

Practical Implications of 7th Circuit's Recent *Minn-Chem* Decision

Ruling narrows the Foreign Trade Antitrust Improvements Act.

In its en banc decision issued June 27, 2012 in *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, the Seventh Circuit substantially narrowed the limits the Foreign Trade Antitrust Improvements Act ("FTAIA") places on the application of U.S. antitrust law to foreign conduct that has an impact in the United States. For trade or commerce with foreign nations (other than import trade or commerce), the FTAIA precludes the application of U.S. antitrust law, unless (1) the foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce or on export commerce of a U.S. exporter; and (2) the effect "gives rise to" the antitrust claim. Initially, the Seventh Circuit held that "the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of federal courts." The court also construed the statutory carve out for "import commerce" and the FTAIA requirement that the foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce. This decision broadens the reach of U.S. antitrust laws as to foreign companies and makes it more difficult for defendants to dismiss claims under the FTAIA.

The Seventh Circuit's decision was reached in a private action by U.S. companies that purchased potash against certain foreign suppliers. The complaint alleged the defendants — foreign suppliers and their distributors — formed a cartel to reduce output and increase prices. Defendants allegedly reached agreements on prices for Brazil, India and China, and then applied those agreed prices as benchmarks for sales to U.S. purchasers. The U.S. District Court denied the defendants' motion to dismiss the complaint, rejecting arguments that the FTAIA barred the claims. *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907 (N.D. Ill. 2009). Recognizing that this issue was close, the district court certified its decision to a three-judge court of appeals panel.

The panel decision noted that 2003 Seventh Circuit en banc precedent treated the FTAIA as a jurisdictional provision, but concluded that dismissal of the complaint was required even if the FTAIA was considered to be an element of a claim rather than a jurisdictional limitation. See *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650, 659 (7th Cir. 2011) (citing *United Phosphorus, Ltd. v. Angus Chemical Corp.*, 322 F.3d 942 (7th Cir. 2003) (en banc)). The panel decision first determined that the complaint failed to plead that the foreign anticompetitive conduct was directed at the U.S. import market, which the panel viewed as necessary to fall within the FTAIA's "import commerce" exception." 657 F.3d at 661. The panel then held that the complaint also failed to plead sufficient facts to fall within the "direct-effects" exception. The panel construed this exception narrowly, following a Ninth Circuit decision holding "direct" in the FTAIA provision to mean "follows as an immediate consequence of the defendant's. . . activity." 657 F.3d at 662 (quoting *United States v. LSL Biotechs*, 379 F.3d 672 (9th Cir. 2004)). The panel thus held dismissal of the complaint was required.

The Seventh Circuit en banc vacated and then reversed the panel decision, reinstating the complaint. *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012). Initially, the en banc decision reviewed recent Supreme Court precedents addressing whether to construe statutory limitations as jurisdictional provisions, including *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

The court noted that the Third Circuit in *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), had construed those precedents to show the FTAIA did not limit subject matter jurisdiction. The en banc court concluded that *Morrison* provided "all the guidance we need" to conclude the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit.

Resolving this threshold issue, the court then turned to the question of whether the foreign conduct alleged by the complaint to violate antitrust laws fell within the FTAIA's bar. The FTAIA's limitation on antitrust liability for foreign conduct does not apply to "import trade or import commerce." 15 U.S.C. § 6(a). The Seventh Circuit disagreed with the panel (and the Third Circuit's *Animal Science* decision) that this constituted an "'import commerce' exception." Instead, trade involving import trade — foreign buyers selling to domestic buyers — did not require analysis of the FTAIA's standards; like antitrust claims involving purely domestic commerce, the only question was whether the anticompetitive conduct affected the import commerce. Since much of the conduct alleged in the *Potash* complaint involved direct purchases by plaintiffs from foreign supplier defendants, the FTAIA did not apply.

Other conduct alleged in the complaint did not involve import trade, requiring the court to construe the FTAIA's direct effects test. For such foreign conduct, the FTAIA limits antitrust liability to two subcategories:

Conduct "involving trade or commerce . . . with foreign nations" must have a "direct, substantial, and reasonably foreseeable effect" on *either* [A] U.S. domestic commerce (phrased awkwardly as "trade or commerce which is not trade or commerce with foreign nations") or U.S. import commerce, *or* [B] the export trade or commerce of a U.S. exporter.

Minn-Chem, 683 F.3d at 845 (citing 15 U.S.C. § 6a(1)). In parsing the "direct, substantial, and reasonably foreseeable effect" provision, the court quickly concluded the *Potash* complaint satisfied the substantiality and foreseeability elements by alleging 600% price increases during the time period, affecting millions of tons of imported potash, resulting from price and output restrictions set by the defendants' international cartel. As to the "direct effects" requirement, the Seventh Circuit acknowledged differing approaches. The Ninth Circuit, in the decision relied on by the panel, had narrowly construed the meaning of "direct" in the FTAIA provision, based on the Supreme Court's interpretation of the term in a provision of the Foreign Sovereign Immunities Act, to mean "follows as an immediate consequence of the defendant's . . . activity." *United States v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004). The Antitrust Division of the Department of Justice ("DOJ"), however, in amicus briefing, argued against the *LSL Biotechs* standard and instead posited that "direct" in the FTAIA means only a "reasonably proximate causal nexus." Adopting the DOJ's interpretation, the court agreed that Congress intended the term "direct" to be used along with "substantial" and "foreseeable" as "part of an integrated phrase." Applying this legal analysis to the *Potash* complaint, the court concluded that the plaintiffs' allegations sufficed to show both substantial effect on the import trade and direct, substantial and reasonably foreseeable effect on domestic commerce.

As the Seventh Circuit's en banc *Minn-Chem* decision discussed, treating the FTAIA as an element of plaintiff's case rather than as a question of subject matter jurisdiction has procedural advantages to the plaintiff that can substantively affect the outcome on a motion to dismiss. On a Rule 12(b)(6) motion addressed to the elements of a plaintiff's claim, the court's review generally is limited to the face of the complaint and the allegations of the complaint are taken as true and construed in plaintiff's favor. Jurisdictional challenges under Rule 12(b)(1) may invoke matters outside the pleadings in support. Moreover, the plaintiff has the burden to show clearly alleged facts demonstrating jurisdiction is proper. The Seventh Circuit's ruling, together with the Third Circuit's 2011 *Animal Science* decision, deepens the split among the U.S. courts of appeal, as the D.C. Circuit and the Ninth Circuit have each held that the FTAIA presents a jurisdictional bar. See *Empagran SA v. F. Hoffmann-La Roche Ltd*, 417 F.3d 1267, 1269 (D.C. Cir. 2005); *LSL Biotechs*, 379 F. 3d at 680. Ultimately, the Supreme Court may need to resolve this split in authority.

The Seventh Circuit also interpreted the FTAIA's "import trade" and "direct effect" provisions broadly to allow plaintiffs to reach more foreign commerce than under the Ninth Circuit's approach. Under *LSL Biotechs'* interpretation of "direct" as requiring an "immediate consequence," any break in the causal chain between foreign conduct and domestic effect, such as an uncertain intervening development, would bar the plaintiff's claim. Defendants have successfully invoked this interpretation of the FTAIA to dismiss claims for purchases through foreign intermediaries. The Seventh Circuit's decision adopts a less strict test for direct effects that does not foreclose liability even for foreign defendants that do not sell directly to U.S. purchasers. Until the Supreme Court rules which standard is correct, whether foreign defendants prevail on motions to dismiss under the FTAIA thus may well depend on the circuit in which the case is brought.

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