

MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
OCTOBER TERM, 2003 – NUMBER 6

Today the Supreme Court granted certiorari in two cases of potential interest to the business community, including one case in which Mayer, Brown, Rowe & Maw LLP represents one of the petitioners. Amicus briefs in support of the petitioners are due on Thursday, January 29, 2004, and amicus briefs in support of the respondents are due on Thursday, March 4, 2004.

1. Antitrust — Extraterritorial Reach of the Sherman Act. The Court granted review in *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, No. 03-724, to decide whether U.S. antitrust law provides a remedy for injuries not incurred in U.S. commerce.

The Sherman Act prohibits restraints of trade or commerce within the United States or with foreign nations. 15 U.S.C. § 1. In 1982, Congress clarified the Sherman Act's extraterritorial scope by enacting the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a ("FTAIA"). The FTAIA states that the antitrust laws shall not apply to non-import commerce with foreign nations unless (1) the conduct at issue has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce *and* (2) that domestic effect "gives rise to a claim" under the Sherman Act. It is the second prong of that test that is at issue in this case.

The plaintiffs are five foreign companies located in Australia, Ecuador, Panama, and the Ukraine. They allege that a cartel of European and Asian distributors of bulk vitamins conspired to fix prices and allocate markets on a global basis in violation of the Sherman Act, causing supracompetitive prices in both the United States and foreign countries. However, *all* of the plaintiffs' purchases took place in foreign countries. The question before the Court is whether purchasers abroad who were *not* injured by higher prices in the U.S. can bring U.S. antitrust claims in U.S. courts.

This question has sharply divided the courts of appeals. In *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420, 428 (5th Cir. 2001), the Fifth Circuit held that the Sherman Act does not extend to claims arising from injuries incurred solely in foreign commerce. In that case, a Norwegian oil company alleged that a price-fixing conspiracy by barge companies violated the Sherman Act by inflating both the plaintiff's operating costs in the North Sea and oil prices in the U.S. market. Because the plaintiff's claim arose exclusively from its North Sea contracting and not from any impact of the conspiracy on U.S. commerce, the court held that the plain language of the FTAIA precluded subject matter jurisdiction over the plaintiff's claim.

The Second Circuit created a circuit split in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 397-398 (2d Cir. 2002), by authorizing plaintiffs who allegedly paid fixed commission prices only in foreign auctions to sue the auction houses under the Sherman Act. The Third Circuit reached a different result in *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293,

307 (3d Cir. 2002), holding that foreign travel agents lacked standing to bring antitrust claims alleging fixed airline commissions because their injuries “occurred exclusively in foreign markets” and thus were “not of the type Congress intended to prevent through the Foreign Trade Antitrust Improvements Act or the Sherman Act.”

In this case, the district court dismissed the plaintiffs’ Sherman Act claims for lack of subject matter jurisdiction, explaining that the federal antitrust laws provide no remedy to “persons injured abroad in transactions otherwise unconnected with the United States.” 2001 WL 761360, at *2. The D.C. Circuit reversed in a 2-1 decision. It held that, so long as “*someone*, even if not the foreign plaintiff who is before the court,” has a claim arising from effects of the defendant’s conduct on U.S. commerce, then a foreign plaintiff with a claim based on purely foreign effects can sue as well. 315 F.3d 338, 341 (D.C. Cir. 2002). The panel majority relied primarily on its own policy views regarding what is required to deter global cartels.

That deterrence rationale has been rejected by the federal antitrust enforcement agencies. In amicus briefs previously filed in *Den Norske* and in the court of appeals in this case, the United States and the Federal Trade Commission opposed extension of the Sherman Act to claims asserting injury in purely foreign commerce. Limiting cognizable claims to those arising from effects on U.S. commerce, the Solicitor General explained, is consistent with the text and purpose of the FTAIA and will encourage cooperative international efforts to detect and punish international cartels.

The Supreme Court’s decision will affect the scope of antitrust liability risk faced by companies operating in foreign commerce. Accordingly, the outcome of this case will be exceptionally important to all companies transacting business overseas.

Mayer, Brown, Rowe & Maw LLP represents one of the petitioners. Any questions about this case should be directed to Andrew S. Marovitz (312-701-7116) in our Chicago office.

2. NEPA — Clean Air Act — Application to Department of Transportation’s Regulations Opening Border To Mexican Motor Carriers. The National Environmental Policy Act of 1969 (“NEPA”) requires preparation of an Environmental Impact Statement for all “major Federal actions significantly affecting the * * * human environment.” 42 U.S.C. § 4332(2)(C). It also establishes a streamlined procedure that allows a federal agency to undertake a more limited Environmental Assessment and, if the agency makes a preliminary “Finding of No Significant Impact” on the environment, to dispense with the preparation of a full Environmental Impact Statement. The Clean Air Act, meanwhile, imposes a requirement that “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to” State air quality standards (which must themselves be approved by the Environmental Protection Agency). Without first preparing Environmental Impact Statements or making Clean Air Act “conformity” determinations, the U.S. Department of Transportation issued regulations for the licensing of Mexican motor carries to conduct business throughout the United States — regulations that the President had announced were precursors to his lifting of a

trade moratorium on Mexican companies conducting cross-border trucking operations and scheduled bus service in the United States. The Supreme Court granted certiorari in *United States v. Public Citizen*, No. 03-358, to determine whether the Department of Transportation's regulations are invalid because the agency failed to perform full environmental analyses under the NEPA and the Clean Air Act.

