# THE SUPREME COURT'S DESTRUCTION OF INCENTIVE TO PARTICIPATE IN THE JUSTICE DEPARTMENT'S CARTEL LENIENCY PROGRAM

## I. INTRODUCTION

From 1990 to 1999, "the most pervasive and harmful criminal antitrust conspiracy ever uncovered"[1] was inflicted on the global markets by the manufacturers of vitamins. The vitamin price fixing cartel affected $34.3 billion of the global commerce in vitamins and premixes, causing injuries between $9 and $13 billion.[2] If you purchased a vitamin at any time during the 1990's, you paid 30% more than you should have paid.[3] Both foreign and domestic purchasers brought antitrust actions in the federal courts of the United States, claiming violations of the Sherman Act.[4]

The Foreign Trade Antitrust Improvements Act (FTAIA) excludes foreign trade from the antitrust laws of the United States.[5] Exceptions to this act allow enforcement actions for foreign trade activities that affect domestic trade. In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,[6] the Supreme Court held that in a claim based solely on foreign effects, the exception to the FTAIA does not exist where the price-fixing conduct significantly and adversely affects customers both inside and outside the United States, and the adverse foreign effect is independent of any adverse domestic effect.[7]

By restricting jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 to trade that includes an adverse domestic effect, the Supreme Court lessened the incentive for corporations to take advantage of the amnesty program run by the Justice Department's Antitrust Division. The global profits from illegal price fixing schemes will allow international cartels to remain profitable even if they receive the maximum penalties allowable for domestic harms.[8] This note shows

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[1] Joel Klein, *Press Conference with Attorney General Janet Reno and Joel Klein, Assistant Attorney General*, Antitrust Division, Federal News Service, May 20, 1999, at 2.

[2] Brief for Professor Darren Bush et al. as Amici Curiae Supporting Respondents at 11, 15, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724).

[3] *Id.*

[4] 15 U.S.C. § 1 (2004).

[5] 15 U.S.C. § 6a (2004).

[6] 542 U.S. 155 (2004).

[7] *Id.* at 159, 174.

[8] Brief for Professor Darren Bush et al., *supra* note 2, at 19.

that the Supreme Court has weakened the antitrust laws that protect consumers and allowed corporations to use global price fixing profits to offset any damages they may face in the United States.

## II. BACKGROUND

### A. *History of Antitrust Law and Enforcement*

The history of antitrust law in the United States began with the enactment of the Sherman Antitrust Act in 1890.[9] The United States has always been at the vanguard of antitrust enforcement; for many years the Sherman Act stood alone in the world as the only potent regulation of anticompetitive behavior. The Sherman Act prohibits every contract and conspiracy in restraint of trade.[10] In 1914 the Clayton Act[11] followed the Sherman Act, adding the powerful remedy of treble damages to the restrictions of the Sherman Act.[12] For ninety years these two acts have been the cornerstone of competition law in the United States.

The Sherman Act primarily deals with the anticompetitive conduct of defendants through prohibitions of certain actions.[13] A violation of the Sherman Act does not depend on whether injury has occurred.[14] The Sherman Act is violated when one undertakes a prohibited action.[15] Whether a plaintiff has suffered an injury is relevant only to the Clayton Act. The Clayton Act trebles damages for injuries that occur under the Sherman Act.[16] A Sherman Act violation may occur that is not actionable under the Clayton Act.[17] This happens when a person violates the Sherman Act through anticompetitive behavior but the behavior does not actually result in damages that can be trebled.

### B. *Foreign Trade Antitrust Improvements Act*

Enacted in 1982 to amend the Sherman Antitrust Act, the Foreign Trade Antitrust Improvements Act (FTAIA)[18] places all non-import activity involving

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[9] 15 U.S.C. § 1.

[10] *Id.*

[11] 15 U.S.C. § 15 (2004)

[12] 15 U.S.C. § 1.

[13] Kruman v. Christie's Int'l PLC, 284 F.3d 384, 397 (2d Cir. 2002). The Sherman Act can be violated in many ways. Conspiring to drive up prices, refusing to deal with certain parties, using market power in one market to obtain monopoly power in another, and attempting to monopolize a market through unfair competition such as predatory pricing are all examples of Sherman Act violations. 15 U.S.C. §§ 1, 2, 13, 14 (2004).

[14] *Kruman*, 284 F.3d at 397.

[15] *Id.*

[16] 15 U.S.C. § 15.

[17] *Id. See also Kruman*, 284 F.3d at 397.

