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Access Denied: Ninth Circuit Court of Appeals Rules that Foreign Purchasers of Dynamic Random Access Memory Lack Standing to Bring Sherman Act Claims in U.S. Courts

David P. Nemecek

Cartels have taken on an increasingly international flavor over the past two decades as multinational corporations have expanded their global operations. The United States is the only jurisdiction in the world in which plaintiffs may obtain treble damages for violations of its antitrust laws. As such, foreign purchasers of goods sold by alleged cartel members are typically eager to file antitrust claims in the United States. But when should they be permitted to do so? The Ninth Circuit Court of Appeals examined this issue in *In re: Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 08 C.D.O.S. 10595 (9th Cir. Aug. 14, 2008).

The Foreign Trade Antitrust Improvement Act

The Sherman Act prohibits acts in restraint of trade or commerce "among the several states, or with foreign nations." Congress became concerned that the broad jurisdictional language contained in the Sherman Act would allow plaintiffs to bring claims in U.S. courts where American economic interests were only minimally affected, and enacted the Foreign Trade Antitrust Improvement Act (FTAIA) in part to limit the access of foreign antitrust plaintiffs to U.S. courts.

The FTAIA provides that U.S. courts have no jurisdiction for claims arising under the Sherman Act that only involve an injury to foreign competition. Specifically, the FTAIA provides that the Sherman Act is not applicable to "conduct involving trade or commerce . . . with foreign nations" unless (1) "the conduct has a direct, substantial, and reasonably foreseeable

NEWSLETTER EDITORS

Martin J. Thompson
Partner
mthompson@manatt.com
714.371.2530

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effect" on domestic commerce, and (2) the conduct "gives rise to" a claim under the Sherman Act. The Ninth Circuit examined the issue of what a plaintiff must allege to show that the defendants' conduct "gives rise to" a Sherman Act violation in the *DRAM* case.

The *In re: Dynamic Random Access Memory (DRAM) Antitrust Litigation* Opinion

The plaintiff in *DRAM* was a British computer manufacturer known as Centerprise International, Ltd. that purchased dynamic random access memory outside of the United States. The defendants were domestic and foreign manufacturers and sellers of DRAM, a type of high-density memory used in the manufacture of personal computers and other electronic devices. Centerprise alleged that the defendants engaged in a global conspiracy to fix DRAM prices, which artificially raised the price of DRAM to customers in both the United States and in foreign countries. Centerprise also alleged that the defendants could not have maintained their global price-fixing conspiracy unless they fixed DRAM prices in the United States.

The issue before the Ninth Circuit was whether Centerprise's complaint sufficiently alleged that the defendants' conduct "gave rise to" a claim under the Sherman Act. The Ninth Circuit ruled that in order to meet this requirement, a plaintiff must allege facts showing a direct causal link between its injury and the domestic effect of the defendants' anticompetitive practices. It is not enough for a plaintiff to allege that the defendants would not have been able to engage in anticompetitive conduct overseas "but for" the defendants' anticompetitive domestic conduct.

The Ninth Circuit found that Centerprise's complaint failed to allege a direct causal link between its injury and the defendants' domestic conduct.

Implications for Sherman Act Claims by Foreign Purchasers

How will courts determine whether plaintiffs have adequately alleged that the defendants' domestic conduct was a "direct cause" of the plaintiff's injuries in order to determine whether a defendants' conduct "gives rise to" a Sherman Act violation in the future? As Judge John T. Noonan noted in his concurring opinion in the *DRAM* case, the determination of whether to label the defendants' conduct a "but-for cause" or a "direct cause" of a plaintiff's injuries is often a value judgment in which the court decides whether "the conduct in

question is foreseeably harmful to a social interest worthy of protection."

In determining that the conduct at issue was not a direct cause of the plaintiff's injuries, the Ninth Circuit noted that Centerprise's claims solely concerned foreign purchases, and it had standing to bring its claims in the United Kingdom. Allowing Centerprise's claims to go forward in the United States would have been antithetical to the purpose of the FTAIA, which is to clarify that the U.S. antitrust laws concern the protection of American consumers and American exporters, not foreign consumers or producers. The court was also mindful of a recent decision by the United States Supreme Court concerning the FTAIA in which the Court cautioned against construing the statute broadly in order to avoid "unreasonable interference with the sovereign authority of other nations."

While Judge Noonan's observation is not particularly helpful in determining how courts will rule in the future on the issue, it seems likely that a foreign plaintiff that has solely made purchases overseas will not have standing to bring a Sherman Act claim in the United States based on the theory that the defendants' domestic conspiracy was necessary to maintain a conspiracy overseas. This theory of liability has now been considered and rejected by three separate circuit courts.

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FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

David P. Nemecek Mr. Nemecek has significant experience in the field of antitrust litigation, and has litigated class actions involving claims of price fixing and monopolization. He was a member of the trial team for two of the largest antitrust cases in California and Minnesota history. He also has experience litigating cases involving the California unfair competition laws, including claims involving California Business & Professions Code Section 17200, and false advertising claims brought pursuant to the Lanham Act and California Business & Professions Code Section 17500. Mr. Nemecek also provides compliance counseling relating to the antitrust and unfair competition laws, including sales, distribution and pricing counseling, as well as antitrust compliance relating to mergers and joint ventures, and intellectual property licensing issues.