

Reflections on Cartel Enforcement

BY IAN SIMMONS AND KENNETH R. O'ROURKE

TO PARAPHRASE GEORGE STIGLER, few have the right, and even fewer the ability, to write another article about cartels without offering at least some justification. The twenty-fifth anniversary of the ANTITRUST Magazine provides a fitting opportunity to reflect on the evolution of private and public cartel enforcement in the United States and, most importantly, its expected future course.

It is a given that the face of antitrust enforcement in the United States has evolved considerably over the past twenty-five years. The scope, frequency, and seriousness of cartel investigations have all increased, as has the magnitude of civil litigation that follows. This evolution can, in part, be measured in dollars: total criminal fines averaged \$29 million annually from 1987 to 1996,¹ but rose to over \$200 million in 1997, and criminal fines have continued to rise ever since.² In 2011 alone, the U.S. Department of Justice, Antitrust Division collected more than \$1 billion in criminal fines and other monetary assessments as the result of criminal cartel investigations.³ In the early part of this century, corporate fines of \$200 million (or more) were not unheard of. And now, in September 2012, the Antitrust Division has obtained a record fine of \$500 million against a company convicted, after jury trial, of participating in an international cartel in violation of Section 1.⁴

Of course, dollar amounts do not tell the whole story. The substantive and geographic scope of criminal cartel investigations have expanded as well. Cartel investigations involve an increasingly diverse range of industries—everything from food and food supplements (chocolate, vitamins) to rubber and plastics (EPDM, urethanes) to computer components (NAND FLASH memory, DRAM and SRAM memory chips, optical disk drives) to transportation services and products (maritime transport, air cargo and air passenger services, auto parts).⁵ And the Division's investigations cover a broad geographic spread: the hydrogen peroxide investigation, for instance, targeted corporations headquartered in Belgium, Germany, the Netherlands, and the United

Kingdom; the DRAM investigation focused on companies headquartered in the United States, Germany, South Korea, Taiwan, and Japan; and the LCD-TFT investigation zeroed in on companies in Japan, South Korea, and Taiwan.

Three distinct areas in cartel practice are worth considering for the future evolution of cartel enforcement: (1) the Justice Department's corporate leniency program and newly proposed whistleblower incentives; (2) the intersection of criminal and civil enforcement (particularly the effect of guilty pleas, the role of opt-outs in class action litigation, and the likely direction of class certification doctrines); and (3) the increasing globalization of criminal and civil cartel enforcement (including the evolution of Foreign Trade Antitrust Improvements Act doctrine and its central role in international cartel litigation).

The DOJ's Corporate Leniency Program and Proposed Whistleblower Incentives

The last twenty-five years have witnessed fundamental changes, both in how U.S. and international policymakers attempt to curtail anticompetitive conduct and in how they seek to enforce their respective jurisdictions' antitrust policies. Before 1993, there was no automatic amnesty for the first company to report a potential violation; no amnesty was available if an investigation was already underway; and there was no provision for amnesty for individuals.

The 1993 Revisions. In 1993, the U.S. Department of Justice significantly revised its Corporate Leniency Program (also called the "amnesty" program) to strengthen the DOJ's ability to uncover antitrust violations that might otherwise go undetected. The revised program gave immunity from criminal prosecution to the first antitrust conspirator (ostensibly other than the conspiracy's leader) to report a particular criminal antitrust violation to the DOJ.⁶ The revised leniency program produced remarkable results, but it was limited by concerns over civil exposure. The DOJ did not have an ability to provide any relief from the treble-damages civil actions that the cooperating conspirator still faced.

ACPERA and Civil Actions. In 2004, Congress addressed this issue by enacting the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA). ACPERA was intended to "eliminate[] an intractable dilemma previously faced by criminal amnesty candidates"—that is, the very acts of disclosure that the leniency program encouraged would also expose the

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cooperating firm to a rash of federal and state civil lawsuits for treble damages (with joint and several liability for 100 percent of the damages).⁷ ACPERA's aim was to remove this "substantial disincentive" to leniency-program participation by limiting the successful amnesty applicant's civil damages liability. Instead of joint and several liability for treble damages, the successful applicant would be liable only for actual damages attributable to its own conduct. (This benefit was conditioned on the successful applicant's cooperation with civil claimants.)⁸

ACPERA coupled this carrot with the stick of steeper maximum fines for corporations and individuals and increases in maximum jail terms.

The law was originally set to sunset in 2009, but Congress extended it twice, with the most recent extension running until 2020. These extensions, however, did not come easily. Indeed, when the original 2009 expiration date drew near, there was some uncertainty as to whether ACPERA would be renewed at all.⁹ At the last minute, ACPERA was extended for one year.

In 2010, the law was extended for ten years, but this extension came with two significant revisions. First, at the insistence of the plaintiffs' bar, the amended ACPERA added timeliness of cooperation as a factor for the district court to consider in determining whether the successful applicant had satisfied the civil-litigation cooperation requirement.¹⁰ Second, given lingering uncertainty over whether ACPERA actually prompted prospective criminal amnesty candidates to come forward,¹¹ the law commissioned the U.S. Governmental Accountability Office (GAO) to study the issue and to publish a report on its findings.¹² The ensuing GAO study¹³ found mixed results as to ACPERA's role in fostering participation in the amnesty program.¹⁴

Internationalization of Leniency. The success of the U.S. leniency program did not go unnoticed in other jurisdictions. The number of international authorities with antitrust leniency programs has increased dramatically—from only one program (in the United States) in 1990 to over fifty internationally today.¹⁵ The DOJ credits this "proliferation of effective leniency programs" as "[t]he single most significant development in cartel enforcement."¹⁶ A firm desiring to self-report an antitrust violation can now consult the applicable leniency rules in each such jurisdiction and can assess, with some sense of predictability, the exposure it may face. This internationalization of leniency programs has caused firms to develop detailed internal compliance protocols to maximize the available leniency benefits should they face exposure in multiple jurisdictions.¹⁷

Leniency Incentives and Whistleblowing. The leniency programs of the 1990s and 2000s were structured to create incentives for firms (as opposed to individuals) to self-report. The corporation benefited by reducing its corporate exposure to criminal penalties and, under ACPERA, to civil damages. In recent years there have been calls to add incentives for knowledgeable but innocent *individuals* (so-called

whistleblowers) to report suspected violations.¹⁸ The incentives come in two types: (1) "whistleblower protections," which are designed to encourage reporting by prohibiting firms from retaliating against an employee who reports suspected cartel activity to a regulator; and (2) "whistleblower bounties," modeled loosely on laws, such as the Sarbanes-Oxley and False Claims Acts, which give the whistleblower a cut of any fine obtained from the whistleblower's report. Although whistleblower protections and whistleblower bounties differ in some important respects, both are aimed at individuals (rather than firms) and are designed to promote the direct reporting of potential antitrust violations to a regulator (rather than to a firm's internal designee).

