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Does What Happens Outside the U.S. Stay Outside the U.S.?

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As the economy continues to globalize, so too does the reach of antitrust law. Two recent cases illustrate the interaction between international trade and U.S. antitrust law: *Biocad v. F. Hoffman-La-Roche Ltd.* and *In re Capacitors Antitrust Litigation*. These cases invoke the Foreign Trade Antitrust Improvement Act, which creates exceptions to the jurisdiction limiting language of the Sherman Antitrust Act, and exposes defendants to liability for conduct involving import and export trade or commerce. As the law evolves to keep up with changing trade and practices, the underlying principle to protect competition remains the same.

The 1982 Foreign Trade Antitrust Improvements Act (FTAIA) codified the international scope of the Sherman Antitrust Act. Specifically, the Act provided that the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

- Such conduct has a direct, substantial, and reasonably foreseeable effect –
  - On trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
  - On export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
- Such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

The statutory text does not provide significant practical insight. In fact, courts have characterized the FTAIA as "inelegantly phrased" and simply "a web of words." The Supreme Court clarified the legislative intent, noting it "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements…, however anticompetitive, as long as those arrangements adversely affect only foreign markets." Still, courts around the country have struggled to consistently interpret the law.

On September 30, 2017, a New York federal court contributed to the evolving body of law. Russian drug manufacturer, Biocad, sued F. Hoffman La Roche and related entities for engaging in anticompetitive conduct that precluded the Russian company from entering the U.S. oncological pharmaceutical market. The Southern District of New York dismissed the case, finding the plaintiff did not have standing, and, even if it did, that the FTAIA barred Biocad's Sherman Act and Donnelly Act claims.

The court found that the claims did not fall within the import exception, that is, conduct involving import trade or import commerce. The complaint "alleges foreign acts conducted by one domestic and three foreign Defendants that caused foreign injuries to the Plaintiff and compromised its future plans to import biosimilars" to the United States. The connection between the conduct and the import at issue was not sufficiently close; the court found that it "thus applies only to foreign anticompetitive conduct "with an immediate impact on U.S. markets,"" not "*anticipated* participation in *future* import commerce."

While Biocad did not argue that the allegedly anticompetitive conduct fell into the domestic effects exception, the court opined on that point nonetheless, providing needed clarity. The court found that "any domestic effect resulting from Defendants' alleged behavior did not "give rise to" Plaintiff's claim under the Sherman Act." It was F. Hoffman La Roche's foreign behavior that was at issue; not the domestic effect of that issue. That is, the plaintiff's injuries were not caused by the domestic effect, but would cause the domestic effect; the defendant's behavior in Russia would lead to Biocad's exclusion in the U.S. market, eventually driving up drug prices domestically. The court explained that "the direction of causation runs the wrong way."

In California, a federal judge similarly clarified the implications of the FTAIA on litigating anticompetitive conduct. On October 22, 2014, purchasers of capacitors – small components used to store energy flow in electronic devices – sued several capacitor manufacturers for allegedly conspiring to fix prices of the components sold in the U.S. Most of the manufacturers operate abroad, largely in Asia. Given the complexity of the issues and the necessarily foreign reach, the judge issued an order on September 30, 2016 specifically addressing the FTAIA claims. There was disagreement, however, as to how to treat capacitors billed to foreign entities but shipped to the U.S. The court agreed with plaintiffs that this was considered import trade or commerce, noting plaintiffs' dictionary definition of import as "to bring (as merchandise) into a place or country from another country." For capacitors both billed and shipped to a foreign entity, the court analyzed proximate cause under the domestic effects exception; the court noted that, going forward in the case, these claims would not be barred by the Sherman Act.

While the Sherman Act is intended to protect competition in the United States, increasingly foreign commercial conduct does impact competition at home. The *In re Capacitors* and *Biocad* matters help explain the required connection between foreign conduct and its effect on the U.S. necessary to establish an antitrust claim under U.S. law. The U.S. implications of business activities and practices outside the U.S. should always be considered for antitrust compliance and risk analysis, and should be considered in light of the latest developments under the FTAIA.

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