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Empagran - The U.S. Supreme Court limits U.S. jurisdiction in anti-trust litigation

On June 14, 2004 the United States Supreme Court decision in the *Empagran* case effectively limited U.S. jurisdiction in private anti-trust litigation. Equally, the case raised important and continuing challenges for the international anti-trust community.

Empagran itself involved vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries. Five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins for delivery outside the United States, sued in the United States under the Sherman Act seeking treble damages.

The U.S. Supreme Court held emphatically that the Sherman Act did not apply and thus denied the plaintiffs' claim before the U.S. courts for foreign damages suffered by foreign plaintiffs as a result of a U.S. conspiracy.

For the international community, the case has broad implications. Practically it means that private claims arising in foreign jurisdictions will not be drawn to the U.S. through the enticement of treble damages. Perhaps more importantly, international comity has been respected and the principle of anti-trust convergence has been supported from an august judicial source.

The Court received briefs from Canada, Germany, the U.K., Ireland, the Netherlands, and Japan as *Amici Curaie*. These argued that the U.S. Courts ought not to accept jurisdiction. Each of those nations submitted arguments which stated that co-operation and accommodation are essential to the orderly and harmonious regulation of international commerce by the family of nations. The principles of comity were stated to be essential to the functioning of the closely related economies of the United States and its trading partners. Disregard of those fundamental principles would not only complicate and impede the enforcement of anti-trust policies by many other countries, but would also intrude upon, and derogate from the sovereign prerogatives of foreign governments. Underlying these arguments were the historic facts that each of the *Amici Curaie* had in place its own laws regulating anti-competitive behaviour but that each had adopted a distinct manner of dealing with the underlying offences. The Government of United States itself supported those arguments and expressed further concern that allowing the plaintiffs claim to stand would substantially harm the ability of the United States to uncover and break up international cartels and would further undermine the law enforcement relationships between the United States and its trading partners.

The Court gave close attention to those arguments. Justice Breyer, in his opinion for the Court, asked:

> "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"

Indeed, the Court specifically referred to the German and Canadian *Amici Curaie* briefs, noting from the Canadian brief that "Treble damages remedy would supersede" Canada's "national policy decision" to the contrary. Justice Breyer further adopted the reasoning of these briefs that "a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own anti-trust enforcement policies by diminishing foreign firms' incentive to cooperate with anti-trust authorities in return for prosecutorial amnesty."

While the Court was sympathetic to the hope that America's anti-trust laws, so fundamental a component of its own economic system, might commend themselves to other nations as well, it was firm that if America's anti-trust policies could not win their own way in the international

marketplace for such ideas those ideas ought not, "in an act of legal imperialism" be imposed through legislative fiat or by the courts.

Observers frequently characterize the U.S. Supreme Court as an activist judicial body. In many ways, however, *Empagran* is a recognition of conservative principles of international law.

The first critical issue addressed by the Court is the effect on U.S. domestic and foreign courts. If the plaintiffs' claims in *Empagran* had been allowed to stand, the U.S. would have become a magnet for international private litigation. The lure of treble damages would attract plaintiffs from around the world, and where they did not recognize the bonanza awaiting them, U.S. class action attorneys would seek them out. The result: a proliferation of court proceedings, the cost of which would be for the U.S. Court system, the benefits of which (attorney's fees apart) would be for foreign plaintiffs. In foreign countries, plaintiffs would ignore less rewarding domestic remedies.

The other major question underlying *Empagran* was the effect on Immunity Programs, both U.S. and foreign. If *Empagran* cases could be pursued in U.S., the U.S. Immunity Program would be in jeopardy. That program grants immunity from prosecution to those providing information that can form the basis for prosecution of other cartel members. The program has been enormously successful, and through the information of cartel activity provided by those seeking immunity, many convictions have been secured and many millions of dollars have been paid to the U.S. Treasury. To encourage its effectiveness the U.S. has recently enacted legislation that "detrebles" damages for corporations cooperating with federal investigations of cartel conduct.

Were *Empagran* claims to be allowed, those considering a quest for immunity would be faced with a fresh danger which they could not quantify. Not only would U.S. domestic plaintiffs seek damages from them, but so would foreign plaintiffs. The extent of the claims could therefore not be quantified. The balance between seeking immunity from prosecution and facing unlimited legal action would be tipped against the quest for immunity. The U.S. Program would be at risk and as the U.S. program collapsed, so would foreign programs which have frequently been invoked following a quest for U.S. Immunity.

The Court was aware of these concerns, but they were not the object of judicial consideration and the Court did not dwell on them. We can properly assume that the Court's deference to comity was strongly influenced by these factors.

As a result, a broad interpretation of the Court's judgment is appropriate. In endorsing the validity of the positions of foreign governments in anti-trust matters, the Court has recognized the effectiveness of an international anti-trust system with shared objectives. Is it possible that the Court, with suitable judicial constraint, has offered a pointed contribution to the movement towards convergence in anti-trust matters? Will the International Competition Network be able to take up the suggestion and work toward an international regime in which plaintiffs are provided adequate redress for proven cartel activity?

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