Optical Disk Drive Summary Judgment Orders Clarify FTAIA Claims, But Land Blow to Conspiracy Claims

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In a set of recent decisions, Northern District of California Judge Richard Seeborg granted defendants' summary judgment motions against various plaintiffs in the long-running antitrust litigation, *In re Optical Disk Drive Products Antitrust Litigation,* No. 3:10-md-02143 (N.D. Cal.).[1] After earlier presiding over significant settlements in the case (including $180 million to the indirect purchaser class, and nearly $75 million to the direct purchaser class)[2], Judge Seeborg found, among other things, that the Foreign Trade Antitrust Improvements Act ("FTAIA") did not preclude recovery for foreign sales to consumers in the United States, but ultimately concluded that the plaintiffs had failed to show an industry-wide conspiracy or resulting injury.

Background

In 2009, the Department of Justice ("DOJ")[3] reported a criminal investigation of possible antitrust violations in the optical disc drive ("ODDs") industry.[4] The DOJ secured guilty pleas from Hitachi-LG Data Storage, Inc. and some of its employees, with significant fines and prison terms imposed as well.[5] Private actions followed against various ODD manufacturers, including actions by a class of direct purchaser plaintiffs, a class of indirect purchaser plaintiffs (i.e., purchasers of devices with ODDs at the end of the supply chain who sued under California state consumer protection and antitrust statutes), and individual purchasers (sometimes referred to as "Opt-outs").

A longstanding concern in the case has been whether the conspiracy was limited to certain defendants and certain targeted customers, or whether there was an industry-wide price-fixing conspiracy.[6] Judge Seeborg, who had been assigned the multidistrict litigation, had flagged that concern in prior orders, but later granted class certification to the indirect purchaser class,[7] finding that the answer to that question could be determined on a class-wide basis.[8] As indicated, several parties settled before summary judgment, where this issue and related concerns arose for consideration.

Summary Judgment Orders

The Court issued its summary judgment rulings on December 18, 2017. The Court's FTAIA order related to all the plaintiffs, whereas the Court issued separate rulings on the summary judgment motions against the indirect class, Acer and its subsidiaries ("Acer"), and the bankruptcy trustees of Circuit City and RadioShack, respectively. This article focuses on the FTAIA order and conspiracy rulings impacting the indirect class and Acer, as well as the ruling on pass-through damages claims of the indirect class.

FTAIA Order

In an "omnibus" order,[9] the District Court considered the defendants' challenges to the recoverability of certain categories of sales under the FTAIA. In doing so, the Court considered the FTAIA's exemption from the federal antitrust laws of "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" (15 U.S.C. § 6a), and the Act's two exceptions: conduct that has a direct, substantial, and reasonably foreseeable effect (1) "on trade or commerce which is not trade or commerce with foreign nations, or import trade or import commerce with foreign nations," or (2) "on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States," that "gives rise to a claim" under the antitrust laws (15 U.S.C. § 6a(1)–(2)).[10]

The Court primarily analyzed two categories of challenged sales: (1) ODDs sold in foreign countries to foreign customers for use in computers sold abroad; and (2) ODDs sold abroad to foreign companies for incorporation into computers that were subsequently sold in the United States. Relying heavily on *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2015), the Court found that "various ODD suppliers . . . specifically targeted United States markets and acted with knowledge that their ODDs would be incorporated into finished products destined for domestic markets," and thus, sales of products in Category 2 were actionable.[11]

However, the Court rejected sales of products in Category 1, noting those purchases were not "import commerce" under the first FTAIA exception, nor did they have domestic effects under the second exception, because "Category 1 purchases never wind up in this country's stream of commerce."[12] Plaintiffs, though, argued "that Defendants' illegal conduct directed at the United States had an effect in the form of setting an artificially-inflated price that applied to their ODD purchases around the world."[13] The Court acknowledged this argument presented "a more difficult question," but ultimately found there was only "independent foreign harm" – even if global pricing for the relevant products was established in the United States.[14] The Court thus joined other courts in generally rejecting global price-fixing models under the FTAIA.[15]

Failure to Prove Conspiracy & Causation

Despite determining that Category 2 sales were actionable under the FTAIA, Judge Seeborg nonetheless ruled that the indirect class and Acer ultimately failed to raise sufficient evidence by which a reasonable jury could find the conspiracy was industry-wide, rather than just targeting a few specific direct-purchaser manufacturers, namely HP and Dell, noting that the "evidence was insufficient to bridge the gap between a conspiracy targeting only Dell and HP and a vast industry-wide version."[16] The Court explained that references to targeting other customers were "few and far between in a vast expanse of documents and communications supporting the pending motions[,]" and "instead, the overwhelming amount of evidence suggests that Defendants' actions were aimed only at Dell and HP."[17]

