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Antitrust Ruling Shows Limits Of US Law's Global Reach

By **Daniel Swanson and Eli Lazarus** (March 28, 2024, 5:56 PM EDT)


Daniel G. Swanson


Eli Lazarus

Grappling with the Foreign Trade Antitrust Improvements Act continues to present difficult problems for courts, counsel and litigants. But one aspect of the law — the relationship between its legislative history and its application to overseas harms — should be put to bed following a recent decision out of the Northern District of California.

Congress passed the FTAIA to clarify whether and when U.S. antitrust law reaches overseas. Antitrust parties and courts have frequently cited the statute's legislative history to support application of U.S. antitrust law to alleged injuries abroad.

But as shown in one recent case, the cited legislative history does no such thing — because it isn't even about the law that was ultimately passed.

In Figaro v. Apple, a case in the U.S. District Court for the Northern District of California that was decided Sept. 13, 2023, the plaintiff French app developers cited the FTAIA's legislative history to support a theory of global harm.

Specifically, Figaro invoked a 1982 House Judiciary Committee report on the proposed law[1] for the proposition that, even though they were in France, U.S. antitrust law applied because "they were injured by way of anticompetitive conduct impacting the domestic commerce of the United States."[2]

Since successful antitrust litigants under U.S. law can collect three times the amount of a demonstrated overcharge, plaintiffs like those in Figaro from around the world often strive to have their cases heard in U.S. court, no matter where the defendants are.

And for decades, plaintiffs and some courts have relied on the 1982 report as authority to prop up claims of U.S. antitrust liability based on foreign injuries that are independent of any effects on U.S. commerce.

In the 2004 F. Hoffmann-La Roche Ltd. v. Empagran SA decision, the U.S. Supreme Court held that those claims must be dismissed,[3] but neither it nor other cases have explained why the House report doesn't suggest a different result.

So litigants keep citing the report to legitimize new claims of foreign injury. If one looks closely enough, however, the trouble with the House report is that, with respect to claims of independent foreign harm,

the report isn't about the statute that was actually enacted.

The text of the FTAIA establishes, in a nutshell, that nonimport activity involving foreign commerce is outside the reach of the Sherman Act, unless it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or — certain — export commerce, and that effect gives rise to the antitrust claim.

The statute's phrasing is famously confusing. The U.S. Court of Appeals for the First Circuit's 1997 decision in U.S v. Nippon Paper Industries politely described the FTAIA as "inelegantly phrased."[4]

The U.S. Court of Appeals for the Ninth Circuit's U.S. v. Hsiung opinion in 2015 called it a "web of words."[5] So it's not surprising that many litigants have tried to make sense of the statute by turning to its legislative history.

For Figaro and others looking to support an expansive view of extraterritorial antitrust liability, the legislative history does not disappoint. The 1982 House report stated that the bill would

> not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the U.S. — e.g., price fixing not limited to the export market — would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad.[6]

Numerous courts were taken in by this language. After quoting the House report, the U.S. Court of Appeals for the D.C. Circuit's 2003 decision in Empagran concluded that "the legislative history as a whole supports the less restrictive interpretation of FTAIA that would allow plaintiffs injured by [challenged] conduct's foreign effects to bring suit even where the conduct's U.S. effects do not give rise to the plaintiff's claim."[7]

The U.S. Court of Appeals for the Second Circuit had reached the same conclusion in the 2002 Kruman v. Christie's International PLC decision , saying that the House report "explained that the language [debated in Committee] 'does not ... mean that the impact of the illegal conduct must be experienced by the injured party within the United States.'"[8]

The U.S. Supreme Court reversed the D.C. Circuit's Empagran judgment — and abrogated the Second Circuit's Kruman decision — concluding that a "purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm."[9]

The court reasoned that the "gives rise to" requirement in the FTAIA's text is not satisfied when "conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect."[10]

Still, in Empagran, the Supreme Court joined the lower courts in quoting portions of the House report, never suggesting or explaining why the report's language that arguably supports claims based on independent foreign injury does not accurately reflect the law.