Tension Between Whistleblowers and Corporate Leniency. The calls for adding whistleblower programs that give incentives to individuals to the current regime of leniency programs that give incentives to corporations raise a number of questions. For example, will employees use whistleblower protections as a shield against legitimate employment decisions such as suspension or termination? Or will employees report what they honestly (but mistakenly) believe is a violation? Regardless of a whistleblower's motive, will whistleblower protections such as the Leahy-Grassley bill¹⁹ actually contribute to their stated goal of rigorous antitrust enforcement?

Will whistleblower bounties prompt the reporting of false positives (and make enforcement more inefficient and costly)? In any event, how would the incremental contribution of whistleblower programs to antitrust enforcement be measured? And, perhaps most important of all, is the individual-oriented model—on which whistleblower protections and bounties are based—fundamentally incompatible with the firm-oriented leniency model that the DOJ (and now dozens of other jurisdictions) have so strongly and successfully embraced?

While we do not attempt to provide answers here, these questions suggest that adding a whistleblower protection—much less, a whistleblower *bounty*—may not accomplish their proponents' stated goal of optimal cartel enforcement. The current amnesty model is effective in part because it incentivizes those most likely to know of actual wrongdoing to come forward.²⁰ By contrast, innocent bystanders (the only ones eligible for whistleblower protection or bounties) are less likely to be aware of actual cartel activity, given the secretive nature of cartels (as opposed to innocuous or even procompetitive information-sharing that could be mistaken for collusion). A firm that has uncovered evidence of a potential violation will likely conduct an internal investigation before self-reporting under a corporate leniency program. As it does so, however, employees (including those who are interviewed) will become aware of the investigation, and will stand to gain financially by reporting suspected conduct to regulators before the company has had a chance to do so.²¹

In short, there is good reason to suspect that the promised benefits of a whistleblower-oriented model of cartel report-

ing would prove elusive, and whistleblower programs may actually undermine the effectiveness of time-tested, firm-oriented leniency programs that have proliferated in the United States and abroad.

The Intersection with Civil Litigation

As night follows day, civil litigation follows criminal investigations (although at times the reverse is true, too). Civil cases are filed on behalf of direct and indirect purchaser classes as well as by individual purchasers, such as settlement class opt-outs or direct-action plaintiffs. In antitrust proceedings, these seemingly parallel paths of public and private enforcement actually intersect (and, to change metaphors, the civil and criminal regimes sometimes collide).

Guilty Pleas and Twombly Motions. A hallmark of the U.S. corporate leniency program is that only the first firm to report gets the carrot of antitrust immunity. Suspected co-conspirators remain vulnerable to criminal charges stemming from the alleged cartel. Ensuing indictments are filed not only against corporations, but increasingly against executives in their individual capacities. Beginning in 1999 with the Vitamins investigation, “no-jail” plea agreements largely became a thing of the past.²² Now, the DOJ has a strong policy against unconditionally agreeing to a “no-jail” sentence for *any* defendant.²³ In the past decade, over forty foreign executives have served, or are currently serving, federal prison sentences in the United States for cartel-related offenses.²⁴

Where corporations and/or their executives plead guilty to antitrust offenses, plaintiffs’ counsel may leverage those pleas in ensuing private antitrust actions—a tactic one court has described as “cross-fertilization.”²⁵ Guilty pleas often come into play when defendants move to dismiss under the Supreme Court’s decision in *Bell Atlantic Corporation v. Twombly*, which held that plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face.”²⁶ As plaintiffs argued in the *LCD* litigation, for example, it “defie[d] logic” and was “potentially sanctionable” that three corporations that had pled guilty to felony antitrust charges would join a motion to dismiss under *Twombly*.²⁷ After all, these defendants had “admitted to the same core facts, and the same antitrust violations, that are the subject of this civil action.”²⁸ In denying the motion to dismiss, the district court pointed to several factual allegations supporting the existence of a conspiracy, including “facts of the guilty pleas” entered by defendants.²⁹

Still, the guilty plea must actually tend to support the conspiracy alleged in the civil case. In *In re Hawaiian & Guamanian Cabotage Antitrust Litigation*, for example, plaintiffs sued several providers of shipping services between the continental United States, Hawaii, and Guam, alleging price fixing in violation of Section 1 of the Sherman Act.³⁰ Four individuals had pled guilty to antitrust offenses relating to shipping between the continental United States and Puerto Rico.³¹ Plaintiffs relied heavily on those pleas in opposing a motion to dismiss under *Twombly*,³² but only one of the

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executives even allegedly had anything to do with the defendants’ Hawaii or Guam routes—and the complaint failed to allege any connection between his guilty plea and the shipping lines at issue.³³ The district court granted defendants’ motion to dismiss, with the admonition that “[s]imply saying ‘me too’ after a government investigation does not state a claim.”³⁴

Guilty pleas often dog the defendant throughout the civil litigation in other ways as well. Pleas by foreign entities become the focus in arguments over the extraterritorial reach of the U.S. antitrust laws. For instance, when a defendant’s plea admits that the conspiracy was intended to affect and had a direct effect on U.S. commerce, civil plaintiffs frequently cite that admission in contending that the Sherman Act sweeps in the defendant’s foreign conduct.

More broadly, a guilty plea makes it much more challenging for a defendant to convince a jury (or perhaps even a judge) to distinguish between the illegal conduct underlying the admitted violation and different (but arguably related) legal conduct that may be more central to the allegations in the follow-on civil litigation. A plea can also bend the lens through which the civil impact of admitted criminal conduct is viewed, even when the criminal conduct caused little impact (e.g., a plea to price fixing “certain” but otherwise undefined sales transactions often is magnified in civil litigation such that “certain” is argued to mean “many” or “most” when in fact the parties to the plea agreement know it did not).

