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*2007-2 Cumulative Supplement*  
**FOREIGN COMMERCE  
AND THE  
ANTITRUST LAWS**  
**Fifth Edition**

**WILBUR L. FUGATE  
LEE H. SIMOWITZ**



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# Foreign Commerce and the Antitrust Laws

## Fifth Edition

*by Wilbur L. Fugate*

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Today, many international transactions have potential antitrust implications. Before you risk anything in business agreements, mergers, or joint ventures with foreign firms, consult the Fifth Edition of *Foreign Commerce and the Antitrust Laws*, the source cited by courts and trusted by government officials. You'll find immensely practical discussions of the newest developments as well as expert analysis of existing law.

### Highlights of the 2007-2 Cumulative Supplement

*Supplement prepared by Lee H. Simowitz*

Now the 2007-2 Cumulative Supplement brings you up to date on the latest issues and developments:

- Numerous cases continued to examine the ramifications under the Foreign Trade Antitrust Improvements Act of attempts by foreign antitrust plaintiffs to recover damages in U.S. courts.
- More courts, including the Eighth Circuit, considered whether to follow the D.C. Circuit in rejecting “but for” causation to determine jurisdiction over foreign plaintiffs’ claims under the FTAIA.
- Significant new decisions explored the extent to which U.S. courts can exercise personal jurisdiction over foreign defendants in antitrust cases.



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- In AMD's massive monopolization case against Intel, the district court dismissed AMD's claims based on sales outside of the U.S.

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## Foreign Commerce and the Antitrust Laws

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Fifth Edition

2007-2 Cumulative Supplement

Current through June 1, 2007

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To Wilbur L. Fugate  
1913-2001  
Gentleman, scholar, and friend



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# VOLUME I

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## CHAPTER 1

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# Antitrust Statutes — Basic Philosophy and General Interpretation

### §1.1. Background and philosophy of the U.S. antitrust laws — application to foreign trade

§1.1. p. 5. *Add the following text and notes at the end of the section:*

The Antitrust Modernization Commission, created by the Antitrust Modernization Act of 2002 to “examine whether the need exists to modernize the antitrust laws and to identify and study related issues,”<sup>19</sup> decided at its January 13, 2005 meeting to study three issues in the area of international antitrust:

1. Should the [Foreign Trade Antitrust Improvements Act] be amended to clarify the circumstances in which the Sherman Act applies to extraterritorial anticompetitive conduct?
2. Should the antitrust exemptions for exporters set forth in the Webb-Pomerene Act and Title III of the Export Trading Company Act be eliminated?
3. Are there technical or procedural changes that the United States could implement to facilitate further coordination with foreign antitrust enforcement authorities?

The Commission issued its report and recommendations in April 2007. In the international area, the Commission did not recommend repeal of the Webb-Pomerene or Export Trading Company Act exemptions; they were subsumed in the Commission’s recommendations for a general approach by Congress to all antitrust exemptions. The Commission also recommended that as a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act, a recommendation that simply mirrored

the courts' prevailing approach to the interpretation of that statute. The Commission also recommended steps to increase international cooperation and convergence in antitrust enforcement, including consideration of a centralized international pre-merger notification system. The extent to which any of the Commission's recommendations will receive serious consideration in the Democratically controlled Congress is questionable.

<sup>19</sup> Pub. L. No. 107-273, §11051, 116 Stat. 1856 (2002). Information about the Commission and its activities can be found at <<http://www.amc.gov>>.

### §1.3. The Sherman Act

§1.3. p. 13. *Add the following text and notes as a new paragraph before the first full paragraph on page 13:*

The Justice Department Antitrust Division has implemented a very strong criminal program and the fines exacted, particularly in criminal international antitrust conspiracy cases, have been enormous. Foreign companies, as well as domestic companies, have been indicted and have entered guilty pleas, and company officials have also been targeted.

The Antitrust Division obtained record fines in 1996 and 1997, all with respect to international arrangements. Archer Daniels Midland Co. (ADM) was sentenced to pay a \$100 million criminal fine for activities in an international price fixing and market division cartel in the lysine and citric acid markets.<sup>15.1</sup> As a result of the same investigation into the food and feed additives market, an American subsidiary of the German pharmaceutical and chemical firm, Bayer A.G., pled guilty and paid a \$50 million fine for participating in the international cartel in the citric acid market,<sup>15.2</sup> and two international Swiss chemical companies pled guilty and were fined a total of \$25 million for participating in the same cartel in that market.<sup>15.3</sup>

Three companies, including Dutch and Belgian companies, agreed to pay \$65 million in criminal fines for participating in international conspiracies in marine construction and transportation services. An

official of the Dutch company and two officials of the Belgian company agreed to pay fines totaling \$325,000.<sup>15.4</sup>

