Sherman Act's Int'l Reach — A Hot Issue In 2013 And 2014


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A number of important cases regarding the reach of the U.S. antitrust laws to conduct occurring overseas percolated through the courts in 2013. In particular, courts struggled with the meaning and impact of the Foreign Trade Antitrust Improvement Act,[1] which limits the extraterritorial reach of the Sherman Act. Cases are presently pending in the Second Circuit[2] and the Ninth Circuit[3] Courts of Appeals in which interpretation of the FTAIA are key questions.

The FTAIA sets forth a general rule that the Sherman Act does not apply to conduct "involving" trade or commerce (other than import trade or import commerce) with foreign nations, but includes an exception when the conduct significantly harms domestic commerce. The convoluted language of the FTAIA has led courts to pronounce that the Sherman Act does not apply to foreign conduct unless that conduct comes within one of two statutory exceptions: (1) the "import commerce" exception, or (2) the "domestic effects" exception. As will be explained below, during this year, courts and litigants have taken different positions with respect to the meaning of each of these exceptions.

Further, only recently, the government of Japan argued in a federal case that the FTAIA should bar damage claims brought by foreign-based subsidiaries of U.S. parent corporations which buy price-fixed components overseas.[4]

The Appeal in the Criminal Price-Fixing Case Against AU Optronics

In October, the Ninth Circuit heard oral argument in appeals from the criminal convictions of AU Optronics Corporation ("AUO") and two key executives, who were convicted in a jury trial in San Francisco of engaging in a global conspiracy to fix the price of TFT-LCD ("LCD") panels incorporated into computer monitors, notebooks and flat screen TVs. AUO argued on appeal that the "import commerce" exception should be construed narrowly, and should only apply where the defendant manufactures the actual good that is directly imported into the U.S.

AUO argued that it only manufactured a component (the LCD glass panel) that was incorporated into finished products made overseas, and it was the finished products that were imported into the U.S. AUO argued that the "import commerce" exception should be narrowly construed to apply only to foreign corporations who engage in "direct import sales" of the price-fixed products to U.S. customers. Pointing to a recent Third Circuit decision,[5] AUO argued that the indictment and proof of trial was deficient, even under a somewhat broader interpretation of the "import commerce" exception that applies where the defendant's conduct was "directed at an import market" or "targeted" the U.S. market.

AUO also argued on appeal that the government failed to prove the elements of the "domestic effects" exception to the FTAIA because the government failed to prove that AUO's conduct had a "direct" effect on domestic commerce.[6] AUO asserted that this exception did not apply because AUO did not import any products or manufacture any finished products; it only produced overseas a component that was incorporated into finished products by others. Under AUO's interpretation,

restraints in foreign markets for inputs that are used abroad to manufacture downstream products that may be later imported into the U.S. do not satisfy the requirement under the FTAIA "domestic effects" exception for a "direct, substantial and reasonably foreseeable effect" on domestic commerce.

Not surprisingly, the U.S. Department of Justice argued on appeal that its indictment and the proof of trial satisfied the requirements of the FTAIA. The DOJ argued that the key term "involving" import trade or import commerce in the FTAIA should be interpreted broadly to reach "fixing the price of panels made abroad and sold as raw panels in, and for delivery to, the United States."[7] The DOJ asserted that the narrow interpretation of the "import commerce" and "domestic effects" exceptions urged by defendants would be contrary to the FTAIA's purpose to ensure that purchasers in the United States remain fully protected by the federal antitrust laws.[8] A decision in this case is expected soon.

