THE NORTHERN DISTRICT OF CALIFORNIA OPENS ITS DOORS TO THE WORLD'S CIVIL ANTITRUST DISPUTES

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I. INTRODUCTION

Policy choices dominate antitrust law. The U.S. Supreme Court made a policy choice, enshrined in its *Illinois Brick* decision, that under federal antitrust law, only direct purchasers have standing to bring claims, and that under *Hanover Shoe*, those direct purchasers may recover for 100% of the overcharge—empowering the direct purchasers to enforce the antitrust laws and avoid the complexities of pass-on calculations. The U.S. Congress made another policy choice, enshrined in the Foreign Trade Antitrust Improvements Act ("FTAIA"), that U.S. antitrust law would be applied within the United States, and only reach outside the United States when activity in foreign commerce had a direct effect on U.S. commerce.

Each of these two doctrines is meant to be read narrowly, with few and strict exceptions. Yet in the last two years, these two doctrines have been expanded beyond their intended ranges under Northern District of California precedent. As to the bar on indirect purchasers, the Ninth Circuit recognized an exception permitting indirect purchasers to sue when they purchased their product from an innocent direct purchaser which is owned or controlled by a conspirator. The Northern District of California recently doubled that exception, extending it to instances in which the ownership or control relationship exists in the opposite direction, that is, the innocent direct purchaser owns or controls the conspirator. As to the bar on extraterritorial application, the Northern District of California has improperly expanded the "import commerce" exception to the FTAIA to include instances in which the conspiracy occurred in some part in import commerce, even if the plaintiff did not purchase the product in import commerce.

When these expansive precedents are employed together, an unintentionally broad level of antitrust standing for a certain category of potential civil antitrust plaintiffs arises: foreign corporations, engaging in foreign commerce, who have claims based on foreign purchases, can bring direct purchaser claims for their foreign purchases under U.S. antitrust law. This development contradicts the purpose of both *Illinois Brick* and the FTAIA. The Northern District of California has gone too far.

The Seventh Circuit, when looking at the same issues in the context of the same conspiracy, decided that disputes between foreign parties regarding purchases occurring abroad should be decided under the laws of those foreign nations, not under the Sherman Act. The Ninth Circuit would be wise to follow the Seventh Circuit here.

Section II of this article discusses the Ninth Circuit's recent consideration of the FTAIA's limits in the criminal conspiracy case of *United States v. Hsiung*, and the application of *Hsiung* in the civil context. Section III presents the background of *Illinois*

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Brick and its federal bar on indirect purchaser claims, and examines the current contours of the "ownership and control" exception to the *Illinois Brick* bar as applied by the Ninth Circuit and its district courts. Section IV examines the intersection of the "ownership and control" exception and the holding of *Hsiung*, as applied by district courts in the Ninth Circuit. Section IV also examines how the Seventh Circuit has approached the question of the proper reach of U.S. antitrust laws in the *Motorola Mobility* litigation.

II. THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

Congress enacted the FTAIA[2] in 1982 as a limit on the extraterritorial reach of the Sherman Act and the Federal Trade Commission Act.[3] The FTAIA prohibits the application of U.S. antitrust law to conduct taking place in foreign commence or in export commerce; it permits the application of U.S. antitrust law to conduct taking place in domestic commerce or import commerce. Excepted from the prohibition on the application of U.S. antitrust law to conduct in foreign commerce is conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, if such effect gives rise to a Sherman Act claim.[4]

Since the FTAIA's enactment, courts have struggled to define the precise scope of the exception for "import commerce."

A. *United States v. Hsiung*

In *United States v. Hsiung*,[5] the Ninth Circuit upheld the criminal convictions of a Taiwanese electronics manufacturer and two of its executives. The U.S. Department of Justice had alleged that, in a conspiracy spanning more than four years, the defendants conspired with Taiwanese and Korean electronics manufacturers to fix prices of thin film transistor liquid crystal display ("LCD") panels, a display technology incorporated in LCD products such as computers and television monitors.[6] Ultimately, the LCD panels

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2 The Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"), 15 U.S.C. § 6a ("Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.").