In 1998, a Japanese pharmaceutical company, Fujisawa Pharmaceutical Co., Ltd., entered a guilty plea and was fined \$20 million for being a party to an international conspiracy to fix prices and allocate markets for an industrial cleaner called sodium gluconate; an executive of the company, a Japanese citizen, also entered a guilty plea.<sup>15.5</sup> A French company, Roquette Freres, earlier agreed to pay a fine of \$2.5 million for activities in the same conspiracy.<sup>15.6</sup> A Department of Justice press release on these cases stated that the penalties from international conspiracy cases had exceeded \$250 million in one year.<sup>15.7</sup> The Justice Department, in 1998, charged that UCAR International, Inc., the largest producer of graphite electrodes, participated in an international cartel to fix the prices and allocate the supply of graphic electrodes sold in the United States and other countries. The company entered a guilty plea and was fined a record \$110 million.<sup>15.8</sup> Earlier, the U.S. subsidiary of a Japanese company, Showa Denko Carbon, Ind., had agreed to pay a fine of \$29 million for its part in the same cartel.<sup>15.9</sup> Assistant Attorney General Joel I. Klein said in May 1999 that in the past two fiscal years over 90 percent of the record \$472 million in fines, nearly \$440 million, were in connection with international cartel activity.<sup>15.10</sup>

Department of Justice fines against participants in international conspiracies continued to rise in 1999 and 2000. The Department of Justice on May 20, 1999 announced that two foreign pharmaceutical companies, F. Hoffman-La Roche Ltd. of Switzerland and the German company BASF, A.G., would pay remarkable fines of \$725 million for participating in an international conspiracy to fix prices for vitamins.<sup>15.11</sup> The companies agreed to pay \$500 million and \$225 million respectively. Further, the former director of worldwide marketing for Hoffman La Roche Vitamins and Fine Chemicals Division, Dr. Kuno Sommer, agreed to pay a \$100,000 fine and serve four months in prison for his part in the conspiracy and for lying about it. The Justice Department said that the parties met regularly over the past 10 years to fix prices, including the price of Vitamins A, B2, B5, C, and E. Joel I. Klein, Assistant Attorney General, described the conspiracy as “the most pervasive and harmful” ever uncovered. Rhone-Poulenc, S.A., a French pharmaceutical firm, cooperated in

the investigation and will be protected by the Department's amnesty program.

The Antitrust Division in its Annual Report for 1999 states that —

[s]ince the beginning of FY 1997, the Antitrust Division has obtained over \$1.5 billion dollars in criminal fines, well over 90 percent of which were imposed in connection with the prosecution of international cartel activity.<sup>15.12</sup>

<sup>15.1</sup> See 71 Antitrust & Trade Reg. Rep. (BNA) 536 (Dec. 5, 1996). In September 1998, three officials of ADM were found guilty of price fixing. See S. Walsh, Wash. Post, Sept. 18, 1998, F-1, col. 4. The government put into evidence video and audio tapes of conversations between the executives and officers of foreign corporations. The verdicts were a signal victory for the government. See Statement of Joel I. Klein, Assistant Attorney General, Before the Subcomm. on Antitrust, Business Rights, and Competition, 105th Cong., 2d Sess., Oct. 2, 1998.

<sup>15.2</sup> See 72 Antitrust & Trade Reg. Rep. (BNA) 98 (Jan. 30, 1997); S. Walsh, Bayer Unit Agrees To \$50 Million Fine, Wash. Post, Jan. 30, 1997, at D-1, col. 4.

<sup>15.3</sup> See 72 Antitrust & Trade Reg. Rep. (BNA) 299 (Mar. 27, 1997).

<sup>15.4</sup> See Dept. of Justice press release, Dec. 22, 1997.

<sup>15.5</sup> See Dept. of Justice press release, Feb. 25, 1998.

<sup>15.6</sup> See Dept. of Justice press release, Dec. 17, 1997.

<sup>15.7</sup> See Dept. of Justice press release, Feb. 25, 1998.

<sup>15.8</sup> U.S. v. UCAR Intl., Inc., No. CR 98-177 (E.D. Pa. Apr. 7, 1998). See 74 Antitrust & Trade Reg. Rep. (BNA) 352 (Apr. 9, 1998).

<sup>15.9</sup> See Dept. of Justice press release, Feb. 23, 1998. In April 1999, another Japanese company, Tokai Carbon Co., agreed to plead guilty and pay a fine of \$6 million. U.S. v. Tokai Carbon Co., Ltd., E.D. Pa., No. 99-233, Apr. 29, 1999. A Swiss vitamin manufacturer, Lanza, A.G., pled guilty in March 1999 to informations filed by the Department of Justice charging an international conspiracy to fix the price and allocate the output of vitamins. It agreed to pay a fine of \$10.5 million. Five U.S. executives also pled guilty and have cooperated in the investigation. U.S. v. Lanza, A.G., N.D. Tex., No. 3-98-CR 338 R. Sept. 30, 1998; U.S. v. Kennedy, N.D. Tex. No. 3-99-CR-064-G Mar. 2, 1999 and other cases Nos. 063-D, 065R, 066R, and 067P, Mar. 2, 1999.

<sup>15.10</sup> See Statement of Joel I. Klein before the Senate Judiciary Comm., Subcomm. on Antitrust, Business Rights, and Competition, concerning International Antitrust Enforcement, Washington, D.C. May 4, 1999.

<sup>15.11</sup> U.S. v. Hoffman-La Roche Ltd., N.D. Tex., No. 3-99 Cr-184-R, May 20, 1999, et al. See 76 Antitrust & Trade Reg. Rep. (BNA) 558 (May 20, 1999); D. Segal, Record Fine for Vitamin Cartel, Wash. Post, May 21, 1999, A-1, col. 1; J. Seper, Plot to Fix Vitamin Prices Draws \$725 Million Fine, Wash. Times, May 21, 1999, B-9, col. 1.

<sup>15.12</sup> See Antitrust Division, United States Department of Justice, Annual Report, FY 1999.