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BY EDWARD D. CAVANAGH

IN *EMPAGRAN*,[1] THE SUPREME COURT construed the Foreign Trade Antitrust Improvements Act[2] (FTAIA) to severely limit the extraterritorial reach of the Sherman Act. In the wake of *Empagran* and the D.C. Circuit's subsequent ruling on remand in that case,[3] foreign plaintiffs asserting claims under U.S. antitrust laws for injuries based on transactions consummated abroad have been largely shut out of federal courts. Foreign plaintiffs, however, have not abandoned their efforts to obtain relief in American courts for anticompetitive acts committed in the international arena. Rather, they have turned to claims under various state laws, including state antitrust laws, state unfair trade practice laws, and common law relief under theories of unjust enrichment and restitution.

This article analyzes the viability of these state law claims and concludes that state law remedies are likely to be unavailable for injuries based on transactions consummated abroad, for the same reasons the FTAIA bars antitrust claims under federal law. Additionally, these state law claims are barred by the Supremacy Clause of the U.S. Constitution, the Foreign Commerce Clause, the Due Process Clause, and the doctrine of prescriptive comity.

Background

Historically, U.S. courts have been hesitant to apply American antitrust laws to conduct occurring outside of the country. In *American Banana Co. v. United Fruit Co.*, the Supreme Court ruled that the Sherman Act must be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[4] As American traders became increasingly involved in the international arena, courts began to relax the hard-line view of *American Banana*. In *Alcoa*, the Second Circuit held that the Sherman Act does proscribe extraterritorial acts that are "intended to affect imports [into the United States] and did affect them."[5] At the same time, *Alcoa* made clear that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."[6] Still, the court made no attempt to identify the point at which foreign acts were qualitatively and quantitatively sufficient to affect domestic commerce to confer jurisdiction on U.S. courts.

Congress enacted the FTAIA in 1982 to clarify the reach of the Sherman Act in matters involving foreign commerce. The statute, however, was inartfully drafted and led to more confusion than clarity among courts and litigants. The Supreme Court in *Empagran* granted certiorari to resolve a dispute among the circuits on construction of the FTAIA.[7] The D.C. Circuit had concluded that the FTAIA allowed subject matter jurisdiction over claims by plaintiffs located in the Ukraine, Australia, Ecuador, and Panama, each of whom alleged that they had suffered injuries from a global price-fixing cartel when they bought vitamins for delivery outside of the United States. The Supreme Court vacated, holding that the FTAIA bars the exercise of subject matter jurisdiction over Sherman Act claims by foreign plaintiffs claiming illegal conduct that "significantly and adversely affects both customers outside the United States and customers within the United States" if "the adverse foreign effect is independent of any adverse domestic effect," that is, if "the conduct's domestic effects did not help to bring about that foreign injury."[8]

The Court articulated a two-pronged rationale for its interpretation of the FTAIA. First, under principles of prescriptive comity, ambiguous statutes—and the FTAIA is, at the very least, ambiguous—should generally be interpreted so as to "avoid unreasonable interference with the sovereign authority of other nations."[9] The Court concluded that the Sherman Act may not supersede a foreign nation's determination of how best to protect its citizens in cases where foreign conduct causes foreign injury independent of domestic injury and that foreign injury alone gives rise to foreign plaintiffs' claims.[10] The Court further observed, citing amici filings by foreign governments, that allowing foreign plaintiffs to proceed with treble damage claims under these circumstances "would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."[11]

Second, the Court found plaintiffs' argument for expansive construction of the FTAIA unpersuasive. As a threshold matter, the FTAIA was meant to limit—not to expand—the reach of the Sherman Act in matters involving foreign com-

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merce. Moreover, the Court found no case decided prior to the enactment of the FTAIA that would have upheld the exercise of jurisdiction over similar foreign claims.[12] Although the Court acknowledged that plaintiffs' argument favoring jurisdiction presented "the more natural reading of the statutory language," considerations of comity and history made clear that plaintiffs' reading "is not consistent with the FTAIA's basic intent."[13] Instead, the Court adopted the narrower reading championed by defendants because "[t]hat reading furthers the statute's basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history."[14] The Court emphasized that its holding "assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury."[15]

On remand, the plaintiffs argued that their injury was not unrelated to the anticompetitive effects of the cartel on U.S. commerce, urging that but for defendants' price-fixing activities in the United States, the international cartel would have collapsed. The plaintiffs maintained that, given the fact that vitamins are fungible and readily transportable, without U.S. participation in the conspiracy, foreign purchasers would have bought vitamins in the United States at competitive prices, instead of dealing with the cartel at supracompetitive prices. By incorporating the U.S market, the cartel cut off that avenue of arbitrage. Accordingly, the plaintiffs argued that the domestic effect of the cartel caused the plaintiffs' foreign injury.