And so that language in the legislative history has lived on, to be cited again and again as the true voice

of Congress by litigants hoping to ferry their claims of foreign injury past the Empagran bar.

The reason that the House report does not support antitrust claims based on independent foreign harm — even though its words seem to suggest otherwise — is that those words refer to a version of the bill that was not enacted.

The final page of the House report provides commentary from Judiciary Chairman Peter Rodino, stating that he would put the bill forward "with one minor clarification."[11] Where the committee's version of the bill would have required the effect on domestic commerce to be "the basis of the violation alleged," Rodino substituted in a requirement that "such effect gives rise to a claim."[12]

Rodino believed that the "substituted language accomplishes the same result as the Committee version" — the result of "mak[ing] it absolutely clear that the basis of American antitrust jurisdiction has to be a domestic anticompetitive effect."[13]

And he was correct that either phrasing would achieve that result. But the chairman's amendment changed exactly the language that the House report was talking about in suggesting that the bill would, in the D.C. Circuit's words, "allow plaintiffs injured by ... foreign effects to bring suit even where the [relevant] conduct's U.S. effects do not give rise to the plaintiff's claim."[14],

Instead, as the Supreme Court held in Empagran but without clarifying the legislative history, a plaintiff may sue based on foreign antitrust harm only where the challenged conduct has an effect on U.S. commerce that "gives rise to a claim" — and not just any claim, the plaintiff's claim.[15]

In other words, a plaintiff must show not only that a U.S. effect of the alleged conduct gave rise to the violation complained of, it must show that that effect caused the plaintiff's actionable injury.

In the September Figaro decision, U.S. District Judge Yvonne Gonzalez Rogers acknowledged Rodino's amendment that makes the FTAIA's legislative history consistent with Empagran.[16] Judge Gonzalez Rogers stated that "we cannot be looking at legislative history for something that wasn't enacted."[17]

In dismissing Figaro's claims of foreign injury, she recited Empagran's holding that "the FTAIA bars foreign-based claims where U.S.-based anticompetitive conduct gives rise to domestic and foreign harms that are independent of one another."[18] And she noted, "Nothing in the FTAIA's legislative history, which Empagran dissected in part, compels a different result."[19]

FTAIA issues remain difficult problems that antitrust counsel and parties must grapple with. But as this decision from Judge Gonzalez Rogers illustrates, the 1982 House report does not offer any support to U.S.-law claims of overseas antitrust harm not caused by an effect on domestic U.S. commerce.

That recognition should bring the bar's understanding into better alignment with the Supreme Court's account that "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."[20]

Daniel G. Swanson is a partner at Gibson Dunn & Crutcher LLP. He co-chaired the firm's antitrust and competition practice group for 25 years.

Eli M. Lazarus is of counsel at the firm.

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[1] H.R. Rep. No. 97-686 (1982).

[2] Figaro v. Apple, Plaintiffs' Memorandum in Opposition to Motion to Dismiss First Amended Complaint, Case No. 4:22-cv-04437 (N.D. Cal. Feb. 10, 2023) at 10.

[3] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[4] United States v. Nippon Paper Industries Co. Ltd., 109 F.3d 1, 4 (1997).

[5] United States v. Hsiung, 778 F.3d 738, 751 (9th Cir. 2015).

[6] H.R. Rep. 97-686 at 10.

[7] Empagran S.A. v. F. Hoffmann-Laroche Ltd., 315 F.3d 338, 352 (D.C. Cir. 2003).

[8] Kruman v. Christie's International PLC, 284 F.3d 384, n.8 (2d Cir. 2002).

[9] 542 U.S. at 159.

[10] Id. at 164, 173-75.

[11] H.R. Rep. 97-686 at 18.

[12] Id.

[13] Id.

[14] 315 F.3d at 352.

[15] 542 U.S. at 173-74.

[16] Case No. 4:22-cv-04437 (N.D. Cal.).

[17] Case No. 4:22-cv-04437 (N.D. Cal.), Jul. 11, 2023 Tr. 20:22-23.

[18] Case No. 4:22-cv-04437 (N.D. Cal.), Dkt. 84 at 7.

[19] Id.

[20] 542 U.S. at 169.