No. 02-649

I S C U Sa

DEE-K ENTERPRISES, INC. AND ASHEBORO ELASTICS CORPORATION, PETITIONERS

v.

HEVEAFIL SDN. BHD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

R. HEWITT PATE
Acting Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

ROBERT B. NICHOLSON
ADAM D. HIRSH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

WILLIAM E. KOVACIC
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether, in a case brought under the Sherman Act, 15 U.S.C. 1, alleging a global cartel organized outside the United States, the applicable jurisdictional test is governed by *McLain* v. *Real Estate Board*, 444 U.S. 232 (1980), or by *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993), when one or more defendants made substantial sales in interstate commerce of goods subject to the conspiracy.

2. Whether, assuming that *Hartford Fire* applies, the question of the cartel's effects on domestic markets is a question for the jury.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. Although the court of appeals' decision applies the wrong test in concluding that the Sherman Act did not apply to the global price-fixing conspiracy in this case, the court's decision nontheless does not warrant this court's reviw in light of the insufficient development of the record below and the absence of any conflict in the circuits on the question presented.

STATEMENT

1. Petitioners are United States companies that purchase rubber thread, which is "used to make elastic fabric, bungee cords, toys, and other products." Pet.

App. 4a. In 1997, petitioners brought a class action against several producers of extruded rubber thread under Section 1 of the Sherman Act, 15 U.S.C. 1, seeking treble damages for overcharges they allegedly paid as a result of a price-fixing conspiracy. Petitioners named as defendants nine Malaysian, Indonesian, and Thai producers of rubber thread, four United States subsidiaries of Malaysian producers, and two United States independent distributors. After the district court denied class certification and "most defendants settled, declined to appear, or were dismissed," the case against the five Malaysian producers and the United States subsidiary of one of producers (Rubfil USA, Inc.) proceeded to an eight-day jury trial. Pet. App. 3a-5a.

Petitioners "introduced substantial evidence at trial of horizontal price fixing among the producers" during 1991-1996. Pet. App. 5a-6a. All of the price-fixing meetings occurred, and all of the rubber thread was produced, outside the United States. *Id.* at 6a. The conspiracy, however, was "aimed at a global market" including the United States. *Id.* at 10a. The Malaysian producers distributed rubber thread to the United States by (1) selling directly to larger American customers without using an intermediary; (2) selling to United States purchasers through an unincorporated, United States-division of respondent Heveafil Sdn. Bhd.; and (3) selling to domestic purchasers through wholly owned, United States-incorporated subsidiaries. *Id.*

sold over $7 million in rubber thread to customers in 31 States in one year. Pet. 4, 8-9.

The evidence at trial also showed that prices for rubber thread generally rose during 1991-1996. Petitioners contended that the price increases resulted from the conspiracy. Respondents argued, however, that the alleged price-fixing agreement was never implemented in the United States and that any increase in observed prices in the United States flowed from antidumping duties imposed by the Department of Commerce (pursuant to 19 U.S.C. 1673) and increases in the price of raw materials, particularly latex, used to manufacture rubber thread. Pet. App. 6a-7a.

The parties disputed the jury instructions concerning the jurisdictional reach of the Sherman Act. Respondents requested that the jury be required to find that the conspiracy had a "substantial effect" in the United States. Respondents relied on this Court's statement in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 796 (1993), that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." At trial, petitioners objected "to the use of the terms 'substantial effect' in any of the jury instructions." Pet. App. 36a. The district court denied petitioners' objection and submitted the following two questions to the jury:

> 1. Was there a conspiracy * * * to fix the prices of extruded rubber thread, which was intended to have a substantial effect in the United States?
>
> 2. Did the conspiracy have a substantial effect in the United States?

C.A. App. 3665; Pet. App. 7a.

The jury answered the first question in the affirmative but the second question in the negative. The district court entered judgment for respondents. Pet. App. 7a.

2. Petitioners moved for a new trial pursuant to Federal Rule of Civil Procedure 59, arguing that the clear weight of the evidence was contrary to the jury's finding that respondents' conspiracy did not have a substantial effect on United States commerce. The

ble activity demonstrably in interstate commerce." The court of appeals held that, "[b]ecause the conspiracy involved primarily foreign conduct," the district court "did not abuse its discretion in applying the substantial-effect test" of *Hartford Fire*. Pet. App. 3a.

