In Re-Issued Motorola Decision Interpreting the FTAIA, Seventh Circuit Panel Modifies Rationale for Dismissal of Price-Fixing Claims Arising from Foreign Component Purchasing

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In a recent and highly anticipated decision, the Seventh Circuit has revisited the issue of whether the FTAIA precludes antitrust claims by purchasers of price-fixed foreign components that were later incorporated into finished goods sold in the U.S.\(^1\) Writing again for the same three-judge panel that decided the case in March 2014, Judge Posner expressly preserved the U.S. Department of Justice’s (DOJ) ability to prosecute foreign component cartels criminally. Nonetheless, the opinion reaffirmed dismissal of Motorola’s $3.5 billion civil claims on a variety of grounds, the most important of which being that those claims failed the “second prong” of the FTAIA analysis -- that the requisite U.S. domestic effects “give rise to” a civil plaintiffs’ antitrust claim. The Seventh Circuit’s revised analysis in the Motorola case seems to represent a fairly straightforward application of guidance from the Supreme Court on interpretation of the FTAIA in civil cases,\(^2\) and relies on a different analytical approach than the panel’s controversial initial opinion.

History of the Case

The Foreign Trade Antitrust Improvements Act of 1982\(^3\) precludes the application of U.S. antitrust laws to anticompetitive activities outside the U.S. unless (1) the foreign conduct has a “direct, substantial, and reasonably foreseeable” effect on U.S. domestic commerce or import trade, and (2) the effect “give[s] rise” to a Sherman Act claim. At issue in Motorola was whether the company could bring a U.S. antitrust action against foreign liquid crystal display (LCD) manufacturers for allegedly fixing prices of LCD screens manufactured abroad, purchased by Motorola’s foreign subsidiaries, and incorporated into mobile phones at the foreign subsidiaries -- where a significant quantity of those phones were subsequently sold in the U.S.

\(^1\) Motorola Mobility, LLC v. AU Optronics, No. 14-8003 (7th Cir. Nov. 26, 2014).
\(^3\) The FTAIA specifies that in order for allegedly illegal conduct to be actionable in the U.S., the conduct must have a direct, substantial, and reasonably foreseeable effect --

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States....

The Seventh Circuit previously issued an opinion in this matter on March 27, 2014, but vacated the opinion and granted rehearing on July 1, 2014. In the March decision, authored by Judge Richard Posner, the court appeared to hold categorically that foreign component sales could never be subject to U.S. antitrust laws as they are too remote to meet the first prong of the FTAIA. Immediately following the issuance of the opinion, concerns abounded as to what impact such a holding might have on the DOJ’s ability to pursue criminal antitrust actions on the basis of such foreign component transactions.

On November 26, 2014, the court issued another opinion, reaching the same result but this time on grounds which expressly would not implicate the government’s ability to bring criminal enforcement actions against component price-fixers. The decision also clarified some of the difficulties inherent in bringing a private damages claim for foreign transactions, including reiterating the reasoning underlying the Supreme Court’s *Empagran* decision.4

**Background**

Motorola Mobility, Inc. (“Motorola”) is a U.S.-based technology company that manufactures mobile phones containing LCD screens. Motorola alleged that the defendant LCD manufacturers engaged in a global conspiracy to raise the price of LCD screens. Motorola’s LCD purchases were grouped into three categories for purposes of FTAIA analysis:

- **Category I**: LCD screens purchased by Motorola and delivered directly to Motorola’s U.S. facilities (about 1% of the implicated LCD screens)
- **Category II**: LCD screens purchased by Motorola’s foreign subsidiaries, delivered to the subsidiaries’ facilities outside the U.S., and later incorporated into mobile phones sold in the U.S. (about 42% of the implicated LCD screens)
- **Category III**: LCD screens purchased by Motorola’s foreign subsidiaries, delivered to the foreign subsidiaries’ facilities outside the U.S., and incorporated into mobile phones later sold outside the U.S. (about 57% of the implicated LCD screens)

The defendant manufacturers sought partial summary judgment, arguing that the LCD screens sold to Motorola’s foreign affiliates (the Category II and III purchases) were exempt from U.S. antitrust law pursuant to the FTAIA. Specifically, defendants argued that Motorola could not show that any alleged price fixing of LCD screens purchased abroad produced the requisite “domestic effect” needed to permit Motorola’s Sherman Act claim under the FTAIA.