The D.C. Circuit disagreed. The court did acknowledge that the plaintiffs had painted a plausible scenario that but for supracompetitive prices in the United States resulting from cartel activities in the United States, they would not have been injured.[16] Nevertheless, the court held that " 'but-for' causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anticompetitive conduct within the FTAIA exception."[17] Rather, the statutory formulation calls for "a direct causal relationship, that is, proximate causation," between domestic effects and foreign injury, a standard that is not satisfied by establishing a mere "but-for 'nexus.'"[18] The proximate cause standard under the FTAIA has proven to be a formidable barrier to foreign plaintiffs who seek to bring antitrust suits under U.S. law in American courts.

The Shift to State Law Claims

The restrictive holdings in *Empagran* and its progeny have led foreign plaintiffs to seek relief in state court under state law, invoking state antitrust laws, state unfair trade practices acts, and common law remedies for unjust enrichment or restitution.[19] State law, however, may not be an effective vehicle for foreign plaintiffs to escape the limits of the FTAIA. State law claims by foreign plaintiffs are likely to face the same restrictions that the FTAIA places on such claims under federal law.[20] In addition, state law claims seeking redress for foreign-based injuries would run afoul of the Supremacy Clause, the Foreign Commerce Clause, and the Due Process Clause of the Fourteenth Amendment, as well as principles of prescriptive comity.

State Antitrust and Unfair Competition Claims

In construing the FTAIA, the Court in *Empagran* did not question the power of Congress to enact legislation with an extraterritorial reach. Nevertheless, as the Court observed subsequently in *Morrison*,[21] "It is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " This presumption against extraterritoriality "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters," and "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect [a court] must presume it is primarily concerned with domestic conditions."[22] Where "a statute gives no clear indication of an extraterritorial application, it has none."[23] This same canon of construction applies with equal force to state statutes.[24]

As a threshold matter, it would be illogical to suggest that a state's power to legislate extraterritorially exceeds that of the national government. But, even if state powers were coextensive with those of the federal government, no state antitrust or unfair trade practices statute by its terms purports to apply outside of the United States. Accordingly, the limiting rationale of *Morrison* applies equally to state law.

State Antitrust Laws. To succeed in bringing state law claims that would be barred under federal antitrust law by the FTAIA, plaintiffs must convince the courts that the extraterritorial reach of state antitrust statutes is broader than that of the Sherman Act. Any attempt to do so, however, would be a nonstarter. The states, through harmonization statutes[25] and judicial decisions,[26] have directed their courts to follow federal antitrust laws and the federal judiciary's construction of those laws in interpreting their respective state statutes. This is not to say that harmonization statutes require states to move in lock step with federal antitrust law. Many states have gone their own way by enacting *Illinois Brick* repealers to permit indirect purchaser claims,[27] and the Supreme Court has upheld those statutes.[28] Those statutes suggest that state legislatures know how to react when they believe that a Supreme Court decision would, if applied to the state

antitrust scheme, unduly limit the protections of state law. More recently, notwithstanding the Supreme Court's decision in *Leegin*,[29] some states continue to treat resale price maintenance as per se illegal.[30] The post-*Leegin* cases suggest that at least some states view their antitrust statutes as tools that can be used to extend greater protection than federal law, even given the general principle of deference to construction by the federal courts.

Given the fact that states have diverged from federal antitrust law, it is especially noteworthy that no state has enacted the state law equivalent of the FTAIA, nor has any state court or state legislature decreed that its antitrust laws would have broader extraterritorial reach than that permitted by federal law in the three decades since the enactment of the FTAIA. This inaction by the courts and legislatures serves to underscore the fact that there is no basis for extraterritorial jurisdiction under state law that would be more expansive than such jurisdiction under federal law. Even if state statutes on their face provided for extraterritorial reach (which they do not), it would be anomalous if such statutes were construed to have greater extraterritorial reach than the Sherman Act.[31]

Moreover, there is a well-developed body of case law that limits the application of a state's antitrust statute where the conduct occurs outside that state.[32] Relying on *Empagran*, the Supreme Court of Texas held that Texas law may not supplant the judgment of the legislatures of other states about how best to protect consumers from anticompetitive conduct and injury in those states.[33] The court concluded that under the principles of federalism, "One state's legislature cannot dictate to other states what can and cannot be tolerated in economic competition. This is 'so obviously the necessary result' that it needs no supporting authority."[34]