Guilty Pleas and State Courts. Sometimes plaintiffs will file their civil complaints in state courts asserting state law theories—at least arguably to avoid tougher federal procedural doctrines (e.g., *Twombly* and Rule 12(b)(6) pleading standards, *Wal-Mart Stores, Inc. v. Dukes*³⁵ and Rule 23 class action standards, and *Celotex Corp. v. Catrett*³⁶ and Rule 56 summary judgment standards) and (at least in many states) to avoid having to obtain a unanimous jury vote to achieve a federal verdict (in contrast, California state court verdicts can be reached by 9 of 12 jurors; New York state court verdicts require 5 of 6 jurors). The recently tried *Rambus v. Micron*³⁷ antitrust case in state court in San Francisco, a case asserting a state law Cartwright Act violation, is one possible example of a civil plaintiff’s perception that state court provides an advantage against a guilty-plea defendant.

But state court procedures can have some downsides for plaintiffs as well. In a federal trial, defendants will be concerned that the jury will watch a videotaped deposition of an overseas and unavailable witness repeatedly asserting his or her Fifth Amendment right about his or her role in the alleged wrongdoing. In some state courts (such as in California), the defendants need not share this concern because a witness's Fifth Amendment invocation is off-limits to criminal and civil juries.

Opt Outs. Twenty-five years ago, the notion of opt-out litigation as it is known today was largely unheard of. To be sure, some companies would sue their suppliers for overcharging on sales of the goods, but the prevailing view of large purchasers was a reluctance to sue their key suppliers. These companies risked future supply interruptions from their litigation adversary while simultaneously exposing themselves to the burdens, costs, and risks of litigation. A large purchaser generally preferred the alternative of quietly seeking a resolution via private negotiation or remaining as a largely anonymous member of a class and taking its pro rata share of the class settlement. Some larger companies also worried about creating “bad” law—that is, helping to establish plaintiff-friendly antitrust precedents, only to find itself sued under that same precedent in some other future dispute.

Today, opt-out litigation is a staple of the civil litigation arising from a publicly disclosed international cartel investigation. And opt-out litigants have mastered the ability to allow others (i.e., DOJ, class plaintiffs) to take the lead on discovery and then swoop in with their own complaint, quickly inheriting the benefit of the discovery obtained by others. This has minimized the cost of pursuing an opt-out case. And given the successes of some early opt-out litigants, more and more companies are willing to take the risk of voluntarily becoming a litigant. Indeed, not only are large direct purchasers filing an increasing number of direct action lawsuits, but major indirect purchasers and resellers are entering the fray. Opt-out litigation is here to stay.

Opt-out cases typically are filed long after the class actions are filed. Amounting to a third wave of civil litigation (after the first wave of direct purchaser class actions, commonly followed closely by a second wave of indirect purchaser class actions), the opt-out cases necessarily extend the overall length of the MDL proceedings, often by years. This situation can test the patience of the presiding judge whose docket can be consumed with the criminal, class action, and opt-out cases, sometimes for 10 years or more. The opt-out plaintiffs need to concern themselves with their place in line, particularly if the various opt-out litigants think they are entitled to a separate trial, each of which is often a major antitrust litigation in its own right.

Class Certification. Twenty-five years ago, it seemed that certifying a class in an antitrust case was a virtual certainty. But the past twenty-five years have seen a remarkable evolution in the standards for class certification under Federal Rule of Civil Procedure 23. Particularly in the last decade,

courts have imposed heightened evidentiary standards on class action plaintiffs and have shown greater willingness to examine merits issues at the class certification stage.

If the last twenty-five years of antitrust cartel litigation yields one observation it is this: the “per se” rule has been placed in its proper context and has not been permitted to subsume the separate inquiry required under Clayton Act Section 4 that an “injury” “by reason” of a violation, be proven. While criminal investigations may set the stage for subsequent class-based civil litigation, the existence of cartel-related investigations, convictions, and even guilty pleas are not enough to establish “classwide injury,” much less that that injury can be shown by proof that is “common” to the class.

The Eighth Circuit made this abundantly clear in *Blades v. Monsanto Co.*³⁸ There, the court held that evidence of a conspiracy affecting all class members would suffice for proving the alleged conspiracy itself, but “proof of conspiracy is not proof of common injury.”³⁹ In that case, the market was highly individualized; the prices for goods varied widely; and crucially, plaintiffs’ expert had failed to show that the fact of injury could be proven for the class as a whole with common evidence.⁴⁰ The court provided a seminal definition of common proof: the proof on the material element has to be the “same” for each class member.⁴¹

As the Second Circuit held in *In re IPO Securities Litigation*, the district court judge must “assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.”⁴² This obligation is “not lessened by overlap between a Rule 23 requirement and a merits issue.”⁴³

Thus, courts should no longer shy away from examining the merits of plaintiffs’ claims if necessary to determine whether class-based litigation is appropriate. This way of speaking about class actions twenty-five years ago was virtually unheard of: “presumed impact” (and similar language) has nearly been banished from the vocabulary.

The coming years will likely see further development of Rule 23 doctrine in civil antitrust cases. This Term, the Supreme Court will hear *Comcast Corporation v. Behrend*, a putative class action alleging that Comcast had perpetrated a “clustering scheme” in violation of the Sherman Act.⁴⁴ At the Third Circuit, the panel majority and dissenting judge split as to whether, at the class certification stage, the court was required to determine the admissibility of plaintiffs’ expert testimony that classwide injury could be shown through common proof.⁴⁵ The majority insisted that the district court need only “evaluate whether an expert is presenting a model which could *evolve* to become admissible evidence.”⁴⁶ Judge Jordan maintained that because the plaintiffs’ expert opinion would be inadmissible at trial under Federal Rule of Evidence 702 and *Daubert*,⁴⁷ “it cannot constitute common evidence of damages.”⁴⁸

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In June of this year, the Supreme Court granted certiorari on the question of “[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the class is susceptible to awarding damages on a class-wide basis.”⁴⁹ Thus, if the Supreme Court continues down the path taken in *Blades* and *IPO Securities*, future class action plaintiffs in cartel cases may be required to establish, at the class certification stage, that classwide injury can be shown through evidence that is both common to the class members and *admissible* at trial—further widening the gap between criminal and civil cartel enforcement in federal court.

State Courts and State Law Claims. Twenty-five years ago, many of the class actions (but particularly indirect purchaser claims) were brought under state law in state court. The Class Action Fairness Act of 2005⁵⁰ meant that virtually all class actions seeking redress for antitrust and unfair competition would be filed in, or be removed to, federal court. No longer do defendants have to try to coordinate dozens of state court class actions. Instead, these state law class actions are now in the same MDL federal district court as the federal law claims. And, of course, federal standards now apply on procedural issues, such as the sufficiency of the pleadings, summary judgment and, perhaps more importantly, class certification.