3 *See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 156 (2004) ("Empagran I") ("[T]he FTAIA's language and history suggest that Congress designed the Act to clarify, perhaps to limit, but not to expand, the Sherman Act's scope as applied to foreign commerce.").

4 *Id.*

5 *United States v. Hui Hsiung*, 758 F.3d 1074 (9th Cir. 2014).

6 *Id.* at 1078-79.

were sold to companies in the United States and to companies abroad. The DOJ charged the defendants with conspiracy to fix prices of LCD panels in violation of the Sherman Act. Rejecting the defendants' motion to dismiss the indictment, the district court held that "the [FTAIA] is inapplicable to [the] import activity conducted by defendants."[7] A jury found the defendants guilty.[8]

On appeal, the Ninth Circuit affirmed the district court's decision that the conduct involved import commerce, and therefore the FTAIA limited the Sherman Act's application to the defendants' conduct.[9] The court held that the defendants' conduct constituted import trade because they "engaged in the business of producing and selling LCDs to customers in the United States,"[10] insofar as there was some direct importation of foreign LCD panels into the United States.[11] Responding to the defendant's contention that it was not an importer, the Ninth Circuit explained that the argument "misses the point" and that the relevant fact was that "the panels were sold in the United States, falling squarely within the scope of the Sherman Act."[12] A defendant does not technically need to be an "importer" to engage in import commerce. The relevant inquiry, the court found, centers on whether the defendant directly imported at least some products to the United States.[13]

B. The Northern District of California Misapplies *Hsiung* in Civil Context

Before *Hsiung*, courts in the Northern District of California applied the FTAIA's import exception in civil cases to those purchases the plaintiffs made in import commerce, not to purchases made in foreign commerce.[14] But the Northern District of California has read *Hsiung* to change that interpretation, permitting under import exception any civil claim regarding a conspiracy that took place in part in import commerce, even claims for purchases of price-fixed products abroad. This interpretation confuses the application of criminal and civil case law, and renders the FTAIA almost impotent in the age of global price-fixing conspiracies.

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7 *Id.*

8 *Id.* at 1080. The district court sentenced the executives to thirty-six months imprisonment and a $200,000 fine each, in addition to a $500 million fine on the corporate defendant. *Id.*

9 *Id.* at 1089.

10 *Id.* at 1091.

11 *Id.* at 1090 n.7.

12 *Id.* at 1091.

13 *Id.*

14 *See, e.g. Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1105 (N.D. Cal. 2007) (finding FTAIA did not apply where plaintiffs purchased the price-fixed product in the U.S., for delivery to and consumption in the U.S.); *In re Rubber Chemicals Antitrust Litig.*, 504 F. Supp. 2d 777, 783 (N.D. Cal. 2007) ("Interpreting the FTAIA to permit Plaintiffs to bring claims for independent foreign injury, merely because they also suffered domestic injury arising from the same conduct, would significantly encroach upon the traditional jurisdictional prerogatives, and run afoul of principles of prescriptive comity."); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,* No. C 02-1486 PJH, 2006 WL 515629, at *3-5 (N.D. Cal. Mar. 1, 2006) aff'd, 538 F.3d 1107 (9th Cir. 2008), withdrawn from bound volume opinion amended and superseded, 546 F.3d 981 (9th Cir. 2008) and aff'd, 546 F.3d 981 (9th Cir. 2008) (finding FTAIA did not apply where plaintiffs failed to allege a sufficient direct link between their foreign injury and any direct effect on domestic commerce).

In a separate civil litigation involving the same LCD price-fixing cartel at issue in *Hsiung*, plaintiff TracFone brought a claim under Florida state law.[15] TracFone was an indirect purchaser—it purchased handsets from Motorola and Nokia, who had purchased LCD panels from the defendants and incorporated them into the products that TracFone purchased.

