
Motorola Mobility v. AU Optronics: Seventh Circuit Curtails Liability for Foreign Component Sales in International Cartel Cases

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Yesterday, the United States Court of Appeals for the Seventh Circuit issued an important opinion in *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2014 WL 1243797 (7th Cir. Mar. 27, 2014), part of the LCD flat panel antitrust litigation that has been ongoing since December 2006. The court held that the Sherman Act, 15 U.S.C. § 1, does not reach price fixing of inputs sold outside the United States that are later incorporated into finished products subsequently imported into the United States. This decision may have immediate implications for, among other cases, antitrust actions seeking damages under U.S. antitrust laws for alleged price fixing of component parts in foreign markets.

Decision

Writing for the court, Judge Posner affirmed the district court's entry of summary judgment against Motorola's price-fixing claims based on overseas purchases of LCD panels by Motorola's foreign affiliates. In so doing, the decision eliminated all but about 1% of Motorola's \$5.4 billion in claimed damages. The only remaining claims are those involving LCD panels sold directly into the United States—that is, in U.S. import commerce.

The Seventh Circuit held that Motorola's claims were barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), which limits the application of U.S. antitrust laws to foreign conduct. The FTAIA provides that U.S. antitrust laws do not apply to anticompetitive conduct in foreign, non-import commerce unless (1) the foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and (2) this effect "gives rise to" the plaintiff's claim.

Motorola's complaint against major LCD manufacturers asserted antitrust claims for allegedly fixing the prices of LCD panels used as a component in Motorola's mobile phones. Motorola sought to recover (1) for LCD panels imported into the United States, (2) for LCD panels purchased outside the United States that were used as inputs in finished products that Motorola later imported into the United States, and (3) for LCD panels purchased outside the United States that were used as components in finished products that Motorola's affiliates sold outside the United States.

The case was originally filed in the Northern District of Illinois, but was transferred to Judge Illston of the Northern District of California for coordinated pretrial proceedings as part of the LCD multi-district litigation. The defendants moved for summary judgment under the FTAIA as to claims based on sales made outside the United States. Arguing against the motion, Motorola relied heavily on the role of its U.S. parent in approving purchasing decisions and the activities of the defendants' sales personnel in the United States. Judge Illston denied the defendants' motion, ruling that although the sales took place outside the United States between the defendants and Motorola's foreign subsidiaries (including the issuance of purchase orders, issuance of invoices, payments, and delivery of the products) there was evidence that could allow a jury to find that final decisions regarding pricing of LCD panels took place in the United States, thus satisfying the FTAIA's "domestic effect" exception. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2012 WL 3276932, at *2 (N.D. Cal. Aug. 9, 2012). The case was then remanded to Judge Gottschall of the Northern District of Illinois for a trial set to begin this month. After defendants moved for reconsideration of Judge Illston's ruling, the court granted summary judgment and certified the decision for immediate interlocutory appeal. See *Motorola Mobility, Inc., v. AU Optronics*, No. 09-C-6610, 2014 WL 258154, at *5–10 (N.D. IL Jan. 23, 2014).

The Seventh Circuit affirmed Judge Gottschall without further briefing or oral argument. The court first held that Motorola's claims based on its foreign subsidiaries' purchases could not satisfy the FTAIA's "direct ... effect" on U.S. commerce exception because the negotiation or approval of prices in the United States is not itself an anticompetitive effect on U.S. commerce when the prices that were actually paid to any of the defendants occurred in a foreign country. Instead, the effect on U.S. commerce from the sales to the foreign subsidiaries was "indirect— or 'remote' ... the kind of effect that the statutory requirement of directness excludes." *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2014 WL 1243797, at *2 (7th Cir. Mar. 27, 2014) (citation omitted). In particular, "[t]he alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent." *Id.*

Judge Posner distinguished the Seventh Circuit's *en banc* decision in *Minn-Chem, Inc. v. Agrium, Inc.*, 638 F.3d 845 (7th Cir. 2012) (*en banc*), where the court held that the Sherman Act applies to foreign conduct that has a "reasonably proximate causal nexus" to effects in the United States. *Id.* at 857. He emphasized that although *Minn-Chem* involved foreign sellers who "took steps outside the United States" to raise prices, once successful they sold the allegedly price-fixed product to U.S. customers. *Motorola*, 2014 WL 1243797 at *2 (citing *Minn-Chem*, 638 F.3d at 860). By contrast, Motorola's claims were similar to *Minn-Chem*'s description of a "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Minn-Chem*, 638 F.3d at 860. In *Motorola*, those layers were Motorola's foreign subsidiaries and their foreign purchases of the LCD panels.

Judge Posner then turned to the FTAIA's separate requirement that effects on U.S. *domestic commerce* must "give[] rise" to the plaintiff's antitrust claim. *Id.* at *3–4. He first observed that "Motorola's claim against the defendants is based ... on the effect of the alleged price fixing on

Motorola's foreign subsidiaries." *Id.* at *3. And any effect on U.S. commerce "is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component." Therefore, "the effect in the United States of the price fixing could not give rise to an antitrust claim" because that effect—potentially higher prices for Motorola's mobile phones in the United States—did not stem from a violation of U.S. antitrust laws. *Id.* Judge Posner emphasized that "[i]f Motorola's foreign subsidiaries have been injured by violations of the antitrust laws in countries in which they do business; if the remedies are inadequate, or if the countries don't have or don't enforce antitrust laws, th[o]se were risks ... [Motorola] assumed by deciding to do business in [foreign] countries." *Id.*

Finally, in a concluding portion of the opinion that may have particularly far-reaching implications, Judge Posner wrote that "we don't want to rest our decision on the statutory language ... without considering the practical stakes in the expansive interpretation urged by Motorola." *Id.* at *4. "[T]he stakes are large and cut strongly against [Motorola's] position. Nothing is more common nowadays than for products imported into the United States to include components that the producers had bought from foreign manufacturers." *Id.* After emphasizing that the Supreme Court has warned against "rampant extraterritorial application of U.S. law," Judge Posner observed that Motorola's position would "enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer.'" *Id.* at *8 (citation omitted).

Implications

The *Motorola* decision could have immediate and far-reaching consequences. In recent years, there have been an increasing number of criminal investigations and civil complaints directed at alleged cartels involving components sold overseas and reaching the United States only after being incorporated into finished goods. In a decision authored by Judge Posner, one of the federal bench's most prominent judges and antitrust scholars, the Seventh Circuit has now issued an opinion holding that the Sherman Act does not reach such claims. The decision, moreover, may have implications going far beyond private litigation by direct purchasers under the Sherman Act. It may be used to challenge claims by indirect purchasers of the imported finished products suing under state antitrust and consumer protection laws. It may also be used to challenge the Department of Justice's authority to prosecute cartel conduct involving price fixing of components in foreign markets that are later incorporated into finished goods imported into the United States, or to limit the fines that the Department may obtain.

Authors



Steven F. Cherry

PARTNER

✉ steven.cherry@wilmerhale.com

☎ +1 202 663 6321



Leon B. Greenfield

PARTNER

✉ leon.greenfield@wilmerhale.com

☎ +1 202 663 6972



Perry A. Lange

PARTNER

✉ perry.lange@wilmerhale.com

☎ +1 202 663 6493