Civil Discovery. Criminal investigations color civil discovery in several respects. One major consequence of criminal enforcement is that it essentially lays the groundwork for civil plaintiffs’ subsequent discovery efforts. For example, antitrust defendants should expect that documents submitted in response to a grand jury subpoena often will be turned over in civil litigation (typically in response to plaintiffs’ very first document request). The discoverability of documents submitted to a government under a corporate leniency program has gone both ways. Nonetheless, documents submitted under a foreign sovereign’s amnesty program may be immune from discovery for reasons of comity (at least when the foreign sovereign itself maintains those documents are immune from civil claimants).⁵¹

In fact, plaintiffs in the United States may even obtain information that escaped disclosure in a criminal investigation. As a matter of comity, the Division does not (and arguably cannot) request documents located in another country

in the possession of foreign persons or entities. Yet, the Division has sought the foreign documents once they are in the hands of the civil litigants’ lawyers in the United States. Civil plaintiffs are of course not bound by this foreign location restriction, and they may discover relevant documents held overseas so long as they are within the possession or control of the defendants.⁵²

A Smaller World: Globalization and the Future of Antitrust

The last twenty-five years have witnessed unprecedented global integration, ushering Sherman Act enforcement into a legal frontier abundant with issues of extraterritoriality, sovereignty, comity, and state immunity. For example, ANTI-TRUST’s Summer 2012 issue included an article assessing the viability of a foreign sovereign immunity defense among wholly or partially state-owned companies facing Sherman Act scrutiny.⁵³ Civil and criminal antitrust enforcement have significantly internationalized in the past quarter century but many unresolved questions lie ahead.

Origin and Purpose of the FTAIA. Five years before this magazine’s inaugural publication, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) in an effort to make domestic exporters more competitive in foreign markets.⁵⁴ The law formalized American exporter immunity in U.S. courts for conduct with purely foreign effects.⁵⁵

The FTAIA makes the Sherman Act inapplicable to conduct involving nonimport trade or commerce with foreign nations unless the conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce and that effect gives rise to a Sherman Act claim.⁵⁶ As a result, U.S. courts may entertain claims involving foreign trade or commerce if the “conduct significantly harms imports, domestic commerce, or American exporters.”⁵⁷ In *F. Hoffman-La Roche Ltd. v. Empagran*, the Supreme Court held that the FTAIA barred foreign purchasers of price-fixed vitamins from bringing claims in U.S. courts because, though the anticompetitive conduct exerted both harmful foreign and domestic effects, the foreign purchasers’ claims depended only on the foreign effects.⁵⁸

Although the FTAIA was enacted to protect domestic producers from antitrust scrutiny when engaging in business abroad, the last three decades have nearly turned the FTAIA on its head. As manufacturing operations continue their migration overseas to foreign companies or to the foreign facilities of foreign affiliates of U.S. companies, the FTAIA—designed primarily to shield domestic manufacturers against foreign purchaser claims—is increasingly wielded by foreign manufacturers to defend themselves against *domestic* purchaser claims.

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statute gained notoriety). The internationalization of civil antitrust enforcement has forced practitioners and the courts alike to grapple with the statute's scope and significance. Fundamental questions about the FTAIA's interaction with the Sherman Act still remain unanswered, such as whether the FTAIA limits the subject matter jurisdiction of the Sherman Act or simply sets forth additional substantive elements that must be satisfied when the challenged conduct involves foreign commerce.

Jurisdiction or Substance. Early decisions by the D.C. and Ninth Circuits treated the FTAIA as a rule of subject-matter jurisdiction. Under the framework of *Empagran II* and *LSL Biotechnologies*, plaintiffs bear the burden of establishing subject-matter jurisdiction, defendants may move for dismissal under Rule 12(b)(1), and courts are free to examine evidence and resolve factual disputes.⁵⁹ In contrast, and relying heavily on the Supreme Court's 2006 pronouncement in *Arbaugh v. Y&H Corporation* that statutes should be treated as non-jurisdictional in character unless Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional,"⁶⁰ the *Animal Science* and *Agrium* decisions of the past two years have positioned the Third and Seventh Circuits on the other side of the debate.⁶¹ This latter view's apparent momentum will have important implications for civil litigation defendants, primarily at the pleading stage (requiring motions to be brought under Rule 12(b)(6) instead of Rule 12(b)(1)).

Import Exclusion. Another battle brews over the meaning of the FTAIA's import exclusion. The statute strips courts of Sherman Act jurisdiction over conduct involving "trade or commerce (other than import trade or import commerce) with foreign nations . . ." ⁶² Courts in the Ninth Circuit have held that a defendant is deprived of FTAIA protection only if the defendant actually or directly brings the goods or services into the United States.⁶³ The Third Circuit arguably adopts a more plaintiff-friendly position, broadly construing the "import trade or import commerce" exclusion to encompass not only physical importers but also defendants whose conduct is "directed at an import market."⁶⁴ The latter interpretation has significant implications for foreign input manufacturers that sell to finished product makers known to import into the United States. Because these foreign input manufacturers arguably "target" U.S. import markets, under this view they would likely be denied FTAIA protection from the outset.

Domestic Effects. Perhaps the most consequential open question relates to the scope of the "domestic effects" exception. In recent years, a series of cases involving allegations of price fixing among foreign input manufacturers has tested the scope of the exception.⁶⁵ U.S. finished-products purchasers have sought damages for allegedly price-fixed inputs sold to foreign manufacturers for incorporation into finished products.⁶⁶ Those claims may be cognizable to the extent that a finished-product overcharge exists, the finished products are alleged to be the object of the conspiracy, and the effect is the

direct, substantial, and reasonably foreseeable consequence of the input price fixing.⁶⁷

But what if the object of the conspiracy is simply the input, made and sold abroad and incorporated into finished products that may be imported into the United States (as well as other countries) but the finished products themselves are not alleged to be the object of any conspiracy? Foreign input makers have advocated a narrow interpretation of the domestic effects exception, arguing that the chain of transactions between the initial input sale and the ultimate finished-product purchase implicate intervening developments that render residual domestic effects indirect and not reasonably foreseeable.⁶⁸ U.S. purchasers promote a broader interpretation that captures foreign input sales.⁶⁹

