). As a court, we must be faithful to, and honor legislative meaning.”<sup>28</sup> Strikingly, however, the Second Circuit made a decision opposite to that of the Fifth Circuit. The court struck down the defendants’ argument to limit antitrust claims to those plaintiffs whose injury stemmed from domestic conduct, observing that to do so would fly in the face of *Alcoa*’s longstanding principle that it is the situs of the effect on trade that determines whether U.S. antitrust law applies, not the situs of the conduct.

Given the relevance and timeliness of *Den Norske*, it was inevitable that the *Kruman* defendants would rely on it in their pleadings. The “floodgates” argument figured centrally. The defendants claimed that reading the language of the FTAIA broadly would open U.S. federal courts to all varieties of antitrust claims by foreign plaintiffs. This was especially true, argued the defendants, because the world’s markets were becoming increasingly interdependent.

The *Kruman* majority dismissed this argument, noting that Section 6a (1) of the FTAIA was in place to combat just such a wave of frivolous and unrelated foreign lawsuits. Not only must the claim highlight an effect on the U.S. economy (as required in subsection (2) of 6a), but the effect must be “direct, substantial, and reasonably foreseeable.”<sup>29</sup> Clearly, the court believed these elements of the FTAIA sufficient to stem the supposed flood of internationally driven lawsuits.

### C. *Empagran*

The most recent addition to the mix was the 2003 case *Empagran*, decided by the D.C. Circuit. If the Fifth Circuit’s holding was the most restrictive reading of the FTAIA and the Second Circuit’s the most lenient, then the D.C. Circuit’s ruling fell in the middle but leaning more toward the Second’s interpretation. The D.C. Circuit agreed with the Second Circuit that foreign plaintiffs should be allowed to bring their claims in U.S. federal court.

In *Empagran*, a class of vitamin retailers brought suit against the world’s leading vitamin producers, alleging a global price-fixing conspiracy among the several defendants. Just as in *Den Norske* and *Kruman*, the plaintiffs in *Empagran* made no claim that their injuries arose from domestic transactions.

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27. *Id.* at 400.

28. *Id.*

29. 15 U.S.C. § 6a (1).

All their transactions, in fact, had happened outside the U.S. stream of commerce. Instead, the plaintiffs charged that the defendants' global price-fixing scheme adversely affected the U.S. economy. Prices were kept high all over the world, particularly in the United States, and American consumers suffered as a result.

To the foreign plaintiffs, the two requirements of Section 6a of the FTAIA had been met. First, by virtue of the fact that the alleged cartel controlled billions of dollars in revenue from vitamin sales, the plaintiffs argued that the actions of the vitamin producers had a "direct, substantial, and reasonably foreseeable effect" on the U.S. economy.<sup>30</sup> Second, they argued that this effect gave "rise to a claim."<sup>31</sup> Again, the issue boiled down to the interpretation of the FTAIA language.

Unlike the two previous circuits, the D.C. Circuit found no "plain meaning" in the language of the FTAIA. Instead, they found that they had to reinterpret the provisions all over again. This time, citing the statutory language itself, the FTAIA's legislative history, and public policy considerations, the D.C. Circuit determined that foreign plaintiffs should be allowed to bring their claims. While the majority deemed the Fifth Circuit's interpretation of the FTAIA "overly rigid," they also saw the Second Circuit's holding as going too far, particularly in its determination that only the "substantive provisions" of the Sherman Act need be violated to give rise to a claim.

In striking new legal ground, the court supported its judgment with three legal pillars. First, referencing the statutory language itself, the D.C. Circuit issued the following holding:

We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct must violate the Sherman Act and the conduct's harmful effect must give rise to "a claim" by someone, even if not the foreign plaintiff before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim.<sup>32</sup>

The court remarked of its holding: "This interpretation has the appeal of literalism."<sup>33</sup> Next, the court concluded that, by and large, the legislative

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30. 15 U.S.C.S. § 6a(1).

31. 15 U.S.C.S. § 6a(2).

32. *Empagran*, 315 F.3d at 341.

33. *Id.*

history of the FTAIA favored an expansive reading of the Act's jurisdictional elements. Specifically, the court said that the legislative history, if it were interpreted to favor the more restrictive view of the FTAIA (as seen in *Den Norske*), did not exclude the less restrictive reading (*Kruman*). However, if the roles were reversed, the less restrictive reading *would* exclude the more restrictive view. The majority found this not only significant but also dispositive.

