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Supreme Court Has Opportunity to Clarify Application of Foreign Trade Antitrust Improvements Act

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Last week, the U.S. Supreme Court was asked, in parallel petitions, to resolve a split between the Seventh Circuit and the Ninth Circuit on the application of the federal antitrust laws to a conspiracy to fix prices of thin-film transistor-liquid crystal display (TFT-LCD) panels. The petitions provide an excellent opportunity for the High Court to offer needed guidance on the Foreign Trade Antitrust Improvements Act (FTAIA), which the Court last took up just over a decade ago in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 2004-1 Trade Cases ¶74,448.

In a petition for *certiorari* filed on March 16, Taiwanese electronics manufacturer AU Optronics Corporation, two of its former officers, and the company's U. S. subsidiary seek 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. The next day, U.S.-based cellphone maker Motorola Mobility filed a petition, asking the Court to review a decision of the U.S. Court of Appeals in Chicago, rejecting their suit to recover overcharges paid by its foreign subsidiaries as a result of the alleged conspiracy. The two underlying cases involved the same conspiracy, but reached different results with respect to the application of the antitrust laws to the foreign conduct.

AU Optronics Conviction. In March 2012, a jury convicted AU Optronics and the related petitioners in a criminal price fixing suit. The federal district court in San Francisco refused to disturb the convictions (2012-1 Trade Cases ¶77,924) and later imposed a record-tying $500 million fine on AU Optronics and prison sentences on the executives. The Ninth Circuit affirmed.

Private Damages Suit. Motorola Mobility pursued a private damages action to recover overcharges resulting from the conspiracy. The federal district court in Chicago ruled in favor of the defending TFT-LCD makers. The appellate court affirmed, extinguishing most of Motorola Mobility's case.

The AU Optronics petition raises three questions. The first two involve the scope of the FTAIA. The third question involves the appropriate standard of liability for "foreign price fixing agreements under §1 of the Sherman Act."

Foreign Trade Antitrust Improvements Act. The FTAIA governs the extraterritorial reach of U.S. antitrust law. In the criminal case, the Ninth Circuit ruled that, because import trade is excluded from the FTAIA's limitations on the application of the antitrust laws, the FTAIA did not

bar the prosecution. The government sufficiently proved that the defendants engaged in "import trade," it was decided.

The Seventh Circuit, on the other hand, concluded that Motorola Mobility's claim was "tripped up" because, even assuming that there was a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce from the TFT-LCD conspiracy, the effect did not give rise to the federal antitrust claim. The immediate victims of the purported price fixing were Motorola's foreign subsidiaries that purchased the price-fixed LCD panels to use in the manufacture of cell phones, according to the Seventh Circuit.

In its petition, AU Optronics contends that the case involved foreign sellers who agreed overseas to fix the prices of goods sold to foreign buyers. They take issue with the Ninth Circuit's holding that the challenged conduct involved import commerce and that the import commerce covers any conduct consummated within an import market. They point out that the Ninth Circuit's view conflicts with the Seventh Circuit's decision to preclude recovery of overcharges resulting from the same conspiracy in Motorola Mobility's private action. According to AU Optronics, the import trade or commerce provision refers only to direct transactions between foreign sellers and domestic buyers.

AU Optronics also questions the Ninth Circuit's alternative holding that the challenged conduct had an "immediate consequence" on U.S. commerce, satisfying the FTAIA's requirement of a "direct" effect that "gives rise to" a Sherman Act claim. This determination cannot be reconciled with the Seventh Circuit's finding that Motorola's injuries were "indirect" and "derivative," it was argued.

In its petition, Motorola Mobility contends that certiorari should be granted based on the Seventh Circuit's unprecedented narrowing of U.S. antitrust law as it applies to international cartels. In addition to conflicting with the Ninth Circuit's decision, the Seventh Circuit's holding conflicts with a 2011 decision of the U.S. Court of Appeals in Philadelphia in *Animal Science Products, Inc. v. China Minmetals Corp*., 654 F.3d 462, 2011-2 Trade Cases ¶77,566, it was argued.

Standard of Liability for Foreign Price Fixing Agreement. The AU Optronics petitioners also ask the Supreme Court to decide whether the *per se* rule is appropriate for evaluating foreign price fixing agreements. They contend that rule of reason analysis is the proper test for reviewing a conspiracy involving "foreign manufacturers [meeting] overseas to fix prices of TFT-LCD panels in foreign sales to foreign buyers."

Questions Presented. AU Optronics and related petitioners raise the following questions: (1) whether a foreign seller's conduct can "involve[e] * * * import trade or commerce" even when the seller himself does not import any goods into the United States; (2) whether a foreign price fixing agreement can have the effect on U.S. commerce that is "direct" and "gives rise" to a Sherman Act claim, even when the agreement fixes prices only in foreign sales; and (3) whether a foreign price fixing agreement should be condemned as *per se* unlawful, instead of evaluated on a case-by-case basis under the rule of reason.

Motorola Mobility asks whether a cartel's delivery of price-fixed goods overseas for incorporation into finished products imported directly to the United States is immune from private suit under U.S. antitrust law. A second question concerning appellate procedure in the case asks whether, absent special circumstances, a motions panel may assign itself to decide the merits of a case.

While the disagreement among the circuits on the proper application of the FTAIA might persuade the Court to take up the one or both of th epetitions, it seems unlikely that the Court would disturb the Ninth Circuit's holding on the use of *per se* analysis for a "foreign price fixing agreement." In recent antitrust decisions, the Supreme Court has encouraged lower courts to apply an analysis appropriate for the type of conduct alleged. The presumption is now for application of rule of reason analysis. However, the Court has suggested that *per se* scrutiny remains the appropriate test for price fixing. The fact that foreign conduct is involved would not likely change the Court's view.

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