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Convictions in LCD Panel Price Fixing Case Stand After Motions for Acquittal, New Trial Rejected

Jeffrey May (Wolters Kluwer) · Wednesday, June 20th, 2012

The government's successful prosecution of AU Optronics Corporation, its wholly-owned U.S. subsidiary, and two former company executives serves as a cautionary tale. The case marks the first time a company has gone to trial over charges resulting from a U.S. investigation into an international cartel. It highlights the dangers of participating in a price fixing conspiracy and perhaps more importantly the risks of fighting the Justice Department's charges in court.

A recent decision of federal district court in San Francisco is a reminder of these hazards. On June 11, the court issued an order denying the defendants' motions under Rule 29 of the Federal Rules of Criminal Procedure for acquittal and Rule 33 for a new trial based on insufficiency of evidence to sustain the convictions.

In March, following an eight-week trial, a federal jury found the companies and two top executives guilty of participating in a conspiracy to fix prices of thin-film transistor-liquid crystal display (TFT-LCD) panels. AU Optronics is the largest Taiwanese TFT-LCD producer and seller. TFT-LCD panels are electronic components used in computer monitors, televisions, and other consumer electronics.

The jury also found two company employees not guilty, and a mistrial was declared against a third employee. A retrial of that individual could take place as early as October.

The convicted defendants raised a number of arguments in an effort to overturn their convictions that were quickly rejected by the court. The defendants contended that the government failed to prove both of the required exceptions under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The court rejected the defendants' contentions that the government did not establish that: (1) the defendants fixed the price of TFT-LCD panels "targeted" for sale or delivery to the United States, and (2) the defendants' conduct had a "direct, substantial and reasonably foreseeable" effect on U.S. import commerce.

The jury was instructed on both of the FTAIA exceptions and found beyond a reasonable doubt that the government's evidence sufficed. A reasonable jury could have found that the price fixing conspiracy involved import commerce and that the conspiracy, which extended to the United States, had a "direct, substantial, and reasonably foreseeable effect" on that import commerce, the court ruled. Moreover, there was considerable evidence in the record from which a jury could find beyond a reasonable doubt that company employees participated in the conspiracy on behalf of the

company and reached illegal pricing agreements.

Alternative Fine Based on Gain

The jury's finding that the gross gain from the price fixing conspiracy was "$500 million or more" was supported by the evidence, the court held. The finding raises the potential for a fine well above the Sherman Act statutory maximum of $100 million. An alternative fine calculation under 18 U.S.C. § 3571(d) permits a fine of up to twice the gross gain derived from the crime or $1 billion in this case. Sentencing has been set for September.

The multiple regression analysis of the government's expert estimated total overcharges in excess of $2 billion, far more than $500 million. The defendants made no compelling argument as to why the jury's reliance on the expert's analysis was unreasonable, the court explained. Nor did they offer at trial any alternative assessment of gross gains earned by the conspirators. Further, the defendants' argument that the expert's testimony was flawed for failure to distinguish between panels affected by the conspiracy and unaffected by the conspiracy failed because the jury was charged with finding the total gain from the conspiracy, not the proportion of the panels affected by it.

Rule of Reason Analysis

The government was not required to allege and present its case under the rule of reason rather than as a *per se* violation of the Sherman Act, according to the court. The court rejected the defendants' argument that, because the alleged violations were based on foreign conduct, they were subject to rule of reason analysis. Also rejected was the defendants' due process argument that they only had fair warning that their conduct might be subject to a rule-of-reason analysis to determine whether there was a Sherman Act violation, not a *per se* analysis. There was ample evidence in the trial record that the defendants knew they were committing a wrongful act, in the court's view.

Improper Venue

The court also dismissed an argument that venue was improper in the Northern District of California. Guided by the parties' stipulated jury instructions regarding venue, the jury concluded that the conspiracy, while born abroad, extended into the district. The government presented evidence from which this finding could be made, including the fact that employees of the defendants were located in the district and that a customer maintained a procurement office in the district during the relevant period.

The June 11 decision in *U.S. v. AU Optronics Corp.*, ND Cal., 09-CR-0110, appears at **(CCH) 2012-1 Trade Cases ¶77,924**.

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