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"But for" is not enough

US appeal court finds it has no jurisdiction in Empagran case

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The US Court of Appeals for the District of Columbia has rejected the latest attempt by foreign plaintiffs to sue in the US for injury caused outside of the US by an alleged worldwide conspiracy to fix the price for certain vitamins.[1]

The *Empagran* case is already familiar to Canadian competition and class action lawyers. Foreign plaintiffs who claim to have suffered losses as a result of alleged conspiracies to fix prices for vitamins sued in the US, no doubt attracted by the availability of treble damages. However, the *Foreign Trade Antitrust Improvements Act* (FTAIA)[2] bars claims relating to foreign conspiracies unless the conspiracy has a "direct, substantial and reasonably foreseeable effect" on trade in the US. Until *Empagran* reached the US Supreme Court, lower courts in the US disagreed on whether it was enough that the conspiracy had this effect in the US for foreign plaintiffs to be able to sue in the US to recover losses experienced outside of the US.

In *Empagran*, the US Supreme Court held that foreign plaintiffs cannot sue where price-fixing 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.[3]

The Supreme Court remanded the case back to the trial court to assess an alternative theory advanced by the plaintiffs.

The plaintiffs' alternative theory was that because vitamins are fungible, the manufacturers could not have fixed prices outside of the US without also fixing them in the US. Had they not fixed prices in the US, cheaper vitamins would have flown back out of the US, making the fixed price unsustainable.

In affirming the District Court's rejection of this theory, the appeal court noted that the alternative theory involved only "but for" causation between the domestic effects and the foreign injury claim. That is, the price fixing outside of the US would not have been successful but for the price fixing within the US.

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The FTAIA requires, however, that the domestic effect "gives rise to" the foreign injury claim. That is, the domestic effect must be the proximate cause of the foreign injury claim. "But for" causation is not enough.

It is noteworthy this most recent decision and the earlier decision of the US Supreme Court contain strong statements about the importance of comity. The US Supreme Court stated that the court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations".[4] It noted that the doctrine of comity helps "potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world".[5]

On the remand of *Empagran*, the plaintiffs invited the D.C. Circuit appeal court to adopt a standard of causation that would have rendered almost meaningless the Supreme Court's decision. Instead, the court followed the Supreme Court's lead in basing its decision on principles of comity.

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1 *Empagran S.A.* v. *F. Hoffman-Laroche Ltd.*, D.C. Cir., June 28, 2005 (not yet reported).

2 15 U.S.C. §6

3 *F. Hoffman-La Roche, Ltd.* V. *Empagran S.A.*, 124 S. Ct. 2359 at 2366 (2004)

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