Continuing FTAIA Issues in the Opt-Out LCD Civil Cases

In the meantime, FTAIA issues continue to arise in the opt-out civil cases arising out of the LCD conspiracy. During the summer of 2013, opt-out plaintiff Best Buy went to trial against two remaining defendants, Toshiba Corporation (from Japan) and HannStar (a Taiwanese company). The jury returned a special verdict, finding that Toshiba did not knowingly participate in the alleged conspiracy; but that HannStar knowingly participated in the conspiracy to fix the prices of LCD panels; and awarded Best Buy damages for its direct purchases of approximately $7.4 million (substantially less than what Best Buy sought). In post-trial motions decided in November, the district court rejected HannStarr's argument that Best Buy had failed to satisfy the requirements of the FTAIA.[9]

The district court noted that the jury instructions specifically required the jury to find that the defendant knowingly joined an agreement to fix prices of LCD panels and that such agreement occurred in or affected interstate, import or foreign commerce. The instructions specifically noted that, "Any such conduct involving import commerce must have produced substantial intended effects in the United States; any such foreign commerce must have produced direct, substantial and reasonably foreseeable effects in the United States."

The court rejected HannStar's argument even though the jury arguably gave inconsistent answers to questions on the special verdict form. The jury answered "yes" to the question of whether Best Buy proved that the conspiracy involving these imported TFT-LCD panels and/or finished products produced substantial intended effects in the United States; but answered "no" to the question of whether Best Buy proved that the conspiracy involved conduct which had a "direct, substantial and reasonably foreseeable effect on trade or commerce in the United States".[10]

On the other hand, in another opt-out LCD case, brought by plaintiff Proview Technology Inc. and affiliated entities in Taiwan and China (referred to as the "Proview OEMs"), which actually purchased the LCD panels and incorporated them into finished products in Taiwan and China, the same judge granted a motion to dismiss on FTAIA grounds, finding that the complaint lacked enough specificity with respect to where the Proview representatives actually reached agreements with respect to the purchase price of the LCD panels it was buying — whether in Asia or in the U.S. Thus, the court concluded that the plaintiffs had not alleged sufficient facts to bring the Proview OEMs' Sherman Act claims within the "domestic effects" exception to the FTAIA.[11]

The Lotes v. Hon Hai Case in the SDNY

The Southern District of New York addressed the FTAIA and dismissed plaintiff's complaint in the recent case of Lotes Co. Ltd. v. Hon Hai Precision Industry Co. Ltd.[12] In this case, the plaintiff is Lotes, a Taiwan corporation, and the defendants are competing makers of Universal Serial Bus ("USB") connectors that are incorporated into notebook computers and the motherboards used in desktop computers and servers. These USB connectors comply with a technical standard to which one or more of the defendants had contributed intellectual property. Lotes claimed that the defendants had committed to the standard setting body that they would license their intellectual property at reasonable and nondiscriminatory, zero-royalty basis (RAND-zero terms) but failed to do so.

Lotes manufactured its USB connectors in China. The defendants also made their USB connectors in China. The defendants brought a patent infringement suit against Lotes in China, seeking to enjoin Lotes from selling certain of its USB connectors. Based on this conduct, Lotes brought suit under Sections 1 and 2 or the Sherman Act against the defendants in New York. Lotes alleged that "anything that affects the price, quantity or competitive nature of the production market for USB 3.0 connectors will ... have a direct, substantial and reasonably foreseeable effect on U.S. commerce" because any price increases in USB 3.0 connectors will "inevitably" be passed on in the price paid by purchasers in the U.S. for connector-incorporating computer products.

The district court dismissed the complaint, ruling that the court lacks subject matter jurisdiction under the FTAIA. The court concluded that any anti-competitive effect the conduct had on the relevant U.S. commerce was not "direct," as required to satisfy the requirements of the first prong of the "domestic effects" exception. The court held that an effect is "direct" if it follows as an immediate consequence of the defendant's activity.

