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BLOG

Second Circuit Clarifies When Foreign Conduct "Involves" Import Commerce Subject to U.S. Antitrust Laws

DECEMBER 5, 2019

Corporations continuing to grapple with the contours of when U.S. antitrust law applies to conduct outside the United States should take note of the Second Circuit's latest decision interpreting the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a. In a November 5, 2019 decision in *Biocad JSC v. F. Hoffmann-La Roche Ltd. et al.*, 942 F.3d 88 (2d Cir. 2019), the Second Circuit undertook a detailed analysis of the so-called "import exclusion" under the FTAIA and sided with a narrower interpretation advanced by defendants.

Since its enactment, the FTAIA has been notorious for being "convoluted"[1] and "cumbersomely worded."[2] However, the statute can basically be understood as first creating a general rule that the Sherman Act does not apply to conduct involving trade or commerce with foreign nations, but then detailing two exceptions to that general rule. The U.S. Supreme Court most significantly explained how the FTAIA works in a 2004 decision, coincidentally also involving Roche, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). The two exceptions that bring foreign conduct within the reach of the Sherman Act are often referred to as the "import exclusion" and the "domestic effects exception."

The *Biocad* decision focuses on the import exclusion, which excludes "conduct involving . . . import trade or import commerce" from the FTAIA's scope—*i.e.*, it basically says that the Sherman Act applies to conduct involving imports. Sounds simple enough, but the devil has been in the details. Here, the big dispute before the Second Circuit came down to what it means for conduct to "involve" import commerce, and how close a connection must exist between the alleged foreign conduct and U.S. import commerce.

Plaintiff Biocad is a Russian pharmaceutical company that alleged, although it had no current U.S. business, it was on the verge of entering the U.S. market in order to compete against defendant Roche and its affiliates. Specifically, Biocad planned to enter the U.S. market by importing biosimilars of three cancer drugs to compete against branded Roche drugs sold in the United States whose patents had expired or were about to expire. Biocad claimed that, faced with this impending competition, defendants undertook a multifaceted campaign of anticompetitive conduct in both Russia and the United States intended to harm Biocad financially and hobble its ability to enter the U.S. market.

Because Biocad was not yet in the business of importing drugs to the United States, but intended to enter, the Second Circuit framed the question presented as "whether foreign conduct involves import trade or commerce where there is no actual current effect on United States markets, but where the defendant intends to impact import

commerce in the future." 942 F.3d at 95. The plaintiff argued for a broad interpretation (unsurprisingly) that foreign conduct "involves" imports whenever it is intended to affect imports. Thus, Biocad argued that it was enough to allege that the defendants intended to, and did, prevent Biocad's future imports into the United States. The defendants argued for a narrow interpretation (unsurprisingly) that foreign conduct only "involves" imports when it directly acts upon import commerce. Thus, Roche argued that, since Biocad had no business in the United States, the alleged conduct was really directed at Biocad's business in Russia and was too attenuated from U.S. import commerce.

After a lengthy textual analysis of the FTAIA and the meaning of "involve" (citing not one, but two dictionaries!), the Second Circuit ultimately sided with the narrower defendant-advanced position, holding that "'conduct . . . involving import trade or import commerce' is not determined by reference to a defendant's subjective intent to affect import commerce. Rather, the import exclusion applies to conduct by a defendant that has a direct or immediate effect on import commerce." 942 F.3d at 100.

The court then went on to apply that holding to the facts, affirming dismissal of Biocad's claims because the alleged conduct did not have a sufficiently direct or immediate effect on import commerce, and because the Defendants' alleged subjective intent to affect import commerce was not relevant.

The court went through essentially a two-step analysis applying its holding. First, the court noted that the alleged conduct did not directly involve importing into the United States. The court emphasized that Biocad did not allege that it had ever imported any product or biosimilar to the United States and admitted that it "had no active U.S. business with which to interfere" because Roche's exclusivity periods had not yet expired. *Id.* The court then considered if the alleged conduct—although not directly involving imports—"immediately or indirectly *affected*" import trade or commerce. *Id.* at 100 (emphasis added). But even crediting allegations that the "sole purpose" of defendants' actions was to delay Biocad's entry into the U.S. market, the court found the alleged scheme's effect on U.S. imports to be too indirect. *Id.* at 100-01. The panel reasoned that "Defendants' immediate objective was to impair Biocad's ability to compete in the Russian market for the Drugs. The possibility that Defendants' conduct would diminish Biocad's financial circumstances, and, in turn, prevent it from engaging in business in the United States when it was at some point ready to do so is too remote and speculative to plausibly affect imports to the United States with the directness necessary to invoke the import exclusion." *Id*. at 100.

The Second Circuit's overarching theme seems to be that currently observable effects trump intent. The court cared neither about the plaintiff's intent to enter the U.S. market, nor the defendants' alleged intent to prevent that entry. But as with nearly all FTAIA questions, the analysis here was highly fact specific. Companies with any question about whether their conduct may be subject to U.S. antitrust law would always be wise to talk the issue through with U.S. antitrust counsel.

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[1] *E.g.*, *United States v. Hsuing*, 778 F.3d 738, 754 (9th Cir. 2015)

[2] *Biocad*, 942 F.3d at 95.

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