In the district court's view, *Hsiung* short-circuited any application of the FTAIA to Florida state law. The *Hsiung* court had found that, for the same underlying conspiracy, "defendants' conduct was outside of FTAIA's scope because 'the conspiracy's intent, as alleged, was to 'suppress and eliminate competition' by fixing prices for panels that [defendants] sold to manufacturers 'in the United States and elsewhere.'"[16] The district court interpreted *Hsiung's* finding to mean that as long as a conspiracy intended to impact import commerce, then the import exception applies, even if the plaintiff's purchases were not in import commerce.[17]

The district court obscured *Hsiung's* central holding while broadly expanding the Sherman Act's extraterritorial application. When evaluating the *Hsiung* case, it is important to keep in mind its context: the decision concerns a criminal conviction. Even if the defendants conspired regarding the price of only a single LCD panel subject to the Sherman's Act territorial jurisdiction, there is a violation of the Sherman Act. Thus, the question of the relevance of a particular imported LCD panel to the case is immaterial—any imported LCD panel is sufficient to give rise to a criminal conviction. In *Hsiung*, there was no dispute that there were some LCD panels that were imported into the United States, and that is all that is required for the criminal conviction.[18]

In contrast, in the civil context the central evidentiary question is not whether *some* portion of the underlying conspiracy occurred in import commerce, but whether a defendant's business activities at issue in the plaintiffs' specific claims occur in import commerce. The FTAIA's import exception, by its terms, applies only to plaintiffs' purchases made in import commerce.[19] Nothing in *Hsiung* changes this, because *Hsiung* was decided solely within the criminal context, where the central issue is one of whether there was even a single violation of the Sherman Act sufficient to justify conviction.

The implications here are difficult to limit. Given the size of the U.S. economy and the global nature of many price-fixing conspiracies, virtually any conspiracy will have *some* effect on U.S. import commerce. That means that any civil plaintiff, including a

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15 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 10-3205 SI, 2014 WL 4652126 (N.D. Cal., Sept. 18, 2014).

16 *Id.* at *2 (quoting *Hsiung*, 758 F.3d at 1091).

17 *Id.* at *3-4. In another separate civil litigation, also involving the same LCD price-fixing cartel at issue in *Hsiung*, the court again applied *Hsiung* in the same manner, holding that the FTAIA did not apply to the plaintiff's California state law claims. *Proview Tech., Inc. v. AU Optronics Corp.*, No. 3:12-cv-03802, 2014 WL 2916933 (N.D. Cal. May 9, 2014).

18 *See United States v. Bowman*, 260 U.S. 94, 98 (1922) (explaining that the presumption that Congress intended a particular law to apply only within U.S. boundaries "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated").

19 *Sun Microsystems*, *supra* note 14.

foreign defendant, could sue for purchases made entirely in foreign commerce simply because that conspiracy somehow touched U.S. import commerce. If followed, this ruling renders the FTAIA's limitations as no limit at all.

III. INDIRECT PURCHASER CLAIMS BARRED TO PROMOTE ENFORCEMENT AND LIMIT DIFFICULT PASS-ON ANALYSES

Two Supreme Court decisions, *Hanover Shoe*[20] and *Illinois Brick*,[21] set out the Supreme Court's policy on U.S. civil antitrust enforcement: direct purchasers have standing to bring claims for 100% of the overcharge, therefore encouraging direct purchasers to act as private attorneys general and avoiding complex pass-on analyses. The flipside to this policy is that indirect purchasers do not have antitrust standing. For over 40 years, this rubric has been the dominant enforcement policy under civil federal antitrust law. The Ninth Circuit has created an exception to the bar on indirect purchaser standing, for instances in which an indirect purchaser purchased from an innocent subsidiary of a defendant. But the Northern District of California has expanded this exception to the breaking point.