Unfair Competition Statutes. Courts are likely to find that the foreign reach of state-based claims for unfair competition is similarly limited. State unfair competition statutes are generally modeled after the Federal Trade Commission Act (FTCA), and states generally look to federal precedent construing the FTCA in interpreting their own statutes.[35] At the time Congress enacted the FTAIA to clarify the foreign reach of the Sherman Act, it also amended the FTCA and adopted the same "direct, substantial and reasonably foreseeable" test that is set forth in the FTAIA, thereby creating a single legal standard against which to measure jurisdiction under U.S. competition law in matters involving foreign commerce.[36] As is the case with the state response to the FTAIA, no state has amended its "little FTC Act" to create a state statute at odds with the jurisdictional reach of the FTCA. Accordingly, to the extent that the Federal Trade Commission would be barred from bringing an unfair competition claim under the FTCA, it is likely that analogous claims would be barred by state law.

Animal Science

The federal courts decisions, in applying the FTAIA to foreign antitrust claims, have been somewhat obscure in distinguishing between dismissal based on subject matter jurisdiction and dismissals based on the merits. This imprecision has relevance for foreign claims based on state law. Although *Empagran* did not specifically address the issue, most lower courts have treated the matter as one of subject matter jurisdiction.[37] Recently, however, the Third Circuit in *Animal Science* held that, in light of the Supreme Court's decision in *Morrison* that the question of the extraterritorial reach of Rule 10-b(5) claims under the securities laws goes to the merits, the issue of the extraterritorial reach of the antitrust laws also goes to the merits.[38]

If the Third Circuit is correct in its analysis, then application of state harmonization statutes is likely to cause state courts to conclude that state claims are unavailable where the FTAIA would bar federal claims. On the other hand, if the issue is simply one of subject matter jurisdiction, then the fact that Congress has stripped the *federal* courts of *federal* jurisdiction does not necessarily address whether state legislatures might authorize state courts to hear foreign claims. The issue then becomes whether the Constitution limits the power of state law to govern foreign-based claims. As argued below, the Constitution does in fact limit state court jurisdiction over such claims, even if the states themselves might wish to assert such jurisdiction.

Constitutional Constraints

The Constitution does not specifically address the issue of whether, and the extent to which, states may legislate extraterritorially. Nevertheless, there are underlying themes in the Constitution suggesting that the power of states to legislate beyond their borders is severely circumscribed. These themes can be found in the Supremacy Clause, the Foreign Commerce Clause, and the Due Process Clause of the Fourteenth Amendment.

A review of the legislative history of the FTAIA demonstrates that Congress had several aims in enacting the statute. First, Congress intended to clarify the law by eliminating "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction" and by providing "a clear benchmark . . . for businessmen, attorneys and judges as well as trading partners" in order to "promote certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions."[39] In enacting the FTAIA, Congress enabled the United States to speak with one voice with respect to the interaction between American antitrust law and foreign commerce. The Supreme Court has recognized that "[f]oreign commerce is pre-eminently a matter of national concern" and that the United States must therefore speak with a unified voice on foreign commerce issues.[40]

Second, Congress sought to ensure that companies involved in foreign commerce could readily ascertain whether American antitrust law applied to their conduct. Congress meant to make clear that the Sherman Act did not govern

activities of U.S. companies operating abroad, "however anticompetitive, as long as those arrangements adversely affect only foreign markets."[41] Third, Congress intended to foster international comity by accommodating antitrust schemes of other sovereign nations, recognizing that respect for foreign regimes would serve to ease "foreign animosity toward U.S. antitrust enforcement."[42] Applying state law, whether antitrust law, unfair competition law, or the court-made doctrines of restitution or unjust enrichment, to foreign claims in the face of the foregoing purposes underlying the congressional enactment of the FTAIA, would run afoul of the Supremacy Clause, the Foreign Commerce Clause, and the Due Process Clause of the U.S. Constitution.