[18] The FTAIA says:

foreign commerce outside of the range of the Sherman Act.[19] This makes clear to exporters and firms doing business abroad that the Sherman Act allows them to enter into anticompetitive business arrangements as long as those arrangements adversely affect only foreign markets.[20] Exceptions to this general exclusion exist when the conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, imports to the United States or exporting activities of one engaged in such activities within the United States and when such conduct is prohibited by the Sherman Act.[21]

### *C. Cartel Leniency Program*

It is difficult to uncover anticompetitive conspiracies.[22] Price-fixing behavior can easily be disguised and cartel members have every incentive to keep their illegal activities from coming to light.[23] In order to combat this problem, the Justice Department created an amnesty program.[24] The cartel leniency program encourages

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> Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
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> (A) on trade or commerce which is not trade or commerce with foreign nations [i.e., domestic trade or commerce], or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [i.e., on an American export competitor]; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. §6a (2004).

[19] 15 U.S.C. § 6a(1).

[20] H.R. REP. NO. 97-686, at 1-3, 9-10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487-2488, 2494-2495.

[21] 15 U.S.C. § 6a(1), (2).

[22] *See* Brief for Economists Joseph E. Stiglitz and Peter R. Orszag as Amici Curiae Supporting Respondents at 17, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

[23] *Id.*

[24] *See* James M. Griffin, Deputy Assistant A.G., U.S. Department of Justice—Antitrust Division, The Modern Leniency Program After Ten Years—"A Summary Overview of

conspirators to come forward and reveal their illegal actions.[25] Under the leniency program, the first conspirator to step forward pays "zero dollars in criminal fines."[26] The amnesty is automatic if the conspirator comes forward before the start of an investigation.[27] A corporation, however, can still receive amnesty if an investigation is underway.[28] Under the leniency program, a cooperating conspirator can receive an order waiving the restitution to victims required by the Sherman Act.[29] The leniency program does not, however, provide a safe harbor from civil suits seeking restitution from the illegal behavior.[30]

The leniency program extends its protection beyond corporations. Corporate executives and employees can receive amnesty to avoid prison time and personal fines. This protection is automatic for all directors, officers, and employees of a corporation that qualify for automatic amnesty, and who come forward and agree to cooperate in the investigation and prosecution of a cartel.[31]

## III. CASE HISTORY

### *A. Battle of the Circuits*

#### 1. The First Circuit: *United States v. Nippon Paper Industries*[32]

The First Circuit Court of Appeals applies the FTAIA broadly.[33] The United States brought a criminal action against Nippon Paper Industries (NPI) for price-fixing violations of the Sherman Act in the facsimile paper market.[34] The Court ruled against NPI and held that section 1 of the Sherman Act applies to wholly foreign conduct which has a substantial and intended effect in the United States.[35] The Court went further to say that a ruling in favor of NPI would incentivize "those who would use nefarious means to influence markets" to erect "as many territorial firewalls as possible between cause and effect."[36]

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the Antitrust Division's Criminal Enforcement Program," Presentation Before the American Bar Association Section of Antitrust Law Annual Meeting 8 (Aug. 12, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201477.htm. *See also* 4 Trade Reg. Rep. (CCH) ¶ 13, 113 (Aug. 16, 1994) (Corporate Leniency Policy 1993).

[25] *See* Griffin, *supra* note 24.

[26] *Id.*

[27] 4 Trade Reg. Rep. (CCH) ¶ 13, 113 (Aug. 16, 1994); Griffin, *supra* note 24.

[28] 4 Trade Reg. Rep. (CCH) ¶ 13, 113 (Aug. 16, 1994).

[29] Griffin, *supra* note 24.

[30] *Id.*

[31] *Id.*

[32] 109 F.3d 1 (1st Cir. 1997).

[33] *Id.* at 9.

[34] *Id.* at 2.

[35] *Id.* at 9.

[36] *Id.* at 8.

2. The Fifth Circuit: *Den Norske Stats Oljeselskap As v. HeereMac Vof*[37]

The Fifth Circuit Court of Appeals takes a narrower view of FTAIA.[38] The state oil company of Norway sued owners of heavy lift barges for conspiring to fix prices.[39] Den Norske Stats Oljeselskap As ("Statoil") alleged that the anticompetitive conspiracy raised both its operating expenses and price in the United States.[40] The Fifth Circuit Court of Appeals held that Statoil failed to "assert jurisdiction under the antitrust laws because the plaintiff's injury did not arise from that domestic anticompetitive effect."[41] The court found that the plain language of the FTAIA precludes foreign plaintiffs from bringing claims under the Sherman Act when the injury occurred overseas and the "injury arises from effects in a non-domestic market."[42] Therefore, the conduct of the defendants must be found to have a "direct, substantial and reasonably foreseeable effect on United States domestic commerce" and such effect must give rise to the antitrust claim.[43]

The court accepted that the defendant's conspiracy to fix prices had a direct, substantial and reasonably foreseeable effect on United States markets.[44] The court did not find, however, that the effect of the conspiracy gave rise to the antitrust claim.[45] The court interpreted the language of section 2 of the FTAIA to require that the effect on United States commerce give rise to the plaintiff's claim.[46] Thus, the majority found that the legislative intent of the FTAIA requires the domestic effect to give rise to any antitrust claim.[47]