Appellate and district courts have divided over how broadly or narrowly the exception's language should be construed. Even within a single district, judges have reached different results. For example, in *In re Static Random Access Memory Antitrust Litigation (SRAM)*, Judge Wilken of the Northern District of California required the plaintiffs to show more than the input maker's "inchoate hope or intention" that their inputs eventually reach the United States.⁷⁰ Plaintiffs could only recover on their claims to the extent they proved that the defendants made certain types of inputs *specifically designed* to be sold to a particular manufacturer in order to be incorporated into a finished product that *in turn was specifically designed* for and actually sold in the United States.⁷¹

But faced with similar facts, Judge Illston, also of the Northern District of California, reached a different conclusion.⁷² In *In re TFT-LCD Antitrust Litigation*, she held that a domestic effect is sufficiently direct and reasonably foreseeable so long as that effect does not "change in any substantial way before it reaches the United States consumer."⁷³ Judge Illston found that the effect of the defendants' anti-competitive conduct did not change significantly between the beginning of the process (LCD panel overcharges) and the end (television and other finished product overcharges); as a result, "[n]o intervening events interrupted its journey."⁷⁴

These interpretations of the domestic effect exception may seem to split hairs but in this delicate and undeveloped area, emphasis in one or another direction can mean the difference between opening Pandora's Box and keeping it shut.

The FTAIA in Criminal Cases. The increasingly integrated global marketplace has also created ripples in the criminal arena, where a sufficient U.S. nexus is required.⁷⁵ In its 1997 decision in *United States v. Nippon Paper Industries Co.*, the First Circuit became the first federal appellate court to adjudicate a criminal antitrust prosecution of extraterritorial conduct.⁷⁶ A key question for the court was whether the Sherman Act should be read more narrowly in the criminal setting than in the civil context. The court considered it "common sense" to interpret "the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil."⁷⁷ The First Circuit held that since the Supreme Court's decision in

Hartford Fire had already established Sherman Act jurisdiction over wholly foreign conduct with intended and substantial domestic effects, and since both common sense and canons of statutory construction counseled in favor of “uniform” interpretation for criminal and civil purposes, foreign anticompetitive conduct could be criminally prosecuted under the Sherman Act.⁷⁸

Years later, the Eleventh Circuit in *United States v. Anderson* implied the same in dicta when it engaged in a domestic effects analysis of a Sherman Act prosecution for quasi-foreign conduct.⁷⁹ Earlier this year, criminal defendants in *United States v. AU Optronics* unsuccessfully argued that a California federal district court lacked subject-matter jurisdiction over their Sherman Act prosecution because the allegations lacked the requisite impact on domestic commerce.⁸⁰ The court found jurisdiction because the government’s charges related to an anticompetitive domestic conspiracy, not to wholly foreign conduct, as the defendants had argued.⁸¹

The Future for Criminal Cases Under the FTAIA. With few exceptions, the case law construing the meaning and limits of the FTAIA has been decidedly civil, not criminal. That may change in coming years. Indeed, future Sherman Act criminal prosecutions of foreign conduct appears to be a foregone conclusion. Criminal defendants typically make their stand on whether the alleged conduct has sufficient domestic effects.⁸² But the prosecutorial implications of the FTAIA—a statute *Empagran* recognizes as having a force of its own⁸³—has yet to be fully explored. Although the law had been in effect for more than a decade, *Nippon Paper* dismissed it as “inelegantly phrased” and expressly declined to rely on it.⁸⁴ Other courts to recognize criminal prosecutions of foreign anticompetitive conduct have focused primarily on the statute’s domestic effects exception.⁸⁵

If, as the *Agrium* court held, the FTAIA is merely construed as adding *substantive elements* to a Sherman Act charge (and is not therefore a restriction on the subject-matter jurisdiction of the federal courts) and if, as the *Nippon Paper* court held, the Sherman Act is construed in a congruent manner in both the civil and criminal settings, then the meaning of the “domestic effects” exception in the criminal context must be explored.

The Undefined “Claim.” The FTAIA removes non-import conduct involving foreign commerce from the reach of the Sherman Act unless that conduct has a direct and substantial effect on U.S. commerce and that effect “gives rise to a claim” under the Sherman Act.⁸⁶ *Empagran* makes clear that “a claim” means “the plaintiff’s claim” or “the claim at issue,” not some third party’s claim.⁸⁷ What does this mean in a criminal prosecution? *Empagran* recognizes that “a statute can apply and not apply to the same conduct, depending upon other circumstances,” such as “the nature of the lawsuit.”⁸⁸

Future defendants might well argue that in light of the FTAIA, the Sherman Act does not criminalize some con-

duct that may nevertheless be subject to a civil action because a criminal prosecution is not a “claim.” For one thing, the FTAIA does not define the term “claim.”⁸⁹ In determining the scope of a statute, courts first look to its plain language,⁹⁰ and where a term is undefined, give the statutory language its “ordinary meaning.”⁹¹ This fundamental canon of statutory interpretation applies with particular force in the criminal context where the canon serves as a corollary to the rule of lenity construing ambiguous criminal statutes in favor of defendants.⁹²

The term “claim” has not traditionally been understood to extend to the government’s interest in a criminal proceeding. *Black’s Law Dictionary*, for example, defines “claim” as “[t]he assertion of an existing right”; “any right to payment or to an equitable remedy”; or “[a] demand for money, property or a legal remedy to which one asserts a right, esp[ecially] the part of a complaint in a civil action specifying what relief the plaintiff asks for.”⁹³ Other dictionaries provide similar definitions,⁹⁴ none of which can fairly be described as including criminal prosecutions. Unlike “claims,” which implicate rights, demands, and remedies, “criminal prosecutions” implicate wrongs, charges, and punishment. Hence, *Black’s Law Dictionary* defines “crime” as, *inter alia*, an “act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding,” and “prosecution” as, *inter alia*, a “criminal proceeding in which an accused person is tried.”⁹⁵ The term is defined in other statutes, both civil and criminal, in a way that likewise accords with the limitation to civil actions.⁹⁶ And in practice, courts typically do not construe “claim” to include criminal prosecutions brought by a governmental entity.⁹⁷

In enacting the FTAIA, Congress could easily have formulated the statute to include criminal proceedings, for example, by requiring that the domestic effects “give rise to a claim or charge” or “give rise to an action” under the Sherman Act, or more simply, by providing that jurisdiction exists where a domestic effect results in a “violation of” the antitrust laws. In other words, “if Congress had intended [the asserted meaning], it could have said so in straightforward language.”⁹⁸ Congress’s use of the word “claim” is thus significant when judged against alternative language that on its face would encompass criminal proceedings.

