FBLS 2014 Competition Colloquium – John Speech by

SEDDELMEYER

When the Sherman Antitrust law was adopted as federal law in 1890 one of its ostensible targets was the predecessor of my employer for the past forty years, the Standard Oil Trust. When Standard was broken up for violation of the Sherman Acts' prohibitions in 1911, one of the newly independent companies was Standard Oil of New Jersey which changed its name to Exxon in 1972. I worked on the merger in 1999 which rejoined two major parts of the Old Standard Oil as Standard Oil of New York (Mobil) was acquired by Exxon to create ExxonMobil.

Antitrust law has been important to Exxon. As a new lawyer in the mid 70's we all took a one week course in antitrust law. We also had an in-house program which included a prominent academic authority to keep up with developments in this law. Managers in sensitive positions attend antitrust reviews with their counsel at least annually.

The question of the scope of a nation's laws, in this case, the antitrust laws of the United States, to reach conduct outside its jurisdiction has a long history. As early as 1812, Chief Justice Marshall wrote that "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute." Despite this very strong language, there has always been a tension between national sovereignty and the extraterritorial application of the law. The U.S. Constitution gives Congress the power to "regulate Commerce with Foreign Nations." U.S.

laws are applied to U.S. citizens for conduct in other countries. International law also allows extraterritorial application of laws in cases involving conduct that threatens its security even if performed in other countries by foreign nationals. Justice Oliver Wendell Holmes held that when someone intends to cause and does cause an injury in another state, that person can be treated "as if he had been present at the effect." Under this analysis, the law is not being applied "extraterritorially" since the locale of the "cause" is conflated with the location of its "effect". So there is a tension between the principle that one nation can't punish activity in another nation and the principle that, at least in some cases, it can.

The earliest Sherman Act case on this subject was American Banana v. United Fruit Company. The plaintiff alleged the defendant had used the government of Costa Rica to seize its property and prevent competition. The Supreme Court held that the acts all occurred in other countries and that U.S. law had no application outside the United States.

If things had stayed in that position, my talk would now conclude. But the very next year the court held an agreement made in London to restrict the sale of American tobacco in Britain and British tobacco in the U.S. violates the Sherman Act.

U.S. enforcement of the Sherman Act increased in the early 20th century and prosecutions rose steadily in the 1930's and 40's. The Alcoa decision in 1945 established the principle that conduct occurring outside the U.S. could be the basis of a U.S. prosecution if the conduct was intended, at least in part, to cause an effect on Commerce in the U.S. while subsequent cases dealt with the question of how much U.S. impact was required, the reaction of a number of countries, including Great Britain and France in 1980, included the passage of “blocking” statutes that prohibited the enforcement of judgments in their jurisdictions based on the Alcoa doctrine.

The U.S. was sensitive to this reaction and responded in two ways. First, courts began to focus on principles of comity and required an analysis of more than whether the conduct caused an effect in the U.S., but should include whether the impact was substantial and whether U.S. enforcement was outweighed by potential impact on the interests of the country or countries in which the conduct occurred.

Congress also responded in 1982 with the Foreign Trade Antitrust Improvements Act (Improvements Act). This Act added a new section to the Sherman Act intended to clarify when the Sherman Act would apply to conduct outside the United States. Unfortunately, this section caused as many new questions and problems on the prior jurisdiction. What came to the rescue was the adoption of strong antitrust laws in Europe and across the globe. Much of this law is similar to the Sherman Act. Today, U.S. prosecutors and regulators work closely with their counterparts in other countries with a common purpose of promoting competition and preventions attempts to gain certain advantage by agreements to set prices, allocate markets or restrict production. As a result, most of the case law in recent years has focused on when private parties outside the U.S. can bring damage claims in U.S. courts.

Perhaps this is a good point to discuss damages in the U.S. and treble damages in particular. The calculation of damages in private antitrust actions is based on expert testimony from economists. Private civil actions usually follow a government investigation and prosecution, so the fact of the violation can be accepted. Take as a hypothetical an agreement among manufacturers of asphalt to divide markets or set prices. The plaintiffs, in this case largely governmental entities who purchase asphalt directly or through contractors for road surfacing, have presumably been injured. But the extent, or amount, of the injury depends on a complex calculation of what they would have paid for asphalt in a free market. Unsurprisingly, the defendants experts will argue that the violation of the law caused little or no loss. The plaintiffs will argue for a substantial loss. The fact finder, judge or jury, will decide the amount of damages. The judge will triple that amount and enter judgement against the defendants in that amount. I should also note that liability is joint and several.

The only way to avoid treble damages is to have qualified for the government's amnesty program and provide "satisfactory cooperation" to the plaintiffs in the civil action. The judge determines if the defendant's cooperation is satisfactory. If a corporation qualifies, its civil liability will be limited to the damage its conduct caused. There is no trebling and, in addition, no joint and several liability.

As it stands today, jurisdiction in U.S. courts can be based on violations of the law in U.S. commerce, the Alcoa standard of substantial intended effects of conduct outside the U.S. and under the provisions of the Improvements Act. The first is straight-forward, a violation in the U.S. causing injury in the U.S. The other two are slightly different, but that difference can be significant. The Alcoa test required an intended substantial effect on commerce in the U.S. from Non-U.S. conduct. Under the Improvements Act the effect must be "direct, substantial and reasonably foreseeable". Note that the Act adds the concept of "direct" and drops the need to prove intention if the effect is reasonably foreseeable.

Since so many countries have adopted their own antitrust laws, why don't plaintiffs bring actions in their own countries? Of course many do so, but the siren song of treble damages in U.S. lawsuits carries across the waters and brings litigants to America's shores despite the procedural and jurisdictional hurdles.

A recent case involving two Chinese companies may serve to summarize the current state of play. In Lotes, a Taiwanese company made USB connectors in China and sold them to Chinese companies to be incorporated into computers sold by Dell, Apple and others. Lotes was sued in China by the defendant for patent infringement. This defendant also made USB connectors. Lotes contended that the suit was fraudulent and intended to put them out of business.

The case was brought in U.S. District Court which dismissed on the ground that the effects in the U.S. were neither substantial nor direct. On appeal the Second Circuit Court of Appeals did not follow the District Court but instead held that Lotes had not suffered an injury in the U.S., but rather its injury was in China.

Finally I would like to say a word about criminal penalties in the U.S.

Criminal penalties for per se violations of the antitrust laws have increased over the years. The statutes provide for maximum fines and jail sentences, but the actual punishment is determined by the judge with reference to the Sentencing Guidelines. These Guidelines were mandatory until the Supreme Court decision in United States v Booker held that they could only be advisory. I think that judges adhere pretty closely to the Guidelines which increase or decrease the punishment based on “points” for good or bad behavior. Sentencing is a part of any plea bargain, but the resulting agreement is still subject to court approval. The fines can exceed the statutory maximum when the government asks that the fine be set at twice the gain or loss caused by the illegal activity. Under that alternative system the fines can be quite large indeed.