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Foreign Antitrust Defendants Feel Some Relief from the Reach of the Sherman Act in Civil Matters

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The Seventh Circuit Court of Appeals ruled that Motorola cannot recover overcharges to its non-U.S. subsidiaries that purchased price-fixed LCD panels abroad, even though finished cellphones incorporating those panels were ultimately sold in the United States. The Court held that permitting such actions would be an unjustified interference with the right of foreign nations to regulate their own economies.

Foreign LCD Panel Cartel

Motorola and its foreign subsidiaries buy liquid crystal display (“LCD”) panels and incorporate them into mobile phones and other electronic devices that are eventually sold to U.S. consumers. Motorola filed suit under Section 1 of the Sherman Act against foreign LCD manufacturers, alleging that the prices of LCD panels were fixed in three separate types of transactions: (1) panels purchased directly by Motorola for use in products sold in the U.S., (2) panels purchased by Motorola’s foreign subsidiaries that eventually became part of products sold in the U.S. and (3) panels purchased by Motorola’s foreign subsidiaries that did not eventually become part of products sold in the U.S. In seeking relief, Motorola argued that the second and third types of price fixing transactions—accounting for

99% of Motorola’s alleged harm—injured its foreign subsidiaries and that it was entitled to recover for those injuries.¹

History of the Case

In Motorola’s lawsuit, the District Court had granted partial summary judgment to defendant manufacturers for all transactions involving purchases by Motorola’s foreign subsidiaries. The lower court reasoned that Sherman Act claims involving non-import foreign commerce were barred by the Foreign Trade Antitrust Improvements Act (“FTAIA”), 15 U.S.C. § 6a,² which excludes conduct involving foreign trade or commerce—including price fixing—

¹ Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842, 843-44 (7th Cir. 2014).

² *Id.* at 843.

unless that conduct produces a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce that also “gives rise to” the plaintiff’s claim.³

A three-judge panel of the Seventh Circuit then affirmed the District Court on interlocutory appeal, unusually deciding the issue without oral argument or additional briefing. This panel held that defendants’ alleged price fixing of LCD panels sold to Motorola subsidiaries abroad could not have a “direct” effect on U.S. commerce—even if the price-fixed LCD component panels were later incorporated into electronic products sold in the U.S.⁴ The Court also observed that price fixing of LCD panels purchased by Motorola’s foreign subsidiaries could not give rise to claims based on the subsidiaries’ injuries because “U.S. antitrust laws are not to be used for injury to foreign consumers.”⁵ This decision generated considerable controversy. The decision was later vacated, and the Court invited further briefing including amicus briefs from the Department of Justice and several foreign countries.

The Latest Developments

On November 26, 2014, the same three-judge panel of the Seventh Circuit again affirmed the District Court’s ruling. The Court held that the Sherman Act applies when (i) there is a direct, substantial and reasonably foreseeable effect on the U.S. economy and (ii) the effect gives rise to a federal antitrust claim. Assuming the first requirement was satisfied, the Court focused on the second requirement to determine who could bring a suit based on the assumed antitrust violation. Three points were key to the Court’s decision:

- First, the immediate victims of the price fixing were Motorola’s foreign subsidiaries. Because “U.S. antitrust laws are not to be used for injury to foreign customers”,⁶ Motorola’s foreign subsidiaries must seek relief under the law of the countries in which they are incorporated or do business, even if U.S. antitrust remedies are more attractive than those available to them in these other jurisdictions.⁷
- The *Illinois Brick*⁸ doctrine prevents an indirect purchaser from recovering damages under the Sherman Act. Here, as Motorola’s foreign subsidiaries were the direct purchasers and Motorola and its customers were the indirect purchasers, Motorola was thus barred from recovery as an indirect purchaser. The Court rejected Motorola’s argument that *Illinois Brick* should not apply when the direct purchaser was owned or controlled by the indirect purchaser. The Court also rejected several other attempts by Motorola to “wiggle out from under *Illinois Brick*.”⁹
- Third, the Court stressed that its decision applied to civil cases and that its ruling against Motorola would not interfere with criminal enforcement of the Sherman Act, where jurisdiction exists so long as foreign anticompetitive conduct has a direct, substantial and reasonably foreseeable effect on domestic U.S. commerce.

The Court emphasized that siding with Motorola would “enormously increase the global reach of the Sherman Act, creating friction with many foreign countries”.¹⁰ This risk was addressed at length in amicus curiae briefs filed by foreign authorities. The Korean Fair Trade Commission (“KFTC”) argued that overbroad application of U.S. antitrust

³ 15 U.S.C. § 6a.

⁴ *Motorola Mobility*, 746 F.3d at 844-45.