3. The Second Circuit: *Kruman v. Christie's International PLC*[48]

The Second Circuit Court of Appeals reads the FTAIA very broadly.[49] In *Kruman*, buyers and sellers from foreign auctions sued Christie's and Sotheby's auction houses under the Clayton Act for their agreements to fix prices at international auction houses in violation of the Sherman Act.[50] *National Bank of Canada v. Interbank Card Association*[51] established the rule in the Second Circuit that the Sherman Act regulates foreign anticompetitive conduct only if that conduct causes injury to domestic commerce by "(1) reducing the competitiveness of a

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[37] 241 F.3d 420 (5th Cir. 2001).
[38] *Id.* at 428.
[39] *Id.* at 422.
[40] *Id.*
[41] *Id.* at 421.
[42] *Id.* at 428.
[43] *Id.* at 426.
[44] *Id.*
[45] *Id.* at 427.
[46] *Id.*
[47] *Id.* at 426 n.19.
[48] 284 F.3d 384 (2d Cir. 2002).
[49] *Id.* at 389-390.
[50] *Id.* at 391.
[51] 666 F.2d 6 (2d Cir. 1981).

domestic market; or (2) making possible anticompetitive conduct directed at domestic commerce."[52] The court determined that the FTAIA did not alter this rule.[53]

In *Kruman*, the Second Circuit applied the "effects test" penned by Judge Learned Hand in *United States v. Aluminum Co. of America*.[54] The effects test deems foreign conduct actionable if it was intended to affect domestic conduct and actually did so.[55] This broad test is limited by the Second Circuit's decision in *National Bank of Canada*.[56] The location of the effect, rather than the location of the conduct, determines whether the antitrust laws apply.[57] Thus, according to *Kruman*, the relevant inquiry to determine application of the FTAIA is whether the conduct of the defendants involves import trade or commerce.[58] The court further found that the text of the FTAIA is not concerned with whether a plaintiff has suffered domestic harm, but with whether the defendant has engaged in the proscribed anticompetitive behavior.[59] The actions of the plaintiff were found to be applicable only to Sherman Act actions, not to the assertion of a violation of the Clayton Act.[60]

The Second Circuit further held that a plaintiff must demonstrate that the price-fixing agreement in foreign markets has an effect on domestic commerce.[61] The FTAIA requires only that the domestic effect violate the substantive provisions of the Sherman Act.[62] The Second Circuit read the FTAIA to govern only conduct by the defendant that is regulated by the antitrust laws, not by the grounds for which a plaintiff can bring suit.[63]

The court went on to register concern that a foreign price-fixing scheme can help a domestic scheme succeed:

> When a foreign scheme magnifies the effect of the domestic scheme, and plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the

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[52] *Kruman*, 284 F.3d at 390.

[53] *Id.* at 389-90.

[54] U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[55] *Kruman*, 284 F.3d at 393-94.

[56] *Nat'l Bank of Can.*, 666 F.2d at 8. The Second Circuit will hear an antitrust claim arising out of foreign conduct only if the injuries to United States commerce are an effect of the anticompetitive violation or are made possible by the violation. *Id.* The court held that "[A]ntitrust laws apply to anticompetitive conduct directed at foreign markets only if such conduct injures domestic conduct by either (1) reducing the competitiveness of the domestic market or (2) making possible anticompetitive conduct directed at domestic commerce." *Kruman*, 284 F.3d at 394.

[57] *Kruman*, 284 F.3d at 395.

[58] *Id.*

[59] *Id.* at 396-97.

[60] *Id.* at 397-98.

[61] *Id.* at 399.

[62] *Id.* at 400.

[63] *Id.* at 402.

> foreign scheme and the domestic scheme rather than the domestic scheme alone. Our markets suffer when the foreign scheme is not deterred because the domestic scheme may have a greater chance of success when it is supplemented by the foreign scheme.[64]

Thus, the Second Circuit found that the Sherman Act was applicable to the actions of the defendants, regardless of whether the injury occurred in the domestic or foreign market. This was in direct contrast to the Fifth Circuit's earlier ruling in *Den Norske*.[65]

4. District of Columbia Circuit: *Empagran S.A. v. F. Hoffman-La Roche Ltd.*[66]

The District of Columbia Circuit Court of Appeals also read the FTAIA more broadly than the Fifth Circuit.[67] Empagran sued F. Hoffman-La Roche on behalf of foreign and domestic purchasers of vitamins who suffered economic losses because of a price-fixing conspiracy in violation of the Sherman Act.[68] The District Court dismissed the foreign purchaser's claims.[69] The court held that the pricing had a direct, substantial, and reasonably foreseeable effect on ordinary domestic trade or commerce and that such effect gave rise to a Sherman Act claim.[70] The D.C. Circuit partially agreed with the Second Circuit's expansive reading of the FTAIA, defining "giving rise to a claim" to mean giving rise to "someone's private claim for damages or equitable relief."[71] The lack of connection between the foreign effect and domestic effect did not matter to the District of Columbia Circuit in light of the FTAIA's text and legislative history and the general dictates of antitrust policy.[72]

