

Third Circuit Eases Burden on Foreign Injury Antitrust Plaintiffs

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As global economic activity increases, the U.S. courts see more and more antitrust claims brought by customers and competitors allegedly injured in transactions occurring outside the United States. International cartel and monopolization cases routinely feature complaints filed by foreign plaintiffs or that allege foreign conduct. U.S. antitrust law applies to some—but far from all—foreign conduct. The Foreign Trade Antitrust Improvements Act (FTAIA)¹ delineates the U.S. antitrust law's extraterritorial reach and thus provides standards for evaluating which foreign injury antitrust claims may be properly brought pursuant to U.S. law. A recent Third Circuit decision regarding the scope of the FTAIA should make it more difficult for defendants to defeat antitrust claims involving foreign conduct.

Background

Until recently, courts, including the Third Circuit Court of Appeals, have overwhelmingly treated the FTAIA as a jurisdictional statute, holding that it defined the parameters of federal court subject matter jurisdiction in international antitrust cases. In challenges to subject matter jurisdiction—which any party may raise until the last appeal is exhausted—the plaintiff bears the burden of proving the court has jurisdiction by a preponderance of the evidence. In contrast, in substantive challenges—which defendants may raise only at the pleading or summary judgment stages—defendants bear the burden of proof that the plaintiff's allegations do *not* have merit.

Construing the FTAIA as a jurisdictional rather than substantive rule confers several procedural advantages on defendants, particularly with respect to the timing and costs associated with litigation. Because courts, until recently, considered the FTAIA to define the jurisdictional limits with respect to foreign conduct, FTAIA challenges were generally raised and resolved early in case proceedings. Early resolution of such claims is possible because (1) the plaintiff always bears the burden of proof, when faced with a motion brought under Federal Rule of Civil Procedure (Fed. R. Civ. P.) 12(b)(1) challenging subject matter jurisdiction; and (2) courts are allowed to make factual findings, often relying on extrinsic evidence, before all discovery is complete (and in some cases, at the pleading stage) when defendants assert a factual challenge to jurisdiction under Fed. R. Civ. P. 12(b)(1). Finally, U.S. courts are required, when possible, to resolve jurisdictional questions prior to the merits—and to do so as early as reasonably practicable.

1. 15 U.S.C. § 6a.

Substantive Limit

In *Animal Science Products, Inc. v. China Minmetals Corp., et al.*,² the Third Circuit reversed itself by holding that the FTAIA creates a substantive, rather than a jurisdictional, limit on the reach of the antitrust laws.³ In so doing, it split with courts that treat the FTAIA as a jurisdictional statute, including the Seventh Circuit, which decided en banc that the FTAIA is jurisdictional. The split among circuit courts sets up the issue for possible review by the Supreme Court.

In *Animal Science Products*, plaintiffs alleged that defendants, all of whom were Chinese firms, had fixed the prices of Chinese magnesite (a compound used in industrial processes) exported to the United States after 2000. The district court raised the issue of subject matter jurisdiction sua sponte and defendants subsequently asserted both facial and factual challenges to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The district court concluded that the alleged conduct was not subject to the U.S. antitrust laws under the FTAIA and dismissed the case. The Third Circuit reversed, ruling that the FTAIA should properly be viewed as a substantive limitation on the merits, rather than a limitation on subject matter jurisdiction. In its ruling, the Third Circuit relied extensively on *Arbaugh v. Y&H Corp.*, a 2006 Supreme Court case that held that courts should regard statutory limitations as substantive unless Congress specifically stated that they are jurisdictional.⁴ Because the FTAIA does not state that the statute delineates jurisdiction, the Third Circuit relied on *Arbaugh* to conclude that it must be substantive. The court noted that it split with the Seventh Circuit on the issue, but that the Seventh Circuit had considered the matter prior to the Supreme Court's ruling in *Arbaugh*. The Third Circuit instructed the district court to review any motions to dismiss relying on the FTAIA under Fed. R. Civ. P. 12(b)(6) (motion to dismiss for failure to state a claim), which switches the burden of proof from the plaintiff to the defendant.

Implications

From a strategic perspective, *Animal Science Products* will make it more difficult for defendants to raise and resolve FTAIA issues at an early stage, as defendants will be limited to either a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim (which favors the plaintiff) or a Fed. R. Civ. P. 56 motion for summary judgment (which may only be asserted after discovery and its associated cost is under way). As a consequence, discovery costs for foreign conduct claims will likely increase, enhancing plaintiffs' settlement leverage.

At this time, it is not clear whether the *Animal Science Products* decision will lead to more foreign injury claims being filed in the Third Circuit. Although the Third Circuit's decision makes it easier for such claims to survive an FTAIA challenge, its recent class certification jurisprudence in antitrust cases makes it one of the more challenging circuits for plaintiffs to certify a class action. It also remains to be seen whether (a) other circuits will adopt the Third Circuit's reasoning and (b) whether the Supreme Court will have to resolve a split among the circuits.

2. No. 10-2288 (3d Cir. Aug. 17, 2011).

3. *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300–02 (3d Cir. 2002); *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69–73 (3d Cir. 2000).

4. 546 U.S. 500 (2006).

If you have any questions or would like more information about the topics covered in this LawFlash, please contact any of the following attorneys in our Antitrust Practice:

Washington, D.C.

Jonathan M. Rich	202.739.5433	jrich@morganlewis.com
Scott A. Stempel	202.739.5211	sstempel@morganlewis.com
J. Clayton Everett, Jr.	202.739.5860	jeverett@morganlewis.com
Thomas J. Lang	202.739.5609	tlang@morganlewis.com
Greta Burkholder	202.739.5894	gburkholder@morganlewis.com

New York

Harry T. Robins	212.309.6728	hrobins@morganlewis.com
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Philadelphia

Mark P. Edwards	215.963.5769	medwards@morganlewis.com
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Brussels

Izzet M. Sinan	+32 2 507 7522	isinan@morganlewis.com
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Frankfurt

Jürgen Beninca	+49 69 71 40 07 19	jbeninca@morganlewis.com
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