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Seventh Circuit Sitting En Banc Reverses in Potash, Announces Second Most Important of All FTAIA Opinions, Shores Up the Text Messaging Position on Conspiracy Pleading

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Well, okay, I guess there might just possibly have been an appellate decision this week of even more pressing moment, but I believe something important and very positive happened in the Seventh Circuit yesterday: the *en banc* reversal in *Minn-Chem, Inc. v. Agrium, Inc.*, No. 10-1712 (7th Cir. June 27, 2012) (*en banc*) ("*Potash II*"). The court ruled that plaintiffs had pled a foreign price-fixing conspiracy that it is subject to U.S. antitrust under the Foreign Trade Antitrust Improvements Act. I suppose *Potash II* is itself a case primarily about FTAIA, and it is now second in importance within the FTAIA caselaw only to the Supreme Court's *Empagran* ruling. But as I've suggested before, I think this case has a lot of significance within the ongoing saga of the *Twiqbal* pleading standard. I will explain.

Several surprising things have happened with pleading standards in the Seventh Circuit in the last year or so. Specifically, the *Potash* litigation and another big antitrust class action, *In re Text Messaging Antitrust Litigation*, both saw important appellate rulings on the adequacy of conspiracy allegations and applied the *Twiqbal* framework to them. The rulings were remarkably unlikely as a procedural matter—in each case, the Seventh Circuit took interlocutory review of a *denial* of a motion to dismiss. To take one such appeal is very rare; for the same court to take two of them, close in time, and on essentially the same issue is all the more so. Also improbable was that *Text Messaging* granted that review only to affirm. Interlocutory review is made so difficult to get precisely because the courts see no point in interfering in trials to fix problems that can be fixed just as well after a final judgment. But where a court takes interlocutory review to unanimously affirm a denied motion to dismiss, that's just what the court has done. On top of all that, the initial panel decision in *Potash* drew *en banc* review, which is rare in its own right. All of this highlights for me just how acutely concerned this court has been with the problems remaining under *Twiqbal*, and the evident desire of at least some of its judges to assure that *Twiqbal* will not kill private antitrust altogether.

Potash II is at least three opinions, and two of them are really quite significant. (First, of perhaps less real significance, the court resolved a circuit split over whether FTAIA's limits on the reach of U.S. antitrust go to the court's subject matter jurisdiction, or merely go to the merits of the antitrust cause of action. The court, reversing its own *en banc* precedent, chose the latter.)

The opinion's two really important components were these:

(1) The court exhaustively analyzed the details of the FTAIA statute, a fiendishly written little beast that has caused a lot of confusion. The analysis is lengthy, very careful, and overall quite favorable to overseas antitrust, at least in cases with U.S. impacts this large.

(2) In my mind the really more interesting and more important aspect of the opinion is in some sense an atmospheric one: to me, this case is as much about conspiracy pleading under Twiqbal as it is about FTAIA.

Technically, *Potash II* is not really a *Twiqbal* conspiracy case—it does not ultimately turn on whether plaintiffs pled circumstantial proof of conspiracy sufficient to raise a "plausible" inference that a conspiracy actually occurred. It applies the *Twiqbal* pleading standard only to the extent that all federal civil litigation must—all material elements of plaintiff's claim, including the elements of FTAIA pleading, must be pled "plausibly." And indeed, the en banc panel upheld the District Court's denial of dismissal on the ground that the complaint satisfied FTAIA — that it demonstrated illegal conduct either in "import commerce," or in "foreign commerce" that has "direct, substantial and reasonably foreseeable" consequences for domestic U.S. markets. Easily half the opinion is devoted to analysis of the FTAIA statute and application of the FTAIA standard to the facts pled.

But consider this. First, as I have written elsewhere, the original *Potash* panel in one respect did in fact resolve the case as a *Twiqbal* conspiracy case. The panel said that FTAIA required proof of foreign conduct "directed at an import market," implying that there be proof of some intent to "target [U.S.] import goods or services." It then became critical whether plaintiffs' circumstantial proof sufficiently showed a foreign conspiracy to raise U.S. prices. The panel found insufficiently "plausible" proof of any such conspiracy. That holding was more or less explicitly reversed *en banc*, in one terse little sentence at the very end, and that little sentence cited *Text Messaging*. See slip op. at 29 ("We are also satisfied that the allegations suffice, at this stage, to support a plausible story of concerted action.")

More importantly in my mind, roughly the entire first half of the opinion comprises a long and approving summary of the facts that plaintiffs pled as to conspiracy. Judge Wood in this opinion, joined by Judges Easterbrook and Posner as well as others, seems almost aghast that anyone could look at this complaint and doubt that it pleads a triable case of conspiracy, and yet the initial panel opinion did just so.