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After FTAIA Ruling, Sky Is Not Falling On Antitrust Claims

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Law360, New York (June 02, 2014, 12:10 PM ET) -- Doomsday scenarios abound concerning the recent Seventh Circuit ruling in Motorola Mobility LLC v. AU Optronics Corp. Some legal observers contend that this ruling[1] interpreting the Foreign Trade Antitrust Improvements Act of 1982 “may profoundly limit future antitrust claims by plaintiffs in the United States.”[2] While others have even gone so far as proclaiming that this ruling will preclude future antitrust claims predicated upon foreign conduct altogether. However, these prognostications may actually amount to little more than wishful thinking. The debate concerning the correct interpretation of the FTAIA is far from over. This is evidenced by the fact that we continue to see inconsistent foreign antitrust decisions both among the circuits and among district courts within the same circuit.

The FTAIA, 15 U.S.C. § 6a, was enacted in 1982 in an attempt to clarify the correct application of the Sherman Act to foreign anti-competitive conduct. This act extends the reach of U.S. antitrust laws to cover foreign anti-competitive conduct if that conduct “has a direct, substantial, and reasonably foreseeable effect” on U.S. commerce.[3] In addition, the effect of that conduct on U.S. commerce must also independently give rise to a Sherman Act claim.[4] Confused yet? Don’t feel bad. Courts have been trying to interpret the FTAIA for decades. The Third Circuit has observed that this legislation uses “rather convoluted language” and even joined the First Circuit in describing it as “inelegantly phrased.”[5]

Background

Cellular technology pioneer Motorola Mobility LLC filed suit in 2009 alleging that several foreign LCD (liquid crystal display) manufacturers violated Section 1 of the Sherman Act by conspiring to fix the price of LCD panels purchased by Motorola and its foreign subsidiaries who incorporated them into cellphones and other popular consumer devices.[6]

While the case was pending in the Northern District of California, as part of a multidistrict litigation, Motorola defeated defendants’ motion for partial summary judgment concerning Motorola’s foreign purchases of LCDs.[7] However, after pretrial proceedings were completed and the case was remanded to the Northern District of Illinois, the defendants renewed their motion for partial summary

judgment.[8] The federal district court judge granted the defendants' motion for partial summary judgment and Motorola appealed to the U.S. Court of Appeals for the Seventh Circuit, which brings us to the current ruling.[9]

Seventh Circuit Ruling

In Motorola, the Seventh Circuit affirmed the lower court's grant of partial summary judgment. The three-judge panel held that 99 percent of Motorola's claim, which relates to allegedly price fixed LCD panels purchased by its foreign subsidiaries, was barred by 15 U.S.C. § 6a(1)(A) as the alleged price fixing conduct did not have a direct effect on domestic commerce.[10]

The court determined Motorola's claim to be based upon three distinct types of transactions and addressed each of them. The first type of transaction, which comprised only one percent of the total transactions, involved LCD panels purchased by and delivered to Motorola in the U.S. These transactions were not part of the appeal, but the three-judge panel easily concluded that this type of transaction "would be subject to the Sherman Act because of the foreign trade act's exception for importing."[11]

The next type of transaction, which accounted for 57 percent of the overall transactions, involved panels bought by Motorola's foreign subsidiaries that were incorporated into products sold abroad. The court disregarded these transactions because the panels never entered the United States and as such never became domestic commerce.[12] The remaining 42 percent, about which there has been much debate, involved the purchase of panels by Motorola subsidiaries operating outside the U.S. that incorporated them into products shipped to the U.S. for resale by Motorola.[13] It is this 42 percent that is at the heart of the court's ruling.

FTAIA and the 42 Percent

Pursuant to the FTAIA, the court required "Motorola [to] show that the defendants' price fixing of the panels that they sold abroad and that became components of cellphones imported by Motorola had a direct, substantial, and reasonably foreseeable effect on commerce within the United States."[14] Assuming price fixing would be proven, the court was satisfied that there was "doubtless some effect", but it was not satisfied that effect was direct. [15] The court found that "[t]he [domestic] effect of component price fixing on the price of the product of which it is a component is indirect" .[16]

Nonetheless, the panel determined that the effect was foreseen by the defendants if they knew that some of the panels would be incorporated into products bound for sale in the U.S.[17] Interestingly, the court chose not to grapple with whether the challenged conduct had a substantial effect on U.S. domestic commerce stating only, "who knows what substantial means in this context?"[18] Instead, the court turned its attention to explaining why Motorola failed to show that the challenged conduct had a direct effect on U.S. commerce.

The court distinguished the situation in the instant case from that in another Seventh Circuit ruling, Minn-Chem Inc. v. Agrium, where "foreign sellers allegedly created a cartel, took steps outside the

United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers."[19] However, the conduct of the alleged cartelists in Motorola is arguably only distinguishable from the conduct of the price fixers in Minn-Chem because here the cartelists did not sell products to U.S. customers.

This distinction may have motivated the court to rule as it did. The court went to great lengths to reject Motorola's assertion that it purchased $5 billion worth of LCD panels and instead emphasized that any injury sustained as a result of the alleged price fixing conduct was sustained by Motorola's subsidiaries, not Motorola itself. [20] Thus, this distinction was critical to the court's ruling.