The court explained that, in determining whether to apply the jurisdictional test for foreign conduct under *Hartford Fire* or the jurisdictional test for domestic conduct under *McLain*, "a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic." Pet. App. 24a-25a. Applying that test to the facts of this case, the court of appeals concluded that "the price-fixing conspiracy [petitioners] alleged and proved was primarily 'foreign conduct' to which the *Hartford Fire* test properly applied." *Id.* at 27a. The court reasoned that "the bulk of the conduct * * * occurred abroad"; that "the agreements here were all formed entirely outside the United States"; that the "target of the conspiracy was a globacb abroad.test pr* oc5-3 Tc05

the jury with a good deal of evidence supporting the challenged finding [of no substantial effect], including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price

state activity or some more-than-minimal effect on interstate activity. The test for conduct involving non-import foreign commerce is set forth in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, which requires such foreign conduct to have a "direct, substantial, and reasonably foreseeable [domestic] effect" and that "such effect gives rise to a claim" under the Sherman Act.[1]

And the jurisdictional test for conduct involving im-

ments." Pet. App. 10a. The court of appeals held that, "[i]n determining which jurisdictional test (*Hartford Fire* or *McLain*) applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are *primarily* foreign or *primarily* domestic." *Id.* at 24a-25a (emphasis added). Because the court of appeals found the conspiracy here to involve "primarily 'foreign conduct,'" the court held that "the *Hartford Fire* test properly applied." *Id.* at 27a. That analysis was erroneous. The relative or absolute amount of foreign activity is immaterial if the aspects of the conspiracy giving rise to the plaintiff's injury sufficiently affect domestic commerce,[2] *i.e.*, "the defendant's activity is itself in [domestic] interstate commerce, or * * * has an effect on some other appreciable activity demonstrably in [domestic] interstate commerce." *McLain*, 444 U.S. at 242. In other words, the relevant question is not a relative one, but rather whether there is a domestic commerce component of the case that justifies an instruction under *McLain*, regardless of the relative amount of import commerce or foreign activity involved in the conspiracy.

Moreover, a focus on whether the conduct at issue is primarily domestic or foreign erroneously suggests that a case must be placed in a single category. The alleged conduct at issue may involve significant domestic com-

[2] Unlike the government, private plaintiffs must demonstrate standing by "show[ing] that the [conduct] caused them an injury for which the antitrust laws provide relief,"

merce as well as import and foreign commerce. In particular, the court of appeals' observation (Pet. App. 26a) that the domestic links in a given case may be "mere drops in the sea of conduct that occurred" outside the United States is troubling. That statement might be read to mean that the Sherman Act would extend to a $10 million, purely domestic price-fixing cartel, but not extend to the domestic conduct of the same cartel if it expands to involve foreign producers, foreign meetings, and foreign sales to make it a $100 million global cartel. Certainly, conspirators should not be able to immunize the domestic effects of a conspiracy by broadening the conspiracy to include foreign markets.

b. In this case, respondents' sales appear to fall into three categories: interstate sales, direct imports into the United States to domestic purchasers, and foreign sales to foreign purchasers. Pet. App. 6a, 10a. Moreover, the conduct that gives rise to the petitioners' alleged injuries is limited to the first two categories. Although the facts are not entirely clear, there may well have been a sufficient domestic commerce component in the case to justify an instruction under *McLain*. One respondent, Rubfil USA, Inc., is a United States-incorporated subsidiary of a Malaysian producer, and made interstate sales of rubber thread from its office in North Carolina. Another respondent, Heveafil Sdn. Bhd., maintained an unincorporated division in the United States, which also made interstate sales of rubber thread from its office in North Carolina. *Id.* at 6a, 26a. Although the jury made no finding on the extent of such sales, and the court of appeals did not mention any evidence of such sales, it appears from record evidence cited by petitioners (Pet. 4, 8-9)—and not disputed by respondents—that interstate sales

from the respondents' North Carolina offices totaled in the tens of millions of dollars. If so, that evidence would be sufficient to establish jurisdiction under *McLain*. See 444 U.S. at 242, 246; accord *Fortner Enters.* v. *U.S. Steel Corp.*, 394 U.S. 495, 501-502 (1969) ($190,000 sufficient commerce to establish jurisdiction).