Admittedly, the enacting legislators do not appear to have expressly contemplated criminal proceedings. But as *Nippon Paper* recognizes, antitrust criminal prosecutions for wholly foreign conduct were rare-to-nonexistent even before that case.⁹⁹ Congress would not have had to explain its decision to exclude criminal prosecutions from the “domestic effects” exception (if that exclusion is read into the statutory language as it could very well be). Moreover, only “the most extraordinary showing of *contrary* intentions in the legislative history will justify a departure” from plain and unambiguous statutory language.¹⁰⁰ Thus, a future FTAIA battleground may well be whether the FTAIA categorically forecloses criminal jurisdiction over foreign anticompetitive conduct under the

substantial effects text, leaving only the import exclusion applicable to criminal prosecutions. Defendants and courts have yet to explore this area.

Conclusion

Learned Hand wrote that every statute is “at once a prophecy and a choice.”¹⁰¹ A statute is a choice because it purports to strike a balance between competing values, although the balance is not always clear or complete. It is a prophecy because it predicts its own effects, its beneficiaries, and perhaps most relevant for purposes of this article, how completely it can be enforced (and at what cost). The “choices” of the past twenty-five years of Sherman Act Section 1 cartel enforcement—the enhanced extraterritorial enforcement of U.S. law and the international proliferation of amnesty regimes, to name only two—contain their own implicit prophecy, one ensuring that there can be no going back to the view that the Sherman Act is simply a domestic charter of economic freedom. The next twenty-five years will be decidedly foreign in focus. ■

¹ Scott D. Hammond, Acting Deputy Ass’t Att’y Gen., U.S. Dep’t of Justice Antitrust Div., Speech Before the ABA Midwinter Leadership Meeting: An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program 6 (Jan. 10, 2005), available at <http://www.justice.gov/atr/public/speeches/207226.pdf>.

² *Id.*

³ Gibson Dunn, 2011 Year-End Criminal Antitrust Update (Jan. 9, 2012), available at <http://www.gibsondunn.com/publications/Documents/2011YearEndCriminalAntitrustUpdate.pdf>.

⁴ See Press Release, U.S. Dep’t of Justice Antitrust Div., Taiwan-Based AU Optronics Corporation Sentenced to Pay \$500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/287189.htm.

⁵ See U.S. Dep’t of Justice Antitrust Div., Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, <http://www.justice.gov/atr/public/criminal/sherman10.html> (last visited Oct. 11, 2012).

⁶ See Scott D. Hammond, Deputy Ass’t Att’y Gen. U.S. Dep’t of Justice Antitrust Div., Speech at the Twenty-Fourth Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades 5–6 (Feb. 25, 2010) [hereinafter *Evolution*], available at <http://www.justice.gov/atr/public/speeches/255515.pdf>.

⁷ Ian Simmons et al., *Muddy Waters? Navigating the Antitrust Criminal Penalty Enhancement and Reform Act*, ANTITRUST REP., Aug. 2006, at 25.

⁸ See *id.*

⁹ See Benjamin G. Bradshaw & Angela Thaler Wilks, *ACPORA—Lasting Limits or Fleeting Experiment?*, LAW360 (Mar. 20, 2009), <http://www.law360.com/competition/articles/92936> (by subscription).

¹⁰ See Antitrust Criminal Penalties Enhancement and Reform Act of 2004 Extension Act of 2010, Pub. L. No. 111-190, § 3(a), 124 Stat. 1275, 1275–76 (2010).

¹¹ See Bradshaw & Wilks, *supra* note 9 (explaining that “it is unclear whether [ACPORA] alone has bolstered participation in the DOJ’s Corporate Leniency Program”).

¹² Antitrust Criminal Penalties Enhancement and Reform Act of 2004 Extension Act of 2010, § 5, 124 Stat. at 1276.

¹³ See GAO, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PRO-

TECTION (July 2011) [hereinafter GAO Report], available at <http://www.gao.gov/new.items/d11619.pdf>.

¹⁴ See *id.* at 15 (noting “little change” in overall number of leniency applications after ACPERA, but increases in reporting of violations about which DOJ had no prior knowledge).

¹⁵ Hammond, *Evolution*, *supra* note 6, at 1, 3.

¹⁶ See *id.* at 1.

¹⁷ See Andrea L. Hamilton & Joseph F. Wintersheid, *Antitrust Compliance Programs: Risk-Benefit Analysis*, LAW360 (July 20, 2012), <http://www.law360.com/articles/362315/antitrust-compliance-programs-risk-benefit-analysis>.

¹⁸ See Carolina Bolado, *Lawmakers Propose Antitrust Whistleblower Protections*, LAW360 (July 31, 2012), <http://www.law360.com/articles/365638/law-makers-propose-antitrust-whistleblower-protections> (Senators Leahy and Grassley introducing legislation to add whistleblower anti-retaliation provisions to ACPERA); see also Melissa Lipman, *Cartel Whistleblower Bill May Fall Short in Boosting DOJ Cases*, LAW360 (Aug. 7, 2012) (citing proponents of whistleblower bounties), <http://www.law360.com/articles/367580/cartel-whistleblower-bill-may-fall-short-in-boosting-doj-cases>.

¹⁹ Criminal Antitrust Anti-Retaliation Act, 112th Cong. (July 31, 2012), available at <http://www.leahy.senate.gov/imo/media/doc/Antitrust%20Legislation%20073112.pdf>.

²⁰ See Kevin R. Sullivan et al., *The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA* 5, ANTITRUST SOURCE (Oct. 2011), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct11_sullivan_10_24f.pdf.

²¹ See *id.*

²² Hammond, *supra* note 1, at 7.

²³ *Id.*

²⁴ *Id.* at 7–8.

²⁵ *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1258 (W.D. Wash. 2009).

²⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

²⁷ Direct Purchaser Pls.’ Opp. to Joint Mot. to Dismiss Direct Purchaser Pls.’ First Am. Compl. at 1, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. Jan. 30, 2009), ECF No. 813.

²⁸ *Id.* at 21.

²⁹ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009).

³⁰ *Hawaiian & Guamanian Cabotage*, 647 F. Supp. 2d at 1254.

³¹ *Id.* at 1258.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1258 n.2, 1270–71 (internal quotation marks omitted) (quoting *In re Tableware Antitrust Litig.*, 363 F. Supp. 2d 1203, 1205 (N.D. Cal. 2005)).