A. *Hanover Shoe* Empowers Direct Purchasers to Enforce U.S. Federal Antitrust Law

In *Hanover Shoe*, the Supreme Court prohibited the pass-on defense, consolidating damages to the direct purchasers to encourage private enforcement of federal antitrust laws while conserving judicial resources.[22] The Court believed that recognizing the pass-on defense would impair the deterrent function of treble damages actions: individual end-users would bear the brunt of any overcharges, yet would have little incentive to sue because their individual damages would be so small.[23] Concentrating the full amount of the damages in the hands of the first purchasers, usually U.S. companies that would later resell to end-users or others, created greater incentive for those direct purchasers to pursue their claims and enforce the antitrust laws. Additionally, the Court was concerned about the uncertainties and difficulties in analyzing price and out-put decisions, and reasoned that the pass-on defense would trigger unwieldy and complicated evidentiary analyses.[24]

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20 *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481 (1968).

21 *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

22 The *Hanover Shoe* court recognized two limited exceptions to the general rule against allowing a defendant to assert a pass-on defense: (1) "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present"; and (2) "where no differential can be proved between the price unlawfully charged and some price that the [defendant] was required by law to charge." *Hanover Shoe*. 392 U.S. at 494.

23 *Id*. at 494. Given the prevalence of consumer class actions in modern price-fixing cases brought under state laws seeking hundreds of millions of dollars, this justification now rings hollow.

24 *Id*. at 493 ("[T]here would remain the *nearly insurmountable* difficulty of demonstrating that the particular plaintiff could or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."). The Court also reasoned that the antitrust violation was already complete once the violation caused its customers to pay overcharges, and the actions taken by the first purchasers are irrelevant. *Id*. at 489.

As a corollary to *Hanover Shoe*, in *Illinois Brick* the Supreme Court found that because all of the damages are consolidated into the hands of direct purchasers, indirect purchases have no damages left and therefore have no standing to sue under federal antitrust law. The Court held that an indirect purchaser plaintiff may not use a pass-on theory to claim damages against an alleged antitrust violator.[25]

First, the Court noted that the use of pass-on "would create a serious risk of multiple liability for defendants," because under *Hanover Shoe*, "[e]ven though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on."[26] The indirect purchaser would be able to sue to recover for all or part of an overcharge from the direct purchaser following such automatic recovery, causing overlapping recoveries.[27]

Second, the Court held that the same evidentiary complexities and uncertainties involved in a pass-on defense barred in *Hanover Shoe* would be present in its use by plaintiffs, or even multiplied for a plaintiff several steps removed from the defendant in the chain of distribution.[28]

Finally, the Court reasoned that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[29] The Court was concerned that dividing the potential recovery among a much larger group would diffuse the benefits of bringing a treble-damages action,[30] and introduce complex tracing problems into already complex and costly antitrust litigation, reducing the effectiveness of treble damages actions.[31]

The Court recognized certain exceptions to the rule barring indirect purchaser claims, but only in two narrowly defined circumstances. The first exception was the pre-existing cost-plus exception, where the direct purchaser is insulated from any decrease in its sales as a result of trying to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price.[32] In a footnote, the Court also suggested a second possible exception: in situations where the plaintiff owns or controls the direct purchaser, indirect purchaser standing may be permitted.[33]

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25 *Ill. Brick*, 431 U.S. at 730.

26 *Id.*

27 *Id.*

28 *Id.* at 732, 737 ("Permitting the use of pass-on theories under s 4 essentially would transform treble-damages action into massive efforts to apportion the recovery among the potential plaintiffs that could have absorbed part of the overcharged from direct purchasers to middlemen to ultimate consumers.").

29 *Id.* at 735.

30 *Id.* at 745.

31 *Id.* at 732 n.12.

32 *Id.*

33 *Id.* at 736 n.16.

B. The Ninth Circuit Creates A New Defendant Ownership and Control Exception

In *Royal Printing*,[34] the Ninth Circuit created a new exception from the *Illinois Brick* bar on indirect purchaser claims, allowing a plaintiff that purchased from a direct purchaser owned or controlled by defendant to recover, where the controlled direct purchaser did not participate in the conspiracy.

