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The Limits Of FTAIA's Jurisdiction

Law360, New York (March 18, 2011) -- In In re Static Random Access Memory (SRAM) Antitrust Litig., 2010 WL 5477313, 4:07-md-01819-CW (N.D. Cal. Dec. 31, 2010), the court ruled that the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, barred certain claims for damages brought by indirect purchaser plaintiffs (IP plaintiffs), to the extent those claims resulted from the foreign sales of SRAM.[1]

The SRAM court's ruling is the latest in a line of federal decisions that have interpreted the FTAIA to limit subject matter jurisdiction over antitrust claims, where plaintiffs purchased an end product in the U.S. but the alleged antitrust injury stemmed from the foreign sale of a product component.

The IP plaintiffs in SRAM brought price-fixing claims against manufacturers of SRAM memory chips. The certified class of IP plaintiffs consisted of consumers in 27 states and territories who purchased in the U.S. products containing SRAM, including desktop computers, modems, personal digital assistants, routers, servers, smart phones and switches.

The defendants[2] argued that pursuant to the FTAIA, the court lacked jurisdiction over claims that were based on the indirect purchases of such products, to the extent that those products contained SRAM that was originally sold to a customer in a foreign country.

Much has been written about the confusing and vague language of the FTAIA.[3]

Generally, the FTAIA has been treated as a jurisdictional statute that divests the court of subject matter jurisdiction over most antitrust claims[4] that arise from anti-competitive conduct that results in exclusively foreign injury.[5] The FTAIA is implicated whenever the alleged conduct by a defendant constitutes "trade or commerce … with foreign nations." 15 U.S.C. §6a. This includes any transaction in which the buyer and/or seller is foreign.[6]

At the time the SRAM defendants moved for dismissal pursuant to the FTAIA, the parties had completed fact and expert discovery. As a result the SRAM defendants presented a factual challenge to subject matter jurisdiction under the FTAIA.

Unlike a facial challenge, which tests the sufficiency of the jurisdictional allegations in a complaint, a factual attack presents a substantive challenge to subject matter jurisdiction. Therefore the IP plaintiffs were required to produce evidence in support of their jurisdictional allegations.[7]

The FTAIA sets out a three-part test for determining whether a defendant's foreign conduct is subject to the court's jurisdiction.

First, the defendant's conduct must involve U.S. "import trade or import commerce." If not, the conduct is outside the court's jurisdictional scope, unless it satisfies both prongs of the FTAIA's "domestic effects" exception: 1) the foreign conduct has a "direct, substantial and reasonably foreseeable effect" on U.S. domestic or import commerce, or the export commerce of a U.S. exporter; and 2) the effect "gives rise to" the plaintiff's claim.[8]

In the SRAM case, the "import trade or import commerce" requirement was inapplicable because defendants themselves did not import SRAM into the U.S.[9]

Additionally, the IP plaintiffs could not meet the requirements of the domestic effects exception, because they could not show a "direct, substantial and reasonably foreseeable" effect on U.S. commerce. For an anti-competitive effect to be "direct," it must be an "immediate consequence" of the defendant's alleged anti-competitive conduct, and there can be "no intervening developments."[10]

However, where, as in the SRAM case, the IP plaintiffs' antitrust claims are based upon the purchase of products in the U.S., and the alleged anti-competitive conduct related to a product component that was sold in a foreign country, courts hold that these are "intervening developments" that preclude the finding of a direct effect in most cases.

For example, in United Phosphorus, the plaintiffs were prospective manufacturers of a chemical used to make a tuberculosis drug. The plaintiffs sued a competing chemical manufacturer for monopolization under the Sherman Act. The court found that the plaintiffs intended to sell the chemicals to foreign buyers outside the U.S.

