High Court Considering Fate of Three Antitrust Petitions

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UPDATE: On June 15, the Court denied review in *Hsiung v. U.S.*, Dkt. 14-1121, and *Motorola Mobility LLC v. AU Optronics Corp.*, Dkt. 14-1122. Apparently, *Dow Chemical Co. v. Industrial Polymers, Inc.*, Dkt. 14-1091, remains pending. The parties filed a joint motion to hold the petition in abeyance before release of the Supreme Court Order List, and the motion was subsequently withdrawn.
On June 11, the U.S. Supreme Court is scheduled to consider whether to grant review in three antitrust cases. We could know as early as next Monday the fate of the petitions for *certiorari*.

Two of the petitions question the application of the Foreign Trade Antitrust Improvements Act to an international cartel and the other raises class certification issues. Below are summaries of the questions raised to the Court.

FTAIA issues.

The Supreme Court is being asked to resolve a perceived split between the Seventh Circuit and the Ninth Circuit on the application of federal antitrust laws to a conspiracy to fix prices of thin-film transistor-liquid crystal display (TFT-LCD) panels. The cases involve the application of the Foreign Trade Antitrust Improvements Act (FTAIA) to the challenged conduct.

Taiwanese electronics manufacturer AU Optronics Corporation, two of its former officers, and the company's U.S. subsidiary are seeking review of a decision of the

U.S. Court of Appeals in San Francisco, upholding their convictions for their role in the TFT-LCD conspiracy. In another petition, U.S.-based cellphone maker Motorola Mobility is asking the Court to review a decision of the U.S. Court of appeals in Chicago, rejecting some of its claims for overcharges flowing from the alleged conspiracy that were paid by foreign subsidiaries. The petitions were discussed in an earlier blog post.

Last month, the Department of Justice filed its opposition brief in the criminal matter, asking the Court to deny *certiorari*. According to the government, the Seventh Circuit correctly held that the conspiracy involved "import trade or import commerce" within the meaning of Section 6a of the Sherman Act. In addition, the appellate court's alternative holding that the conspiracy had "a direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce within the meaning of Section 6a(1) of the Sherman Act was correct, in the government's view. Moreover, these determinations do not conflict with Supreme Court precedent or with decisions of any other court of appeals.

The government specifically addresses the criminal defendants' contention that the Ninth Circuit's decision conflicts with the Seventh Circuit's decision in the *Motorola* case. In the government's view, "no reason exists to think that the outcome of this criminal prosecution would be any different in the Seventh Circuit."

The Justice Department explains that Motorola's claims were divided into three categories: (1) Category One claims based on panels sold and delivered to Motorola in the United States; (2) Category Two claims based on panels sold and delivered to Motorola's foreign subsidiaries and incorporated into cellphones bound for the United States; and (3) Category Three claims based on panels sold and delivered to Motorola's foreign subsidiaries and incorporated into cellphones sold abroad. The government's case involved price-fixed panels sold and delivered to customers in the United States, like Motorola's Category One, which were not at issue in the appeal before the Seventh Circuit. "The Seventh and Ninth Circuits agree that conspiring to fix the price of TFT-LCD panels sold for delivery to the United States falls within Section 6a's import-commerce exclusion, and thus that petitioners' con-spiracy is subject to the Sherman Act," the government argued.

The government also noted that the Hsiung case "would be an unsuitable vehicle to consider the effects exception because petitioners' convictions can be affirmed solely on the basis of the import-commerce exclusion."

Motorola's petition questions the Seventh Circuit's holding that the FTAIA foreclosed the company's efforts to recover under the Sherman Act overcharges paid by wholly-owned foreign subsidiaries to the foreign LCD panel makers. The appellate court ruled that these claims were barred by the FTAIA because they did not involve "import trade or import commerce," and the effect on domestic commerce did not "give[] rise to a claim" under the Sherman Act.

Both the American Antitrust Institute (AAI) and National Association of Manufacturers (NAM) support Motorola's petition. AAI suggests that the Seventh Circuit takes too narrow a view of the import-commerce exclusion in requiring that the defendant be the actual importer. This holding is inconsistent with decisions of the Third and Ninth Circuits, as well as the language and intent of the FTAIA, according to AAI.

NAM asked the Court to clarify when the U.S. antitrust laws apply to transactions for goods intended for import into the United States. "U.S. manufacturers and their suppliers and affiliates, would be best served by this Court imposing clarity and consistency on the currently uncertain state of the law," NAM stated.

Class action certification. The third petition involving an antitrust case up for conference today was raised by Dow Chemical Company. Dow is asking the Court to review a decision by the U.S. Court of Appeals in Denver, upholding a district court's grant of class certification in an antitrust action against Dow and other chemical producers over an alleged conspiracy to fix prices for chemicals used in the manufacture of polyurethane products. In this matter, Dow has the defense bar in its corner. DRI has urged the Court to grant the petition.

Specifically, Dow aks: (1) whether, in certifying a class under Federal Rule of Civil Procedure 23(b)(3), courts may presume class-wide injury from an alleged price fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges; and (2) whether a class may be certified or a class-wide damages judgment affirmed where plaintiffs' common "proof" of damages is a model that (a) does not purport to determine the actual damages of most class members, but instead applies an "average" overcharge estimated from a sample of transactions of very different purchasers, or (b) assumes that defendants engaged in multiple antitrust violations, even though plaintiffs attempted to prove only one violation at trial.