*B. The Supreme Court Weighs In:* F. Hoffman-La Roche Ltd. v. Empagran S.A.[73]

F. Hoffman-La Roche appealed the District of Columbia Circuit's ruling and the Supreme Court granted certiorari to resolve the split in the Court of Appeals' applications of the FTAIA exception.[74] The Court concluded that the price-fixing conduct involved trade or commerce with foreign nations, but that the exception of the FTAIA does not apply when the plaintiff's claim rests solely on the independent foreign harm.[75] Since the FTAIA exception does not apply, the

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[64] *Id.* at 403.

[65] Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420 (5th Cir. 2001).

[66] Empagran S.A. v. F. Hoffman-La Roche Ltd., 315 F.3d 338 (D.C. Cir. 2003), *rev'd*, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[67] *Id.* at 341.

[68] *F. Hoffmann-La Roche*, 542 U.S. at 158.

[69] *Empagran*, 315 F.3d at 342-43.

[70] *Id.* at 340.

[71] *Id.* at 352.

[72] *Id.* at 341.

[73] 542 U.S. 155 (2004).

[74] *Id.* at 159-160.

[75] *Id.* at 158.

Sherman Act does not apply to foreign antitrust violations when the price-fixing conduct significantly and adversely affects both foreign customers and customers but the adverse foreign effect is independent of any adverse domestic effect.[76]

When construing the ambiguous nature of the FTAIA, the Court wished to minimize interference with the sovereign authority of other nations.[77] Antitrust laws have long been applied to foreign anticompetitive conduct if they reflect a legislative effort to redress domestic antitrust injury caused by foreign anticompetitive conduct.[78] Fearing excessive interference in a foreign nation's ability to independently regulate commerce, the Court was not willing to extend this principle when both the harm and the conduct are foreign.[79] The Court read the intent of Congress as seeking to release foreign conduct from the Sherman Act, only bringing it back under the Sherman Act when the foreign conduct causes domestic harm.[80] Relying on principles of prescriptive comity,[81] the Court rejected the D.C. Circuit's interpretation of the FTAIA.[82]

Justice Breyer also summarily rejected the respondents' linguistic argument that the exception to the FTAIA applies to "a claim," rather than specifically to "the plaintiff's claim" or the "claim at issue." The respondents argued that, because a domestic claim arises, a general claim linguistically exists to maintain an action.[83] The Court recognized that this reading is both a logical and more natural interpretation of the statute.[84] The Court chose to ignore the more natural reading of the statute due to considerations of comity and legislative history.[85]

In addition, the Court summarily dismissed policy considerations that an expansive reading of the exception to the FTAIA would help protect Americans against anticompetitive injury.[86] Both parties presented empirical arguments on the effect of the FTAIA exception on protecting American commerce.[87] Rather than weighing the arguments, the Court threw its hands up in the air and rested its conclusion upon comity and legislative history.[88]

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[76] *Id.* at 163-164.

[77] *Id.*

[78] *Id.* at 163-165.

[79] *Id.* at 165.

[80] *Id.* at 159-160.

[81] Comity is a courtesy among different nations "involving . . . mutual recognition of legislative, executive and judicial acts." BLACK'S LAW DICTIONARY 284 (8th ed. 2004). Prescriptive comity adds an element of time to the comity principle. If enough time elapses without one nation rejecting the application of another nation's laws upon its jurisdiction, the law is accepted through prescriptive comity. The Supreme Court rejected the notion that American antitrust laws have been accepted through prescriptive comity since the international marketplace has not adopted such ideas.

[82] *F. Hoffman-La Roche*, 542 U.S. at 168-169.

[83] *Id.* at 172.

[84] *Id.* at 174.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

The Justices continued to shirk their duty to protect the American consumer by failing to address whether the sellers could have maintained their international price-fixing arrangement without an adverse domestic effect.[89] The Supreme Court refused to apply the Sherman Act when anticompetitive conduct creates both a domestic and foreign harm, but the foreign claim rests on foreign harm solely independent of the domestic harm.[90]

## IV. THE PROPOSITION ON WHICH SOVEREIGNTY ANALYSIS RELIES IS FLAWED IN LIGHT OF TODAY'S GLOBAL ECONOMY

Though this note focuses on the ramifications of the *F. Hoffman-La Roche* decision on antitrust enforcement, some discussion of the Supreme Court's focus on sovereignty is needed.