The court rejected the plaintiffs' argument that a domestic injury could be claimed based on the foreign buyers' subsequent sale of the end product — the tuberculosis drug — in the U.S. The Ccourt noted: "The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs … that are used abroad to manufacture downstream products … that may later be imported into the United States."[11]

Next, in In re Intel Corp. Microprocessor Antitrust Litig., 476 F.Supp.2d 452 (D. Del. 2007), the purported class of plaintiffs consisted of U.S. purchasers of computers containing Intel microprocessors. Id. at 454. The plaintiffs argued that Intel charged higher prices overseas to manufacturers who purchased the microprocessors, installed them into computers sold in the U.S., then sold the computers to retailers, who then sold the computers to class members.

The court ruled that "this speculative chain of events is insufficient to create the direct, substantial and foreseeable effects on commerce by the FTAIA."[12]

Similarly, in Pabst Motoren GMbH & Co. KG v. Kanematsu-goshu (USA) Inc., 629 F.Supp. 864 (S.D.N.Y. 1986), a Japanese manufacturer of computer motors accused a German competitor of fraudulently procuring patents in an effort to monopolize the Japanese motor market.

The Japanese manufacturer argued that because its manufactured motors were eventually sold in the U.S. via a subsidiary, the anti-competitive conduct had a direct effect on the U.S. market. The court disagreed, stating that an alleged restraint "in Japan cannot be said to have an anti-competitive effect upon U.S. commerce" when that restraint is based upon "the later sale" of "manufactured motors in the United States, since jurisdiction over Sherman Act claims is not 'supported by every conceivable repercussion of the action objected to on United States commerce."[13]

By comparison, in SRAM, the court took a slightly different approach, articulating a narrow exception in which IP plaintiffs could establish a domestic injury from the foreign sale of component SRAM. The IP plaintiffs had argued that they met their evidentiary burden by showing that defendants "targeted [end] purchasers in the United States" when they sold SRAM to foreign buyers.

The court found that the IP plaintiffs produced some evidence from which it could be inferred that "defendants produced certain types of SRAM products specifically designed to be sold to a particular manufacturer, to be incorporated into a product in turn specifically designed for the United States market, and actually sold in the United States."

The court suggested that "[s]upra-competitive pricing of that SRAM could have had a domestic effect in the United States which could have given rise to antitrust injury."

The court found that the IP plaintiffs had not yet met their evidentiary burden, and accordingly ordered the IP plaintiffs to: 1) identify additional evidence in support of their jurisdictional argument; and 2) segregate foreign transactions from domestic transactions. The court warned that if the IP plaintiffs were unable to do both, "all of their damage claims would fail."[14]

In contrast to the courts in United Phosphorus, Intel and Pabst Motoren, the SRAM court did not bar all of the IP plaintiffs' claims resulting from the initial foreign sale of SRAM. Nonetheless, the court articulated a difficult evidentiary standard for the IP plaintiffs to overcome.

Under the SRAM court's standard, the IP plaintiffs would potentially have to track every link in the chain of commerce, from the initial sale of SRAM by the defendants, to the intervening sale to contract manufacturers, distributors, brokers, sales representatives and retailers, to the final sale of the end product to the IP plaintiff class members.

For each of these sales, the IP plaintiffs would have to show that: 1) The foreign SRAM sale led to a U.S. purchase of the end product; 2) the defendants targeted the U.S. market when they made their initial foreign sale of SRAM; and 3) these "targeted" sales can be segregated from other purely foreign sales that are outside the scope of the FTAIA.

In practice this standard would be challenging, if not impossible, to satisfy. If other courts adopt the SRAM standard, going forward IP plaintiffs could face significant difficulties in recovering damages for products sold in the global market.

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[1] The defendants in SRAM challenged the court's subject matter jurisdiction over claims brought by both the Direct Purchaser (DP) and IP plaintiffs. This article focuses on the court's analysis of the application of the FTAIA to the IP plaintiffs' claims and the unique issues presented in their case.

[2] Although the IP plaintiffs brought claims against numerous defendants, all but two had settled at the time the motion was filed: Cypress Semiconductor Corporation and the "Samsung" defendants (Samsung Electronics America Inc., Samsung Semiconductor Inc. and Samsung Electronics Co. Ltd.) By the time of the court's ruling, Cypress was the only defendant remaining in the IP case, as the court granted summary judgment for Samsung Electronics America Inc., and the remaining Samsung defendants had settled. SRAM, 2010 WL 5477313, at *1 n.1.

