AntitrustConnect Blog

Judge Donato Issues FTAIA Order in Capacitors Civil Litigation

Robert E. Connolly (Law Office of Robert Connolly) · Monday, October 3rd, 2016

Thanks to my friend Jarod Bona at Bona Law PC, for alerting me to the September 30, 2016 Order of Judge James Donato regarding FTAIA issues in *In Re Capacitors Antitrust Litigation*, Master File no 14-cv-03264-JD (ND Cal.). It was obvious from the start of the DOJ criminal capacitors investigation that FTAIA issues were going to play a major role in the possible settlement of civil class action cases. See Robert Connolly, *Current Capacitor Investigation May be Tip of a Very Large Iceberg*, Law 360, October 1, 2015. Judge Donato addressed the FTAIA issues (relatively) early to narrow the scope of the costly litigation. The Court's 14-page opinion can be found here. Below are highlights of the opinion (in italics) with some of my thoughts added.

The Court started with the same observation as many courts grappling with FTAIA issues: "*As is often noted, the FTAIA is an "inelegantly phrased" statute. Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462, 465 (3d Cir. 2011); see also United States v. Hsiung, 778 F.3d 738, 751 (9th Cir. 2015) ("a web of words").*" The Court then noted:

> *"Congress's goal was to assure American companies that they would not be liable under the Sherman Act for conduct that typically would be considered anticompetitive so long as that conduct adversely affected foreign markets only. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161 (2004) ("Empagran I")."*

[As an aside–What an odd statute the FTAIA is. Fix prices if you must, but for heaven's sake, do it overseas! The immunity for price fixing overseas stands in stark contrast to the expansive application of the Foreign Corrupt Practices Act (FCPA). If you wish to procure a contract in Vietnam for example, it is illegal under US law to bribe the purchasing officer, but rigging the bid is OK. If ever the FTAIA is amended, I hope this oversight is addressed. See Robert Connolly, *Repeal the FTAIA, Connolly Competition Policy International* Sept 14, 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501336; Cartel Capers, *Motorola Mobility and the FTAIA*, September 30, 2014, available at http://cartelcapers.com/blog/motorola-mobility-ftaia/.]

Judge Donato explained why he was dealing with FTAIA issues at an early stage in the litigation:

> *"The extraterritorial reach of the Sherman Act remains far from obvious in the case law. The facts pertinent to the FTAIA add to the complexity of applying it. All of this can make cases with a serious FTAIA component a time and money sinkhole for the litigants. The typical case management schedule exacerbates the problem by tending to defer FTAIA determinations until late in the case and after years of staggeringly costly multinational discovery."*

The Court's solution:

"[T]he Court decided to address the FTAIA issues sooner rather than later in the case. The goal was to resolve the parties' FTAIA disagreements early enough to realize downstream efficiencies and economies in discovery and class certification and other motions. Early resolution might also help to spur settlement talks. To these ends, the Court set a separate and early briefing track for FTAIA issues. After an initial round of briefs on this track, it became clear that a phased approach would simplify and clarify resolution of the FTAIA questions."

Application of the FTAIA involves substantial discovery because courts consider the FTAIA to be a substantive element of a Sherman Act offense rather than a jurisdictional element. *"In our circuit, it is now settled that the limitations imposed by the FTAIA are not jurisdictional but go to the merits of a Sherman Act claim. Hsiung, 778 F.3d at 751."* In *Hsuing*, the Ninth Circuit joined the Second, Third and Seventh Circuit in finding that the FTAIA imposes substantive elements, not a jurisdictional element of a Sherman Act claim. The practical effect of this is that instead of the plaintiffs bearing the burden of showing that the court has jurisdiction under Fed R. Civil P. 12 (b)(1), the allegations in the complaint are taken as true for purposes of a motion to dismiss under Fed R. Civil P. 12(b)(6). See Cartel Capers, *Second Circuit Adds Voice to the Extraterritorial Application of the FTAIA*, June 12, 2014.

Judge Donato then addressed the FTAIA issues in a very organized way. The Court classified the commerce at issue into four distinct categories and either made a ruling or gave guidance as to each category.