The court also noted that Motorola's subsidiaries were not plaintiffs in this suit and that Motorola's claim against the defendants was based "on the effect of the alleged price fixing on Motorola's foreign subsidiaries."[21] All of this leads one to wonder whether the court would have ruled differently if it was presented with a different (i.e., more sympathetic) plaintiff. The court even went so far as to describe the aforementioned 57 percent of transactions upon which Motorola's claim is based as "a frivolous element of Motorola's claim."[22]

Motorola's claim relating to the 42 percent was also upended because it failed the second prong of the FTAIA which exempts foreign conduct from antitrust scrutiny "unless the effect gives rise to a claim under the Sherman Act."[23] The court concluded that the effect of the price fixing in the U.S. could not give rise to an antitrust claim because the effect of the alleged price fixing on domestic commerce was "mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component."[24] In other words, the price fixing did not factor into or affect what Motorola chose to charge in the U.S. for its devices alleged to have contained the price-fixed component.

Different Plaintiff

If we closely examine the court's ruling and reasoning it can be argued that the ruling is aimed at a very specific type of plaintiff — namely, one who seeks civil redress on behalf of what the court deemed "foreign customers."[25] What would have happened if this matter involved indirect purchaser plaintiffs that purchased cellphones containing price-fixed components in the U.S.? Would the court find the effect on domestic commerce sufficiently direct if the transactions upon which a claim is based occurred in the U.S.? Perhaps. In a 2002 decision, the Seventh Circuit said that "the existence of several steps in the causal chain does not alone render an effect indirect or too remote"[26] The Third Circuit has also held that injuries to indirect purchasers are not too remote, even when they are several steps removed from the antitrust defendant in the chain of distribution[27] Thus, there may be reason to believe an indirect purchaser plaintiff might have fared better before this panel.

Will This Ruling Stand?

When referring to the fact that the California district court had previously ruled for Motorola on the issue of the Sherman Act's applicability to the 42 percent, Judge Richard Posner, who authored the

Seventh Circuit opinion, acknowledged “there is room for a difference of opinion … on the issue of the Sherman Act’s applicability” here.[28] Therefore, it should come as no surprise that not only has Motorola appealed this ruling, but the U.S. Department of Justice, the Federal Trade Commission, American Antitrust Institute and others have submitted amici curiae briefs petitioning for panel rehearing or rehearing en banc.

The DOJ and FTC argue in their joint brief that “[u]nless vacated, the panel’s narrow view of the statutory term direct is likely to constrain the government’s ability to effectively prosecute cartels that substantially and intentionally harm U.S. commerce and consumers, as well as prevent those injured in the United States from redressing that harm.”[29]

Ironically, in an effort to prevent “unreasonable interference with the sovereign authority of other nations”[30] the court’s ruling, if it stands, could result in an unreasonable interference with the sovereign statutory authority of this nation. The court appears to be interested in further examining this issue, recently seeking feedback from both the U.S. Departments of State and Commerce concerning the potential foreign policy implications of its ruling.[31]

Conclusion

Whether this ruling will pose a serious threat to plaintiffs seeking redress based upon foreign conduct remains to be seen because, as we know, nothing is ever really settled concerning the ever-evolving and enigmatic area of FTAIA jurisprudence. However, what is settled is that “U.S. antitrust laws are not to be used for injury to foreign customers,” which is precisely what the court held Motorola sought to do here.[32] Thus, this ruling may not affect the rights of plaintiffs across the board, but rather those seeking recovery on behalf of what the court deems to be purely "foreign customers." Irrespective of how this case unfolds, we predict that it will not end the debate about the correct interpretation of the FTAIA, especially considering “a substantial percentage of U.S. manufacturers utilize global supply chains and foreign subsidiaries to effectively compete in the global economy.”[33]

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[1] Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Mar. 27, 2014).

[2] Ian Simmons, Bo Pearl, Kevin Feder and Qais Ghafary, 7th Circ. FTAIA Ruling Profoundly Limits Antitrust Claims, CompLaw 360 (March 31, 2014),https://www.law360.com/articles/523304/7th-circ-ftaia-ruling-profoundly-limits-antitrust-claims

[3] 15 U.S.C. § 6a(1)(A).

[4] 15 U.S.C. § 6a(2).

[5] Turicentro v. Am. Airlines, 303 F. 3d 293, 300 (3d Cir. 2002); See also Carpet Group Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 69 (3d Cir.2000) (quoting United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir.1997)).

[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).

[7] In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827, slip op. at 5, (N.D. Cal. Aug. 9, 2012).

[8] Motorola, Inc. v. AU Optronics Corporation et al, 09-6610, slip op. at 15 (N.D. Ill. Jan. 23, 2014) .

[9] Motorola Mobility, slip op. at 2-3.

[10] Id. at 2-3; 4.

[11] Id. at 4.

[12] Id. at 2.

[13] Id.

[14] Id. at 4 (quotations omitted).

[15] Id.

[16] Id. at 4-5.

[17] Id. at 4.

[18] Id.

[19] 683 F.3d 845, 860 (7th Cir. 2012) (en banc).

[20] Motorola Mobility, slip op. at 2.

[21] Id. at 2, 6.

[22] Id. at 2-3.

[23] Id. at 3 (quotations omitted).

[24] Id. at 5-6.

[25] Id. at 6.

[26] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing en banc at 9, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Apr. 24, 2014) ("Amicus Brief")

[27] In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 399-401 (3d Cir. 2000).

[28] Motorola Mobility, slip op. at 3–4.

[29] Amicus Brief, at 10.

[30] Motorola Mobility, slip op. at 8.

[31] Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. May 2, 2014).

[32] Motorola Mobility, slip op at 6 (quoting Agrium, 683 F.3d at 858).

[33] Id. at 7-8.

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