

ANTITRUST UPDATE

## Seventh Circuit Interprets FTAIA to Bar Some of Motorola's Claims in LCD Case

The Seventh Circuit's November 26, 2014 decision in *Motorola Mobility LLC v. AU Optronics Corp., et al.*,<sup>1</sup> like its prior (now vacated) decision in the same case could substantially limit the ability of some plaintiffs to recover damages in the U.S. from participants in an overseas cartel. This decision interpreted the Foreign Trade Antitrust Improvements Act (FTAIA) to bar Motorola's claims for damages based on its foreign subsidiaries' purchases of price-fixed LCD panels.

The provision of the FTAIA at issue concerns the reach of U.S. antitrust statutes as to non-import foreign commerce. It provides that U.S. antitrust laws do not apply to non-import foreign commerce unless the overseas conduct at issue has: (1) a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and (2) an effect that "gives rise" to the U.S. claim.<sup>2</sup> These elements are sometimes referred to as the "domestic effects exception."

Judge Susan Illston in the Northern District of California, who presided over the LCD Multi-District Litigation, first ruled on whether the FTAIA permitted Motorola's claims regarding the panel purchases overseas. She denied defendants' motion for summary judgment, finding a triable issue of fact regarding whether Motorola could fit its claims within the domestic effects exception.<sup>3</sup> The case was then transferred to the Northern District of Illinois for trial. Motorola brought a motion for reconsideration of Judge Illston's ruling. Judge Joan Gottschall granted the motion. She held that Motorola could not fit its claims within the domestic effects exception.<sup>4</sup>

The Seventh Circuit issued the third opinion on Motorola's claims, affirming Judge Gottschall's ruling. The Seventh Circuit found that Motorola could not meet either prong of the domestic effects exception: Motorola could not show a "direct" or "substantial" effect and, separately, could not show that the effect "gave rise" to the Sherman Act claim.<sup>5</sup>

After several procedural twists and turns, the Seventh Circuit vacated its opinion and asked for further briefing. The government then filed an amicus brief suggesting that, if the court reaffirmed its dismissal of damages

<sup>1</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Nov. 26, 2014).

<sup>2</sup> 15 U.S.C. § 6a.

<sup>3</sup> 2012 U.S. Dist. LEXIS 112499, \*47 (N.D. Cal. Aug. 9, 2012).

<sup>4</sup> 2014 U.S. Dist. LEXIS 8492, \*36 (N.D. Ill. Jan. 23, 2014).

<sup>5</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014).

claims based on the overseas purchases by Motorola's subsidiaries, it should rule in a way that would not limit the government's ability to seek criminal or injunctive remedies against participants in a LCD-type conspiracy. That is, the government argued that the court should rule that plaintiffs met the first prong of the domestic effects exception but not the second.<sup>6</sup>

Last week's opinion took the path suggested by the government: it assumed that there was a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce but not that this effect "gave rise" to a Sherman Act claim. In other words, the effect in the U.S.—the increased price of cell phones in the U.S.—is not the same as the basis for Motorola's claims—overcharges for LCD panels in Asia. This ruling therefore does not limit the scope of the government's criminal enforcement power but does limit the ability of some private plaintiffs to obtain damages based on foreign purchases.

The opinion, authored by Judge Posner, called attention to the government's decision not to advocate that Motorola could meet both prongs of the domestic effects exception. Judge Posner quipped that the government's position meant that "Motorola has lost its best friend."<sup>7</sup> He also chided Motorola at both oral argument and in the court's opinion for setting up its subsidiaries under foreign corporate and tax law but then having these subsidiaries seek relief under U.S. antitrust law. He wrote, "Motorola is pretending that the foreign subsidiaries are divisions rather than subsidiaries. But Motorola can't just ignore its corporate structure whenever it's in its interests to do so."<sup>8</sup>

It is possible that the Supreme Court will provide some clarity on the FTAIA and these decisions in another opinion on Motorola's claims. Until then, the most recent decision means that defendants have a stronger FTAIA defense than before in certain cartel cases.

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<sup>6</sup> DOJ brief filed September 5, 2014 in Case No. 14-8003.

<sup>7</sup> Slip Op. at 18.

<sup>8</sup> Slip Op. at 11.