In 1982, Congress imposed a moratorium on the entry into the United States of foreign motor carriers domiciled in a "contiguous foreign country" (*i.e.*, Mexico or Canada). Under the moratorium, Mexican motor carriers may enter certain limited border zones in the United States, but may not go beyond those zones and offer service to the rest of the country. Accordingly, cargo and bus passengers from Mexico must be transferred at the border onto U.S. vehicles before continuing on to other destinations throughout the country. As modified by statute in 1995, the moratorium remains in place unless the President expressly rescinds it for any of a number of statutorily-acceptable reasons, including "obligations of the United States under a trade agreement." 49 U.S.C. § 13902(c). (The moratorium was rescinded for Canadian motor carriers in 1982, but it remained in effect for Mexican motor carriers.)

On February 6, 2001, an international arbitration panel determined that the moratorium on Mexican motor carriers violates the North American Free Trade Agreement ("NAFTA"). Accordingly, President Bush announced that he would lift the moratorium (and thereby comply with NAFTA) after the Department of Transportation's Federal Motor Carrier Safety Administration issued regulations governing Mexico-domiciled motor carriers seeking to operate within the United States. Then, in the 2002 Appropriations Act for the Department of Transportation, Congress prohibited the Department from expending any funds for licensing or permitting of Mexico-based motor carriers in the United States until the Department issued safety and inspection rules to cover those carriers.

Accordingly, the Department promulgated three regulations governing Mexican motor carriers. For two of these, the Department conducted a preliminary Environmental Assessment under the NEPA, concluding that the regulations would have no significant impact on the environment, and hence that full-scale Environmental Impact Statements were unnecessary. The Department did not conduct an Environmental Assessment for the remaining regulation, nor did it make "conformity" determinations under the Clean Air Act for any of the three regulations, because it concluded that the regulations fell within categorical exceptions to the NEPA's and Clean Air Act's requirements.

Following the Department's issuance of those regulations, the President lifted the moratorium, thus permitting Mexico-based motor carriers to offer cross-border service. (Such firms may not, however, offer service between points in the United States.)

Public interest and environmental organizations as well as trucking unions sought review in the Ninth Circuit of the Department's issuance of the regulations, arguing that the regulations are invalid because the Department failed to comply with the environmental analysis requirements of the NEPA and the Clean Air Act. Their underlying claim was that allowing Mexican trucks to operate in the United States would increase air pollution in violation of state

standards and would harm inhabitants of border states, who would bear the brunt of increased vehicle emissions.

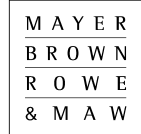
The Department defended its action in part by arguing that additional Mexican truck and bus traffic (and any attendant increases in pollution) would be the result of the President’s action in lifting the moratorium rather than the agency’s own safety and licensing requirements; thus, the effects of the traffic would be attributable to the President’s exercise of his foreign policy power rather than agency rulemaking. *Public Citizen v. United States*, 316 F.3d 1002, 1022 (9th Cir. 2003). Because the NEPA and Clean Air Act environmental analysis requirements apply to proposed actions of federal agencies but not to those of the President, the Department took the position that the causal link between its regulations and any actual environmental effects of the increased truck traffic were too attenuated to trigger the NEPA and Clean Air Act requirements.

The Ninth Circuit rejected that argument, declaring the “distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry” to be “illusory.” *Id.* at 1030. At the same time, however, the court reasoned that its decision did not implicate the President’s “unreviewable discretionary authority to modify the moratorium,” nor did it affect the United States’ ability to comply with NAFTA, because the court limited review to the narrow question whether the Department had authority to promulgate its regulations without performing full-scale NEPA and Clean Air Act environmental analyses. *Id.* at 1020.

The court then concluded that the Department’s rules governing Mexican motor carriers operating in the U.S. are “major federal actions” that may significantly affect the environment, and that the Department “systematically underestimated the emissions that would result from its regulations” in the preliminary Environmental Assessments it performed for two of the three regulations. *Id.* at 1030. The court held that the Assessments were “woefully inadequate,” in part because the agency did not consider whether increased emissions “may be localized in certain areas near the Mexican border” (*id.* at 1023), and also because the agency limited its review to the environmental impact of Mexican trucks in 2002 rather than considering the long-term effects of increased vehicle emissions. The court also rejected the Department’s determinations that the third regulation fell within a categorical exclusion from the NEPA and that all three came within categorical exclusions to the Clean Air Act’s “conformity” requirement. *Id.* at 1029. Accordingly, the Ninth Circuit held that the Department acted arbitrarily and capriciously in failing to perform full NEPA and Clean Air Act analyses before issuing the regulations, and remanded the matter to the agency to prepare Environmental Impact Statements and make conformity determinations. *Id.* at 1032.

This case is important to all businesses engaging in cross-border shipping with Mexico and all those that offer domestic motor carrier services in areas along the U.S.- Mexico border. Moreover, because Mexico has retaliated for the United States’ failure to end the motor-carrier moratorium by imposing its own restrictions on U.S. motor carriers operating there, and because the case potentially implicates the President’s foreign affairs powers and U.S. compliance with NAFTA, the case is also important to U.S. companies seeking access to Mexican markets and to those in competition with Mexico-based businesses.

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Any questions about this case should be directed to Richard B. Katskee (202-263-3227) in our Washington, D.C. office.

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The Supreme Court requested the views of the Solicitor General in the following case of interest to the business community:

Bates v. Dow Agrosciences LLC, No. 03-388: The question presented is whether certain state-law claims for crop damage from herbicide use are preempted by the Federal Insecticide, Rodenticide, and Fungicide Act.

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