SQUIRE PATTON BOGGS

APPELLATE COURT RULING MAKES IT EASIER TO APPLY US ANTITRUST LAWS TO FOREIGN CONDUCT

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The extent to which foreign conduct can run afoul of the US antitrust laws remains an unsettled question. Cases related to that question were recently before three US appellate courts. In one of the three, the Second Circuit issued an opinion that makes it easier to apply US antitrust laws to anticompetitive conduct that occurs outside the US. In *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.,* No. 13-2280, slip op. at 2 (2d Cir. June 4, 2014) (*Lotes*), the Second Circuit Court of Appeals interpreted the Sherman Act's provisions relating to foreign trade. While the opinion leaves many unanswered questions, it is likely that the effect of the decision will be to make it easier for litigants in the US to bring claims against companies for conduct outside the US.

The Foreign Trade Antitrust Improvements Act

The *Lotes* case is the most recent of a number of cases working their way through the appellate courts that are focused on the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a. The FTAIA is a Sherman Act amendment that limits the statute's ability to reach conduct outside the US. After the FTAIA, foreign conduct can lead to a Sherman Act violation only if: (1) the foreign conduct relates to commerce imported into the US; or (2) the foreign conduct (a) has a "direct, substantial, and reasonably foreseeable effect" on US commerce, *and* (b) "gives rise to a claim" under the Sherman Act. 15 U.S.C. § 6a. It is the second prong of the FTAIA test, known as the domestic injury exception, that was the subject of the *Lotes* appeal and has been the subject of litigation in other circuit courts. In addition to the *Lotes* opinion by the Second Circuit, the Seventh Circuit recently issued an opinion addressing the FTAIA in *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014). A decision by the Ninth Circuit is pending in *United States v. AU Optronics Corp.*

Lotes Co., Ltd., a manufacturer of computer components including USB connectors, brought Sherman Act claims against two competitors, Hon Hai Precisions Industry Co., Ltd. and Foxconn International Holdings, Ltd., and certain affiliates. Lotes alleged its competitors, foreign companies with foreign manufacturing operations, prevented Lotes from being able to manufacture new USB 3.0 connectors. Lotes claimed that the defendants refused to license needed technology to Lotes, contrary to prior commitments made by the defendants to license on reasonable and non-discriminatory terms. One or more of the defendants also brought patent infringement suits against Lotes in China based on Lotes manufacture and sale of USB connectors. These connectors are incorporated into numerous electronic products (such as laptops and mobile devices) by companies in China, that assemble finished goods that are later sold in the US. Lotes alleged that the refusal to license combined with the patent infringement suit constituted anticompetitive conduct in violation of the Sherman Act.

The district court dismissed Lotes's antitrust claims finding the alleged conduct did not lead to a "direct effect" in the US. In the district court's view, there was not a sufficiently direct link between the market for USB connectors in China, which plaintiffs claimed was being monopolized, and the market for electronic products in the US that use USB connectors that the plaintiffs claimed was affected by the conduct. Applying the standard used by the Ninth Circuit in *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004), the district court found that the conduct in China did not have the "immediate consequences" in the US required to be a direct effect under the FTAIA.

The Second Circuit, at the urging of the US Department of Justice and the Federal Trade Commission as amicus curae, rejected the district court's view of what constitutes a direct effect under the FTAIA. The court found the Ninth Circuit's immediate consequences test to be too limiting. Instead, the court applied the test used by the Seventh Circuit in *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). Under the *Minn-Chem* standard, "direct" means only a reasonably proximate causal nexus. 683 F.3d at 857. Although the district court, in finding no directness, gave weight to the USB connectors' being manufactured and assembled into finished products in China, the Second Circuit was persuaded that "[t]his kind of complex manufacturing process is increasingly common in our modern global economy" and such a multi-layered supply chain can transmit antitrust injuries. *Lotes*, No. 13-2280, slip op. at 43.

Although the Second Circuit found that the foreign manufacturing and assembly of the product could meet the FTAIA's directness requirement, the court ultimately affirmed the district court's dismissal of the action. Despite explaining the directness standard of proximate causation, the court did not address whether the facts in *Lotes* were sufficient to meet that standard. Instead, the Second Circuit upheld dismissal because the plaintiffs were unable to meet the second prong of the domestic injury exception – that the foreign conduct gave rise to the injury alleged in the US. The court found that Lotes alleged the defendants' foreign conduct drove up the prices of consumer electronics in the US, but Lotes's alleged injury was its exclusion from the market for USB connectors. The foreign conduct did not give rise to that alleged injury and therefore did not meet the second prong of the FTAIA domestic exception.

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Looking Forward

The *Lotes* decision comes on the heels of the Seventh Circuit's March 27, 2014, decision in *Motorola Mobility*. In that matter, the Seventh Circuit took a more restrictive approach to the domestic exception of the FTAIA. That court found that foreign conduct by manufacturers of LCD components, purchased by foreign subsidiaries of U.S. companies and assembled abroad into products sold into the US lacked a "direct effect" and did not "give rise to" a Sherman Act claim. 746 F.3dat 845 (citing *Minn-Chem, Inc.*, 683 F.3d at 856-57) (motion for en banc review pending). The Seventh Circuit reasoned that the foreign LCD components had only an "indirect" or "remote" effect on US domestic commerce, insufficient to satisfy the directness requirement of the statutory domestic injury exception. *Id.* at 844-45. The Ninth Circuit will likely have more to say on the FTAIA when it decides the *AU Optronics* matter pending before it.

Given the somewhat conflicting reasoning by the Seventh and Second Circuits, there is not clear guidance on when a corporation's foreign conduct may be subject to the Sherman Act. The more closely the conduct can be tied to an effect in the US, the more likely the conduct will come within the reach of the Sherman Act. More guidance from the courts is needed on how close that connection must be to come within US law. Given the importance of the issue and the somewhat differing pronouncements by the circuit courts, the question of the extent of the FTAIA's extraterritorial reach may be headed to the Supreme Court.

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