Lastly, in regard to the public policy issues, the court borrowed from the ruling in *Kruman* and Judge Higginbotham's dissent in *Den Norske*. Both had argued that allowing foreign plaintiffs in U.S. federal court would have a strong deterrence effect on potential anticompetitive conspirators on a worldwide scale. Whereas precluding these foreign claims in U.S. federal court could encourage a conspirator to engage in global price-fixing and offset his U.S. liabilities with profits from abroad, allowing foreign claims would obligate the conspirator "to internalize the full costs of his anticompetitive behavior."<sup>34</sup> Moreover, the court reasoned that domestic consumers would also benefit if foreign claims were permitted. Closing U.S. courts would have the effect of diminishing the efficacy of U.S. laws, while at the same time driving the plaintiffs back to their home fora, where the possibilities of prosecution and enforcement were uncertain. The *Empagran* majority finished assertively: "The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy."<sup>35</sup>

As a corollary to the main holding, the majority in *Empagran* ruled that the foreign plaintiffs in question had standing to bring their case in U.S. federal court. This issue had been left unanswered at the district court level.

Given the facts that *Den Norske* and *Kruman* reached opposite rulings and that the court split in *Den Norske*, the split decision in *Empagran* should not come as a surprise. Dissenting, Judge Henderson deemed the more "natural reading" of the FTAIA to be the narrower one espoused by the majority in *Den Norske*. She found it peculiar that a claim by a foreign plaintiff would be judged actionable based on the potentiality of a domestic, hypothetical claim. More reasonable to Judge Henderson was the idea that a claim – *the* claim before the court – be based on the domestic injury that affects U.S. trade or commerce.

To recap, *Empagran* held that U.S. federal courts have subject matter jurisdiction over Sherman Act claims brought by foreign plaintiffs whose injury resulted solely from transactions that were external to the U.S. economy but, nonetheless, had an effect on U.S. trade or commerce and gave rise to a domestic (private) claim. As long as at least one domestic plaintiff can bring a claim against these domestic or foreign defendants, so too can the foreign

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34. *Id.*

35. *Id.* at 55.



plaintiff. *Empagran* followed the overall result of *Kruman* but diverged in its reasoning. The latter case was deemed to have gone too far in setting the requirements for subject matter jurisdiction, providing for a jurisdictional nexus simply when the main provisions of the Sherman Act are contravened.

## V. THE GOVERNMENT'S AMICUS CURIAE BRIEF

In response to an invitation from the D.C. Circuit court, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued an amicus curiae brief in March of 2003, stating the position of the U.S. government on *Empagran*. Contrasting sharply with both *Kruman* and *Empagran*, the position of the government was that only those claims that arise from domestic conduct and accompanying domestic effect should be permitted under the FTAIA. Citing the importance of this area of the law and the need for agreement among the circuits,<sup>36</sup> the brief called for an en banc rehearing of *Empagran* by the D.C. Circuit to mend the split of authority. The government's argument came in three parts.

First, the brief stated that the "most natural reading" of Section 6a (2) of the FTAIA would understand the phrase "gives rise to a claim" as referring not to a claim by any plaintiff but only to a claim "by the *particular plaintiff* before the court."<sup>37</sup> As the FTAIA does not talk to the purpose of allowing a remedy for foreign conduct and foreign effect, the Sherman Act cannot be stretched to include the sorts of foreign plaintiffs seen in the three controlling cases.

Next, the brief countered the legislative history argument put forth by the D.C. Circuit. Whereas the majority in *Empagran* concluded that, absent "express legislative history to the contrary, Congress must have intended the more expansive interpretation"<sup>38</sup> of the FTAIA, the government determined this to be dubious logic. The brief proposed that the default position, absent controlling language, should be one that is wholly domestically focused in terms of the *effect* of anticompetitive conduct. The government brief supported the position put forth in *Den Norske*: "Nothing is said about protecting foreign purchasers in foreign markets."<sup>39</sup>

Lastly, the government disagreed with the majority in *Empagran* that extending U.S. antitrust laws would have a deterring effect on global anticompetitive conduct. In fact, the government maintained that just the

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36. In January 2002, the DOJ and FTC issued a joint amicus curiae brief commenting on *Den Norske*. Their logic unchanged from 2002, the *Empagran* brief borrowed substantially from its predecessor.

37. Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing *en banc* at 8, *Empagran S.A. et al., v. F. Hoffman-LaRoche, Ltd., et al.*, No. 01-7115, 2003 U.S. App. LEXIS 647 (D.C. Cir. Jan. 17, 2003) [hereinafter Brief].

38. *Id.* at 10.

39. *Den Norske*, 241 F.3d at 429, n. 28.

reverse was true. Prefacing its argument with the fact that "price-fixing conspiracies are inherently difficult to detect and prosecute [and therefore require the help of co-conspirators,]"<sup>40</sup> the government made the case that extending the jurisdiction of the Sherman Act to foreign plaintiffs injured by foreign conduct "would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency. . . ."<sup>41</sup> In other words, there is a certain balance at the moment between anticompetitive behavior and resulting lawsuits. The government, through its leniency program, has a way of controlling criminal prosecutions against anti-competitive entities, which in turn influences subsequent civil prosecutions. However, if jurisdiction is broadened, then countless more plaintiffs enter the equation, potentially upsetting the delicate equilibrium. This equilibrium is crucial, it will be recalled, in getting the necessary co-conspirators to come forward in the first place. Thus, co-conspirators will ultimately be deterred from divulging what they know and stopping anticompetitive conduct.