Supremacy Clause. As a general proposition, federal law preempts state law where: (1) Congress expressly preempts the operation of state law; (2) federal law occupies the field of intended state regulation; or (3) there is conflict between federal and state provisions. It is well established that the Sherman Act was not intended to occupy the field of antitrust regulation and, accordingly, state antitrust laws are not expressly preempted. Nor are state antitrust laws as a general matter impliedly preempted. The Supremacy Clause, however, bars invocation of state law where, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[43] The question of what constitutes a "sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . ."[44] Significantly, courts broadly construe the preemptive effect of federal law and restrict construction of concurrent state power to the narrowest limits when a state law touches upon foreign affairs or international relations.[45] Additionally, the Supremacy Clause has been held to bar the application of state antitrust law where state statutes would interfere with treatment of the nationally organized professional team sport of baseball.[46]

The application of state antitrust laws to foreign claims beyond the bounds set by the FTAIA and *Empagran* would likely introduce uncertainty and confusion in the law and frustrate the Congressional intent that the United States speak with one voice on the issue of American jurisdiction over foreign commerce. Similarly, sanctioning state regulation of foreign transactions would make it more difficult for American companies to assess the legality of the foreign conduct under American laws. In addition, allowing state laws to reach foreign claims that the FTAIA placed beyond the purview of the Sherman Act would create a fundamental conflict with the statutory goals set forth above.

Finally, if the states were given free rein to entertain matters involving foreign commerce that are beyond the bounds set by the FTAIA for federal antitrust law, the explicit purpose of Congress to accommodate the antitrust schemes of other nations would be hopelessly compromised. The Court in *Empagran* concluded that, in Sherman Act cases involving international transactions, any attempt to analyze comity concerns on a case-by-case basis would be too complicated to prove workable. The *Empagran I* Court explained:

> Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing, price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more nature of that enterprise means lengthier proceedings, appeals and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system. Even in this relatively simple price-fixing case, for example, competing briefs tell us (1) that potential treble-damages liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) the opposite, namely that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty programs). How could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously?[47]

The complexities identified by the Supreme Court in *Empagran* involve potential conflicts between only the Sherman Act and foreign law. Those complexities would be multiplied significantly if courts were directed instead to analyze potential conflicts between foreign law and laws of perhaps 30 or 40 states. Evaluation of state statutes on a case-by-case basis would undermine the stated goals of *Empagran I* to promote comity. Under these circumstances, assertion of state authority over foreign conduct must be preempted. Otherwise, state law would stand as an obstacle to achieving the goals of the FTAIA.

These very concerns prompted one court to rule that the state antitrust and consumer protection claims at issue were in conflict with federal policies set forth in the FTAIA. The court agreed with the defendant's contention that the exercise of jurisdiction over state law claims would run afoul of the Supremacy Clause.[48] In so holding, the court found that "Congress had spoken under the FTAIA" and it was therefore "persuaded that Congress' intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not."[49]

To avoid conflict with the Supremacy Clause, the state statute must be construed so as to go no further than the FTAIA in regulating foreign commerce. That is precisely what a California state court held in *Amarel v. Connell*.[50] The plaintiffs in *Amarel* were independent rice producers who sued agricultural cooperatives under the Cartwright Act, California's antitrust and consumer protection law, and its unfair competition laws, alleging conspiracy to monopolize the sale of California paddy rice, including the foreign export market. The plaintiffs initially alleged collusion between the defendants to sell rice to the Republic of Korea. The trial court granted a motion to dismiss, concluding that the allegations intruded into the exclusively federal sphere of foreign

commerce and foreign relations. Subsequently, the plaintiffs filed an amended complaint in which their Cartwright Act claims were free of any assertions involving foreign commerce and foreign relations. The trial court again dismissed the complaint, but the appellate court reversed and upheld the sufficiency of the Cartwright Act claims, the originally offending allegations having been removed.[51]

In addition, the appellate court in *Amarel* upheld the plaintiffs' consumer protection and unfair competition law claims.[52] *Amarel* concluded that, although Congress had not completely barred state regulation of foreign commerce, the courts still must "square" the jurisdictional limits on the Sherman Act under the FTAIA with the application of state law to foreign conduct and thereby avoid conflict between federal and state law. The court reasoned that the FTAIA creates "an 'effects' test for application of the state's antitrust and unfair competition laws . . ." and, because "the anticompetitive conduct in question has a direct, substantial and reasonably foreseeable effect within the state . . ." the foreign claim was not preempted by the FTAIA.[53]

. . . participants in foreign commerce, faced with conflicting legal standards regarding the applicability of federal law and a multitude of state statutes, would face insurmountable difficulties in assessing their potential liability under state or federal laws.