[3] See, e.g., Ian Simmons and Charles E. Borden, The Class Action Fairness Act Of 2005 And State Law Antitrust Actions, Antitrust 19 (Fall 2005).

[4] The IP plaintiffs in SRAM asserted as a threshold matter that the FTAIA did not apply to their state law claims, but was limited to claims brought under the Sherman Act. The court rejected this argument, finding no evidence of congressional intent to limit the FTAIA in this manner. The court further noted that the U.S. Constitution vests Congress with the express power to "regulate commerce with foreign nations." SRAM, 2010 WL 5477313, at *4.

[5] F. Hoffman-La Roche Ltd. v. Empagran SA, 542 U.S. 155, 158 (2004) (Empagran I); United Phosphorus Ltd. v. Angus Chemical Co., 322 F.3d 942, 951-52 (7th Cir. 2003); Turicentro SA v. Am. Airlines Inc. (Turicentro II), 303 F.3d 293, 300-02 (3rd Cir. 2002). In SRAM, the court treated the FTAIA as a jurisdictional statute, but noted that recent appellate rulings raised questions about whether the FTAIA is jurisdictional, or "simply imposes a requirement on the elements of an antitrust claim." First, in Arbaugh v. Y&H Corp., 546 U.S. 500, 511, 514-15 (2006), a decision interpreting Title VII, the Supreme Court addressed the issue of whether limitations on the a statute's scope should be treated as jurisdictional or "relate[d] to the merits." Next, the Ninth Circuit questioned, but did not determine, whether "the FTAIA is more appropriately viewed as withdrawing jurisdiction … or simply establishing a limited cause of action." In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 985 n.3 (9th Cir. 2008). Because neither decision resolved the jurisdictional question, the SRAM court felt "obliged to treat the FTAIA as jurisdictional." SRAM, 2010 WL 5477313, *3.

[6] Empagran I, 542 U.S. at 163; Turicentro II, 303 F.3d at 301-302.

[7] Turicentro II, 303 F.3d at 300, n.4; In re Rubber Chemicals Antitrust Litig., 504 F. Supp. 2d 777, 780 (N.D. Cal. 2007); In re Hydrogen Peroxide Antitrust Litig., 702 F.Supp.2d 548, 550 (E.D. Pa. 2010); accord Savage v. Glendale Union High School, Dist. No. 205, Maricopa Count, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) ("Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction").

[8] Empagran I, 542 U.S. at 161 (quoting 15 U.S.C. §§ 6a(1), (2)); Turicentro II, 303 F.3d at 300-301.

[9] Every court to address the issue has held that the defendant must bring goods into the U.S. for the import prong of the FTAIA to apply. Turicentro II, 303 F.3d at 302 (transactions in which defendants "did not directly bring items or services into the U.S." do not involve "import trade or commerce"); Animal Science Products Inc. v. China Nat'l Metals & Minerals Import & Export Corp., 702 F.Supp.2d 320, 332 (D.N.J. 2010) (Animal Science II) ("to avoid the FTAIA jurisdictional bar," the plaintiff must show that "the defendants are importers of goods/services in the U.S.", or "in the alternative" the applicability of the domestic effects exception).

[10] United States v. LSL Biotechnologies, 379 F.3d 672, 680-81 (9th Cir. 2004); Sun Microsystems Inc. v. Hynix Semiconductor Inc., 534 F. Supp. 2d 1101, 1110 (N.D. Cal. 2007).

[11] United Phosphorus, 131 F.Supp. at 1014.

[12] Intel, 476 F.Supp.2d at 456 (citing Angus, 131 F. Supp. 2d at 1003).

[13] Pabst Motoren, 629 F.Supp. at 869.

[14] SRAM, 2010 WL 5477313, at *7-*8.