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4 See *Empagran*, 542 U.S. 155.
The district court agreed with the defendants, concluding that the FTAIA barred Motorola’s Category II and III claims. Even though Motorola’s U.S.-based officers approved the LCD prices paid by the foreign subsidiaries, the district court was not persuaded that this approval was the “direct cause” of the foreign subsidiaries’ antitrust injuries. In the alternative, the district court noted that even if this U.S.-based approval was sufficient to “give rise” to an antitrust claim, Motorola would still fail to qualify for the FTAIA’s first requirement -- that the foreign conduct have a “substantial” effect on U.S. commerce or imports.

Seventh Circuit - March 27, 2014 Decision (Vacated)

In its initial opinion, the Seventh Circuit confirmed that the Category III products, which never entered the U.S., were altogether exempt from U.S. antitrust scrutiny. Most notable, however, was the Court’s analysis of the Category II products -- the LCD products bought by Motorola’s foreign affiliates and incorporated into mobile phones later sold in the U.S. The Court focused on the FTAIA exception’s first prong, which requires a “direct, substantial, and reasonably foreseeable effect” on U.S. domestic or import commerce. The court highlighted that the Category II products were purchased by the foreign affiliates, and entered U.S. commerce only as a “component” of the finished mobile phone. The court determined that “the effect of component price fixing on the price of the product of which it is a component is indirect,” and therefore could have no “direct” effect on U.S. commerce.

The U.S. government quickly objected to the Seventh Circuit’s categorical approach respecting the first prong of the FTAIA analysis. In an amicus curiae brief, the U.S. Department of State, Department of Commerce, Federal Trade Commission, and Department of Justice urged the Seventh Circuit to vacate its March decision and rehear the matter. In its brief, the government made two important arguments. It argued that even though the LCD screens were merely a component in Motorola’s foreign-manufactured mobile phones, price fixing of these components could still have a “substantial and foreseeable impact on U.S. commerce,” thus satisfying the FTAIA’s first prong. The government also argued that the court

6 Id. at *9
7 Id.
8 Motorola Mobility, LLC. v. AU Optronics Corp., 746 F.3d 842 (7th Cir. 2014), reh’g granted and opinion vacated (July 1, 2014).
9 Id at 844.
11 Id. at *12-14 (“[a] holding that component price fixing cannot proximately cause effects on commerce in component-incorporating products is likely to constrain the government’s ability to prosecute cartels . . .”).
should distinguish between private damages actions and government enforcement actions, requiring only the private plaintiffs, but not government enforcers, to prove that they suffered injuries that arose out of U.S. domestic effects.¹²

**Seventh Circuit- November 26, 2014 Decision**

In the most recent *Motorola* decision, Judge Posner (writing for the same three judge panel) took a different analytical approach.¹³ In this opinion, the court assumed for the sake of discussion that the FTAIA exception’s first prong was satisfied, and bypassed the issue to focus on the second prong.¹⁴

Ultimately, the court concluded that Motorola’s claims failed on three separate grounds. First, the court was highly skeptical of Motorola’s attempt to assert injury on behalf of its foreign subsidiaries given that they were created as independent legal entities for tax purposes.¹⁵ Second, the court found that the foreign subsidiaries were the direct purchasers of the cartelized LCD screens. Motorola itself, on the other hand, was merely an indirect purchaser, barred from recovery by the *Illinois Brick* doctrine.¹⁶ Finally, and most importantly, the court concluded that Motorola’s claims failed to satisfy the FTAIA’s second prong — that the plaintiffs’ antitrust claims must arise from the same domestic injury that satisfied the FTAIA’s first prong. Here, Judge Posner relied on the Supreme Court’s precedent in *Empagran*, which emphasized comity and respect for foreign countries’ own antitrust regimes.¹⁷ The court noted:

Motorola’s foreign subsidiaries were injured in foreign commerce—in dealings with other foreign companies—and to 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 nations to regulate their own economies.¹⁸

The Seventh Circuit also clarified that while private plaintiffs must satisfy this second prong, the government is required to meet only the first prong in criminal enforcement actions:

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¹² *Id.* at *10-11.

