

CLIENT ALERT

Seventh Circuit Makes it Easier for Antitrust Plaintiffs to Pursue Their Claims Against Overseas Cartels

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The Seventh Circuit issued an opinion yesterday that makes it easier for the U.S. antitrust laws to be applied to international price-fixing cartels that are alleged to have injured U.S. companies and consumers. Continuing a trend started by the Third Circuit in *Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), the Seventh Circuit held that the Foreign Trade Antitrust Improvement Act of 1982 (the “FTAIA”) imposes an additional substantive merits limitation on Sherman Act claims involving foreign trade or commerce, instead of a limitation on the subject matter jurisdiction of the federal courts. The decision in *Minn-Chem, Inc., et al., v. Agrium Inc., et al.*, Case No. 10-1712 (7th Cir. June 27, 2012), means that defendants will now face an increased burden when seeking dismissal of antitrust claims involving alleged foreign anticompetitive conduct.

In the case, the defendants argued that the FTAIA, which states that the Sherman Act “shall not apply” to conduct involving foreign trade or commerce unless that conduct also has a “direct, substantial and reasonably foreseeable effect” on U.S. trade or commerce, barred the plaintiffs’ antitrust claims because of a lack of subject matter jurisdiction. The case involves a class action lawsuit filed by U.S. purchasers of potash, a mineral used primarily in agricultural fertilizer, against seven of the world’s largest potash producers. Their complaint alleges that potash prices in the United States were adversely affected by coordinated price increases in foreign markets. The district court originally denied the defendants’ motion to dismiss based on the FTAIA. However, on appeal, the Seventh Circuit overturned the district court’s ruling and dismissed the case against the defendants. See *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650 (7th Cir. 2011). A short time later, the Seventh Circuit decided to review its earlier ruling *en banc*.

In yesterday’s *en banc* decision, the Seventh Circuit concluded that the FTAIA sets forth a substantive element under the Sherman Act, rather than a jurisdictional limit on the power of federal courts. The court’s reasoning followed recent Supreme Court decisions holding that limitations on the extraterritorial reach of a statute describe what conduct the law purports to regulate, rather than stripping courts of subject matter jurisdiction, unless Congress clearly asserts otherwise. Because the FTAIA expressly limits “conduct” and does not use the word “jurisdiction” or any commonly accepted synonym, the Seventh Circuit concluded that the statute merely sets forth an additional substantive element for certain Sherman Act claims.

Construing the FTAIA as a substantive limitation has significant implications for antitrust cases involving international cartels. If the Seventh Circuit had found that the FTAIA imposes a jurisdictional limitation on the federal courts, plaintiffs would bear the burden of proving the existence of subject matter jurisdiction under the FTAIA when faced with a FRCP 12(b)(1) motion to dismiss. Instead, defendants in the Seventh Circuit must now rely on FRCP 12(b)(6) when moving to dismiss claims under the FTAIA, meaning that courts will assume that plaintiffs’ allegations are true, and defendants will bear the burden of showing that plaintiffs have failed to allege sufficient facts to state claims for relief that are plausible on their face.

This trend continued by the Seventh Circuit is making it easier for antitrust plaintiffs to pursue their claims against overseas cartels, as the procedural differences between FRCP 12(b)(6) and FRCP 12(b)(1) increase the likelihood that plaintiffs' claims will survive initial motions to dismiss. It will be interesting to see if other Circuits follow suit.

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