Foreign Commerce Clause. The Foreign Commerce Clause gives Congress the sole power to regulate commerce with foreign nations. The Supreme Court has acknowledged the dominant federal interest in regulating foreign commerce and has underscored the importance of uniformity in policies regulating foreign commerce.[54] The "special need for federal uniformity" places additional constraints on the states when acting in matters of foreign commerce.[55] Were litigants permitted to circumvent the FTAIA's limitations on foreign claims and avail themselves of what they perceive as more liberal jurisdictional standards under state law, the goal of uniformity would be thwarted and it would be impossible for the United States to speak with one voice on matters of potential antitrust liability under American law for claims relating to injuries suffered outside of the United States. Equally important, participants in foreign commerce, faced with conflicting legal standards regarding the applicability of federal law and a multitude of state statutes, would face insurmountable difficulties in assessing their potential liability under state or federal laws.

The Supreme Court's decision in *Japan Line* is particularly instructive here. In that case, the Supreme Court held that applying a California *ad valorem* tax provision to containers involved in international commerce violated the Foreign Commerce Clause.[56] As with the state antitrust and consumer protection laws and common law claims discussed here, the California tax statute did not discriminate between domestic and foreign commerce. Rather it imposed a tax on any property located in California on a particular date each year. This scheme meant that foreign goods located in California on that date were taxed even though they were not destined for sale, distribution, or consumption in the state. Noting that the United States had entered the Customs Convention on Containers with other nations covering duties on goods temporarily imported into member nations, the Court found that the California statute impaired the ability of the United States to speak with one voice and that the statute was therefore preempted under the Foreign Commerce clause:

> A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce.[57]

For these same reasons, the Court ruled that a more detailed inquiry would be necessary where states seek to tax instrumentalities of foreign, rather than of interstate, commerce. Specifically, the courts must consider whether imposition of state taxes creates a significant risk of international multiple taxation and whether the tax would bar the federal government from "speaking with one voice when regulating commercial relations with foreign governments."[58] Similarly, in the antitrust arena, courts must consider whether liability under state law for injuries suffered wholly outside the United States would create significant risks of multiple liability and would undermine uniform policies that Congress sought to create.

Under *Japan Line* and its progeny, where a state law undermines a clear federal policy to speak with one voice on a matter affecting foreign commerce, applying that law beyond what is permitted by the federal policy violates the Foreign Commerce Clause.

Due Process. The Due Process Clause of the Fourteenth Amendment restricts extraterritorial application of state law in two related but analytically distinct ways: (1) it provides inherent constitutional limitations on the permissible scope of a state's substantive law, i.e., a state's legislative jurisdiction;[59] and (2) it provides constitutional limitations on a state's choice of law rules.[60]

Legislative Jurisdiction. The Supreme Court has long recognized that due process bars a state from regulating activities outside of its borders where the state has only a slight or casual nexus with those out-of-state activities.[61] Due process confines a state's legislative sovereign authority over persons, property, and activities to "its territorial limits, and its laws have no operation in other states except as allowed by those states or by comity."[62] A state "may not impose economic sanctions on violators of its laws with the intent of changing the [wrongdoer's] lawful conduct in other states."[63]

Similarly, in assessing the limits of the states' exercise of long-arm jurisdiction, the Supreme Court has held that "the Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations.'"[64] Where affiliating ties with the forum are lacking, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment over the parties, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum state has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for the litigation."[65] Only where the defendant "purposefully avails itself of the privilege of conducting activities within the forum State" is the defendant subject to personal jurisdiction there.[66] The Court further observed that "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes nor could we and remain faithful to the principles of interstate federalism embodied in the Constitution."[67]

The Due Process Clause is designed to allow orderly administration of the laws and provide "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit."[68] These jurisdictional principles supply a useful framework for analyzing the extraterritorial reach of a state's substantive law. Just as due process protects a nonresident from unfair use of a state long-arm statute, due process also protects an individual or entity from the consequences of extraterritorial application of state law where such application would offend the sovereign interests of sister states.[69] Only where the transaction in question has a meaningful nexus with the forum state and only where the defendant is fairly on notice that a given state's law will apply does due process allow for extraterritorial application of a state statute.[70]

