Motorola Mobility LLC v. AU Optronics Corp.: Judge Posner and the Seventh Circuit
Limits Foreign Reach of U.S. Antitrust Laws

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I. Introduction

On November 26, 2014, the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of Motorola Mobility LLC’s lawsuit against several Asian liquid crystal display (LCD) manufacturers under U.S. antitrust laws. Motorola, on behalf of its foreign subsidiaries, alleged that foreign LCD panel manufacturers violated the Sherman Act in fixing prices of mobile phone displays that were incorporated into products that were shipped to Motorola in the U.S. for resale. Circuit Judge Richard Posner held that Motorola could not invoke U.S. antitrust law because the “immediate victims” had been non-U.S. subsidiaries that had bought most of the liquid crystal display screens that carried inflated prices and subsequently did not give rise to damages claims under Section 1 of the Sherman Act and the Foreign Trade Antitrust Improvements Act. This is the second time the three-judge panel, consisting of Judges Richard Posner, Ilana Rovner and Michael Kanne, rejected Motorola’s arguments; they originally affirmed the lower court’s dismissal order in March 2014.

2 Motorola Mobility LLC v. AU Optronics Corp., 2014 WL 6678622, at *4 (C.A.7 (Ill.), 2014).
II. Procedural and Substantive Background

Motorola, a Chicago-based corporation, manufacturers electronic devices, including mobile phones that contain LCD panels. Motorola’s non-U.S. subsidiaries purchased LCD panels from the defendant LCD manufacturers. Only about 1 percent of the panels were bought by, and delivered to, Motorola in the United States. The other 99 percent were bought by, paid for, and delivered to its foreign subsidiaries and incorporated by them into products that were then shipped to Motorola in the United States for resale by Motorola.\(^6\) Only 42 percent of the panels were bought by the subsidiaries and incorporated into cellphones then sold to and shipped to Motorola for resale in the United States. The remaining 57 percent never entered the United States, thus never became domestic commerce.\(^7\)

In 2009, Motorola brought antitrust claims against these Asian LCD manufacturers for allegedly fixing the prices of LCD panels used as a component in Motorola’s mobile phones.\(^8\) Bringing a claim under the FTAIA, Motorola argued that the manufacturers’ conduct sufficiently affected U.S. commerce and that the subsequent effect on U.S. commerce independently gave rise to a claim by Motorola that is cognizable under the Sherman Act.\(^9\) The district court dismissed all of Motorola’s claims except for the small fraction related to Motorola’s U.S. purchases, and Motorola appealed to the Seventh Circuit. The Seventh Circuit panel affirmed the district court’s decision, finding that nearly all of

\(^{6}\) Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842, 843 (7th Cir. 2014).

\(^{7}\) Id.


Motorola’s purchases fell beyond the scope of U.S. antitrust scrutiny.\footnote{supra note 8.} The Court of Appeals not only granted the petition for review but also decided the appeal, without the benefit of briefing on the merits.\footnote{Robert P. Reznick, David M. Goldstein, Shannon C. Leong, Seventh Circuit Decision in Motorola Holds That the FTAIA Bars a U.S. Parent’s Damages Claims Based on Its Overseas Affiliates’ Purchases of Price-fixed Products, But Does Not Bar Criminal Enforcement of the Sherman Act, ORRICK (December 1, 2014) http://www.orrick.com/Events-and-Publications/Pages/7th-Circuit-Decision-in-Motorola-Mobility-Holds-That-the-FTAIA-Bars-a-U.S.-Parents-Damages-Claims-Based-on-Its-Oversea.aspx.} Writing for a panel of the Seventh Circuit, Judge Richard Posner’s opinion affirmed the entry of partial summary judgment\footnote{supra note 6.} against Motorola, on three grounds: 1) the indirect sales of LCD panels in the United States, through their incorporation in cell phones, did not satisfy the FTAIA requirement that the U.S. injury be “direct”; 2) the allegedly inflated price charged by the foreign seller to the foreign subsidiary of Motorola did not create an effect that was cognizable under the Sherman Act; and 3) from a policy standpoint, adoption of Motorola’s proposed theory of liability would dramatically increase the exposure of international sales transactions to the Sherman Act.\footnote{supra note 8.}

Concerned with the lack of procedural opportunity on appeal, Motorola sought rehearing \textit{en banc}. The panel responded by vacating its original decision and setting the case for briefing on the merits and argument, which took place on November 13, 2014.\footnote{supra note 11.}

\section{Seventh Circuit Decision}

In the November 13, 2014 oral argument, Motorola primarily argued that the defendants’ sale of LCD panels to Motorola’s foreign subsidiaries satisfies the FTAIA “direct
Motorola claimed that its U.S. parent company’s import of phones containing the price-fixed LCD panels [into the United States] and subsequent sale of those phones to U.S. consumers had a direct effect on U.S. commerce. However, the panel, led by Judge Posner, appeared quite skeptical of Motorola’s argument, questioning about whether Motorola was attempting to “have it both ways”, by taking advantage of the tax advantages of foreign subsidiaries, yet downplaying the foreign nature of those entities when trying to avail itself of the protections afforded by U.S. antitrust law, and whether Motorola was “forum shopping” by bringing suit under U.S. antitrust laws rather than utilizing foreign remedies.