As a corollary to this counter-deterrence argument, the government highlights the "floodgates" argument as well. Noting that the government is "unaware of any decision pre-dating the FTAIA that permitted" suits based on a theoretical domestic plaintiff, the brief surmised that *Empagran*'s new rule "threatens to burden the federal courts" with suits concerned with foreign anticompetitive conduct.<sup>42</sup>

In summary, the government's brief centered almost entirely around the notions of domestic and foreign conduct. While the government recognized the right of foreign plaintiffs to bring antitrust claims for injuries stemming from domestic conduct, it refused to concede a similar right to those injured solely by foreign conduct. Moreover, the government found fault with the logic that this latter group of plaintiffs received this right based only on the existence of a single domestic plaintiff. In the end, the government clearly believed that the D.C. Circuit had strayed too far afield in making the jurisdictional nexus between conduct and effect.

## VI. IMPLICATIONS

Two major events will flow from *Empagran*. First, given the split of authority and the three distinct opinions expressed by three federal circuit courts, it seems apparent that this issue is ripe for review by the Supreme Court. Second, a wave of lawsuits by foreign plaintiffs may inundate the federal court system. This was certainly foreseen in a number of sources: the holding in *Den Norske*, the defendants' arguments in *Kruman*, and the amicus brief following *Empagran*. Discounting this argument is not easy, for few

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40. Brief, *supra* note 37, at 12.

41. Brief, *supra* note 37, at 13.

42. Brief, *supra* note 37, at 14.

nations have antitrust laws allowing plaintiffs to recover treble damages and lawyers' fees in civil suits. Thus, it is not unlikely that these existing benefits, in tandem with the newly broadened jurisdictional elements to the Sherman Act, may prompt foreign plaintiffs to bring claims when they otherwise might have refrained.

Certain aspects relevant to *Empagran* do nothing to undercut the "floodgates" argument. Specifically, the DOJ has already obtained against the *Empagran* defendants, both corporate and individual, fees in excess of \$900 million, including the largest criminal fee ever levied by the DOJ (\$500 million).<sup>43</sup> These huge fines hardly dissuade foreign plaintiffs from trying themselves to reach into the defendants' deep pockets.

Conversely, opponents to the "floodgates" theory are not without their own persuasive arguments. They note that Section 6a (1) exists explicitly for the purpose of ensuring a logical nexus between the injury suffered and the right to bring suit. As well as having a direct and reasonably foreseeable effect on U.S. trade or commerce, the injurious effect must be *substantial*. Many commentators feel confident that only the most egregious of cases--those that have a substantial effect on the U.S. economy--will thus be allowed in federal court. Other legal requirements, such as standing, personal jurisdiction, and forum non conveniens, will also contribute to the filtering of marginal cases.

However, the argument put forth in the DOJ/FTC amicus brief that the extension of American jurisdiction as suggested by *Empagran* may dissuade co-conspirators from cooperating with prosecutors seems to be decisive. Put succinctly, *Empagran's* interpretation of the FTAIA may undercut the efficacy of foreign government leniency programs. Given the fact that, by *Empagran*, foreign defendants can be hauled into U.S. federal court to face treble damages and significant personal liability for their exclusively foreign conduct, the ante has been upped considerably in the eyes of many foreigners. It has been increased so much that foreign national competition authorities worry that co-conspirators will be deterred from coming forward to report anticompetitive conduct. As the successful prosecution of anticompetitive behavior hinges so greatly on co-conspirator testimony, detecting and dissolving cartels becomes that much harder.

## VII. CONCLUSION

Clearly, the issue of whether to extend the jurisdiction of U.S. antitrust laws is a contentious one, for it has divided courts and circuits. Supreme Court review does appear necessary. The weight of judicial opinion favors the opening of U.S. courts to the class of plaintiffs seen in *Kruman*, and *Empagran*. The benefits to this course of action are several and not easily discounted. However, the joint opinion of the DOJ and the FTC, coupled with

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43. Brief, *supra* note 37, at 2.

similar opinions from other national competition authorities, is highly persuasive. Control over foreign antitrust matters is rightly left in the hands of those who know the field the best: foreign national competition authorities. *Empagran* and *Kruman* have gone one step too far. The advice in the joint DOJ/FTC brief should be heeded, and the jurisdiction of the Sherman Act as amended by the FTAIA should be rolled back.