Antitrust Law Blog

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Plaintiffs' Failure To Satisfy FTAIA's "Two-Step Dance" Results In Dismissal Of Foreign Purchase Claims

On March 31, 2010, a Federal District Court barred two direct purchasers of hydrogen peroxide and derivative products ("Plaintiffs") from pursuing antitrust damages arising from their foreign product purchases, because Plaintiffs' allegations failed to satisfy the two-step proximate cause requirement of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). *See In re Hydrogen Peroxide Antitrust Litigation*, No. 2:05-cv-00666-SD (E.D. Pa. March 31, 2010) ("Hydrogen Peroxide").

Hydrogen peroxide is an ingredient of persalts, which include sodium perborate, that are used for bleaching, cleaning, and producing products such as detergents. Two purchasers of perborates filed claims against FMC Corp. and FMC Foret S.A. (collectively "FMC") based on allegations of a conspiracy to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs sought to recover damages for their purchases in the United States and abroad during the time of the alleged price-fixing conspiracy.

In January 2007, the Court denied FMC's facial challenge to its subject matter jurisdiction. However, at the conclusion of discovery, FMC lodged a factual challenge to the court's jurisdiction under the FTAIA for perborates purchases made in foreign commerce ("Foreign Purchase Claims"). Given the factual challenge to the Court's jurisdiction, Plaintiffs bore the burden of proving the Court's jurisdiction by a preponderance of the evidence.

The FTAIA provides, in relevant part, that Section 1 of the Sherman Act does not apply to conduct involving non-import foreign trade or commerce "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 [i.e., domestic trade or commerce] . . . and (2) such effect *gives rise* to a claim under the provisions of sections 1 to 7 of this title, other than this section." 15 U.S.C. § 6a (emphasis added) (the "domestic injury exception").

Plaintiffs claimed that they satisfied the FTAIA because they alleged that the domestic and foreign effects on Plaintiffs "are interdependent" and "would have an effect in both regions at the same time." *See Hydrogen Peroxide* at 5 (emphasis added). Plaintiffs also alleged that conspirators met in West Virginia to discuss reducing capacity and, to that end, closed hydrogen peroxide plants in Texas.

FMC argued that, even accepting Plaintiffs' allegations as true, the Court lacked subject matter jurisdiction based on the FTAIA's requirements. Specifically, while there was no dispute that Plaintiffs' allegations that FMC's conduct caused harm in the United States and, thus, satisfied the first prong of the domestic injury exception, whether the Plaintiffs' theory of the case satisfied the second prong -- that the domestic effect "[gave] rise to" the Foreign Purchase Claims -- was hotly contested. *Id.* at 8.

The Court noted that the FTAIA mandates that "two events occur seriatim" for it to have jurisdiction: (1) there are first domestic effects of the defendants' antitrust conduct, and (2) those domestic effects then proximately cause an antitrust claim outside of the United States. *See Hydrogen Peroxide* at 6. In reaching that decision, the Court relied on the *Empagran* decisions and their progeny. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*,542 U.S. 155, 158 (2004) ("*Empagran I*") and *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005) ("*Empagran II*"). In *Empagran I*, the Supreme Court noted an exception to the FTAIA's foreign conduct rules "where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters." *Empagran I*, 542 U.S. at 158-159. However, the Supreme Court also held that the plaintiffs did not satisfy the causation prong of the domestic injury exception if an "independent foreign effect" gave rise to the claim. *Id. Empagran I*, however, did not resolve the issue in *Hydrogen Peroxide* because the domestic and foreign effects of FMC's actions were allegedly "interdependent" and not "independent."

On remand, the Court of Appeals for the District of Columbia addressed plaintiffs' arbitrage contention, namely, that the FTAIA exception applied because "without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." The D.C. Circuit concluded that this but-for causation was not sufficient to meet the causation prong of the domestic injury exception because, among other things, the phrase, "gives rise to" – "indicates a direct causal relationship, that is, proximate causation." *Empagran II*, 417 F.3d at 1270-71.

The *Hydrogen Peroxide* Court agreed with the D.C. Circuit, the Ninth Circuit, the Eighth Circuit, and others who have adopted *Empagran II* -- that the domestic injury exception imposes a proximate cause requirement, because "[i] t is indeed hard to see how we could fairly interpret the phrase "gives rise to" in any other way." *See Hydrogen Peroxide* at 12

Plaintiffs also argued that they satisfied the domestic injury exception based on their allegations that the defendants: (1) reduced the production of hydrogen peroxide at plants located in the United States, which "support[ed] collusive price increases" both here and abroad, (2) held a meeting in West Virginia regarding that plan, and (2) set one global price, which simultaneously affected pricing in the United States and Europe. *Id.* at 14-15. While the Court noted that it is possible that closing two hydrogen peroxide plants in Texas could have "a direct, substantial, and reasonably foreseeable effect . . . on [domestic] trade or commerce," plaintiffs' claim that the conspirators increased sodium perborate prices domestically and abroad "[i]n connection with the foregoing [supply restricting] conduct," was too amorphous an allegation and fell short of proximate cause. *Id.* at 15, and fn 8. ("Holding a meeting in West Virginia does not meet the

Domestic Effect Prong, and plaintiffs also do not show that the West Virginia meeting proximately caused their injuries abroad."). Similarly, the Court held that "[p]roximate cause requires more than establishing the conditions to make something possible. The plaintiffs must show . . . that the domestic effects proximately caused the injury underlying their Foreign Purchase Claims, but they contend only that the activities here generally "support[ed]" price increases, not that they proximately caused plaintiffs' overseas injuries in particular." *Id.* at 16.

Finally, focusing on Plaintiffs' claim that there is an exception to the proximate cause requirement when antitrust conduct simultaneously causes harm in the United States and abroad, the Court reiterated that "proximate causation is a serial process -- i.e., one thing happens (in this case, a domestic effect) and then another thing happens (in this case, a foreign antitrust claim) because of the first event." *Id.* Thus, the Court rejected Plaintiffs' argument that there is an exception to the proximate cause requirement when defendants simultaneously cause foreign and domestic harm, stating "[w]e disagree that the Court has jurisdiction over that single hop with both feet." *Hydrogen Peroxide* at 7. The Court pointed out that Plaintiffs did not argue that the text of the FTAIA supported their view, and rejected Plaintiffs' citations to cases that pre-dated the *Empagran* decisions and/or failed to interpret the causation prong of the domestic injury exception.

Ultimately, the Court held that under the domestic injury exception of the FTAIA, the domestic effects must occur first and then proximately cause the foreign antitrust claim, because the FTAIA imposes "a two-step dance, first with one foot (the domestic effects) and then with the other (the foreign antitrust injury)." *Hydrogen Peroxide* at 7. Thus, the Court rejected the theory that Plaintiffs' simultaneous harm theory could support a claim that domestic effects of the defendants' conduct proximately caused their foreign claims.

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