Seventh Circuit Constricts Extraterritorial Reach of U.S. Antitrust Law

On March 27, 2014, in *Motorola Mobility LLC* v. *AU Optronics Corp.*, the U.S. Court of Appeals for the Seventh Circuit ruled that U.S. antitrust laws could not be invoked to reach foreign price-fixing that had only an indirect effect in the United States. The decision, authored by Judge Posner, held that the domestic effects test of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") was not met where allegedly price-fixed component parts were sold and combined into completed products abroad before being sold to consumers in the United States.[1]

I. Background and Procedural History

The dispute concerned the price of liquid crystal display ("LCD") panels. Motorola, which manufactures electronic devices that incorporate LCD panels, such as mobile phones, alleged that manufacturers of LCD panels conspired to raise prices in violation of Section 1 of the Sherman Act. The LCD panels involved fell into three categories: (1) one percent of the panels at issue were both bought by and delivered to Motorola within the United States; (2) forty-two percent of the panels were bought by Motorola's subsidiaries and placed into products that were then shipped to Motorola in the United States to be resold by Motorola domestically; and (3) fifty-seven percent of the panels were bought by Motorola's subsidiaries and placed into products that were sold outside of the United States. The foreign subsidiaries assigned their claims to Motorola and were not parties to the litigation.

The defendants moved for partial summary judgment and the district court ruled that Motorola's claims to recover overcharges for panels bought by its subsidiaries (the second and third categories, 42 percent and 57 percent of the panels) were barred under the domestic effects test of the FTAIA. The domestic effects test limits application of the Sherman Act by placing non-import foreign commerce outside of the Sherman Act's reach unless such conduct (a) has a "direct, substantial, and reasonably foreseeable effect" on American domestic or import commerce; and (b) such effect gives rise to a Sherman Act claim.[2] A three-judge panel of the Seventh Circuit affirmed.[3]

II. The Court's Decision

The Seventh Circuit first noted that because the "57 percent [(the third category)] never entered the United States," those LCD panels "never became domestic commerce" and therefore could not "possibly support the Sherman Act claim."[4] In addition, although the panels bought by Motorola in the United States (the first category, one percent) were not at issue in the appeal, the court observed that the sale of "LCD panels to Motorola in the United States at inflated prices" would be subject to the Sherman Act.

Evaluating Motorola's claim regarding the second category (42 percent of the LCD panels), the appellate court emphasized that the "alleged price fixers [were] not selling the panels in the United States" but rather were "selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are

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[1] No. 14-8003, 2014 WL 1243797 (7th Cir. Mar. 27, 2014). http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D03-27/C:14-8003:J:Posner:aut:T:fnOp:N:1314930:S:0. The case was captioned *Motorola Mobility, Inc.* v. *AU Optronics Corp.*, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014) in the district court. Plaintiff-Appellant will be referred to as "Motorola" herein.

[2] *Id.* at *1 (quoting 15 U.S.C. § 6a(1)(A)).

[3] The Seventh Circuit agreed to hear the case on an interlocutory basis – that is, before a final judgment was rendered by the lower court – because 99 percent of the relevant transactions could be eliminated from the litigation and there was room for a difference of opinion, evidenced by the fact that the "judge presiding at the multidistrict-litigation phase of the proceeding had ruled for Motorola on th[is] issue." *Id.* at *2.

[4] *Id.* at *1.

then exported to the United States for resale by the parent."[5] The court found that what was "missing from Motorola's case [was] a 'direct' effect" on domestic commerce as the "effect of component price fixing on the price of the product of which it is a component is indirect."[6] Therefore, Motorola's claim regarding the 42 percent would be an impermissibly extraterritorial application of the Sherman Act and was barred by the FTAIA.

Motorola's claim was also barred by the second prong of the FTAIA's test, requiring that the "effect" of the defendants' conduct on "domestic U.S. commerce 'give rise to' a Sherman Act claim,"[7] 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 electronic products manufactured abroad that allegedly contained a price-fixed component.[8] The court found that Motorola's claim was based "on the effect of the alleged price fixing on Motorola's foreign subsidiaries."[9] Those subsidiaries assumed the risk that the antitrust laws of the countries in which they operated might not provide adequate remedies.

The appellate court emphasized that "extraterritorial application of U.S. law 'creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs'" and that the FTAIA was "intended to prevent such 'unreasonable interference with the sovereign authority of other nations.'"[10] In rejecting Motorola's "expansive interpretation" of the FTAIA, the Seventh Circuit stressed that "practical stakes" weigh "strongly against" such interpretation as "[n]othing is more common nowadays than for products imported to the United States to include components that the producers had bought from foreign manufacturers" and that if adopted, Motorola's position would "enormously increase the global reach of the Sherman Act."[11]

The appellate court therefore affirmed the lower court's ruling that Motorola's claims regarding the LCD panels bought by its subsidiaries were barred by the FTAIA.[12]

III. Significance of the Decision

The Seventh Circuit's construction of the FTAIA's domestic effects test narrowly interprets the extraterritorial reach of federal antitrust law and may provide defendants with a powerful tool against some Sherman Act claims. The decision adds to the trend seen in the federal courts limiting the foreign application of federal laws – including, most notably, the Supreme Court's 2010 opinion in *Morrison* v. *National Australia Bank Ltd.*[13]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Elai Katz at (212) 701-3039 or ekatz@cahill.com; or J. Jamie Gottlieb at (212) 701-3138 or jgottlieb@cahill.com.

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[5] *Id.*

[6] *Id.*

[7] *Id.* at *3 (citation omitted).

[8] *Id.*

[9] *Id.* at *3.

[10] *Id.* at *4 (quoting *F. Hoffman La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004)).

[11] *Id.*

[12] *Id.*

[13] 561 U.S. 247 (2010).