The *Royal Printing* defendants were paper manufacturers who sold paper products to their wholesaling divisions or wholly-owned subsidiaries. Those wholesalers in turn sold the products to the plaintiffs, including a retail printer (Royal Printing). The wholesalers were not alleged to have participated in the conspiracy.[35] Therefore, Royal Printing was an indirect purchaser—it did not purchase the price-fixed product directly from a defendant who fixed the price of the product, but instead from an innocent middleman.

The Ninth Circuit allowed Royal Printing's claims to proceed because it had purchased from wholly-owned subsidiary wholesalers.[36] The Ninth Circuit reasoned that the concerns of *Hanover Shoe* and *Illinois Brick* were minimized in the case of a wholly-owned subsidiary, because the subsidiary is unlikely to sue its parent or its parent's co-conspirators.[37] In addition, the Ninth Circuit held that Royal Printing should be allowed to claim for the entire amount of the overcharge to the wholesalers.[38] This method, the Ninth Circuit explained, would resolve the *Illinois Brick* complexities of apportionment, and also prevent a complete barring of private antitrust enforcement, as the direct purchasers in such a case would never sue.[39]

A series of Ninth Circuit decisions followed, reconfirming the existence of the conspirator ownership or control exception, including *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133 (9th Cir. 2003), *Delaware Valley Surgical Supply Inc., v. Johnson & Johnson,* 523 F.3d 1116 (9th Cir. 2008), and *In re ATM Fee Antitrust Litig.*, 686 F. 3d 741 (9th Cir. 2012).[40]

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34 *Royal Printing Co., v. Kimberly-Clark Corp. et al.*, 621 F.2d 323 (9th Cir. 1980).

35 *Id.*

36 *Id.* at 327-28.

37 *Id.* at 326.

38 *Id.* at 327.

39 *Id.*

40 It is noteworthy that the Ninth Circuit in *Royal Printing* characterized the *Illinois Brick's* exception for customer ownership or control of the direct purchaser as only "illustrative," and stated that the real exception lies where "the effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand." *Royal Printing*, 621 F.2d at 326 n.4. The court, however, conceded that this exception did not apply to *Royal Printing* because wholesalers' pricing decisions are determined by market forces, although they are owned or controlled by the manufacturers. *Id.* In doing so, the Ninth Circuit recognized that it had created a new conspirator ownership exception. But in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216-17 (1990), the Supreme Court prohibited the lower courts from creating new exceptions not expressly stated in *Illinois Brick*. Therefore, the *Royal Printing* conspirator ownership exception should be recognized as abrogated by *Utilicorp. See* Lee F. Berger and Michael W. Stevens, *Meritorious Circumstances Are Not Enough: Antitrust Standing Drifts Further Astray in the Ninth Circuit after In re ATM Fee*, 22 Competition: The J. of the Antitrust and Unfair Competition L. Sec. of the State Bar of Cal. 177, at 191-94 (April 29, 2013).

C. Recent District Court Precedent Expands *Royal Printing*'s Ownership and Control Exception

The Northern District of California, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*,[41] has taken the conspirator ownership or control exception a step further, finding not only does it apply, as in *Royal Printing* and its progeny, where "a conspirator owns or controls the direct purchaser," but also where the innocent direct purchaser owns or controls a conspirator.[42]

The defendants argued that *In re ATM Fee* and its predecessors limited the ownership and control exception to only those situations in which the conspirator owns or controls the direct purchaser.[43] But the district court disagreed, noting that "*ATM Fee* did not purport to change the *Royal Printing* standard," and "[n]owhere in the *ATM Fee* decision did the court mandate that the ownership/control relationship be limited *only* to a manufacturer/seller and direct purchaser."[44] The court held that although the plaintiffs had purchased finished products containing price-fixed LCD panels—as opposed to the raw panels themselves—they had standing so long as there was an ownership or control relationship between the middleman and a conspirator, regardless of the direction of control.[45]