The Court begins its sovereignty analysis with the proposition that "[t]he 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."[91] In general, the Court attempts to avoid "unreasonable interference with the sovereign authority of other nations."[92] Antitrust laws can interfere with a foreign nation's ability to regulate its own commercial affairs when applied to foreign conduct.[93] Courts have long held that it is reasonable and consistent with the principles of comity to apply antitrust laws to foreign anticompetitive conduct, insofar as the regulations reflect legislative efforts to redress domestic antitrust injury that foreign anticompetitive conduct has caused.[94]

With that in mind, the Court then asks "[w]hy it [is] reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?"[95] In answering its question, the Court found the imposition of antitrust laws on foreign countries for foreign harms would amount to legal imperialism through legislative fiat.[96]

The problem with the Court's answer to its own question is the proposition that underscores the analysis: "[T]he price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United

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[89] *Id.*

[90] *Id.*

[91] *Id.* at 163.

[92] *Id.* (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); Romero v. International Terminal Operating Co., 358 U.S. 354, 382-383 (1959) (application of Jones Act in maritime case); Lauritzen v. Larsen, 345 U.S. 571, 578, (1953) (same)).

[93] *Id.*

[94] *Id.* (citing United States v. Aluminum Co. of America, 148 F.2d 416, 443-444 (C.A.2 1945) (L. Hand, J.); 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 236 (1978)).

[95] *Id.* at 165.

[96] *Id.*

States, but the adverse foreign effect is independent of any adverse domestic effect."[97] Global cartels do not operate in a vacuum delineated by national boundaries; the prices extorted from one country's citizens can be used to prop up the cartel's operations in another nation. The intertwining of markets in the current global economy makes the proposition that the foreign effect is independent of the adverse domestic effect tenuous at best. When global cartels can harm the domestic consumer through foreign anticompetitive behavior, as described below, it can be reasonable to apply antitrust laws to foreign anticompetitive practices that produce an independent foreign harm.

## V. THE EFFECT OF *F. HOFFMAN-LA ROCHE* ON INCENTIVES FOR CORPORATE WRONG-DOERS TO PARTICIPATE IN AMNESTY PROGRAMS

*F. Hoffman-La Roche* emasculates the ability of antitrust law to effectively prevent global price fixing cartels from mercilessly preying on the unsuspecting American consumer. The global profits from illegal price fixing schemes will allow international cartels to remain profitable even if they receive the maximum penalties allowable for domestic harms.[98] The United States government argues that foreign claims will reduce the effectiveness of the cartel leniency program, one of the most effective tools in catching anticompetitive conspirators.[99] This claim is not logically supportable because cartel members still have an incentive to inform on each other to avoid criminal prosecution, even when facing foreign civil liability. In addition, allowing foreign claims will not affect personal sanctions against corporate officers and employees, for whom the amnesty program gives the greatest incentive to participate. Allowing foreign claims may even have the effect of increasing discovery, as foreign victims will have more incentive to investigate and monitor claims if they can receive the treble damages available in United States jurisdictions.[100]

### *A. Global Profits from Illegal Price Fixing Schemes Will Allow International Cartels to Remain Profitable Even If They Receive the Maximum Penalties Allowable for Domestic Harms*

Firms enter into global price fixing arrangements for one reason—greed. The sole object of a price fixing cartel is to maximize the profit of the members by shielding them from pesky market forces like competition. If the incentive to break the law is money, then the most effective way to punish and deter such illegal behavior is to impose monetary penalties that wipe out all the illegal profits. This

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[97] *Id.* at 163-164.

[98] Brief for Professor Darren Bush et al., *supra* note 2, at 19.

[99] Brief for the United States as Amici Curiae Supporting Petitioners at 20-21, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

[100] Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents at 18, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

is the underlying theory behind the Clayton Act's treble damages provision.[101]

The profits obtained by an illegal cartel can be enormous.[102] Cartels can inflate prices to such a degree that even the treble damages awarded in the United States will not erase the overall gain from the anticompetitive behavior. This was the precise situation in *F. Hoffman-La Roche.* The cartel netted between $9 and $13 billion worldwide in inflated vitamin prices.[103] Only 15% of these injuries occurred in the United States.[104] The total amount of fines and penalties levied against the cartel worldwide only amounts to between $4.4 and $5.6 billion.[105] Simple subtraction shows that the cartel walked away with anywhere between $3.4 and $8.6 billion in ill-gotten gains even after prosecution. This hardly provides a disincentive for anticompetitive behavior, nor can leaving the conspirators with billions in illegal profits be considered punishment.

Lower courts have expressed concerns that cartels would use global profits to offset domestic penalties. The D.C. Circuit Court of Appeals worried that the global profits from an international conspiracy would provide an incentive to engage in anticompetitive behavior, regardless of the disgorgement of funds from United States liability.[106]

Using global sales to determine anticompetitive harm could increase the maximum liability of an international price fixing cartel three to six times.[107] If domestic victims of the vitamin cartel are able to obtain treble damages, those damages would amount to 45% of the illegal profits.[108] The addition of the foreign claims to the antitrust action could bring the private recovery to 300% of the global profits.[109] A punitive amount that large would be precisely the type of punishment envisioned by the drafters of the Clayton Act.

