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March 31, 2014

Motorola Mobility LLC v. AU Optronics Corp.: **Seventh Circuit Clarifies Reach of U.S. Antitrust Law to Foreign Commerce**

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A recent decision from the Seventh Circuit, *Motorola v. AU Optronics Corp.*, provided much-needed clarification on the scope of the Foreign Trade Antitrust Improvements Act (“FTAIA”). Specifically, the court’s decision clarifies that U.S. companies who conduct purchasing and manufacturing operations in foreign commerce are subject to the strictures of the FTAIA just like any other company. The court’s decision also has potentially important implications for the feasibility of state law indirect purchaser claims going forward.

BACKGROUND

Enacted in 1982, the FTAIA governs the Sherman Act’s application to foreign activity. Pertinent here, the FTAIA removes from the Sherman Act’s reach all commercial activity taking place abroad, unless the activity has a “direct, substantial, and reasonably foreseeable effect” on U.S. or import commerce, and such effect “gives rise” to a claim under the Sherman Act. Only after both elements are satisfied will a Sherman Act claim based on foreign activities be recognized.

In its lawsuit, Motorola accused several LCD manufacturers of conspiring to fix the prices of the liquid-crystal display (LCD) panels it purchased for assembly into finished mobile phones. However, Motorola only purchased 1% of the LCD panels at issue in the United States. The remainder of the purchases allegedly subject to price fixing were made by Motorola’s foreign manufacturing subsidiaries, primarily located in China and Singapore. These foreign panel purchases in turn fell into two separate categories: purchases of panels abroad for incorporation into mobile phones that were sold in the United States (accounting for 42% of Motorola’s claims); and purchases of panels abroad for incorporation into mobile phones that were sold outside of the United States (or 57% of Motorola’s claims).

Defendants sought summary judgment on all of Motorola’s claims arising out of purchases of LCD panels made by its foreign subsidiaries. Defendants argued that these “foreign injury” purchases were barred by the FTAIA because Motorola could not show that an effect on United States commerce gave rise to these claims.

As Motorola’s claims were consolidated in the Northern District of California for pre-trial purposes, a multi-district litigation (MDL) judge first decided the issue. The MDL court rejected defendants’ arguments and held that all of Motorola’s foreign injury claims were cognizable under the Sherman Act. After the case was remanded to the Northern District of Illinois for trial, however, defendants moved for reconsideration of the MDL court’s denial of summary judgment. The trial court granted the motion for reconsideration and held that all of Motorola’s foreign injury claims were barred by the FTAIA. The trial court certified its decision for immediate appeal.

Client Alert

OPINION

On March 27, the Seventh Circuit, in an opinion authored by Judge Posner, granted Motorola's petition for interlocutory appeal and affirmed the trial court's ruling on the merits without further argument.

As to purchases of panels abroad for incorporation into phones sold outside the U.S., the court held that these claims were "clearly barred" by the FTAIA. Slip Op. at 3. These LCD panels "never entered the United States" in any form, and therefore "never became domestic commerce" and "can't possibly support the Sherman Act claim." *Id.* at 2. Judge Posner called Motorola's arguments to the contrary "frivolous." *Id.* at 3.

As to purchases of panels abroad for incorporation into phones sold in the U.S., the court held that these claims were also barred by the FTAIA, for three reasons.

First, the court concluded that Motorola could not show a "direct" effect on U.S. commerce as a result of its foreign subsidiaries' purchases. *Id.* at 4. The court reached this conclusion despite the fact that Motorola alleged that the defendants were aware that Motorola's foreign subsidiaries intended to incorporate some of the LCD panels into products sold in the United States. *Id.* at 4. The court explained that the alleged price fixers were not selling panels in the U.S. Rather, they sold the LCD panels at issue abroad, to foreign companies (the Motorola subsidiaries), who in turn incorporated them into finished products (mobile phones) that were then exported to the U.S. for resale by the parent company (Motorola). *Id.* at 3. Any effect on U.S. commerce as a result of this attenuated chain of commerce was therefore "indirect" or "remote," and the "kind of effect that the statutory requirement of directness excludes." *Id.*