The federal courts have long held that the Sherman Act applies to foreign conduct causing domestic injury. Nevertheless, *Empagran* made clear that, even where foreign conduct causes domestic injury, a foreign plaintiff may not recover under the Sherman Act for claims based on foreign transactions unless the adverse effect on domestic commerce is the proximate cause of a plaintiff's foreign injury. On the one hand, due process would not bar an Illinois state court hearing a price-fixing claim from applying forum law to conduct by an Illinois corporation headquartered in Chicago where significant conspiratorial acts took place in Illinois. On the other hand, due process concerns would arise where a foreign plaintiff seeks the protection of Illinois law for injuries suffered from transactions occurring outside the United States, absent proof that the anticompetitive effects in Illinois proximately caused plaintiff's foreign injury, because it would be unreasonable in those circumstances for Illinois antitrust law to supplant the antitrust schemes of foreign governments or sister states.[71] Moreover, the Supreme Court recently underscored the inherent limitations on the exercise of judicial power imposed by the Due Process clause and made clear that merely putting goods in the stream of commerce, even with the expectation that they may be used or consumed in the forum state, is not enough for the forum to exercise jurisdiction over a foreign defendant under the Due Process Clause.[72]

Conflict of Laws. The Due Process Clause also serves to restrict a state court having jurisdiction over claims of plaintiffs whose principal contacts are with other states (or countries) from applying forum law to the case. In *Phillips Petroleum Co. v. Shutts*,[73] the Supreme Court held that the issue of jurisdiction over the parties "is entirely distinct from the constitutional limitations on choice of law." To apply its law, a forum "must have a 'significant contact or significant aggregation of contacts' to the claims asserted . . . contacts creating state interests' in order to ensure that the choice of [forum] law is not arbitrary or unfair."[74] In determining fairness, a paramount concern of the courts is the expectations of the parties. A state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."[75] In so holding, the Supreme Court categorically rejected the lower court's decision that "the law of the forum should be applied unless compelling reasons exist for applying a different law."[76] In assessing the sufficiency of the nexus between the foreign conduct and the forum, the courts must ascertain whether the forum state has significant contact or aggregation of contacts to the claims before it to create state interests that ensure that the choice of forum law "is not arbitrary or unfair."[77]

However, the fact that a forum has sufficient nexus with the claims for its law to apply does not necessarily mean, as a matter of conflict of laws, that forum law must apply. In deciding whether to apply forum law or the law of another jurisdiction, courts typically look to section 6 of the *Restatement (Second) of Conflict of Laws*, which sets forth a variety of factors for the courts to consider.[78] Foremost among them is "the relevant policies of [i]nterested states and the relative interests of those states in the determination of the particular issue."[79] Only after assessing competing concerns can a decision on applicable law be made. Forum law does not apply automatically.

Comity

In *Empagran*, the Supreme Court held that principles of prescriptive comity required that the FTAIA be interpreted so as to preclude exercise of Sherman Act jurisdiction where foreign conduct causes independent foreign harm that alone gives rise to a plaintiff's claim. Prescriptive comity provides that domestic statutes should be construed so as to avoid unreasonable interference with the sovereign authority of foreign nations.

The prescriptive comity principle relied on by the Supreme Court in *Empagran* applies equally to state law claims for reasons already discussed. First, *Empagran* is a decision by the highest court interpreting the reach of the Sherman Act and therefore should be authoritative with respect to state antitrust statutes under harmonizing statutes and case law referred to above. Second, it would be anomalous for a court to find that the jurisdiction of state courts in matters of commerce exceeded that of federal courts.[80] Third, the case law, although sparse, confirms that the jurisdictional reach of state antitrust laws and state consumer protection statutes cannot exceed that of the Sherman Act.[81]

Common Law Claims

Common law actions, such as claims for restitution and unjust enrichment, by foreign plaintiffs based on foreign transactions face even steeper hurdles than statutory claims. Even assuming that a court would have subject matter jurisdiction over these claims, due process concerns would bar application of forum law where the nexus between the defendant's unlawful acts and the forum is attenuated.

Additionally, the common law claims face the same hurdles that the state antitrust claims and unfair trade practices claims face under the Supremacy Clause, the Foreign Commerce Clause, and the Due Process Clause.[82] To permit the common law actions to go forward would stand as an obstacle to the ability of the United States to speak with one voice in matters of international commerce. Moreover, allowing suits based on restitution or unjust enrichment could complicate the conduct of international commerce because traders would have no simple way of assessing their potential liability under various different state-based unjust enrichment or restitution regimens. Equally important, comity concerns counsel against permitting common law claims to trump remedies provided by foreign law for injuries suffered outside the United States.