2. Notwithstanding the court of appeals' improper analysis, the decision below does not merit this Court's plenary review. As the court of appeals observed, "our increasingly global economy will undoubtedly produce * * * cases with mixed fact patterns, defying ready categorization as 'foreign' or 'domestic' conduct." Pet. App. 25a. The decision below, however, represents the first appellate decision analyzing what jurisdictional test applies when a price-fixing conspiracy involves significant foreign and domestic elements.

Petitioners argue (Pet. 14-15) that this Court's review is warranted to resolve a conflict with the decision below and *Carpet Group International* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), and *United States* v. *Nippon Paper Industries Co.*,1097 F.3d12 (stg 198n) Hhowevere

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Id. 6 *arpet Grou*.

matter jurisdiction over domestic conduct is at issue," rejecting the defendants' reliance on *Hartford Fire* "because it dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Id*. at 75.

Although the Third Circuit's description, in dicta, of *Hartford Fire* as addressing "wholly foreign conduct" is different than the characterization of the court below of *Hartford Fire* as involving some domestic elements (see Pet. App. 17a-18a), there is no clear conflict calling for this Court's review. The facts of *Carpet Group* and this case are sufficiently distinct that it is not at all clear that the court below would not have joined the Third Circuit in applying *McLain* to the facts of *Carpet Group*. Nor does *Carpet Group* suggest how the Third Circuit would address the conspiracy involved here.

Circuit's decision does not address the appropriate jurisdictional test when the illicit conspiracy has both foreign and domestic elements.

3. Additional considerations further counsel against granting review in this case. Although petitioners objected to the district court's instruction under *Hartford Fire*, Pet. App. 36a, petitioners did not articulate to the district court that, under *McLain*, the Sherman Act applied to the alleged conduct to the extent that it involves domestic commerce. Rather, petitioners proposed a jury instruction that was *inconsistent* with *McLain* and, as a practical matter, similar to the questions that the district court actually posed to the jury. Thus, petitioners requested that the jury be instructed that the Sherman Act applied in this case only upon a finding that respondents' conspiracy actu-

> lished that the conspiracy affected U.S. commerce and the Sherman Act applies.

Plaintiffs' Proposed Jury Instruction No. 36 (Mar. 13, 2001) (emphasis added) (C.A. App. 3663); accord Plaintiffs' Proposed Jury Instruction No. 37 (Feb. 12, 2001) (C.A. App. 3664).

That instruction is not a correct statement of the law. The "proper analysis focuses, not upon actual consequences [from a conspiracy], but rather upon the potential harm that would ensue if the conspiracy were successful." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991). In other words, proof of a conspiracy and jurisdictionally significant sales of the product are sufficient to establish jurisdiction, without regard to an effect on domestic prices.

Not only was petitioners' proposed instruction erroneous, its focus on the conspiracy's effects on prices in the United States was not materially different from the instruction actually given, which required proof that respondents' conspiracy substantially affected United States commerce. Nor is it clear that petitioners would have prevailed had the court instructed the jury as proposed by petitioners. The jury found that respondents conspired and had the intent to substantially affect United States commerce, but that respondents' conduct did not actually have those effects. In other words, the jury appears to have agreed with respondents' defense that the conspiracy either was never implemented or at least was not the cause of the observed price increases of rubber thread in the United States. Thus, the jury's verdict appears to reject petitioners' argument that the conspiracy actually affected price levels in the United States.

Petitioners' failure to request an appropriate instruction under which it would have prevailed counsels against review by this Court. *City of Springfield* v.

the apparently significant domestic commerce involved. And, in any event, petitioners do not point to any appellate decision addressing what effects must be shown under *Hartford Fire*. Indeed, the court of appeals did not purport to define what constitutes a "substantial effect" under *Hartford Fire*, but rather found that, in this particular case, the jury's finding was not against the weight of the evidence. Pet. App. 7a n.1. Review of that fact-bound conclusion is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

R. HEWITT PATE
Acting Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

ROBERT B. NICHOLSON
ADAM D. HIRSH
Attorneys

WILLIAM E. KOVACIC
General Counsel
Federal Trade Commission

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