³⁵ 131 S. Ct. 2541 (2011).

³⁶ 477 U.S. 317 (1986).

³⁷ CGC-04-431105 (Cal. Super. Ct., S.F. Cnty.).

³⁸ 400 F.3d 562 (8th Cir. 2005).

³⁹ *Id.* at 572.

⁴⁰ *Id.* at 572–73.

⁴¹ *Id.* at 573.

⁴² 471 F.3d 24, 42 (2d Cir. 2006).

⁴³ *Id.* at 41.

⁴⁴ *Comcast Corp. v. Behrend*, 655 F.3d 182, 187 (3d Cir. 2011), cert. granted, No. 11-864, 2012 U.S. LEXIS 4754 (June 25, 2012).

⁴⁵ See *id.* at 214–15 (Jordan, J., concurring in the judgment in part and dissenting in part).

⁴⁶ *Id.* at 204 n.13 (emphasis added).

⁴⁷ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

- ⁴⁸ *Behrend*, 655 F.3d at 215 (Jordan, J., concurring in the judgment in part and dissenting in part).
- ⁴⁹ 2012 U.S. LEXIS 4754, at *1.
- ⁵⁰ Pub. L. No. 109-2, 118 Stat. 4 (2005).
- ⁵¹ See *In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007) (denying motion to compel discovery of communications with European Commission pursuant to corporate leniency program); but see *In re Vitamins Antitrust Litig.*, MDL No. 1285, 2002 WL 34499542, at *10 (D.D.C. Dec. 18, 2002) (ordering production of submissions to European Commission).
- ⁵² See *Costa v. Kerzner Int'l Resorts, Inc.*, 277 F.R.D. 468, 470–74 (S.D. Fla. 2011).
- ⁵³ Benjamin G. Bradshaw et al., *Foreign Sovereignty and U.S. Antitrust Enforcement: Is "The State Made Me Do It" a Viable Defense?*, ANTITRUST, Summer 2012, at 19.
- ⁵⁴ See H.R. REP. 97-686, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2492 (“As Chairman Rodino stated in introducing the bill, ‘[The FTAIA] would allow American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive domestic marketplace [T]he uncertainty of antitrust constraints has remained a strong concern of potential exporters; that concern is remedied by this bill.’ . . . This legislation will send to the export business community the clear signal that it appears to need in order for it to compete with greater confidence and freedom of action in the international marketplace”).
- ⁵⁵ 15 U.S.C. § 6a (FTAIA).
- ⁵⁶ *Id.*
- ⁵⁷ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158 (2004).
- ⁵⁸ *Id.* at 175.
- ⁵⁹ See *Empagran S.A. v. F. Hoffmann-Laroche*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) (*Empagran II*) (“We . . . conclude that we are without subject-matter jurisdiction under the FTAIA.”); *United States v. LSL Biotech.*, 379 F.3d 672, 683 (9th Cir. 2004) (“The FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade.”). Notably, Judge Illston of the Northern District of California has relied on post-*Arbaugh* decisions of the Third and Seventh Circuits in holding that the FTAIA is not a jurisdictional but is a substantive limitation, despite *LSL Biotechnologies* precedent to the contrary. See *In re TFT-LCD Antitrust Litig.*, 822 F. Supp. 2d 953, 958–59 (N.D. Cal. 2011) (“The Court agrees with the Third Circuit that the FTAIA does not implicate the subject matter jurisdiction of the federal courts. Although the Court does not lightly disregard the Ninth Circuit’s decision in *LSL Biotechnologies*, that decision cannot withstand *Arbaugh*.”); cf. *Centerprise Int’l Ltd. v. Infineon*, 546 F.3d 981, 1110 n.3 (9th Cir. 2008) (opinion amended to state that the court is not deciding whether the FTAIA is jurisdictional statute).
- ⁶⁰ 546 U.S. 500, 515 (2006).
- ⁶¹ See *Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 468–69 (3d Cir. 2011) (“[T]he FTAIA’s language must be interpreted as imposing a substantive merits limitation rather than a jurisdictional bar.”); *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 848 (7th Cir. 2012) (en banc) (“We hold first that the FTAIA’s criteria relate to the merits of a claim, and not to the subject-matter jurisdiction of the court.”).
- ⁶² 15 U.S.C. § 6a.
- ⁶³ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2010 U.S. Dist. LEXIS 65037, at *18 (N.D. Cal. June 28, 2010) (order granting defendants’ joint motion to dismiss) (“Motorola does not allege that the foreign-purchased products were imported into the United States by defendants; to the contrary, the complaint alleges that the foreign-purchased products were brought to the United States by Motorola affiliates [G]iven the global nature of the economy, defining “imports” as goods that foreign companies “intended” to ultimately make their way into the United States for resale would potentially sweep in much conduct excluded by the FTAIA.”); *In re Korean Air Lines Co. Antitrust Litig.*, MDL No. 1891, 2008 U.S. Dist. LEXIS 111722, at *16 (C.D. Cal. June 25, 2008) (order granting in part and denying in part defendants’ motions to dismiss) (“In sum, the Court must determine whether defendants directly br[ought] items or services into the United States or directly increase[d] or decrease[d] United States imports.” (alterations in original) (citations omitted)).
- ⁶⁴ *Animal Science Products*, 654 F.3d at 470 (“Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite. Rather, the relevant inquiry is whether the defendants’ alleged anticompetitive behavior was directed at an import market.”) (quotations and footnote omitted).
- ⁶⁵ See, e.g., *In re Static Random Access Memory (SRAM) Antitrust Litig.*, MDL No. 1891, 2010 U.S. Dist. LEXIS 141968 (N.D. Cal. Dec. 31, 2010); *In re TFT-LCD Antitrust Litig. (TFT-LCD)*, 822 F. Supp. 2d 953 (N.D. Cal. 2011).
- ⁶⁶ *SRAM*, 2010 U.S. Dist. LEXIS 141968, at *30; *TFT-LCD*, 822 F. Supp. 2d at 954–55.
- ⁶⁷ See 15 U.S.C. § 6a.
- ⁶⁸ See, e.g., *TFT-LCD*, 822 F. Supp. 2d at 960–61.
- ⁶⁹ *Id.* at 962–63.
- ⁷⁰ *SRAM*, 2010 U.S. Dist. LEXIS 141968, at *47.
- ⁷¹ *Id.* (“Mere argument that Defendants must have harbored an inchoate hope or intention that their SRAM would reach the United States is insufficient. However, IP Plaintiffs have proffered some evidence from which it could be inferred that Defendants produced certain types of SRAM products specifically designed to be sold to a particular manufacturer, to be incorporated into a product in turn specifically designed for the United States market, and actually sold in the United States. Supra-competitive pricing of that SRAM could have had a domestic effect in the United States which could have given rise to antitrust injury. IP Plaintiffs’ evidence is thus far insufficient to prove that all or any particular subset of SRAM sold abroad and then imported would meet this test.” (emphasis added)).
- ⁷² *TFT-LCD*, 822 F. Supp. 2d at 967 (“SRAM does not help defendants’ argument. . . . To the extent defendants argue that this Court should reach the same conclusion as the court in *SRAM*, the Court declines to do so.).
- ⁷³ *Id.* at 964.
- ⁷⁴ *Id.*
- ⁷⁵ See *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995) (“Punishing crimes committed on a foreign flag ship is like punishing a crime committed on foreign soil; it is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States’ pursuit of its interests.”).
- ⁷⁶ *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (“Were this a civil case, our journey would be complete. But here the United States essays a criminal prosecution for solely extraterritorial conduct rather than a civil action. This is largely uncharted terrain; we are aware of no authority directly on point, and the parties have cited none.”).
- ⁷⁷ *Id.*
- ⁷⁸ *Id.* (“To sum up, the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One’s jurisdictional reach.”) (citing *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993)).
- ⁷⁹ 326 F.3d 1319, 1330 (11th Cir. 2003).
- ⁸⁰ *United States v. AU Optronics Corp.*, No. CR 09-0110 SI, slip op. at 7–8 (N.D. Cal. Apr. 18, 2011), ECF No. 287.
- ⁸¹ *Id.*
- ⁸² *Id.* at 3.
- ⁸³ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. at 161–62.
- ⁸⁴ *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (“In arriving at this conclusion, we take no view of the government’s asseveration that the [FTAIA] makes manifest Congress’ intent to apply the Sherman Act extraterritorially. The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. We emulate this example and do not rest our ultimate conclusion about Section One’s scope upon the FTAIA.”) (citations omitted).
- ⁸⁵ See, e.g., *United States v. Anderson*, 326 F.3d 1319, 1330 (11th Cir. 2003).

