



Important U.S. Court Ruling on Scope of the Foreign Trade Antitrust Improvements Act

On August 17, 2011, the United States Court of Appeals for the Third Circuit (the Court) issued an important decision regarding the scope of the Foreign Trade Antitrust Improvements Act (FTAIA). The Court interpreted the FTAIA in ways that may make it easier for plaintiffs to plead antitrust violations based upon foreign conduct. In general, the FTAIA limits the reach of U.S. antitrust laws by articulating a rule that the Sherman Act “shall not apply to conduct involving trade or commerce ... with foreign nations”, subject to two exceptions: the “import” exception, and the “domestic effects” exception.

In general, courts have construed the “import” exception to the FTAIA as limited to circumstances where the defendant is the actual importer of the price-fixed goods. For example, if there was a price-fix on an input or component manufactured in China and sold to a contract manufacturer in China which used the component to assemble a finished product which was then imported into the United States, defendants have been able to argue that the Sherman Act did not reach the price-fixing, because the “import” exception to the FTAIA only applied if the finished product importer (not the component manufacturer) was part of the conspiracy. The Third Circuit held that the “import” exception is not so limited, and applies if the plaintiff can plead that the anti-competitive behavior was “directed at an import market”. Under the Court’s ruling, it is unclear under what circumstances the defendant component makers in the above example could be sued in a U.S. court, inasmuch as the Court does not provide guidance as to what it means for conduct to be “directed at a U.S. import market.” Nonetheless, it is reasonable to assume that plaintiffs will argue that under this decision, the component makers’ prior knowledge that the finished products will be shipped to the U.S. is enough to satisfy this standard.

Second, the Court interpreted the “domestic effects” exception to apply where the “alleged domestic effect would have been evident to a reasonable person making practical business decisions.” The Court stated that this is an “objective” standard that does not depend on the subjective intent of the defendant. Again, under some circumstances, this arguably might make it easier for plaintiffs to satisfy the pleading standards for Sherman Act violations based on price-fixing activities in foreign countries.

On a procedural point, the Court ruled that a defense based on the FTAIA is a substantive merits defense, not a jurisdictional issue. The impact is that it might be harder for a defendant to get a case dismissed through a preliminary motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure than previously. However, defenses based on the argument that the price-fixing only affected foreign goods and foreign markets can still be asserted at the summary

judgment stage or at trial and might still be available at the pleading stage if the allegations in the complaint are insufficient.

With respect to the case before it, the Court reversed dismissal of the complaint, so the case will now return to the trial court for discovery and further proceedings, including consideration of other defenses that were not ruled upon. The case is *Animal Science Products Inc. v. China Minmetals Corp., et. al.*, Case No. 10-2288.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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