WilmerHale Victorious in Two Important Cases Involving Extraterritorial Application of US Antitrust Laws

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We have obtained victories for our clients in two of the first cases to apply the Foreign Trade Antitrust Improvements Act (FTAIA) since the Supreme Court's landmark decision in *F. Hoffman-LaRoche v. Empagran, S.A.* concerning the extraterritorial scope of the US antitrust laws: *United States v. LSL Biotechnologies* in the Ninth Circuit; and *Sniado v. Bank Austria AG* in the Second Circuit. These cases add to our tradition of successfully representing our clients in the matters that are defining the contours of global antitrust and competition laws.

Sniado v. Bank Austria AG

We represented four Austrian banks in a private suit alleging that they, together with other European banks, fixed commissions for the exchange of Euro-zone currencies (*e.g.*, francs for deutschmarks). The district court dismissed the claims for lack of subject matter jurisdiction under the FTAIA on the grounds that the plaintiff, who had exchanged European currencies only in Europe, had not been injured by reason of effects on US commerce from the alleged antitrust violations. The Second Circuit initially reversed the district court's dismissal, based on its prior holding in *Kruman v. Christie's Intern. PLC*, that the FTAIA confers subject matter jurisdiction so long as *someone*–even if not the plaintiff–has been injured in US commerce as the result of an alleged antitrust violation.

On June 21, 2004, the Supreme Court granted our clients' petition for certiorari, vacated the Second Circuit opinion, and remanded with instructions to reconsider the case in light of our related victory in *Empagran*. On August 5, 2004, the Second Circuit ruled in our clients' favor and reinstated the district court's dismissal of the case. The court held that the plaintiff had failed to allege any link between his injuries and US commerce. He failed, in particular, to allege that the defendants' alleged illegal conduct led to supracompetitive currency exchange fees in the United States, let alone that any such supracompetitive fees were a "but for" cause of his injury in Europe.

James Lowe, Leon Greenfield, Paul Wolfson and David Olsky represented the Austrian banks before the Second Circuit and before the Supreme Court.

United States v. LSL Biotechnologies

In *LSL Biotechnologies*, we represented the defendant, a US company that developed a new strain

of seeds used to grow long-shelf-life tomatoes in Mexico, in the first case in which a court of appeals has construed the FTAIA's requirement that foreign conduct must have a direct, substantial, and reasonably foreseeable effect on U.S. commerce in order for the Sherman Act to apply. The Department of Justice had filed suit in 2000 alleging that our client, LSL Biotechnologies, had violated the US antitrust laws by entering into a settlement agreement with a former joint venture partner (Hazera) in Israel that restrains that company from selling competing long-shelf-life tomato seeds in North America. On August 11, 2004, the US Court of Appeals for the Ninth Circuit affirmed a district court ruling dismissing the suit for lack of subject matter jurisdiction under the FTAIA.

The FTAIA provides that the Sherman Act does not apply to foreign commerce unless the conduct at issue "has a direct, substantial, and reasonably foreseeable effect." Although there have been a growing number of cases applying the FTAIA in recent years, this is the first opinion to consider in depth what Congress meant by "direct". The Court found that an effect is direct only "if it follows as an immediate consequence of the defendant's activity. Because it found that it is "sheer speculation" whether Hazera will ever be able to develop a long shelf-life tomato seed that does not infringe LSL's patents, the Court held that the effect of the LSL-Hazera agreement cannot be direct because it depends on uncertain intervening developments. The Court also rejected the government's argument that the agreement would have an effect on U.S. commerce because it may allow LSL to charge Mexican farmers more for seeds used to grow tomatoes for export to the United States. The court found that even if such a price increase were imposed it would not affect US consumers because of an agreement between the United States and Mexico setting a floor on the price of tomatoes shipped from Mexico to the United States.

Thomas Connell, Robert Bell, Ali Stoeppelwerth, and Jeffrey Ayer represented LSL both before the district court and the Ninth Circuit.