Two weeks after oral arguments, Judge Posner delivered the Seventh Circuit Court’s ruling. Judge Posner explained the standard of requisite “direct, substantial and reasonably foreseeable effect” on domestic commerce that “gives rise to a federal antitrust claim” standard for FTAIA cases. Judge Posner concluded Motorola had demonstrated the FTAIA was satisfied with respect to the Category I purchases that Motorola made in the United States, while also noting that the FTAIA was not applicable for the Category III purchases that did not enter domestic commerce.

In determining the claim validity of Category II purchases, Judge Posner concluded that if a price-fixed component were included, there would be an effect on domestic commerce.

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16 Id.
17 Id.
18 *Motorola Mobility LLC 2014 WL 6678622*, at *2.
19 Id.
And that effect would be foreseeable (because the defendants knew that Motorola’s foreign subsidiaries intended to incorporate some of the panels into products that Motorola would resell in the United States) and could be substantial.\(^\text{21}\)

However, the court rejected Motorola’s argument that the Category II purchases should be covered under the U.S. antitrust laws as “import commerce”, and therefore required Motorola to show that the defendant's price fixing on the panels abroad had a “direct, substantial and reasonably foreseeable effect” on domestic commerce.\(^\text{22}\) The panel held that multinational companies, with subsidiaries incorporated in countries all over the world, could not be treated “as one” for purposes of Sherman Act analysis and that Motorola’s subsidiaries are governed by the laws of the countries in which they are incorporated and operate.\(^\text{23}\) Judge Posner held that a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties.\(^\text{24}\) Motorola could not therefore claim any harm as a result of paying allegedly inflated prices against its foreign subsidiaries as its own, and thus show any “direct effect” on domestic commerce. Because foreign subsidiaries avail themselves to foreign laws, those subsidiaries must seek relief for antitrust claims under the laws of the countries in which those subsidiaries are

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id.


\(^{24}\) *Motorola Mobility LLC* 2014 WL 6678622, at *4 (quoting *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996)).
incorporated; the parent has no right to seek relief on their behalf on the United States. Judge Posner makes clear that the *Motorola II* holding does not necessarily block antitrust claims where “foreign cartelists” come into the United States and “unfairly overcharge U.S. manufacturers where actual domestic sales could be considered “foreseeable, substantial and direct”.26

Finally, the Seventh Circuit also discussed the public policy ramification raised by the Department of Justice’s (DOJ) *amicus curiae* that their opinion does not “interfere with criminal and injunctive remedies sought by the government against antitrust violations by foreign companies.27 The ruling in *Motorola II* attempts to balance the U.S government’s ability to pursue criminal prosecution and injunctive actions against concerns of international comity and hyper-expansion of the Sherman Act’s jurisdiction.28 For now, the Seventh Circuit has granted the DOJ with the flexibility to work out a *modus vivendi* (mutual arrangement) with foreign countries regarding the Department’s antitrust proceedings against foreign companies.29

IV. **Potential Impact of Motorola Decision**

*Motorola II* represents a comprehensive analysis of the FTAIA. The biggest takeaway from the case is the lessened ability of U.S. companies with global supply chains to recover damages in private litigation. Judge Posner’s opinion suggests a limitation of private antitrust suits since virtually every product sold in the United States has some foreign-made component, and that such supply chains invites an enormous potential for suits of

25 *Motorola Mobility LLC* 2014 WL 6678622, at *4.
26 *Id*, at *7.
27 *Id*, at *9.
28 *supra* note 11.
29 *Motorola Mobility LLC* 2014 WL 6678622, at *9.
this character if Motorola were to prevail.\textsuperscript{30} Judge Posner also provides justification for such position in that the U.S. government has reason to weigh comity and sovereignty concerns when bringing international cartel cases but private plaintiffs do not.\textsuperscript{31} As multinational U.S.-based corporations continue to expand into foreign nations, and U.S. parent corporations begin to rely more heavily on such foreign subsidiaries, it may be prudent for corporations to develop global supply chains that are covered under U.S. antitrust law, for example, through the "import commerce" exception. This does not necessarily mean that domestic corporate purchasers are not without remedy when buying component parts from foreign vendors. Direct purchases from foreign vendors preserves a plaintiff's rights to sue as a direct purchaser, or they can make the decision to not establish subsidiaries where antitrust laws do not sufficiently protect a parent corporation.\textsuperscript{32} Motorola II essentially mandates that companies operating overseas cannot avail themselves of U.S. antitrust laws when they deliberately outsource to avoid other U.S. laws. This may or may not change or significantly adjust the practices of multinational corporations in how they conduct business through global supply chains in the future.

Motorola has again asked for an \textit{en banc} rehearing, arguing that the conspiracy took direct aim at the U.S. company and should have to pay for such agreements in U.S. court.\textsuperscript{33} Whether or not this \textit{en banc} appeal is granted, the adjudication of this particular case seems to have at least another appeal left. Motorola's hiring of noted Supreme Court advocate Tom C. Goldstein, the editor of the popular \textit{SCOTUSblog}, indicates any appeal may

\textsuperscript{30} Motorola Mobility LLC 2014 WL 6678622, at *9.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
be brought forward to the Supreme Court on a *writ of certiorari* following the exhaustion of proceedings in the Seventh Circuit. Furthermore, this particular issue of foreign effects and the application of the FTAIA may prove to be a case that the Supreme Court may want to consider in the 2015-2016 term.