Under federal law, as discussed above, there is a presumption against the courts giving extraterritorial effect to acts of Congress. A principal rationale for this presumption is to avoid fomenting unintended discord with foreign nations by extending U.S. law abroad by judicial decision. If laws are to have extraterritorial effect, that decision should come from the legislature and, as stated by the Supreme Court in *Morrison*, should require a "clear" or "affirmative" expression of extraterritoriality in order to extend U.S. law to foreign activity.[83] In truth, this suggests that courts have less (and certainly no more) power than the legislature to extend U.S. law outside the country. This principle of construction applies equally to the state law context.[84] In the absence of affiliating contacts with the forum state that would make it fair and reasonable for the court to exercise jurisdiction, a state court may not entertain common law claims involving foreign conduct.

Conclusion

State law claims by foreign plaintiffs based on foreign transactions are limited by the reach of their applicable federal counterparts. It is both incongruous and illogical to suggest that state law can trump federal law in matters of foreign commerce. Moreover, the Constitution clearly delimits state regulation of foreign commerce. In short, satate law cannot provide an end run around the FTAIA. ■

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1 F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (*Empagran I*).

2 15 U.S.C. § 6a.

3 Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1092 (2006) (*Empagran II*).

4 213 U.S. 347, 357 (1909).

5 United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

6 *Id.* at 443.

7 *Empagran I*, 542 U.S. at 160–61. *Compare* Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 427 (5th Cir. 2001) (exception does not apply where foreign injury independent of domestic harm), *with* Kruman v. Christie's Int'l; PLC, 284 F.3d 384, 400 (2d Cir. 2002) (exception does apply even where foreign injury independent).

8 *Empagran I*, 542 U.S. at 164, 175.

9 *Id.* at 164–69.

10 *Id.* at 165.

11 *Id.*

12 *Id.* at 169–70, 173.

13 *Id.* at 174.

14 *Id.* at 175.

15 *Id.*

16 *Empagran II*, 417 F.3d at 1270–71.

17 *Id.* at 1271.

18 *Id.*

19 *See, e.g.*, *In re* Intel Corp. Microprocessor Litig., 476 F. Supp. 2d 452 (D. Del. 2007); *In re* Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538 (M.D. Pa. 2009).

20 *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2010 WL 5477313, at *4 (N.D. Cal. Dec. 31, 2010).

21 Morrison v. National Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (citation omitted).

22 *Id.*

23 *Id.* at 2878.

24 *See* Coca-Cola Co. v. Harmar Bottling Co., 218 S.W. 3d 671, 682 n.13 (Tex. Sup. Ct. 2006); Diamond Multimedia Sys., Inc. v. Superior Ct., 19 Cal. 4th 1036, 1059 (1991); Kennerson v. Thames Towboat Co., 89 Conn. 367, 374 (1915).

25 *See* ABA Section of Antitrust Law, Antitrust Law Developments 624, 624 n.11 (6th ed. 2007) [hereinafter ALD VI].

[26] *Id.* at 624 n.12. *See also* Michael A. Lindsay, *Overview of State RPM*, ANTITRUST SOURCE, http://www.antitrustsource.com [References].

[27] *See id.* at 639 n.118.

[28] California v. ARC Am. Corp., 490 U.S. 93 (1989).

[29] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[30] *See* Jay Himes, *New York's Prohibition of Vertical Price-Fixing*, N.Y.L.J., Jan. 29, 2008, at 4 ("Both the language of the statute and its legislative history make clear that an RPM provision is per se violation of 340 (1) of The Donnelly Act.")

[31] The 'In' Porters, S. A. v. Hanes Printables, Inc. 663 F. Supp. 494, 501 n.8 (M.D.N.C. 1987).

[32] *See* ALD VI, *supra* note 25, at 625–27.

[33] *Coca-Cola Co.*, 218 S.W. 3d at 681–82.

[34] *Id.*

[35] *See Intel*, 476 F. Supp. 2d at 457.

[36] 15 U.S.C. § 45(a)(3)(i); *Intel*, 476 F. Supp. 2d at 457–58; *see also* United Phosphorus, Ltd. v. Angus Chem. Co., No. 94C 2078, 1994 WL 577246, at *4 (N.D. Ill. Oct. 18, 1994) (purpose of the FTAIA was "to amend the Sherman Act and the Federal Trade Commission Act to create a unitary statutory test to determine whether American antitrust jurisdiction exists over certain international transactions.").

[37] *E.g.*, United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 948–51 (7th Cir. 2003); Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 428 (5th Cir. 2001); Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 69–73 (3d Cir. 2000).

[38] *See* Animal Sci. Prods., Inc. v. China Minmetals Corps., 654 F.3d 462, 2011 WL 3606995, at *2 (3d Cir. Aug. 17, 2011).

[39] H.R. REP. No. 97-686 at 1–3, 5, 9–10 (1982).

