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FTAIA May Bar US Cos. From Relief Under US Antitrust Laws

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Congress enacted the Foreign Trade Antitrust Improvements Act due to concerns by foreign sovereigns over the application of U.S. antitrust law to foreign conduct. To address such concerns, the act placed all nonimport foreign commerce outside the Sherman Act (15 U.S.C § 1 et seq.) unless (1) such conduct has a "direct, substantial and reasonably foreseeable effect" on American domestic or import commerce, and (2) such effect gives rise to the plaintiff's Sherman Act claim. 15 U.S.C. § 6a. But application of the FTAIA has been a source of controversy.

Recently, various circuit court decisions have addressed what satisfies each prong of the FTAIA. In June 2015, the U.S. Supreme Court denied certiorari in two cases arguably leaving differing standards as to what constitutes a "direct, substantial and reasonably foreseeable effect" on U.S. commerce and whether such effect gives rise to a Sherman Act claim. See United States v. Hui Hsiung, 778 F.3d 738, 742-43 (9th Cir. 2015), cert. denied, 135 S. Ct. 2837 (2015); Motorola Mobility Inc. v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2014), cert. denied, 135 S. Ct. 2837 (2015); Lotes Co. Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395 (2d Cir. 2014).

Here follows a summary of the law concerning the FTAIA in light of these decisions, followed by consideration of the effect such decisions may have on future private and government Sherman Act enforcement.

The Ninth Circuit

United States v. Hui Hsiung, 778 F.3d 738, 742-43 (9th Cir. 2015), cert. denied, 135 S. Ct. 2837 (2015), involved the criminal prosecution of AU Optronics (a Taiwanese company), its wholly owned subsidiary, and two AU Optronic executives for price-fixing thin-film transistor liquid crystal display (also known as TFT-LCD) panels sold to U.S. companies for use in consumer electronics. The defendants appealed their

conviction on the basis that, inter alia, since "the bulk of the panels were sold to third parties worldwide rather than for direct import into the United States, the nexus to United States commerce was insufficient under the Sherman Act as amended by the [FTAIA]." Id. at 743.

The Ninth Circuit affirmed on the ground that substantial direct sales by defendants to U.S. retailers constituted import commerce, which "does not fall within the FTAIA at all." Id. at 754, 756. The court then addressed whether "foreign sales of panels that were incorporated into finished consumer products ultimately sold in the United States" satisfied the FTAIA's first prong. Id. at 759. With regard thereto, the court opined that "[c]onduct has a 'direct' effect for purposes of the domestic effects exception to the FTAIA 'if it follows as an immediate consequence of the defendant[s'] activity.'" Id. at 758 (citation omitted). The court found that the conspiracy's impact on the U.S. market met such standard: since the panels were "a substantial cost component of the finished products," their price directly impacted the price of finished products; the defendants directly negotiated the price with U.S. companies; and the defendants knew that "substantial numbers of finished products were destined for the United States." Id. at 759.

The Seventh Circuit

In Motorola Mobility Inc. v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2014), cert. denied, 135 S. Ct. 2837 (2015), Motorola alleged that foreign manufacturers of LCD panels conspired to raise the panels' prices above the price that would have prevailed in a competitive market in violation of the Sherman Act. (Motorola involved the same cartel activity at issue in AU Optronics.) Ninety-nine percent of the panels were sold and delivered to Motorola's foreign subsidiaries for incorporation into cellphones, with 42 percent of those cellphones then being shipped to Motorola for resale in the United States and 57 percent of those cellphones being sold abroad. Id. at 817-818.

The Seventh Circuit affirmed the U.S. District Court for the Northern District of Illinois' dismissal of claims relating to the 99 percent of the panels sold to Motorola's foreign subsidiaries. Id. at 818-819. Assuming that Motorola satisfied the FTAIA's first prong without agreeing or disagreeing with the Ninth Circuit's analysis of such prong, the court found that Motorola's claims failed because they did not meet the second prong — "the statutory requirement that the effect of anti-competitive conduct on domestic U.S. commerce give rise to an antitrust cause of action." Id. at 819. The conduct increased the cost to Motorola of the cellphones that it bought from its foreign subsidiaries, but the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce." Id. The direct purchasers were Motorola's foreign subsidiaries, who, according to the court, must seek redress under the antitrust laws of the countries "in which they are incorporated and operate." Id. at 820. Motorola had no right to sue on their behalf. Id.

The court also discussed the "important, and highly relevant, application of the concept of 'antitrust standing'" to Motorola's claims under Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), "which forbids a customer of the purchaser who paid a cartel price to sue the cartelist, even if his seller — the direct purchaser from the cartelist — passed on to him some or even all of the cartel's elevated price." 775 F.3d at 821. The court found Illinois Brick should apply to Motorola's claims in part due to the uncertainties surrounding the extent to which Motorola itself (rather than consumers) was harmed by the price-fixing. Id. at 822. The court also rejected Motorola's claim that its foreign subsidiaries were the equivalent of "divisions" within one company and found that even if that were the case, Motorola "would have been injured abroad when 'it' purchased the price-fixed components" and thus such purchases would not give rise to an antitrust cause of action as required by the FTAIA's second prong. Id. at 823.

The Second Circuit

In Lotes Co. Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395 (2d Cir. 2014), the plaintiff Lotes, a Taiwanese company, manufactured and sold USB connectors to Taiwanese firms that incorporated the USBs into computer products in China. The defendants were foreign and California companies, who competed with Lotes in making and selling USBs. Lotes alleged defendants had used their ownership of certain patents to monopolize the USB connector industry.

As to the FTAIA's first prong, the Second Circuit rejected the Ninth Circuit's "immediate consequence" standard, instead finding that "the term 'direct' means only 'a reasonably proximate causal nexus.'" Id. at 410 (citation omitted). However, the court did not determine whether Lotes' claims satisfied the FTAIA's first prong because the claims failed under the FTAIA's second prong. The court found that Lotes' injury resulted from "defendants' exclusionary foreign conduct" so the domestic effect of the monopoly (higher prices for U.S. consumers) did not give rise to Lotes' injury. Id. at 414.

Impact of the Circuit Court Decisions

While these circuit court decisions will impact the scope of private damages actions for price-fixing of component parts purchased abroad, they do not appear to impact government enforcement of the Sherman Act. As noted in Motorola, because the government considers comity and sovereignty concerns before bringing charges, "there is much to be said for the approach" of limiting private damages actions like Motorola's, but "asserting the government's power to obtain relief through criminal and injunctive actions without ruffling our allies' feathers." Id. at 826. Moreover, AU Optronics sustained criminal convictions concerning the same illegal conduct at issue in Motorola and, as noted, the Supreme Court denied certiorari in those cases.

It is only a matter of time before another FTAIA case will be before the U.S. Supreme Court. Until then, companies purchasing products overseas as a component or otherwise, even via their own foreign subsidiaries, may be barred from seeking relief under U.S. antitrust laws.

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