

E-ALERT | Antitrust

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SEVENTH CIRCUIT DECISION COULD SUBJECT MORE FOREIGN CONDUCT TO ANTITRUST ENFORCEMENT AND LITIGATION IN THE U.S.

Yesterday, the influential Court of Appeals for the Seventh Circuit, sitting en banc, held that foreign anticompetitive conduct can be regulated by U.S. antitrust law if it has “a reasonably proximate causal nexus” with an injury to a U.S. purchaser. The Seventh Circuit explicitly rejected the more strenuous test applied by the Ninth Circuit, which requires that U.S. injury “follow as an immediate consequence” of foreign anticompetitive conduct in order to be actionable. The Seventh Circuit’s more lenient standard could allow more U.S. purchasers to pursue domestic antitrust claims against foreign sellers who engage in anticompetitive conduct in foreign markets.

The case is *Minn-Chem, Inc. v. Agrium Inc.*, No. 10-1712 (June 27, 2012). Judge Wood authored the decision for a unanimous en banc panel of the Seventh Circuit. A copy of the opinion is available [here](#).

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Minn-Chem involves conduct in the market for “potash,” a mineral used primarily in agricultural fertilizer. Most potash is produced abroad, but U.S. customers purchase a significant portion of global potash production. The *Minn-Chem* plaintiffs—classes of U.S. direct and indirect potash purchasers—filed suit against a number of foreign potash producers. They alleged that the foreign producers conspired to reduce potash supply and fix prices to customers in foreign markets, and that these activities resulted in increased potash prices in the U.S.

The defendants moved to dismiss the plaintiffs’ claims on the ground that they were barred by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The FTAIA generally provides that U.S. antitrust law does not apply to anticompetitive conduct related to (non-import) foreign commerce unless that conduct has a “direct, substantial, and reasonably foreseeable” effect on U.S. commerce, and that effect gives rise to a U.S. antitrust claim. 15 U.S.C. § 6a.

The district court denied the defendants’ motion, but a panel of the Seventh Circuit reversed, holding that plaintiffs’ claims were barred by the FTAIA because the defendants’ foreign conduct was not a sufficiently direct cause of any harm to U.S. purchasers. *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir. 2011). The Seventh Circuit agreed to rehear the case en banc, and yesterday the court reversed the decision of the panel and affirmed the order of the district court denying the defendants’ motion to dismiss.

While the decision directly affects only federal courts located in Illinois, Indiana, and Wisconsin, the court’s reasoning is likely to be influential in other federal courts given the Seventh Circuit’s historically strong reputation in antitrust cases.

AN EXPANSION OF THE FTAIA'S "DOMESTIC EFFECTS" EXCEPTION

The most significant aspect of the holding relates to the requirement of a "direct" effect on U.S. commerce. The *Minn-Chem* defendants argued that any anticompetitive conduct that targeted foreign jurisdictions—such as fixing prices in the Chinese potash market—had only an indirect effect on U.S. prices. In support of this position, the defendants relied on the Ninth Circuit's decision in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004), in which the majority held that an effect was direct only if it was an "immediate consequence" of a defendant's anticompetitive activity.

The en banc court rejected the *LSL* definition in favor of one promoted by the Department of Justice, which requires only that the foreign activity have "a reasonably proximate causal nexus" with an effect on U.S. commerce. The court concluded that "[s]uperimposing the idea of 'immediate consequence' on top of the full phrase [direct, substantial, and reasonably foreseeable] results in a stricter test than the complete text of the statute can bear." It determined that the "proximate causal nexus" test struck a more appropriate balance between the need to protect U.S. consumers and the concern that U.S. antitrust law not have the effect of regulating conduct that has only a "remote" connection to any U.S. injury.

Applying this definition, the court held that the FTAIA did not bar claims by U.S. purchasers against even those producers who did not sell directly into the United States. As to these producers, the court held, the plaintiffs adequately alleged that price-fixing and supply restrictions in foreign markets had proximately caused price increases for potash purchasers in the United States.

This holding is most likely to affect two potential categories of claims:

- ***Claims of price-fixing directed at foreign markets for globally-traded commodities.*** The crux of the *Minn-Chem* holding is that the Sherman Act reaches foreign anticompetitive conduct that increases prices to foreign purchasers (e.g., those in China) where those increased prices serve as benchmarks for prices to U.S. purchasers. That scenario is most likely to occur where, as in *Minn-Chem*, there is a global market for a homogenous product, and price fixing directed abroad has a sufficiently direct effect on U.S. commerce even absent conduct targeted specifically at the U.S. market.
- ***Claims based on indirect purchases of finished products containing price-fixed components.*** The *Minn-Chem* decision did not directly address the scenario in which foreign manufactures fixed the price of inputs sold to other foreign manufacturers which in turn incorporated that input into finished goods sold in the United States, but the Department of Justice specifically cited this scenario in advocating the "proximate causal nexus" standard. The Department argued that such claims were the proper subject of U.S. antitrust law, and plaintiffs in future cases are likely to rely on the decision and its reasoning to promote this broader view of the Sherman Act's reach. Specifically, plaintiffs in future cases likely will argue that the "proximate causal nexus" test is easier to meet than a requirement that increased finished product prices are an "immediate consequence" of the increased component prices. By contrast, defendants in prior cases have argued that foreign price-fixing of components did not have a sufficiently direct effect on U.S. commerce because any effect on product prices would depend, for instance, on the pass-through decisions of product manufacturers.

CONFIRMATION OF TREATMENT OF "IMPORT COMMERCE"

The court also held that that the term "import commerce" includes any "transactions in which a good or service is being sent directly into the United States, *with no intermediate stops.*" As to such

transactions, the court held that the FTAIA does not apply *at all*, and that U.S. plaintiffs' claims are governed by regular antitrust standards. The court thus held that the claims of U.S. purchasers who purchased potash directly from foreign defendants were not limited by the FTAIA.

The court explained that non-U.S. persons who want to earn money from the sale of goods or services in American markets should expect to have to comply with U.S. law. That aspect of the decision is not novel, and is less likely to have significant effects on FTAIA decisions, although defendants can point to the "no intermediate stops" language as drawing a bright line that the importation of downstream products containing price-fixed inputs would not qualify as import commerce under this standard.

THE FTAIA GOVERNS THE ELEMENTS OF A SHERMAN ACT CLAIM, NOT THE JURISDICTION OF THE COURT

Finally, the court held that the FTAIA is a substantive element of a U.S. antitrust claim, but does not function as a limit on U.S. courts' jurisdiction to adjudicate such claims. While acknowledging that prior cases had held otherwise, the Seventh Circuit explained that recent Supreme Court cases, including *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), cautioned courts to interpret statutes as jurisdictional only when those statutes speak explicitly in jurisdictional terms—which the FTAIA does not. Under this aspect of the ruling, motions to dismiss will be limited to challenging the sufficiency of the allegations in the complaint (as opposed to a Rule 12(b)(1) factual challenge to jurisdiction); and parties will need to affirmatively raise FTAIA defenses in the lower court.

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