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The Ninth Circuit Gives the Antitrust Division Another Victory in a Cartel Case and Provides Further Guidance on the FTAIA

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Overview

In a victory for the U.S. government, the Ninth Circuit last Thursday affirmed criminal price-fixing convictions of AU Optronics, Inc. ("AUO"), a Taiwanese-based company, and two of its senior executives arising from alleged price-fixing of LCD panels. The decision, and underlying reasoning, marks another step in the Department of Justice's Antitrust Division's pursuit of international cartels and its aggressive approach with regard to conduct and products that fall within its jurisdiction. It also shows the increasing willingness of U.S. courts to provide a forum for criminal and civil antitrust claims—cases in which foreign companies, primarily Asian-based companies, are frequently targets and defendants.

A. The LCD Investigation and the AUO Trial

The Ninth Circuit's opinion is the latest development in the Antitrust Division's long-running cartel investigation into alleged price-fixing of LCD panels that has targeted Asian-based manufacturers and their executives. The investigation began in 2006 and the Division has negotiated several criminal plea agreements with Asian-based manufacturers requiring them to plead guilty to felony violations of the Sherman Act and collectively paying almost $1.5 billion in penalties. Several foreign nationals have also pled guilty and served substantial prison sentences.

In contrast, AUO declined to enter a plea agreement, was indicted, and after an eight week jury trial in San Francisco federal court in early 2012, was found guilty of price-fixing and subsequently sentenced to a $500 million fine and probation. Two of its Taiwanese-based executives were convicted individually at the same trial and received multi-year jail sentences.

B. AUO's Appeal and the FTAIA

AUO appealed the verdict on multiple grounds, but the elements of the Ninth Circuit's opinion on AUO's challenges under the FTAIA are of particular interest. To understand these, it is necessary to have a basic understanding of the FTAIA. The statute was enacted 35 years ago and provides limits on the extraterritorial reach of the U.S. antitrust laws and the situations in which the Sherman Act applies to overseas conduct. The FTAIA bars Sherman Act claims based on conspiracies occurring in foreign

commerce, so conspiratorial conduct occurring in foreign commerce cannot be the subject of criminal or civil claims under U.S. federal law.

But by its terms, the FTAIA's bar does not apply to "import trade or import commerce." It also states that conduct involving foreign trade or commerce having a "direct, substantial, and reasonably foreseeable effect" on the U.S. (referred to as the "domestic effects" test) remains within the purview of the Sherman Act. It is these two points which the Court discussed in the FTAIA portion of the opinion.

The LCD panels alleged to have been the subject of the price-fixing agreements raised interesting FTAIA issues. Many of the panels were manufactured in Asia and then sold to other foreign-based companies for use in manufacturing products ranging from phones to televisions that were subsequently imported into the U.S. The Court noted that at trial, the Antitrust Division had proceeded on a domestic effects theory arguing that the price-fixed panels were included in finished consumer goods sold in the U.S. and thus were captured by the FTAIA exception. In its appeal, AUO contended that because the majority of panels were sold to third parties outside the U.S. and not directly imported into the country, the effects of the price fixing were too attenuated to satisfy the domestic effects test. Accordingly, AUO argued, the conduct was beyond the scope of the Sherman Act and thus could not form the basis for the Antitrust Division's criminal lawsuit.

While much of the trial and the subsequent briefing focused on the FTAIA's domestic effects test, the Ninth Circuit side-stepped the statute, finding that AUO had engaged in import trade, thereby excluding the conspiracy from the FTAIA's bar. It reviewed the indictment and found it broad enough to include allegations that AUO had sold LCD panels directly in the U.S. and that there allegedly had been some improper meetings and conduct in the U.S., even though it had acknowledged that the majority of "conspiratorial" meetings had occurred overseas.

The Court stated that the alleged conspirators had earned over $600 million from the importation of LCD panels into the U.S. over the course of the conspiracy and that the evidence had shown that AUO executives had negotiated with U.S. companies to sell LCD panels at prices allegedly agreed to by the cartel. In response to AUO's argument that it was not the importer of the panels, and thus not involved in import commerce, the Ninth Circuit said that this "misses the point" and that the panels fell "squarely within the scope of the Sherman Act" because "the panels" were "sold into" the United States.

The Ninth Circuit panel did proceed to discuss the "domestic effects" test. It cited a previous Ninth Circuit ruling that "[c]onduct has a 'direct effect' for purposes of the domestic effects exception to the FTAIA 'if it follows as an immediate consequence of the defendant[s'] activity.'" The questions of what is a "direct" domestic effect and whether such an effect "gives rise to" a Sherman Act claim have been the subject of competing interpretations by U.S. Courts of Appeal. Although it recognized these differing views, the panel said that it was not necessary to address that question, given its holding on the import trade question.

C. Analysis

Many of the Antitrust Division's recent investigations have focused on alleged cartels involving Asian-based companies. And where the Division leads, civil plaintiffs follow armed with the twin threats of joint-and-several liability and treble damages that can make cases too risky to defend and force multi-million dollar civil settlements of which there have been many in the LCD case.

Several recent cartel investigations, including those into LCD products, other computer components, auto parts and capacitors, have targeted products that are primarily manufactured in Asia and then in turn used to manufacture end-use products (again, primarily in Asia) that are sold to U.S. consumers. But, is a Taiwanese manufacturer of an allegedly price-fixed product an "importer" into the U.S., if its product is sold to a Korean company which then uses it to manufacture an end-use good sold to a U.S. consumer? This is the scenario applicable to the majority of LCD panels manufactured by AUO. The Ninth Circuit avoided the complexities of this question by simply finding that certain panels were "sold into" the U.S. and ignoring the question of whether the defendant, AUO, imported them. Not even the Antitrust Division pursued this "import" theory at trial. In the future, the government and civil plaintiffs will likely choose to characterize affected products as "imports" seeking to avoid any potential difficult FTAIA arguments to the detriment of the defending companies.

The Ninth Circuit's reasoning on the "import" theory also allowed it to avoid addressing its interpretation of the standard for the "domestic effects" test under the FTAIA, a test that, as the panel noted, the Second Circuit has rejected as too lenient and one that is under current review in the Seventh Circuit in a related civil LCD case, also involving AUO. But these differences are noteworthy and can impact a defendant depending on where its case is situated. The Ninth Circuit's approach arguably allows both the government and civil plaintiffs potentially to ensnare a far greater volume of alleged price-fixed commerce which can increase the potential criminal and civil fines and penalties substantially.

All companies, and Asian-based manufacturers in particular, need to be aware of the ever-expanding long-arm of U.S. law, the U.S. government, and U.S. courts. The trend in U.S. cartel investigations and civil litigation ever more seemingly subjects foreign commerce to harsh and expensive U.S. criminal and civil actions.

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