This decision, if followed by other courts, broadly expands the scope of the ownership or control exception, in contradiction to the policy underlying the Ninth Circuit's decisions. The ownership or control exception was recognized primarily because a parent defendant had the power to require a subsidiary not to sue it or its coconspirators, thereby leaving the antitrust law unvindicated.[46] But the reverse does not make sense—a conspiring subsidiary does not have the power to tell the innocent direct purchaser parent company not to sue it. Instead, the policy here is not that a subsidiary has the power to stop a parent direct purchaser from suing, but that it is unlikely to do so.[47] But *ATM Fee* holds that the fact that a direct purchaser may be unlikely to sue because of its own interest calculation is not enough; instead, the direct purchaser has to be controlled.[48] The *LCD* decision runs afoul of this ruling, and is bad policy. In doing so, it opens up huge new classes of indirect purchasers for standing under federal law, while denying the rights of innocent parent company direct purchasers to sue their subsidiary's coconspirators.

But, as discussed below, the unintended consequence for extraterritorial application of U.S. antitrust law is even more troubling.

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41 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 09-4997 SI, 2012 WL 5869588 (N.D. Cal. Nov. 19, 2012).

42 *Id.* at *1.

43 *Id.* at *2.

44 *Id.* at *3 (emphasis in original).

45 *Id.* at *3, 5 (providing that the ownership/control relationship may be demonstrated between a direct purchaser and a co-conspirator, rather than just a seller).

46 *In re ATM Fee Antitrust Litig.*, 686 F. 3d 741, 756 (9th Cir. 2012); *Royal Printing Co., v. Kimberly-Clark Corp. et al.*, 621 F.2d 323, 326 (9th Cir. 1980).

47 *In re TFT-LCD,* 2012 WL 5869588 at *3-4. It is unclear why the court believed an innocent parent company—one not involved in the alleged conspiracy—would not have an economic incentive to sue its subsidiary's co-conspirators. It would be against that parent company's economic interests to leave such money on the table.

48 *In re ATM Fee,* 686 F.3d at 757.

IV. THE NORTHERN DISTRICT OPENS ITS DOORS TO RESOLVING THE WORLD'S CIVIL ANTITRUST DISPUTES

A. The Northern District of California Permits Foreign Plaintiffs To Bring Claims Based on Purchases Abroad Under the Sherman Act

With its recent expansion of both the FTAIA's import exception and the *Royal Printing* ownership and control exception, the Northern District of California has opened itself up to becoming the world's forum for civil antitrust cases. A hypothetical scenario helps illustrate this idea: assume defendants are Chinese entities selling widgets, who conspire to fix the prices of widgets through agreements reached in China. These defendants sell their widgets both in China and internationally, including in the United States. Plaintiff is a Chinese purchaser of widgets, who purchased price-fixed widgets directly from the conspiring defendants in China.

First, consider the application of the FTAIA's import commerce exception to this hypothetical. This dispute is not one that belongs in a U.S. courtroom. It concerns a dispute between Chinese companies regarding sales that occurred entirely in China, and price-fixing agreements reached entirely in China. Such conduct falls under China's sovereign authority to regulate and resolve internal disputes.[49] Yet under the Northern District of California's recent interpretations of the FTAIA's import commerce exception, because the defendants sold price-fixed widgets to other purchasers in the United States, this dispute would satisfy the import commerce exception and thus be within the Sherman Act's territorial jurisdiction. But if the FTAIA has any meaning at all, surely it is meant to exclude cases arising solely between foreign companies, based on conduct occurring abroad and sales made outside of the United States.[50]

Next, consider the application of the *Illinois Brick* bar to this hypothetical scenario. Assume that the Chinese widget purchaser has a U.S. subsidiary. This U.S. subsidiary buys the widgets from the Chinese parent and sells the widgets to customers located within the United States. Could the Chinese direct purchaser get its subsidiary to bring its claims under the Sherman Act?

As discussed, *Illinois Brick* recognized an exception for situations in which the plaintiff owns or controls the direct purchaser.[51] That exception would not apply to the hypothetical, because the plaintiff subsidiary does not own or control the direct purchaser parent.