- ⁸⁶ See 15 U.S.C. § 6a.
- ⁸⁷ *Empagran*, 542 U.S. at 174–75.
- ⁸⁸ *Id.*
- ⁸⁹ The antitrust laws do not define the word “claim,” but they do use the term in a way that evidences the word’s ordinary meaning. See, e.g., 15 U.S.C. §§ 15, 15a (using “claim” to describe the effort by civil plaintiffs (including the United States) to recover money damages: “The court may award under this section . . . simple interest on actual damages for the period beginning on the date of service of such person’s pleading setting forth a claim under the antitrust laws and ending on the date of judgment . . .”).
- ⁹⁰ *Moskal v. United States*, 498 U.S. 103, 108–09 (1990) (internal quotation omitted).
- ⁹¹ *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) (quotation omitted); see *Moskal*, 498 U.S. at 109 (same); *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (interpreting statutory term according to its “common usage” and “common understanding”).
- ⁹² See, e.g., *Salinas v. United States*, 522 U.S. 52, 57–58 (1997) (“Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language.”); *United States v. Wiltberger*, 18 U.S. 76, 96 (1820) (“The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.”).
- ⁹³ BLACK’S LAW DICTIONARY 281–82 (9th ed. 2009).
- ⁹⁴ See, e.g., WEBSTER’S NEW INTERNATIONAL DICTIONARY 409 (2d ed. 1955) (“claim” includes (1) “A demand of a right or supposed right; a calling on another for something due or supposed to be due”; (2) “a right to claim something; a title to any debt, privilege, or other thing in possession of another”; (3) “that which one claims”); 1 NEW SHORTER OXFORD ENGLISH DICTIONARY 493 (1993) (claim includes a (1) “demand for something as due; a statement of one’s right to something; a contention, an assertion; spec. . . . a demand for payment in accordance with law”; (2) a “right or title (to something); a right to make a demand ((up)on a person etc.)”); cf. David M. Walker, THE OXFORD COMPANION TO LAW 227 (1980) (British law) (“claim” is a “general term for the assertion of a right to money, property, or to a remedy”).
- ⁹⁵ BLACK’S LAW DICTIONARY *supra* note 93, at 427, 1341; see also *Lupton v. Chase Nat’l Bank of New York*, 89 F. Supp. 393, 397 (D. Neb. 1950) (defining “prosecution” generally as “[t]he instituting and carrying forward of a judicial proceeding to obtain some right or to redress and punish some wrong.”) (emphasis added).
- ⁹⁶ The Bankruptcy Code, for example, defines “claim” as any “right to payment” or any “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.” 11 U.S.C. § 101(5). And the False Claims Act, a criminal statute, defines “claim” as any “request or demand, whether under a contract or otherwise, for money or property.” 31 U.S.C. § 3729(c).
- ⁹⁷ One context in which the word “claim” includes criminal proceedings is in private insurance contracts that provide their own definitions of the term to extend coverage to both civil and criminal legal proceedings. See, e.g., *Med. Mut. Ins. Co. of Me. v. Indian Harbor Ins. Co.*, 583 F.3d 57, 61 (1st Cir. 2009) (considering insurance policy that defined the word “claim” to include civil or criminal proceedings). The insurance usage suggests that an association between “claim” and “criminal action” is not unimaginable, but it certainly is not the predominant understanding.
- ⁹⁸ See, e.g., *New Process Steel, L.P. v. N.L.R.B.*, 130 S. Ct. 2635, 2640 (2010) (“[A] statute ought, upon the whole, to be so construed that . . . no clause, sentence, or word shall be . . . insignificant.” (second alteration added) (quotation omitted)); *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) (same); *Bailey v. United States*, 516 U.S. 137, 143 (1995) (same); see also *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) (“[W]e must give effect to every word of a statute wherever possible.”).
- ⁹⁹ See *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (recognizing the prosecution as “uncharted territory”).
- ¹⁰⁰ *Salinas*, 522 U.S. at 58 (internal quotations omitted) (emphasis added).
- ¹⁰¹ Learned Hand, *The Future of Wisdom in America*, SATURDAY REV., Nov. 22, 1952, at 9.