### *B. Deterrence of Global Cartels Will Be Chilled by the Decision in* F. Hoffman-La Roche

Deterrence is a major goal of United States antitrust policy.[110] In order to deter anticompetitive behavior, the expected penalty must be at least equal to the global profits amassed from an illegal scheme. A global cartel would expect to be penalized with the expected penalty of each individual nation.[111] If the total

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[101] *See* 15 U.S.C. § 15(a) (2004).

[102] Brief for Professor Darren Bush et al., *supra* note 2, at 15.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 21.

[106] Empagran S.A. v. F. Hoffman-La Roche Ltd., 315 F.3d 338, 356 (D.C. Cir. 2003).

[107] Brief for Professor Darren Bush et al., *supra* note 2, at 16.

[108] *Id.* at 18.

[109] *Id.*

[110] Brief for Economists Joseph E. Stiglitz and Peter R. Orszag as Amici Curiae Supporting Respondents at 7-8, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

[111] *Id.* at 10.

worldwide penalties are less than the global profits, the cartel will have an incentive to illegally collude to fix prices in all nations.

Price fixing cartels selling global goods must operate in all markets to avoid arbitrage. Arbitrage occurs when the same good exists at two different prices. If a cartel chose to fix prices only in foreign countries, arbitrageurs can purchase the goods in the United States at the competitive market price and take them to a foreign country where the goods could be sold at a price higher than the competitive price but lower than the fixed price of the cartel. Arbitrage can therefore ruin the market power gained by the cartel's price fixing behavior.

Transportation costs and other expenses can prevent arbitrage in some types of goods, but such expenses tend to be low in cartelized goods such as vitamins.[112] Because of arbitrage, a global cartel will choose to fix prices in a market where the expected penalty would normally deter anticompetitive behavior because of the support of foreign profits. The only way to effectively deter a global cartel from forming is for the expected global penalty to exceed the expected global profits.

Domestic harm occurs when a global cartel is not effectively deterred. Because of the threat of arbitrage, a global cartel will operate within the United States even if it would be deterred from fixing prices from a purely domestic standpoint. The necessity of a cartel to operate in the United States market in conjunction with the ability to remain profitable globally after paying domestic penalties means that without foreign claims United States consumers will be hurt by cartels.[113] The United States Court of Appeals for the Second Circuit noted that "[o]ur markets suffer when the foreign scheme is not deterred because the domestic scheme may have a greater chance of success when it is supplemented by the foreign scheme."[114] These concerns were summarily dismissed by the Supreme Court when it refused to allow foreign claims in *F. Hoffman-La Roche*.[115]

### *C. Firms Would Have an Incentive to Participate in the Cartel Leniency Program If Foreign Claims Were Allowed*

The Justice Department's cartel leniency program is one of the most important weapons against price fixing conspiracies because it offers amnesty from criminal prosecution to the first conspirator that comes forward.[116] If foreign claimants are allowed to seek treble damages in United States courts, the Justice Department feared that participation in the cartel leniency program would be chilled.[117] The government's contention was that when corporations weighed the civil damages they were likely to face, the additional claims and subsequent damages by foreign victims would outweigh any benefit from avoiding criminal penalties.[118] This

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[112] *Id.* at 13.

[113] *Id.* at 14.

[114] Kruman v. Christie's Int'l PLC., 284 F.3d 384, 403 (2d Cir. 2002).

[115] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 174 (2004).

[116] Griffin, *supra* note 24.

[117] Brief for the United States, *supra* note 99, at 20-21.

[118] *Id.*

argument fails to hold water for a multitude of reasons. For the reasons explained above, without allowing foreign claims no deterrence exists to prevent the formation of the cartels. The deterrence of the formation of the cartels should be the primary goal of any antitrust enforcement program.

The cartel leniency program is primarily effective because there is no honor among thieves.[119] When faced with discovery, conspirators will race to the courthouse in order to be the first to cooperate and avoid criminal sanctions. This breeds mistrust and paranoia among the members of a cartel. Allowing foreign claims only raises the stakes in this game. Now firms are sufficiently afraid of being discovered. If all face equal criminal sanctions, the firm with the lowest civil liability has the greatest incentive to participate. This same incentive remains even when the stakes increase through the addition of foreign liability.

