Hovenkamp on U.S. Antitrust's Jurisdictional Reach Abroad

Herbert J. Hovenkamp, who is a professor of law at University of Iowa – College of Law, has posted Antitrust's "Jurisdictional" Reach Abroad on SSRN. Here is the abstract:

In its Arbaugh decision the Supreme Court insisted that a federal statute's limitation on reach be regarded as "jurisdictional" only if the legislature was clear that this is what it had in mind. The Foreign Trade Antitrust Improvement Act (FTAIA) presents a puzzle in this regard, because Congress seems to have been quite clear about what it had in mind; it simply failed to use the correct set of buzzwords in the statute itself, and well before Arbaugh assessed this requirement.

Even if the FTAIA is to be regarded as non-jurisdictional, the constitutional extraterritorial reach of the Sherman Act is hardly unlimited. It reaches only to restraints affecting commerce "with" foreign nations rather than those affecting commerce "among" the several states. At the same time, however, the canon of construction against extraterritorial application should not apply to the Sherman Act. First, the statutory language condemning restraints of trade or monopolization of commerce "among the several States, or with foreign nations" is not boilerplate and clearly extends to foreign commerce. Second, the FTAIA itself expressly recognizes or grants the Sherman Act's extraterritorial reach to "import trade or import commerce."

The implications for interpreting the FTAIA as limiting the antitrust law's subject coverage rather than the court's jurisdiction are mainly that, even if the language of the complaint states a claim, the district court will be able to conduct its own jurisdictional fact findings. Further, this inquiry may occur at any time during the proceeding, may occur on the court's own motion, and cannot be waived. A nonjurisdictional interpretation of the FTAIA will thus make it more difficult for defendants to obtain dismissals at an earlier stage. Even here, however, the Supreme Court Twombly and Iqbal decisions require greater specificity in pleading, and will thus serve to diminish the difference between the standards for a motion to dismiss for lack of jurisdiction, and a

motion to dismiss for failure to state a claim.