Thus, the Court (1) granted summary judgment against Acer for failing to raise a genuine question of material fact that the conspiracy targeted or harmed it; and (2) limited the indirect purchasers' potential recovery to only downstream purchases from HP and Dell.[18]

Failure of the Indirect Class to Prove Pass-Through Damages

Next, the Court found that the indirect class had not shown it could prove pass-through damages transmitted down to them from HP and Dell—which was "not only crucial to the elements of injury and damages, but also to causation, as it establishes the necessary link between Defendants' conduct and [indirects'] injury as alleged."[19]

Specifically, the Court held that the indirect purchasers had to demonstrate "that no link in the supply chain would have swallowed any portion of the overcharge,"[20] but had failed in doing so. Although expert analysis showed how the pass-through *could* have functioned, the Court found that analysis not to be a substitute for *actual* evidence of the overcharge and pass-through at each stage.[21] The Court thus granted summary judgment against the indirect class, which he had earlier certified.[22]

Conclusion

The indirect class and other plaintiffs have appealed to the Ninth Circuit. It is likely that they will, at a minimum, challenge the Court's ruling on whether their evidence was sufficient to create a genuine question of material fact that the conspiracy was industry-wide.

The Optical Disk Drive decisions reflect the importance of marshalling evidence in antitrust action to connect all the key aspects of a complex antitrust case. For instance, in a somewhat analogous situation in In re Korea Ramen Antitrust Litigation, summary judgment motions challenged whether a price-fixing conspiracy in Korea impacted purchasers in the United States.[23] Plaintiffs there compiled considerable evidence to create a "linkage" or "palpable tie" to connect the alleged conspiracy in Korea to anticompetitive impact in the United States such that summary judgment dismissal was denied.[24] Given that courts have qualified the inferences to be drawn from circumstantial evidence in antitrust cases over the years, it is incumbent on plaintiffs to seek all necessary discovery and provide sufficient evidence at the summary judgment stage to show that a jury could find in their favor. This may be particularly true when parallel criminal actions define a possibly different scope to the conspiracy.

Footnotes

[1] *See ODDs*, ECF No. 2705 (Summary of Orders).

[2] *See* https://www.law360.com/articles/937968/dell-hitachi-settle-optical-disc-drive-price-fixing-claims.

[3] *See, e.g.*, https://www.justice.gov/opa/pr/three-hitachi-lg-data-storage-executives-agree-plead-guilty-participating-bid-rigging-and.

[4] ODDs are devices that allow data to be read from and, where applicable, written to, optical discs—mediums for storing data.

[5] *Id.*; *see also supra* n.2.

[6] *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 467444, at *1 (N.D. Cal. Feb. 8, 2016).

[7] In approving the settlements for the direct purchaser class plaintiffs, the Court also certified the class for settlement purposes.

[8] *In re Optical Disk Drive Antitrust Litig.*, 2016 WL 467444, at *1.

[9] *See ODDs*, ECF No. 270 (Omnibus FTAIA Order), available at https://www.courthousenews.com/wp-content/uploads/2017/12/Optical-Omnibus.pdf.

[10] *Id.* at 3.

[11] *Id.* at 10.

[12] *Id.* at 7, 11.

[13] *Id.* at 11.

[14] *Id.*

[15] *Id.* at 12. *See Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1113-15 (N.D. Cal. 2007) ("It is difficult to determine whether the higher prices set and established in the U.S. proximately caused the foreign entities associated with plaintiffs to pay higher prices abroad. . . . the injury is far too attenuated to conclude that it is the proximate result of merely the setting of one global price."); *In re Capacitors Antitrust*, No. 14-cv-03264, 2016 WL 5724960, at *6 (N.D. Cal. Sept. 30, 2016) ("Plaintiffs' global pricing theory is rejected as a matter of law.").

[16] *ODDs*, ECF No. 2707 at 6 (Summ. J. Order re: Acer).

[17] *In re Optical Disk Drive Antitrust Litig.*, 2017 WL 6503743, at *6.

[18] *Id.*

[19] *In re Optical Disk Drive Antitrust Litig.*, No. 10-MD-02143-RS, 2017 WL 6503743, at *9 (N.D. Cal. Dec. 18, 2017).

[20] *Id.* at *9.

[21] *Id.* at *9-10.

[22] *Id.* at *10.

[23] *In re Korean Ramen Antitrust Litig.*, No. 13-CV-04115-WHO, 2017 WL 6623036 (N.D. Cal. Dec. 28, 2017).

[24] *Id.* at *18, 20-27.

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