A. Capacitors Billed To Entities In The U.S.

By the terms of the FTAIA "import trade or import commerce with foreign nations" falls squarely within the scope of the Sherman Act and no FTAIA analysis is necessary. *"The parties agree that capacitor sales billed to entities in the United States are not excluded by the FTAIA regardless of where the products were ultimately delivered."* I don't know how much commerce falls within this category. But, it is worth noting that since there were sales of capacitors in the United States the Antitrust Division will not have to rely on FTAIA commerce to obtain convictions. Two companies have pled guilty so far; FTAIA commerce may have been a factor in sentencing. See Cartel Capers, *Hitachi Chemical Sentenced for Role in Capacitor Cartel*, June 10, 2016.

B. Capacitors Billed To Foreign Entities But Shipped To The U.S. — Scope Of "Import Trade Or Commerce"

I will just quote from the Court at length:

> *Here, the undisputed facts for the transactions in this category are that defendants*

> *invoiced capacitor sales to a foreign purchaser but directly shipped the capacitors to a location in the United States. Defendants not only knew and intended that the goodswould be delivered to the United States, they themselves shipped them here. …Consequently, the transactions in this category qualify as import trade or commerce. This holding is consonant with Hsiung. Our circuit declined to "determine the outer bounds of import trade," but it did expressly take note of the Third Circuit's test that "the import trade exclusion . . . applies to importers and to defendants whose 'conduct is directed at a U.S. import market,' even if the defendants did not engage in importation of products into the United States." 778 F.3d at 755 n.8.*

C. Capacitors Billed And Shipped To A Foreign Entity — Proximate Cause Under The Domestic Effects Exception

To meet the domestic effects exception and come within the scope of the Sherman Act, the nonimport trade or commerce conduct must have had a "direct, substantial and reasonably foreseeable" effect on U.S. domestic commerce, and this domestic effect must have "given rise to" the Sherman Act claim. 15 U.S.C. § 6a. It is very difficult for foreign purchasers to show that higher fixed prices in the United States "gave rise to" their claim. Judge Donato, however, rejected the defendants' argument that as a matter of law, sales in this category can never meet the FTAIA test. But, the Judge also rejected the plaintiffs' argument that due to global interdependence, inflated prices in the US cause inflated prices worldwide. "*Going forward in this case, the Sherman Act claims of foreign purchasers who were invoiced and received their capacitors abroad are not barred as a matter of law, but they may not allege a claim on the basis of a global pricing theory*." In a bit of a discouraging note for plaintiffs, the Court stated the plaintiffs may proffer facts "*showing that they can get through the eye of a needle."*

D. Capacitors Incorporated Into Products Destined For Sale In The United States

I suspect that the big FTAIA issue in the plaintiffs' case for damages will be the treatment of this category of commerce. The Court noted that *"capacitors are tiny parts that cost pennies or less to buy, and are unlikely to be a substantial cost component of finished products even when used in volume."* The Court postponed disposition of this issue until more facts were developed but noted, "*The parties are advised to consider the discussion of Hsiung when returning to this category in future motions."*

The reference to *Hsuing* may be a bad omen for the plaintiffs. *Hsuing* involved the global cartel TFT-LCD screens cartel; components used in computers and smart phones. These screens were a substantial cost of the finished product and it was well understood by the conspirators that substantial numbers of these finished products were to be shipped to the United States at inflated prices. The parties' analysis as to whether "capacitor component " price fixing will meet the FTAIA test will inform their respective settlement postures.

State Law Claims

The Court also added this observation about the plaintiffs' state law claims.

> *Plaintiffs have not cited any federal or state decisions that extend the reach of a state*

> *law beyond the FTAIA, and the Court declines to do so here. [But can the reach of state law claims be less than the reach under the FTAIA/]. The Court defers resolution of this issue until the parties file supplemental briefs addressing it on a state-by-state basis.*

This was an early ruling by Judge Donato to narrow but not eliminate the FTAIA issues and give guidance that may inform discovery and/or settlement postures. There may be more from Judge Donato on the FTAIA to come.

P.S. For an article arguing that the FTAIA imposes a jurisdictional limit on courts see Abbott B. Lipsky, Jr. and Kory Wilmot, *The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?*, The Antitrust Source, August 2013.

This entry was posted on Monday, October 3rd, 2016 at 2:44 pm and is filed under Antitrust Exemptions & Immunity
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.