A firm bearing a smaller liability is more likely to participate in the leniency program to avoid the costs that will be imposed on its competitors.[120] Members of a cartel would normally be competitors in a fair marketplace. After the demise of

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[119] The incentive for a thief to turn in his partner is generally exhibited by an economic game known as the prisoner's dilemma. BLACK'S LAW DICTIONARY 1233 (8th ed. 2004). The classical prisoner's dilemma is as follows: Two suspects are arrested by the police. The police have insufficient evidence for a conviction, and having separated both prisoners, visit each of them and offer the same deal: if one turns State's Evidence against the other and the other remains silent, the silent accomplice receives the full 10-year sentence and the betrayer goes free. If both stay silent, the police can only give both prisoners 6 months for a minor charge. If both betray each other, they receive a 2 year sentence each. It can be summarized thus:

| | Prisoner 1 Denies | Prisoner 1 Betrays |
|---|---|---|
| Prisoner 2 Denies | Both serve six months | Prisoner 2 serves ten years; Prisoner 1 goes free |
| Prisoner 2 Betrays | Prisoner 1 serves ten years; Prisoner 2 goes free | Both serve two years |

Assume both prisoners are completely selfish and their only goal is to minimize their own jail terms. Each prisoner has two options: to cooperate with his accomplice and stay quiet, or to betray his accomplice and give evidence. The outcome of each choice depends on the choice of the accomplice. However, neither prisoner knows the choice of his accomplice. Even if they were able to talk to each other, neither could be sure that they could trust the other. Assume the protagonist prisoner is rationally working out his best move. If his partner stays quiet, his best move is to betray as he then walks free instead of receiving the minor sentence. If his partner betrays, his best move is still to betray, as by doing so he receives a relatively lesser sentence than staying silent. At the same time, the other prisoner thinking rationally would also have arrived at the same conclusion and therefore will betray. Thus, in a game played only once by two rational players both will betray each other. Betrayal is their only rational choice. If they could conspire and be sure that the other player would not betray, they would both have stayed silent and achieved a better result. However, such a conspiracy can not exist, as it is vulnerable to the treachery of selfish individuals, which the prisoners are assumed to be.

[120] Brief for Economists Joseph E. Stiglitz and Peter R. Orszag, *supra* note 110, at 28.

cooperation between cartel members, a firm with a smaller liability would be at an advantage to see its competitors burdened with higher damages. The addition of foreign claimants only magnifies the amount of the damages, thereby increasing the incentive for the firm with the smallest exposure to civil suits to take advantage of the cartel leniency program and inform against the former cartel members.

The balancing of costs and benefits that a firm undertakes when deciding whether to participate in the cartel leniency program does not necessarily fall on the side of continuing the collusion.[121] The benefits of amnesty and the desire to beat fellow conspirators to the prosecutor's office remain just as strong or may even be marginally increased by a desire to impose costs on competitors. The real goal of the cartel leniency program, however, should be the elimination of cartels as soon as possible. The added deterrence of the imposition of foreign damages would far outweigh the any potential marginal effect to dissuade a firm from participating in the cartel leniency program.[122] The cartel leniency program would remain a vital enforcement tool to combat price-fixing cartels even if foreign claims were allowed in United States courts.

### *D. The Cartel Leniency Program's Most Effective Incentive is Unaffected by Foreign Claims*

The cartel leniency program offers amnesty to parties other than corporate entities; the officers, directors and employees of the cooperating corporation receive automatic immunity from personal criminal sanctions and jail time.[123] This is generally considered the most effective incentive of the cartel leniency program. Scott D. Hammond states, "It is widely accepted, and it has certainly been our experience in the United States, that holding executives accountable for participating in cartel offenses by prosecuting them criminally and imposing jail sentences provides the greatest deterrent to these crimes."[124] A corporation may be an entity in the eyes of the law, but in reality, corporations consist of individuals. The individual desire for personal liberty and personal financial considerations naturally outweigh an individual's desire to avoid damages to his employer's balance sheet.[125] "[T]he primary deterrent to cartel activity is the threat of imprisonment and other criminal penalties (especially when heightened through the

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[121] *Id.* at 27-28.

[122] *Id.*

[123] Brief for the United States, *supra* note 99, at 20.

[124] Scott D. Hammond, Director of Criminal Enforcement, U.S. Dep't of Justice Antitrust Division, Beating Cartels at Their Own Game–Sharing Information in the Fight Against Cartels, Address Before the Inaugural Symposium on Competition Policy by the Competition Policy Research Center Fair Trade Commission of Japan, 13-14 (Nov. 20, 2003) (text available at http://www.usdoj.gov/atr/public/speeches/201614.pdf).

[125] Brief for Committee to Support the Antitrust Laws and National Association of Securities and Consumer Attorneys as Amici Curiae Supporting Respondents at 6, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

fear of exposure created by the amnesty program)."[126] Automatic amnesty to the directors, officers and employees of a corporation is the key incentive for participation in the cartel leniency program.[127] Allowing foreign claims in U.S. courts does not affect this incentive. Whatever marginal effect foreign claims may have on participation in the cartel leniency program, the main incentive to avoid personal sanctions remains unaffected.[128] Allowing foreign claims would greatly increase the deterrent effect of our laws. Foreign claims would thus deter some cartels from forming, and those that do form would still have a great incentive to participate in amnesty programs as the individuals involved would seek to avoid personal repercussions for the actions of the corporation.