[40] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979).

[41] *Empagran I*, 542 U.S. at 161(citing H.R. REP. 97-686 at 1–3, 9–10 (1982)).

[42] *Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. (1981).

[43] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[44] *Crosby*, 530 U.S. at 373.

[45] *Hines*, 312 U.S. at 68.

[46] Major League Baseball v. Crist, 331 F.3d 1177, 1186 (11th Cir. 2003) ("Federal law establishes a universal exemption [for baseball] in the name of uniformity"); *see also* Northern Sec. Co. v. United States, 193 U.S. 197, 345 (190) (no state may give a corporation "authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress").

[47] *Empagran*, 542 U.S. at 168–69 (internal citations omitted).

[48] *Intel*, 476 F. Supp. 2d at 457.

[49] *Id.*

[50] 202 Cal. App. 3d 137 (1988).

[51] *Id.* at 144–45.

[52] *Id.* at 150.

[53] *Id.* at 149–50; *see also* Global Reinsurance Corp.–U.S. Branch v. Equitas Ltd., 921 N.Y.S.2d 1, 9–10 (1st Dept. 2011) (applying *Empagran* analysis in Donnelly Act case and concluding that foreign conduct had a sufficiently direct substantial and reasonably foreseeable effect on New York commerce to permit German entity to sue under New York law).

[54] *Japan Line*, 441 U.S. at 449.

[55] Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 311 (1994) (citations omitted).

[56] *Japan Line*, 441 U.S. at 437–38.

[57] *Id.* at 450–51.

[58] *Id.*

[59] *See* Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

[60] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985).

[61] Bigelow v. Virginia, 421 U.S. 809, 822-24 (1975) (barring Virginia legislature from regulating activities occurring in New York); Nielsen v. Oregon, 212 U.S. 315, 321 (1909) (holding that Oregon cannot prosecute and punish acts done in the State of Washington); Bonaparte v. Tax Court 104 U.S. 592, 594 (1991) ("No State can legislate except with reference to its own jurisdiction"); *see also Hartford Accident & Indemnity Co.*, 292 U.S. at 149; Dick, 281 U.S. at 407.

[62] Stover v. O'Connell Assocs. , 84 F.3d 132, 136 (4th Cir. 1996).

[63] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996).

[64] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[65] *World-Wide Volkswagen*, 444 U.S. at 294 (citing Hanson v. Denckla, 357 U.S. 235, 251, 254 (1958)).

[66] *Id.* at 297.

[67] *Id.* at 293.

[68] *Id.* at 297.

[69] *Gore*, 517 U.S. at 572.

[70] *Id.* at 572–73.

[71] *Coca-Cola Co.*, 218 S.W. 3d at 681–82 ("[W]hy should Texas law supplant Arkansas, Louisiana, or Oklahoma law about how best to protect consumers from anit-competitive conduct in those states? . . . There is no good answer . . . .").

[72] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790–91 (2011).

[73] 472 U.S. 797 (1985).

[74] *Id.* at 821–22.

[75] *Id.* at 822.

[76] *Id.* at 823.

[77] *Id.* at 821–22.

[78] Section 6 of the Restatement (Second) of Conflict of Laws provides:

> §6. Choice-Of-Law Principles
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

[79] *See* Budget Rent-A-Car Sys., Inc. v. Chappell, 407 F. 3d 166, 177 (3d Cir. 2005).

[80] *See The 'In' Porters, S.A.*, 663 F. Supp. at 501 n.8.

[81] *See Amarel*, 202 Cal. App. 3d at 141.

[82] The fact such claims are rooted in case law rather than in Statutes does not mitigate constitutional concerns. *See Gore*, 517 U.S. at n.17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil law suit as by a statute.").

[83] *Morrison*, 130 S. Ct. at 2877–82.

[84] *See, e.g.*, Tattis v. Karthans 215 So.2d 685 (Miss. 1968) (insult spoken in North Carolina not actionable under Mississippi law); Marmon v. Mustang Aviation, Inc., 430 S. W. 2d 182 (Tex. 1968) (Texas wrongful death statute offers no remedy for death occurring in Colorado]; Burns v. Rozen, 201 So.2d 629 (Fla. Dist. Ct. App. 1967) (Florida statute regulating method of catching food fish applied only to state territorial waters); Dur-Ite Co. v. Industrial Comm'n, 394 Ill. 338, 68 N.E.2d 717 (Ill. 1946) (Illinois worker's compensation law does not encompass persons employed outside the state).