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Third Circuit Reverses Course on Jurisdiction for Sherman Act Claims Against Foreign Defendants

Plaintiffs will face lower bar to survive motions to dismiss

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A panel of the Third Circuit has overturned the District of New Jersey *and itself* with respect to federal court jurisdiction for Sherman Act antitrust claims challenged pursuant to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). In *Animal Science Products, Inc. v. China Minmetals Corp., et al*., No. 10-2288 (3d Cir. Aug. 17, 2011), the Third Circuit for the first time held that the FTAIA "imposes a substantive merits limitation rather than a jurisdictional bar" to Sherman Act claims against foreign defendants.

This change lowers the bar for plaintiffs seeking to survive motions to dismiss such claims. The Third Circuit's decision means that FTAIA challenges will now be Rule 12(b)(6) motions (failure to state a claim), and not Rule 12(b)(1) motions (lack of subject matter jurisdiction). Thus, the burden will now be on the moving party to prove that the substantive elements of the antitrust claim, including the elements imposed by the FTAIA, have not been sufficiently alleged on the face of the complaint, rather than on the plaintiff to prove that the court has jurisdiction to hear the claims.

Moreover, the courts' inquiry will now be limited to whether the facts alleged in the complaint, when taken as true, state an antitrust claim, rather than an independent factual inquiry regarding the elements of the FTAIA that can go beyond the face of the complaint and take the form of an evidentiary hearing. Thus, in the Third Circuit, the motion-to-dismiss hurdle for plaintiffs pursuing antitrust claims against foreign companies has been lowered.

The case was brought in the District of New Jersey by a putative class of United States purchasers of the mineral magnesite, which is used for various industrial purposes including melting steel and making cement. The plaintiffs alleged that a price-fixing conspiracy existed since at least April 2000, among defendant Chinese producers and exporters of magnesite. The first amended complaint asserted federal antitrust claims under the Clayton Act, 15 U.S.C. §§ 4, 16, which in turn were founded upon defendants' alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Certain Chinese defendants moved to dismiss on the ground that the court lacked subject matter jurisdiction under the FTAIA, which generally bars application of the Sherman Act to foreign trade and commerce unless such foreign trade or commerce has an effect in the United States. Judge Garrett E. Brown Jr. granted the defendants' motion on April 1, 2010, in *Animal Science Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp*., 702 F. Supp. 2d 320 (D.N.J. 2010). In doing so, Judge Brown followed Third Circuit precedent holding that the FTAIA's dictates were a jurisdictional limitation to antitrust claims, rather than a substantive-merits limitation. Although the District Court granted the motion without prejudice to further amendment, the plaintiffs appealed instead.

Noting that the "inelegantly phrased" FTAIA employs "rather convoluted language," the Third Circuit vacated and remanded the District Court's dismissal while explaining that, based on a 2006 Supreme Court case, the Third Circuit now holds that the FTAIA represents a substantive-merits limitation to Sherman Act claims and not a jurisdictional

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limitation.

The FTAIA states in general that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." However, it "creates two distinct exceptions [to this general rule] that restore the authority of the Sherman Act." The first exception, commonly known as the "import trade or commerce" exception, permits application of the Sherman Act against foreign defendants whose anticompetitive acts were "directed at an import market." The second exception, known as the "effects" exception, allows Sherman Act restrictions to apply to "'conduct [that] has a direct, substantial and reasonably foreseeable effect' on domestic commerce, import commerce, or certain export commerce and that conduct 'gives rise' to a Sherman Act claim."

Observing that courts have often blurred the line between substantive-merits limitations and jurisdictional bars to claims brought in federal court, the Third Circuit analyzed the FTAIA in terms of Congress's authority to enact it. The issue therefore turned on whether, in drafting the statute, Congress exercised its Commerce Clause authority to dictate the elements for viable antitrust claims under the Sherman Act, or whether it employed its Article III authority to limit court jurisdiction.

The Third Circuit premised its decision on the Supreme Court's "bright line" test set forth in *Arbaugh v. Y&H Corp*., 546 U.S. 500 (2006), which instructed that unless Congress "clearly states" that a statutory limitation is jurisdictional in nature, then "courts should treat the restriction as nonjurisdictional in character." Accordingly, the Third Circuit held that "the FTAIA's language must be interpreted as imposing a substantive merits limitation rather than a jurisdictional bar," because the statute "neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts." This decision therefore overturns the jurisdictional aspects of the Third Circuit's own prior holdings in *Turicentro,* 303 F.3d 293, and *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), both of which were decided prior to the Supreme Court's ruling in *Arbaugh*. The Court noted that "[w]hile a panel of [the Third Circuit] is bound by precedential decisions of earlier panels, that rule does not apply 'when the prior decisions conflict with a Supreme Court decision.'" The panel also indicated that in ruling that the FTAIA represents a substantive-merits limitation, it "disagree[s] with the Court of Appeals for the Seventh Circuit's decision in *United Phosphorus, Ltd. v. Angus Chem. Co.,* 322 F.3d 942 (7th Cir. 2003) (en banc)." However, the Third Circuit noted that *United Phosphorus* was decided prior to *Arbaugh*, and that the holding in *Arbaugh* "largely mirrors the reasoning of Judge Diane Wood's dissent in [*United Phosphorus*]."

Following the holding in *Animal Science,* subsequent motions to dismiss within this Circuit on FTAIA grounds must be asserted under Rule 12(b)(6) for failure to state a claim, rather than under Rule 12(b)(1) for lack of subject matter jurisdiction. This benefits plaintiffs in at least two important ways. First, it shifts the burden on a motion to dismiss from the plaintiff to the defendant. Second, courts will no longer be able to make independent findings of fact in deciding such motions to dismiss because the Rule 12(b)(6) standard generally limits courts to the face of the complaint and requires that the facts alleged be accepted as true. The *Animal Science* holding, therefore, makes it significantly easier for a federal antitrust plaintiff's Sherman Act claims against foreign defendants to survive a motion to dismiss under the FTAIA.

The Third Circuit also provided additional guidance to the District Court regarding properly interpreting, on remand, the FTAIA's two exceptions. With respect to the import trade or commerce exception, "the District Court should assess whether the plaintiffs adequately allege that the defendants' conduct is directed at a U.S. import market and not solely whether the defendants physically imported goods into the United States." This guidance was offered to correct the District Court's overly restrictive interpretation of this exception. Second, the Third Circuit "clarif[ied] that the FTAIA's 'reasonably foreseeable' language imposes an objective standard: the requisite 'direct' and 'substantial' effect must have been 'foreseeable' to an objectively reasonable person." Although it was not clear to the Third Circuit that the District Court had improperly applied a "subjective intent" requirement, it provided this clarification because the plaintiffs had questioned certain language used by the District Court that suggested that it may have relied upon such a standard.

Of course, it is possible that this decision will not be the Third Circuit's last word on this issue. Given that *Animal Science* was decided by a panel of the Third Circuit, the defendants may seek rehearing en banc (i.e., by the full Third Circuit). Moreover, even if the full Third Circuit refuses to review the decision or reviews and upholds it, in light of the current conflict with the Seventh Circuit's *United Phosphorus* decision, it is possible that the Supreme Court will ultimately have to address whether the FTAIA represents a substantive merits limitation or a jurisdictional limitation.

Until that time, the Third Circuit's holding in *Animal Science Products* significantly relaxes the jurisdictional protections for antitrust claims formerly enjoyed by foreign defendants. Foreign import and export companies now will need to consider the increased likelihood of prolonged antitrust litigation that could result from trade activities within, or affecting, this Circuit. ■