⁵ *Id.* at 845.

⁶ *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 858 (7th Cir. 2012).

⁷ *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, slip op. at 8 (7th Cir. Nov. 26, 2014).

⁸ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

⁹ *Motorola Mobility*, slip op. at 13.

¹⁰ *Id.* at 15.

laws could harm Korea's own enforcement efforts and infringe its sovereignty. It noted that companies prosecuted in Korea would be less likely to report violations through the KFTC's leniency programs if they feared suit in the U.S.¹¹ The Republic of China, Taiwan submitted similar views,¹² arguing that nations seek to regulate their own commercial affairs and that extraterritorial application of U.S. antitrust laws could cause friction with foreign nations. The Japanese Ministry of Economy, Trade and Industry ("METI"), stated that although it did not wish to restrict the U.S. government's ability to enforce U.S. antitrust law, giving private U.S. attorneys the right to interfere with Japanese governmental regulation of the Japanese market would be troublesome.¹³

What is most surprising however is that "Motorola . . . lost its best friend" during its journey.¹⁴ In its final *amicus curiae* brief, the Justice Department did not urge the panel to reverse its original decision; the brief only expressed concerns in relation to criminal enforcement of the Sherman Act, stressing that the FTAIA permits the Justice Department to pursue foreign anticompetitive conduct that has a direct, substantial and reasonably foreseeable effect on domestic U.S. commerce. This marked a radical shift away from the Justice Department's initial brief which tended to support Motorola and which had suggested that claims of international friction were overblown.

No Impact on Criminal Price Fixing Investigations

The Justice Department's *amicus* brief argued that the Court should limit its decision to civil actions under the Sherman Act. Consistent with the Justice Department's brief, the decision does not diminish the Justice Department's ability to prosecute foreign subsidiaries for criminal price-fixing violations. The decision acknowledges, as the government argued in its *amicus* brief that "[T]here is a difference between actions brought by the DOJ and private class action damages."¹⁵ While the U.S. government is sensitive to comity and sovereignty concerns when determining whether to bring a criminal prosecution, civil litigants are not equally sensitive and respectful.

Lessons Learned

In affirming the district court's decision against Motorola, the Seventh Circuit confirmed that a bright-line rule is its preferred choice in dealing with foreign component purchasers under the Sherman Act. Rather than address Motorola's claim that there was a direct, substantial and reasonably foreseeable effect on domestic commerce, for the purposes of its decision, the court was willing to accept Motorola's claim that it suffered from the described effects, but nonetheless found that Motorola could not recover damages on behalf of its foreign subsidiaries. The immediate victims of the price fixing were Motorola's foreign subsidiaries: "[T]o give Motorola rights to take the place of its foreign companies and sue on their behalf under U.S. antitrust law would be an unjustified interference with the right of foreign nationals to regulate their own economies."¹⁶ The Court noted that, having taken advantage of foreign countries' tax and labor laws by incorporating foreign subsidiaries, Motorola had to "take the good with the bad" and seek any antitrust remedies under the laws of those countries as well.

¹¹ Brief of the Korea Fair Trade Commission as *Amicus Curiae* in Support of Appellee's Opposition to Rehearing En Banc at 2-3, *Motorola Mobility* (No. 14-8003).

¹² Letter from Chang Chia-juch, Minister, Ministry of Economic Affairs, Republic of China, to Gino J. Agnello, Clerk of Court, U.S. Court of Appeals for the Seventh Circuit at 1, *Motorola Mobility* (No. 14-8003).

¹³ Motion for leave to file *amicus curiae* brief of the Ministry of Economy, Trade and Industry of Japan in support of appellees at 19, *Motorola Mobility* (No. 14-8003).

¹⁴ *Motorola Mobility*, slip op. at 18.

¹⁵ *Id.* at 19 (quoting Robert Connolly, *Repeal the FTAIA! (Or at Least Consider It as Coextensive with Hartford Fire)*, CPI ANTITRUST CHRONICLE 1, at 3 (Sep. 2014)).

¹⁶ *Motorola Mobility*, slip op. at 16.

To be clear, the Court's decision is limited exclusively to circumstances in which a U.S. corporation, in a civil action, seeks to recover damages on behalf of its foreign subsidiaries asserting an alleged violation of the U.S. antitrust laws. That of course leaves the foreign subsidiaries the opportunities to pursue those civil claims available under the laws of the countries in which they are incorporated. Furthermore, although this decision provides some relief from civil claims for manufacturers that do not sell directly into the U.S., companies involved in price-fixing of products sold abroad remain subject to the full force of the Justice Department's criminal enforcement program whenever their conduct arguably affects U.S. commerce.

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