Applying this holding to the "long and convoluted series of transactions and manufacturing steps" alleged, the court found "a disconnect between the relevant (foreign) market [in USB 3.0 connectors] — the market that defendants are alleging attempting to monopolize — and the [downstream] U.S. market supposedly affected by defendants' attempted monopolization (notebooks, desktop computers, servers)." The court ruled that such alleged "ripple" effects were simply "too attenuated to bring plaintiff's foreign injury within the ambit of the Sherman Act." Thus, the court dismissed the complaint for lack of subject matter jurisdiction.[13] The district court's dismissal is now on appeal before the Second Circuit.[14]

The DOJ and FTC Weigh in on the FTAIA in the Second Circuit

Significantly, in the Lotes appeal, the DOJ and Federal Trade Commission (collectively the "government") filed a joint amicus brief in the Second Circuit articulating their views on the proper interpretation of the FTAIA.[15] Interestingly, the government urged the Second Circuit to affirm the dismissal of the complaint, but on grounds different from those relied on by the district court. The government argues in its brief that the district court's definition of "direct" was based on a "flawed analysis."

According to the government, the district court erred by defining "direct" as an "immediate consequence"; rather, the government argues that the term "direct" should be given a broader meaning in the context of the FTAIA as "a reasonably proximate causal nexus." According to the government, the district court also erred by focusing on the number of steps in the manufacturing process. According to the government, the existence of multiple foreign transactions and manufacturing steps does not necessarily render an effect "indirect" within the meaning of the FTAIA. As the government argues, "a contrary rule would leave U.S. commerce vulnerable to anticompetitive conduct involving components incorporated into finished products abroad that increases the price of those finished products to U.S. purchasers in a non-remote, substantial and reasonably foreseeable way."

Nevertheless, the government argued that the Second Circuit should affirm dismissal of the complaint on the simpler basis that Lotes' claims cannot satisfy the second prong within the "domestic effects" exception, which requires that the domestic effect "gives rise to" the claim. According to the government, Lotes' claimed injuries — lost sales in wholly foreign commerce and the potential closure of its factories in China — did not satisfy the requirement that the domestic effect of the anti-competitive action "gives rise to" the plaintiff's claim. Under this view, the domestic effect must be the 'direct or proximate' cause of the plaintiff's injury.

The government thus pointed out that the "line of causation" in Lotes' complaint "runs in the wrong direction." Although Lotes alleged that the defendants' conduct had the effect of driving up prices of consumer electronic devices in the U.S., the higher prices in the U.S. did not cause Lotes' injury. To the contrary, Lotes suffered only foreign injury from lost sales of USB 3.0 connectors in wholly foreign commerce and the potential closure of its foreign factories; that injury results from the defendants' conduct, not its effect on U.S. commerce.

The government also urged the court (if it deemed necessary to its decision) to reject the Ninth Circuit's narrow definition of "direct effect" as one that "follows as an immediate consequence" of the

defendants' activity[16], and rather followed the "reasonably proximate causal nexus" standard articulated by the Seventh Circuit in the Minn-Chem case.

According to the government, this distinction is important since a cartel affecting components made overseas and sold overseas might not be reachable under the Sherman Act if a more narrow definition of "direct" is accepted. As the government argues in its brief, "if a conspiracy of foreign manufacturers to fix the price of components sold to other foreign manufacturers proximately caused effects on import commerce in finished products incorporating that price-fixed component — notably by increasing the price — that effect would be viewed as direct, and the FTAIA exception would apply (assuming the effect was also reasonably foreseeable and substantial)."[17]

In its brief to the Second Circuit, the government endorsed the rulings and jury instructions in the LCD cases, where the district court held that a direct effect on U.S. commerce exists where a conspiracy to fix the price of LCD panels that were made in foreign countries, sold to foreign entities, and generally incorporated into finished products at foreign factories, had increased the price for finished products sold in the U.S., and therefore came within the exceptions to the FTAIA.

Thus, both the Ninth Circuit in the AUO appeal and the Second Circuit in the Lotes appeal have an opportunity to address these important issues.

