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Much Ado About Injury: Making Sense Of FTAIA Circuit Split

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It is not news that there is a circuit court split concerning the correct application of the Foreign Trade Antitrust Improvements Act[1]. Indeed, there have been circuit court splits concerning the FTAIA since its enactment in 1982. However, the recent seemingly contradictory FTAIA rulings in the Seventh Circuit Motorola Mobility case[2] and the Ninth Circuit Hsiung [3] (a.k.a. AU Optronics) case pertaining to the conduct of the same liquid crystal display cartel have generated much commentary and even resulted in dueling petitions for certiorari to the U.S. Supreme Court. The AU Optronics petition challenges the Ninth Circuit's ruling affirming corporate and individual criminal convictions based on the defendants' participation in a horizontal price-fixing conspiracy. Motorola's petition seeks reversal of the Seventh Circuit ruling dismissing the portion of its civil suit aimed at recovering overcharges paid by its foreign subsidiaries when they purchased price-fixed LCD panels directly from AU Optronics and its fellow cartelists outside the U.S. Both of these cases are discussed in more detail below.

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Most believe these rulings are in conflict because each circuit reached a different conclusion after applying the FTAIA to the same conspiracy and products. However, contrary to popular opinion, the authors of this article interpret these two rulings as complementary rather than contradictory because, while they are factually similar, they are nonetheless distinguishable.

Same Conduct

Both rulings rest on the respective court's interpretation of the FTAIA, which governs the extraterritorial application of U.S. antitrust laws.[4] It bars Sherman Act claims, not involving import commerce, based upon foreign anti-competitive conduct, unless the conduct in question "has a direct, substantial and reasonably foreseeable effect"

on U.S. commerce and that conduct gives rise to a Sherman Act claim.[5] The analyses turn on the very specific facts of each case. This makes the results here even more interesting since they, in many respects, involve the same set of facts.

The foreign anti-competitive conduct alleged in both of these cases involved a conspiracy carried out between Taiwanese and Korean electronics manufacturers through express agreements to fix prices and limit the output of LCD panels. Antitrust claims were asserted based upon three distinct types of transactions. The first involved LCD panels sold directly to U.S. customers at inflated prices. These transactions were subject to the Sherman Act because they constituted import commerce exempted from the FTAIA. The second type of transaction involved the sale of LCD panels abroad and incorporated into consumer electronics products that were also sold abroad. These transactions were clearly barred by the FTAIA as primarily foreign transactions and were dismissed without appeal. The final category of transactions involved LCD panels incorporated into consumer electronics products abroad and sold in the U.S. The circuit split pertains only to the latter.

The Two Cases

Seventh Circuit Ruling

In 2009, cellular technology giant Motorola Mobility, a U.S. corporation, brought suit under Section 1 of the Sherman Act to recover overcharges paid by its foreign subsidiaries, which purchased price-fixed LCD panels directly from AU Optronics and its fellow cartelists abroad.[6] After rehearing an interlocutory appeal, a three-judge panel, including the renowned Judge Richard Posner, ruled that the nonimport commerce antitrust claims asserted by Motorola were barred by the FTAIA.[7] Judge Posner provided some much needed clarity regarding these poorly understood requirements, explaining that:

There must be a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce — the domestic American economy, in other words — and the effect must give rise to a federal antitrust claim. The first requirement, if proved, establishes that there is an antitrust violation; the second determines who may bring a suit based on it.[8]

The court assumed arguendo that the conduct of the cartel had a direct, substantial and reasonably foreseeable effect on U.S. commerce, satisfying the first prong of the FTAIA.[9] It then turned its attention to the second prong, which requires that the injury arise from the same domestic effects that satisfied the FTAIA's first prong.[10] The court concluded that Motorola's claims failed to satisfy the FTAIA's second prong because, although the anti-competitive conduct increased Motorola's cost for the cellphones it bought from its foreign subsidiaries, the cartel-induced price increase affecting components, as well as the price of cellphones incorporating those components, occurred entirely in foreign commerce.[11] It was critical to the court's reasoning that "Motorola's foreign subsidiaries were injured in foreign commerce in dealings with other foreign companies."[12]

Furthermore, the court viewed Motorola itself as an indirect purchaser barred from recovering damages for its federal antitrust claims under the Illinois Brick direct purchaser rule.[13] Accordingly, the court concluded that granting Motorola the right to sue on behalf of its foreign subsidiaries under U.S. antitrust law would constitute an unjustified interference with the right of foreign nations to regulate their own economies.[14] Interestingly, Motorola did not bring antitrust claims under state laws which grant indirect purchasers standing to sue for antitrust damages. One wonders whether the result would have been the same if they had.

Ninth Circuit Ruling

In Hsiung, the Ninth Circuit affirmed the convictions of Taiwanese electronics manufacturer AU Optronics, two of its former officers, and its U.S. subsidiary that were found guilty of violating the Sherman Act for their role in the same LCD price-fixing conspiracy involved in Motorola.[15] This case also involved both import and nonimport commerce. However, for discussion here we are only concerned with the nonimport commerce to which the FTAIA applied — i.e., price-fixed LCD panels incorporated into finished products abroad and then sold in the U.S.