But under recent Northern District of California precedent, that ownership and control exception can now operate bi-directionally, such that any parent-subsidiary relationship may be sufficient to give rise to the ownership or control exception. Not

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49 *See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 156 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority. This rule of construction reflects customary international law principles and cautions courts to assume that legislators take account of other nations' legitimate sovereign interests when writing American laws.").

50 *Id.* ("[I]t is not reasonable to apply American laws to foreign conduct insofar as that conduct causes independent foreign harm that alone gives rise to a plaintiff's claim.").

51 *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977).

only does the exception apply where the direct purchaser's customers own or control the direct purchaser, but also where a conspirator owns or controls the direct purchaser.[52] Under that precedent, the U.S. subsidiary can bring direct purchaser claims for their purchases from their parent company in China, allowing the Chinese direct purchaser effectively to circumvent any territorial restrictions on application of the Sherman Act.

Taken together, the Northern District's recent expansions of exceptions to the *Illinois Brick* bar and the FTAIA suggest that a foreign plaintiff may be permitted to bring its claims as direct purchaser claims in the U.S., and seek recovery for purchases made entirely abroad, based on conduct occurring outside of the U.S. Such a scenario would confer on foreign plaintiffs the right to act essentially as private attorneys general enforcing U.S. antitrust law outside the United States.

The Northern District of California has gone too far. The implications of its recent rulings on the import exception and ownership and control exception do not make sense from a policy perspective, unless U.S. courts are to become arbiters of not only domestic disputes arising from anti-competitive conduct, but international ones as well.

B. Contrast: the Seventh Circuit Approach in *Motorola Mobility LLC v. AU Optronics Corp.*

The Seventh Circuit recently faced a scenario similar to the foreign price-fixing hypothetical above in *Motorola Mobility LLC v. AU Optronics Corp.* (*Motorola II*).[53] There, a foreign purchaser bought LCD panels abroad from foreign defendants, at prices that were artificially inflated due to an alleged foreign price-fixing conspiracy. The foreign purchaser then incorporated the panels into cell phones in Asia, and imported the phones into the U.S. for resale to retailers and consumers.[54] The Seventh Circuit affirmed the grant of summary judgment against the plaintiff, holding that the FTAIA barred plaintiff's Sherman Act price-fixing claims arising from its foreign subsidiaries' purchases of price-fixed LCD panels.[55]

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52 Although these are two distinct ownership and control exceptions, it would not be a far leap for a court to apply the reasoning of one to the other.

53 *Motorola Mobility LLC v. AU Optronics Corp. (Motorola II)*, 775 F.3d 816 (7th Cir. 2015).

54 *Id.* at 817. Approximately 1% of the panels sold by the defendants to Motorola and its subsidiaries were bought by, delivered to, Motorola in the U.S. for assembly into cellphones. Among the remaining 99% of the cartelized component that were bought by foreign subsidiaries of Motorola, 42% were incorporated by the subsidiaries, sold and shipped to Motorola for resale in the U.S., while the other 57% never entered the U.S. *Id.*

55 *Id.* at 819-20, 827. This case had been originally been decided in *Motorola I* in which the court held that the requirement of a "direct effect" could not be met because "[t]he effect of component price fixing on the price of the product of which it is a component is indirect." *Motorola Mobility LLC v. Au Optronics Corp. (Motorola I)*, 746 F.3d 842, 844 (7th Cir. 2014), *vacated and reh'g granted*, No. 14-8003, 2014 WL 1243797 (7th Cir. Jul. 1, 2014). The Department of Justice was concerned that such a holding could be interpreted to preclude *all* Sherman Act claims based on foreign conduct involving components of foreign-made products imported into the United States, and filed amicus briefs seeking reversal. *See* Brief for the United States and Federal Trade Commission as Amici Curiae in Support of Neither Party at 24. The Court vacated its judgment and in *Motorola II*, reversed itself on this "direct effect" point. *Motorola II*, 775 F.3d at 819 (if prices of the components were fixed, the effect on U.S. commerce would be sufficiently direct for purposes of the FTAIA).