The Position of the Government of Japan

In another opt-out LCD civil case, the government of Japan, through its Ministry of Economy, Trade and Industry ("METI"), filed an amicus brief, urging the district court to reconsider a prior ruling allowing the foreign subsidiaries of U.S.-based companies to pursue treble damage antitrust claims, where the foreign subsidiaries purchased price-fixed components overseas.

METI explained that it submitted its brief since Japanese companies had been sued as defendants in the LCD civil cases but civil claims were being asserted by subsidiaries of U.S. corporations incorporated abroad, which purchased the LCD panels abroad. According to the brief, the government of Japan strongly opposes assertion of the extraterritorial jurisdiction that would unreasonably interfere with sovereign authority and violate fundamental principles of international law by allowing the "extraterritorial application of U.S. competition laws by foreign companies that have filed suit in U.S. courts, based on U.S. antitrust laws, but that are not affected substantially in the U.S."

Conclusion

Thus, the question of whether the Sherman Act should and can extend to price-fixing of components manufactured abroad and sold abroad will continue to be a hotly contested issue in 2014.

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[1] 15 U.S.C. § 6a.

[2] Lotes Co. Ltd. v. Hon Hai Precision Industry Co., Case No. 13-2280 (2nd Cir.).

[3] U.S. v. AU Optronics Corporation, Case No. 12-10550 (9th Cir.).

[4] Brief of the Ministry of Economy, Trade and Industry of Japan as Amicus Curiae in Support of Defendant's Motion for Reconsideration, filed on October 23, 2013 in Motorola Mobility, Inc. v. AU Optronics Corporation, Case No. 09-cv-6610 (N.D. Ill.). This is one of the opt-out cases in the TFT-LCD (Flat Panel) Antitrust Litigation.

[5] Animal Science Prod. Inc. v. China Minmetals, 654 F.3rd 462 (3rd Cir. 2011)

[6] The "domestic effects" exception has two requirements: first, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on commerce within the U.S. or U.S. import commerce; and second, a plaintiff seeking damages must establish that this domestic effect "gives rise to a claim" under the Sherman Act.

[7] DOJ brief filed in the 9th Circuit on 04/05/2013 in Case No. 12-10550 (ECF 36-1 at p.47).

[8] DOJ 9th Circuit brief at p.48

[9] See decision In Re TFT-LCD (Flat Panel) Antitrust Litigation; Order relating to Best Buy v. AU Optronics, Case C-10-4572, 2013 U.S. Dist. Lexis 168561 (N.D. Cal. Nov. 20, 2013)

[10] Relying on the recent 7th Circuit decision Minn-Chem, Inc. v. Agrium, Inc., 683 F.3rd 845 (7th Cir. 2012) (en banc), the District Court stated, "Best Buy presented evidence that over a number of years, the international cartel controlled well over 90% of the TFT-LCD market, charged supra-competitive prices for TFT-LCD panels, and those panels were incorporated into billions of dollars' worth of finished products such as computer monitors, notebook computers, and mobile phones that were imported into the United States and sold to United States companies and consumers."

[11] See In Re TFT-LCD (Flat Panel) Anti-Trust Litigation, Order dated March 20, 2013 relating to the opt-out case of Proview Technology, Inc. v AU Optronics, Case No. C-12-3802.

[12] Lotes Co. Ltd. v. Hon Hai Precision Industry Co., 2013 U.S. Dist. LEXIS 69407 (S.D.N.Y. May 14, 2013).

[13] The District Court noted a circuit split as whether the FTAIA is jurisdictional or whether it sets forth an additional substantive element of an antitrust claim. It followed Second Circuit authority to the effect that the FTAIA is a jurisdiction-defining statute.

[14] See endnote 2 above.

[15] Brief for the United States and Federal Trade Commission as amicus curiae in support of Defendants/Appellees, ECF No. 68 in Case No. 13-2280, filed 10/07/2013.

[16] See U.S. v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).

[17] Government brief in the Second Circuit at p. 27.