The parties acknowledged that the anti-competitive foreign conduct resulting in the sale of the aforementioned finished products was both substantial and had a reasonably foreseeable impact on U.S. commerce.[16] This concession is understandable considering that, by one estimate, $23.5 billion in price-fixed panels were imported into the U.S. as part of finished products.[17] The court pointed out that, inter alia, there was no dispute regarding whether U.S. consumers purchased finished products containing price-fixed LCDs and concluded that the conduct was sufficiently "direct, substantial and reasonably foreseeable" with respect to the effect on U.S. commerce.[18] Even so, the direct effects must also give rise to the plaintiff's injury.[19] The court found that there was an injury to competition in the U.S. caused by the anti-competitive conduct at issue and held that "[t]he constellation of events that surrounded the conspiracy" lead it to conclude that the impact of the conspiracy on U.S. commerce was direct and followed "as an immediate consequence" of the price fixing.[20] Accordingly, the criminal convictions were affirmed.

Similarities and Differences

Did both rulings correctly interpret the FTAIA? How can that be? In both cases the court concluded that the alleged foreign anti-competitive conduct had a direct, substantial and reasonably foreseeable effect on U.S. commerce. However, satisfying the first prong of the FTAIA is not enough. Before a Sherman Act violation can be asserted with respect to foreign anti-competitive conduct, the FTAIA also requires that the effect on U.S. commerce give rise to the injury for which redress is sought.[21] As was previously discussed, the government satisfied the second prong of the FTAIA in Hsiung, but the plaintiff was unable to do so in Motorola.

A thorough review of the analyses employed in these rulings reveals that, although these cases arose of the same international LCD cartel, they are nonetheless factually distinguishable in one crucial and dispositive respect. In Hsiung, the government sought redress on behalf of U.S. consumers directly injured by the effects of the cartel on U.S. commerce. However, Motorola, also a U.S. consumer, sought to recover for indirect injuries it claimed to have sustained when its foreign subsidiaries purchased price-fixed LCD panels overseas from AU Optronics and its fellow cartelists.[22] Unfortunately for Motorola, derivative injuries such as those suffered by an owner of, employee of, or investor in a company rarely gives rise to a claim under antitrust law even when such company is the victim of an antitrust violation.[23]

In Hsiung, the court applied a proximate causation standard and concluded that the effect gave rise to the antitrust claim because the injury there was an injury to competition in the U.S.[24] About this there can be no doubt. Voluminous evidence documented that the anti-competitive effects in the U.S. were substantial.[25] The fruits of AU Optronics' conspiratorial conduct resulted in a collective gain of over $500 million.[26]

On the other hand, the Seventh Circuit concluded that the effect on U.S. commerce caused by the

foreign anti-competitive conduct of the cartel did not give rise to the claims asserted by Motorola because it sought recovery for injuries sustained by its foreign subsidiaries when they purchased price-fixed LCD panels from AU Optronics and its fellow cartelists.[27] This conclusion stands to reason considering "Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach."[28] Furthermore, it is settled that "U.S. antitrust laws are not to be used for injury to foreign customers,"[29] It is clear that Motorola's foreign subsidiaries, the direct purchasers of the price-fixed panels, are legally distinct foreign entities. Therefore, Motorola cannot impute to itself the harm suffered by them.[30]

Conclusion

The Seventh and Ninth Circuit decisions correctly reached different conclusions in these cases because, while they are factually similar, they are indeed distinguishable from the perspective of the injuries for which redress was sought. In Hsiung, the redress sought was for a direct injury to U.S. commerce, while that sought in Motorola was for an injury that is undoubtedly indirect. Consequently, these seemingly contradictory rulings actually complement one another because both advance the legislative intent of the FTAIA, which was, inter alia, to ensure that purchasers in the U.S. remain fully protected by the federal antitrust laws. Will this purported circuit split entice the Supreme Court to wade back into the murky waters of FTAIA jurisprudence? Your guess is as good as ours.

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[1] 15 U.S.C. § 6a.

[2] Motorola Mobility, LLC v. AU Optronics, No. 14-8003, slip op. (7th Cir., Nov. 26, 2014).

[3] U.S. v. Hsiung, No. 12-10492, slip op. (9th Cir. Jan. 30, 2015).

[4] 15 U.S.C. § 6a.

[5] Id.

[6] In re TFT-LCD (Flat Panel) Antitrust Litig., MDL. No. 1827, 2010 U.S. Dist. LEXIS 65037, *5–6 (N.D. Cal. June 28, 2010); Motorola Mobility, slip op. at 17 (The court refused to permit Motorola to recover on all its claims simply because it purchased some panels, one percent, in import commerce.).

[7] Motorola Mobility, slip op. at 16-17.

[8] Id. at 4.

[9] Id. at 5.

[10] 15 U.S.C. § 6a(2).

[11] Motorola Mobility, slip op. at 6.

[12] Id. at 16.

[13] Id. at 9.

[14] Id. at 16.

[15] Hsiung slip op. at 3.

[16] Id. at 39.

[17] Id. at 40, 42-43.

[18] Id. at 40-41.

[19] Id. at 41; see also 15 U.S.C. § 6a.

[20] Id at 23, 42. See also (Distinguishing the instant case from Metro Industries v. Sammi Corp., 82 F.3d 839, 848 (9th Cir. 1996) where there was "no evidence of actual injury to competition in the United States.").

[21] Hsiung slip op. at 41.

[22] Motorola Mobility, slip op. at 6.

[23] Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1335–36 (7th Cir. 1989).

[24] Hsiung slip op. at 23, 41.

[25] Id. at 23.

[26] Id. at 45.

[27] Motorola Mobility, slip op. at 6.

[28] F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165, 173 (2004).

[29] Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 858 (7th Cir. 2012).

[30] Motorola Mobility, slip op. at 11.