Judge Posner, writing for the *Motorola II* court, affirmed that the FTAIA barred Motorola's subsidiaries' antitrust claims because Motorola's injuries occurred wholly in foreign commerce when its subsidiaries, the direct purchasers, purchased the price-fixed panels abroad; thus, the effect of the alleged price fixing did not give rise to a federal antitrust claim.[56] While the court recognized that Motorola had purchased a small portion (1%) of the panels directly in import commerce, the fact that some price-fixed panels arrived to the U.S. through import commerce did not mean that claims based on the other 99% of the panels that Defendants sold abroad satisfied the FTAIA's import exception.[57]

Motorola II rejected the argument that the conspiracy targeted import commerce as a way to satisfy the import exception.[58] The Seventh Circuit rejected this targeting theory because it would "nullify the doctrine of *Illinois Brick*."[59] The court stated its concern that "a cartel almost always *knowingly* causes injury to indirect purchasers, yet those purchasers are barred from suit by *Illinois Brick* and the doctrine of antitrust standing that the rule of that case instantiates."[60] This, the Seventh Circuit also recognized the "collision" between Motorola's case, *Illinois Brick*, and the FTAIA, noting that Motorola and its customers were indirect panel purchasers, yet Motorola had failed to assert "any basis that we can see, that the [FTAIA], because it does not mention *Illinois Brick* (or the indirect-purchaser doctrine, announced in that case), is not subject to it."[61]

Motorola also tried effective to shoehorn its claim into the *Illinois Brick* plaintiff ownership and control exception, arguing that it "functioned with its subsidiaries as a single enterprise" to support the import commerce exception argument.[62] Again, the Seventh Circuit rejected these arguments as immaterial, holding that "the immediate victims of the price fixing were its foreign subsidiaries and [that the] U.S. antitrust laws are not to be used for injury to foreign customers."[63] Therefore, Motorola was not covered by the import commerce exception, and thus obliged to prove that the price-fixing had "a direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce giving rise to a federal antitrust claim.[64]

In addition, the Seventh Circuit relied on the notion of international comity. To support its decision, the court reiterated the concerns addressed in *Empagran I* that "rampant extraterritorial application of U.S. law 'creates a serious risk of interference with a foreign nation's ability independently to regulate its own affairs."[65] That, of course, is the exact consequence of the Northern District of California's recent precedent.

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56 *Motorola II,* 775 F.3d at 818-19.

57 *Id.* at 817.

58 Appellant's Opening Brief at 17, *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Aug. 29, 2014) (hereinafter "Appellant's Opening Brief").

59 *Motorola II*, 775 F.3d at 822.

60 *Id.*

61 *Id.* at 821.

62 Appellant's Opening Brief, *supra* note 58, at 9.

63 *Motorola II*, 775 F.3d at 822.

64 *Id.* at 818.

65 *Motorola II*, 775 F.3d at 824 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004)).

V. CONCLUSION

Taken together, the Northern District of California's approach to the FTAIA and *Illinois Brick* doctrines serves to expand the scope of who can bring antitrust claims based on foreign purchases in U.S. courts. The Northern District's exceedingly broad views give standing under the Sherman Act to plaintiffs with no business bringing cases in the United States: foreign plaintiffs, suing foreign defendants engaged in conspiracies abroad, for purchases made abroad in foreign commerce, regarding injury sustained entirely abroad. Congress intended the FTAIA to limit the Sherman Act's territorial jurisdiction to injuries incurred in and effects in the United States. The Northern District's recent applications of both doctrines open the courthouse doors to injuries incurred entirely abroad. And the Supreme Court's intention in *Illinois Brick* and *Hannover Shoe* were to limit standing to direct purchasers so they could act as private attorneys general enforcing U.S. antitrust law, but the Northern District's opinions now permit foreign plaintiffs to act as private attorney generals enforcing U.S. antitrust laws in disputes arising entirely abroad. Courts should not follow these overbroad precedents, and leave the resolution of entirely foreign disputes to foreign courts and foreign laws.