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Seventh Circuit Affirms Dismissal of Antitrust Claims Based On Foreign Purchases

The United States Court of Appeals for the Seventh Circuit recently affirmed a district court's dismissal of antitrust claims based on purchases made by a U.S. corporation's foreign subsidiaries in overseas markets, ruling that such foreign transactions do not give rise to a claim under U.S. antitrust law. *Motorola Mobility LLC v. AU Optronics Corp., et al.*, No. 14-8003 (7th Cir. Nov. 26, 2014). The court's ruling preserves the federal government's ability to enforce U.S. antitrust law against foreign manufacturers, and simultaneously clarifies the requirements that U.S. companies with global supply chains must satisfy in order to recover treble damages in private antitrust lawsuits.

The *Motorola* case arises from purchases of liquid crystal display (LCD) panels by Motorola and its foreign subsidiaries from AU Optronics and several other foreign manufacturers, including Samsung, Sanyo Electric Co., and Paul, Weiss client Sharp Corporation. Motorola's complaint alleged that the foreign manufacturers violated section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring with each other to fix the prices that they charged for their LCD panels. Only one percent of the allegedly price-fixed panels were bought by, and delivered directly to, Motorola in the United States. The remainder were purchased by and delivered to Motorola's foreign subsidiaries—primarily in China and Singapore—for incorporation into mobile phones and other consumer products, only some of which entered the United States in their finished form.

In January 2014, a district court in the Northern District of Illinois granted summary judgment to defendants on Motorola's claims based on the 99 percent of LCD panels purchased by Motorola's foreign subsidiaries. The district court found that those claims were barred by the Foreign Trade Antitrust Improvements Act (FTIA), 15 U.S.C. § 6a, which limits the extraterritorial reach of U.S. antitrust law. The Seventh Circuit granted Motorola's petition for interlocutory appeal, and after full briefing and oral argument, including *amicus curiae* briefs from the Department of Justice and several foreign governments, affirmed the decision below, in an opinion by Judge Richard Posner.

The Seventh Circuit first found that the 99 percent of LCD panels purchased by Motorola's subsidiaries in foreign markets did not meet the FTIA's exclusion for "conduct involving . . . import trade or import commerce," 15 U.S.C. § 6a. Over half of those panels never entered the United States at all, even as components of finished products, so the court ruled that their purchases "can't possibly support a Sherman Act claim." (Slip op. at 3). And even with respect to those panels that were eventually incorporated into cellphones that were sold in the United States, "[i]t was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones." (*Id.* at

5). As a result, the transactions involving those panels could not satisfy the FTAIA's import commerce exclusion.

The court next turned to the FTAIA's so-called "direct effects exception," which provides that the Sherman Act may be applied to conduct involving foreign transactions if: (1) "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic commerce; and (2) "such effect gives rise to a claim" under U.S. antitrust law. 15 U.S.C. § 6a(1)-(2). The court highlighted that these are two separate and distinct requirements, both of which must be satisfied in order for a civil antitrust plaintiff to proceed: "The first requirement, if proved, establishes that there is an antitrust violation; the second determines who may bring a suit based on it." (Slip op. at 4).

Here, the Seventh Circuit assumed without deciding that Motorola could satisfy the first requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce. The court had previously issued an opinion in this case finding that the effect on U.S. commerce was too indirect or "remote" to qualify under the direct effects exception to the FTAIA. *Motorola Mobility LLC v. AU Optronics Corp., et al.*, No. 14-8003 (7th Cir. Mar. 27, 2014) (vacated July 1, 2014). But the court later vacated that opinion, and this time, found that the effect on domestic commerce "could be substantial, and might well be direct rather than remote." (Slip. op. at 5).

Proceeding to the second element of the direct effects exception, the court ruled that "[w]hat trips up Motorola's suit is the statutory requirement" that the effect on U.S. commerce "give rise to an antitrust cause of action." (*Id.* at 6). The transactions at issue here all occurred in foreign markets, when Motorola's foreign subsidiaries purchased panels from the defendants. The "immediate victims" of the alleged conspiracy were therefore the foreign subsidiaries, which are distinct corporate entities from Motorola, the U.S. parent, and are "governed by the laws of the countries in which they are incorporated and operate." (*Id.* at 7). Having availed themselves of foreign law for purposes of tax treatment and other benefits, the Seventh Circuit held that the subsidiaries must also seek relief under the antitrust laws of the countries in which they are incorporated or conduct business.

Meanwhile, the court concluded that any injury to Motorola itself as the parent corporation was purely an indirect and "[d]erivative injury." (Slip op. at 8-11). As a result, Motorola was barred from recovery under traditional principles of antitrust standing and the indirect-purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

In the concluding passages of its opinion, the Seventh Circuit underscored the "differences between a private damages suit" like this one and "a government suit seeking criminal or injunctive remedies." (Slip op. at 19). Among other things, private claimants must satisfy the "gives rise to" prong of the FTAIA, while the government need not. And the Seventh Circuit noted that governmental enforcement actions threaten little harm to international comity, while "[p]rivate plaintiffs . . . often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S.

Government.” (*Id.* at 20 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004))).

The clear implication of the Seventh Circuit’s ruling is that the Department of Justice may still proceed against foreign manufacturers whose anticompetitive conduct causes direct, substantial, and reasonably foreseeable harm to U.S. commerce. For companies like Motorola that operate through global supply chains involving foreign subsidiaries—an increasingly common occurrence in today’s global marketplace—the *Motorola* decision clarifies the statutory requirements that they must meet in order to recover treble damages under U.S. antitrust law.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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