Comment: Appeals court ruling on FTAIA likely to favor plaintiffs in overseas cartels claims

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IN BRIEF

The Seventh Circuit’s highly anticipated ruling on how U.S. antitrust laws apply to conduct that takes place overseas is coming soon and will likely favor the plaintiff’s bar. In the keynote address at a conference in Chicago Thursday, U.S. Appellate Judge Diane Wood declined to discuss outright her court’s upcoming decision on the Foreign Trade Antitrust Improvement Act, the FTAIA, but hinted heavily at that outcome.

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In February, the full Seventh Circuit heard arguments on the meaning of the FTAIA in a case involving alleged price-fixing of potash, a mineral used in agricultural fertilizers (see here). The FTAIA -- a 1982 law -- allows the application of U.S. antitrust laws, such as the Sherman Act, to foreign conduct only if the activity has a “direct, substantial and reasonably foreseeable effect” on U.S. commerce.

A major question before the court was largely one of timing -- whether the FTAIA is a restraint on the subject matter jurisdiction of the court or simply an element of the case.

This is significant because if the FTAIA is jurisdictional, defendants can bring a motion to dismiss the case based on subject matter jurisdiction before plaintiffs have substantial discovery to help prove the direct effect.

However, if the FTAIA is considered just one element of the case, the litigation can proceed and the issues will be worked out at trial, when plaintiffs have had an opportunity to obtain more evidence through discovery to prove the effect on commerce.

Based on Wood’s comments Thursday and those made by Judges Frank Easterbrook and Richard Posner during oral arguments in February, the appeals court seems likely to rule that plaintiffs should have a shot at proving at trial that the conspiracy involves import commerce, rather than having to prove that question early on in the case (see here).

That means cases involving foreign conduct are likely to become more common, as will settlements as companies often prefer to settle cases rather than risk larger payouts at trial.

Wood, who has twice been considered for elevation to the Supreme Court, is regarded as one of the country’s leading judicial thinkers on antitrust issues. From 1993 to 1995, she served in the Justice Department’s antitrust division focusing on international and appellate issues. Wood was nominated to the appeals court in 1995 by President Bill Clinton, and since joining the bench has ruled on a number of
important antitrust issues.

The potash case was largely a revisitation of United Phosphorus, a case the court heard in 2003, Wood said. In that case, the court ruled 5-4 that the FTAIA was a jurisdictional question. Wood wrote the four-member dissent, arguing that the law was simply an element of the case.

In August 2011, the Third Circuit Court of Appeals issued an opinion, Animal Science, that adopted Wood’s rationale in her dissent in United Phosphorus.

“To my increasing delight as I read through the opinion, I saw them say, ‘Well, the Seventh Circuit settled this in United Phosphorus, but we think that Judge Wood’s opinion in the dissent was the more persuasive of the two,’” Wood said Thursday.

“They essentially adopted the view that I had urged in the dissent. This doesn’t happen every day, so I felt very pleased that my thoughts had stood the test of time.”

Wood said she had hoped the decision in the potash case would have been issued in advance of her speech so she could discuss it in more detail, but because of procedural issues in the court the decision isn’t yet final.

“It’s certainly by far the most interesting international antitrust case we’ve had in a long time and we’ll see what happens,” she said.

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