With respect to the "directness" requirement, the Seventh Circuit specifically distinguished its prior decision in *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc). In *Minn-Chem*, foreign sellers unlawfully conspired to drive up the price of potash for sale in foreign markets, which prices were then used as a benchmark for sales to U.S. customers. In that case, therefore, the effect on U.S. import commerce was sufficiently direct. Here, by contrast, Motorola's foreign injury claims were based on conduct in foreign commerce that "filters through many layers and finally causes a few ripples in the United States," (Slip Op. at 5 (quoting *Minn-Chem*, 683 F.3d at 860), and therefore was insufficiently remote.

Second, the court explained that Motorola's claims failed for an additional reason – any effect on U.S. commerce "could not give rise to an antitrust claim" on Motorola's part. *Id.* at 6. Higher prices for mobile phones that Motorola resold in the United States, the court explained, did not "give rise" to the foreign subsidiaries' antitrust claims. Motorola's foreign injury claims were based "not on any illegality in the prices Motorola charges" in the U.S. "but rather on the effect of the alleged price fixing on Motorola's foreign subsidiaries." *Id.* Moreover, any "derivative injury" the parent company might have suffered in the United States was irrelevant, because "derivative injury rarely gives rise to a claim under antitrust law, especially a claim by the owner of or an investor in the company that sustained the direct injury." *Id.* at 6. Hence, Motorola could not show an effect on U.S. commerce gave rise to its foreign injury claims.

Third, separate and apart from the statutory language, the court explained that the "expansive interpretation" of the FTAIA urged by Motorola would have "practical effects" that were "large and cut strongly against [Motorola's] position." *Id.* at 7. This is so because in today's economy virtually every large corporation has a globalized supply chain with manufacturing and purchasing operations based outside the U.S. The court noted that the Supreme

Client Alert

Court had previously warned that “rampant 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.’” *Id.* at 8 (quoting *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004)). One purpose of the FTAIA therefore was to prevent “unreasonable interference with the sovereign authority of other nations.” *Id.* (quoting *Empagran*, 542 U.S. at 164). Yet if the court were to adopt Motorola’s expansive interpretation of the FTAIA it would “enormously increase the global reach of the Sherman Act” and turn the United States into the world’s competition police officer. *Id.* Motorola, the court concluded, was “oblivious” to these concerns. *Id.* at 9.

CONCLUSION

The Seventh Circuit’s decision has two important implications for antitrust claims involving foreign commerce.

First, U.S. companies that have manufacturing and purchasing operations offshore are subject to the strictures of the FTAIA just like any other firm operating in foreign commerce. That Motorola’s foreign subsidiaries had assigned their claims to the U.S. parent company, or that Motorola made pricing decisions for its foreign subsidiaries in the U.S., was irrelevant. That the purchasing entities at issue were owned by a U.S. parent company was also irrelevant; the court explained that “a corporation is not entitled to establish and use its affiliates’ separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties.” *Id.* at 6 (quotation omitted). Motorola’s foreign subsidiaries, the court explained, have remedies available under the “antitrust laws in the countries in which they do business.” *Id.* at 7. If those remedies are less generous than remedies available under the Sherman Act, then that was a risk that Motorola assumed “by deciding to do business in those countries.” *Id.*

Second, the court’s conclusion that there was no “direct” effect on U.S. commerce as a result of component purchases abroad could have significant ramifications for the viability of indirect purchaser claims under state law. For example in the TFT-LCD MDL proceedings, a class of U.S. consumers recovered over \$1 billion in settlements. The claims in that case were based upon purchases of finished goods (i.e., TVs, computers, laptops) that contained LCD panels manufactured and sold in foreign commerce. If the FTAIA preempts state laws (a separate question not addressed in *Motorola*), then the court’s opinion could spell serious trouble for indirect purchaser claims based upon components sold in foreign commerce.

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Client Alert

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