### *E. The Cartel Leniency Program Would Be Augmented by Greater Vigilance from Foreign Victims if Their Claims Were Allowed in the Courts of the United States*

Global cartels are inherently difficult to detect and prosecute.[129] The cartel leniency program serves a vital role in the detection and prosecution of these schemes.[130] Allowing foreign claims into United States jurisdiction would have augmented this goal. If foreign plaintiffs believe they will be recompensed three times the amount they are damaged, they will be more likely to disclose illegal behavior.[131] This will add a greater deterrence to cartel formation.[132]

Increased vigilance on the part of foreign consumers will also directly benefit the cartel leniency program. Greater vigilance leads to a greater chance of discovery. A greater chance of discovery makes avoiding criminal charges more attractive to cartel members. If seeking amnesty is more attractive to members, each member is less likely to trust the others and more likely to race to be the first to inform on the cartel, thereby securing individual protection against criminal sanctions. Ultimately, this means the cartel leniency program will become a more attractive option for firms engaged in price fixing. By refusing to allow foreign claims, the Supreme Court emasculated the incentive for the foreign consumer to be vigilant and drive more conspirators to the cartel leniency program.

### *F. Removing Foreign Claims from United States Jurisdiction is not the Ideal Policy Solution to Address Concerns that Participation in the Cartel Leniency Program May Be Chilled*

Barring foreign claims is not the best solution to the Government's concern that firms would not wish to participate in the cartel leniency program if they would then be subject to foreign civil liability. The obvious solution to such a concern

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[126] Brief for the United States, *supra* note 99, at 23.

[127] Griffin, *supra* note 24.

[128] Brief for Certain Professors of Economics, *supra* note 100, at 17.

[129] *Id.* at 19.

[130] *Id.*

[131] Brief for Economists Joseph E. Stiglitz and Peter R. Orszag, *supra* note 110, at 26 n.4.

[132] *Id.*

would be extending the protection of the cartel leniency program's amnesty to civil actions.[133] This would not only eliminate any disincentive to participate in the leniency program, if foreign claims were allowed, it would make the leniency program significantly more attractive.[134] Proposed legislation to this effect is now pending in Congress.[135]

Barring foreign claims on the grounds that they will chill participation also overprotects all conspirators. In order to make it slightly more attractive for one firm to blow the whistle on the cartel, all of the conspirators are shielded from the full liability of their actions. Instead of rewarding an entire global cartel with protection, the sensible policy decision would be to provide civil amnesty to the firm cooperating with the prosecution.

## VI. CONCLUSION

In *F. Hoffman-La Roche*, the Supreme Court refused to allow foreign victims of global price fixing cartels to maintain civil actions in the United States based solely on foreign effects of the price fixing scheme.[136] In so doing, the Court failed to adequately protect American consumers. The goal of American antitrust law is to provide a fair and competitive marketplace for the benefit of the average consumer. Global price-fixing cartels can violate these laws with impunity and rest assured that their overseas profits will more than make up for any penalties they may face in the United States. Thus, these cartels will continue to operate in America in order to maintain an inflated price across the globe.

The cartel leniency program provides one of the best means to detect international price-fixing conspiracies.[137] Allowing foreign claims would not hurt this program; instead, it would only raise the stakes involved and act as a greater deterrent to the formation of cartels. The basic purpose of the leniency program is to prevent the formation of global cartels in the first place.[138] Nothing would more effectively prevent cartel formation than allowing the entire global damages to be assessed to the cartel threefold under American antitrust law.

The cartel leniency program would also become more attractive to cartel members if foreign victims of global price-fixing schemes were more vigilant due to the incentive of damages in United States courts. The more vigilant consumers are across the globe, the more likely a cartel will be discovered and the more attractive the amnesty offered through the cartel leniency program will become.

Any concern that firms would be dissuaded from seeking amnesty should be addressed not by barring claims altogether but by barring claims against the firm

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[133] *Id.* at 29.

[134] *Id.*

[135] Antitrust Criminal Penalty Enhancement and Reform Act of 2003, S. 1797, 108th Cong. § 103 (2003).

[136] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 174 (2004).

[137] Griffin, *supra* note 24.

[138] Brief for Economists Joseph E. Stiglitz and Peter R. Orszag, *supra* note 110, at 7-8.

receiving amnesty. This would solve any disincentive problem for firms while creating greater incentive to blow the whistle on cartels.

The Supreme Court did the American public a great disservice by not allowing foreign claims in United States courts for foreign effects of global price-fixing schemes. As long as global cartels can use international profits to support price fixing schemes in the United States, the American consumer will suffer.

*Grant Butler*