¹³ *Motorola Mobility LLC v. AU Optronics Corp*, No. 14-8003 (7th Cir. Nov. 26, 2014).

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 9-13 (It is important to note that because many states have passed legislation to negate the impact of the *Illinois Brick* decision, this aspect of the opinion applies only to federal antitrust claims, and not to indirect purchaser claims based on state law).

¹⁷ *Id.* at 16-17 (citing *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. at 165).

¹⁸ *Id.* at 16.
All that the government wants from us is a disclaimer that a ruling against Motorola would interfere with criminal and injunctive remedies sought by the government against antitrust violations by foreign companies. The government’s concern relates to the requirement of the Foreign Trade Antitrust Improvements Act that foreign anticompetitive conduct have a direct, substantial, and reasonably foreseeable effect on domestic U.S. commerce to be actionable under the Sherman Act. If price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the Act would not block the Department of Justice from seeking criminal or injunctive remedies. Indeed, we noted earlier that the Department successfully prosecuted AU Optronics for criminal price-fixing of the LCD panels sold to Motorola’s foreign subsidiaries. But the Department does not suggest that the defendants’ conduct gave rise to an antitrust damages remedy for Motorola.19

The Seventh Circuit’s willingness to revisit its prior approach to foreign component sales, while affirming the dismissal of Motorola’s claims on separate grounds, is fully in line with Supreme Court precedent in Empagran. Although both the government and private plaintiffs must prove that the challenged conduct has a “direct, substantial, and reasonably foreseeable” impact on U.S. commerce, private plaintiffs seeking damages face the additional hurdle of showing that their particular injury arises from the same domestic effect that satisfied the first prong.

**Implications and Open Questions**

Clients should assume that U.S. criminal enforcement of alleged price fixing of components manufactured outside the U.S. remains alive and well. Although the Seventh Circuit’s March decision created some confusion on this point, the November decision ultimately rested upon grounds that do not implicate the government’s ability to prosecute firms who fix the prices of goods or components bound for U.S. commerce.

With regard to civil matters, the second Motorola decision has confirmed that purchasers of foreign components will face a significant hurdle under the FTAIA’s second prong, regardless of whether such components are ultimately incorporated into products bound for import into the U.S. Moreover, the Seventh Circuit’s extended Illinois Brick discussion confirms that indirect purchasers of products containing price-fixed components will continue to have difficulty asserting damage claims under federal antitrust law. In the auto parts multi-district litigation, for example, car dealers and end-payors have brought primarily state law (rather than federal) claims for damages.20

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19 Id. at 17.

20 See e.g., In re: Automotive Parts Antitrust Litigation MDL, 12-MD-02311, Dkt. No. 87.
Although the second *Motorola* decision has clarified somewhat how the FTAIA impacts foreign component sales for civil litigants, there remains an open question about downstream claims in a situation where a foreign direct purchaser of price-fixed components is barred under the FTAIA. In such a case, would state law downstream claims by indirect purchasers in the U.S. also be barred under the FTAIA, or might there be a somewhat paradoxical result where indirect damage claims survive FTAIA analysis despite the fact that the predicate direct sales do not? These issues remain open at the moment, pending further judicial clarification, which may come from the auto parts cases or other future litigation. Stay tuned.

*If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:*

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21 *See e.g., In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 457 (D. Del. 2007) (“the Court is persuaded that Congress’ intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not”).