



## Unanimous En Banc Seventh Circuit Decision Expands Extraterritorial Reach of US Antitrust Laws

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Today, the Seventh Circuit in *Minn-Chem, Inc. v. Agrium Inc.* (7th Cir. 2012), in a unanimous *en banc* decision authored by Judge Diane Wood, substantially narrowed the application of the Foreign Trade Antitrust Improvements Act (“FTAIA”). The FTAIA limits the reach of the United States antitrust laws to claims involving (1) purely domestic commerce, (2) import commerce, or (3) conduct that has a “direct, substantial and foreseeable” effect on U.S. commerce that “gives rise” to a Sherman Act claim. In the thirty years since it was passed, the FTAIA has been successfully used by many companies to limit liability for conduct that occurred abroad. The decision has two important ramifications for companies engaged in foreign commerce.

First, the Seventh Circuit followed the Third Circuit’s lead in *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), in reversing prior precedent to find that the FTAIA is not a jurisdictional statute. Instead, the court held that the FTAIA simply lays out the elements of a successful Sherman Act claim where foreign conduct is implicated. Relying on a line of recent Supreme Court cases, the court found that “the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.” *Minn Chem, Inc. v. Agrium, Inc.*, No. 10-1712 (7th Cir. June 27, 2012), at 12. In doing so, the court overruled its previous precedent in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003), in which the court utilized legislative history of the statute and the use of the word “jurisdiction” by several court decisions and commentators in describing the requirement. Recognizing the about-face, the court noted that its new interpretation is “both more consistent with the language of the statute and sounder from a procedural standpoint,” because the FTAIA itself never uses the word “jurisdiction” or any other synonym and instead speaks of “conduct.” *Minn-Chem*, No. 10-1712, at 12-13. The decision makes it far

easier for a plaintiff to survive an FTAIA challenge, because prior to this decision and *Animal Science*, defendants could mount a jurisdictional challenge. If the statute is interpreted as jurisdictional, the burden is on plaintiff to demonstrate that its claims meet the requirements of the FTAIA and defendants may use extrinsic evidence to mount their jurisdictional challenge. Under the court's ruling today, defendants in the Third and Seventh circuits are limited to a 12(b)(6) challenge, where all of plaintiff's allegations are taken as true and the defendants now have the burden. This decision also creates a circuit split with the Ninth and D.C. circuits, which have held that the FTAIA is a jurisdictional statute. See *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 n.5 (9th Cir. 2004); *Empagran S.A. v. F. Hoffmann-Laroche, Ltd.*, 417 F.3d 1267, 1268 (D.C. Cir. 2005).

The second major implication of today's decision stems from the Seventh Circuit's holding that the Sherman Act applies to foreign conduct that proximately causes an effect on domestic commerce. In addressing the FTAIA's standards and requirements regarding import commerce and foreign conduct that has a "direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce," the court recognized the current circuit split regarding the necessary showing for "direct" effects under the FTAIA. The Ninth Circuit has held that an effect is "direct" if it "follows as an immediate consequence of the defendant's . . . activity." *LSL Biotechnologies*, 379 F.3d at 680 (borrowing definition of "direct" from the Supreme Court's interpretation of a different statute in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)). Under the *LSL Biotechnologies* interpretation, any intervening break in the causal chain between the defendant's activity and the alleged effect would prevent application of the Sherman Act. This interpretation of the FTAIA has limited the scope of liability for defendants in cases where intervening events such as subsequent sales of a product prior to their importation of the product into the United States has broken the "direct" causal linkage required under cases such as *LSL Biotechnologies*. In this case, the Department of Justice, in an amicus filing, advocated for the position that for FTAIA purposes, the term "direct" means only "a reasonably proximate causal nexus," *Minn-Chem*, No. 10-1712, at 22, providing a much more lenient standard for plaintiffs. The Seventh Circuit adopted the DOJ's preferred interpretation and criticized the Ninth Circuit's interpretation of "direct," holding that Congress intended the word to be used along with "substantial" and "foreseeable" as "part of an integrated phrase." *Id.* at 23. The decision likely means uncertainty for companies whose pricing conduct in a foreign

jurisdiction could arguably have an impact on pricing in the United States. Focusing on whether the complaint alleged conduct that was sufficiently direct, the court held that “the plaintiffs have alleged that the cartel established benchmark prices in markets where it was relatively free to operate, and it then applied those prices to its U.S. sales. . . . It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct -- that is, proximate -- cause of the subsequent price increases in the United States.” If the Seventh Circuit and DOJ interpretation is widely adopted, allegations of foreign pricing conduct affecting a commodity in a worldwide market could easily be interpreted to have predictable and foreseeable ripple effects on domestic United States commerce, thereby dramatically expanding the reach of the Sherman Act. The circuit splits caused by this decision also raise the possibility that the Supreme Court may ultimately be forced to clarify the intent of the FTAIA.

In sum, the Seventh Circuit’s decision today, along with the Third Circuit’s decision in *Animal Science*, has substantially expanded the reach of the Sherman Act over foreign conduct. Cases alleging that foreign conduct has a direct effect on U.S. commerce will be tougher to dismiss, because they will no longer be subject to a jurisdictional 12(b)(1) challenge under the FTAIA nor subject to close scrutiny as to whether the effect is truly direct rather than merely foreseeable.