

## NOTE

### STANDING IN THE WAY OF THE FTAIA: EXCEPTIONAL APPLICATIONS OF *ILLINOIS BRICK*

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*In 1982, Congress enacted the Foreign Antitrust Trade Improvements Act (FTAIA) to resolve uncertainties about the international reach and effect of U.S. antitrust laws. Unfortunately, the FTAIA has provided more questions than answers. It has been ten years since the Supreme Court most recently interpreted the FTAIA, and crucial questions and circuit splits abound. One of these questions is how to understand the convergence of the direct purchaser rule (frequently referred to as the Illinois Brick doctrine) and the FTAIA. Under the direct purchaser rule, only those who purchase directly from anti-trust violators are typically permitted to sue under section 4 of the Clayton Act for treble damages. There are several court-created exceptions to this rule that allow indirect purchasers to sue under section 4. This Note addresses the open question of whether courts should apply these exceptions in the FTAIA context. The Seventh Circuit recently discussed this question in Motorola Mobility LLC v. AU Optronics Corp., implying that courts should not recognize Illinois Brick's exceptions in the FTAIA context. This Note argues for a different interpretation of the case—one that supports the effective deterrence of anti-trust violations while vindicating the need to compensate American consumers who are foreseeably, substantially, and directly damaged by foreign anticompetitive conduct. Based on an analysis of the purpose of the Illinois Brick doctrine and the text of the FTAIA, this Note concludes that when an exception to Illinois Brick would permit indirect purchasers to sue in the domestic context, U.S. courts should also allow indirect purchasers to sue under the FTAIA.*

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#### INTRODUCTION

The following hypothetical implicates many of the concerns this Note confronts:

*At the annual Computer Speaker Manufacturers’ Conference, the producers of computer speakers in Europe and Asia conspire to price fix, forming an international cartel artificially inflating the price of computer speakers.<sup>1</sup> After the formation of the conspiracy, one of the conspirators, Mono Polly Speakers, Inc. (the supplier), sells its artificially expensive product to Computer Direct, a computer manufacturer in a small Asian country. Once it purchases the overcharged goods, Computer Direct is a direct purchaser from Mono Polly. This means that, if all of the parties were in the United States, Computer Direct would have standing<sup>2</sup> to sue Mono Polly for antitrust damages under the Illinois Brick doctrine.<sup>3</sup> Computer Direct could accrue damages in one of three ways. First, Computer Direct might keep its computer prices the same, sell the same number of computers, and lose profits equivalent to Mono Polly’s overcharge on the speakers. Second, it could increase sales prices by the exact amount of the overcharge. In this scenario, Computer Direct would pass on the overcharge to its customers.<sup>4</sup> Although this would bring in the same per-unit profits, the increased price may diminish demand for the computers, thereby reducing sales numbers. Finally, Computer Direct might take a middle path: increase the sales price by some amount less than the total overcharge, losing some profits and losing some sales.*

*Mono Polly’s anticompetitive conduct also reaches American commerce because Computer Direct and other similar foreign manufacturers sell computers to consumers and department stores in the United States. Assuming that Computer Direct and others pass on a portion of the overcharge by increasing their sales prices, American purchasers are damaged because they pay more for the product than they would have absent the price fixing. Since the*

1. This would be illegal under U.S. antitrust laws. See generally DANIEL A. CRANE, ANTITRUST 59–66 (2014) (discussing horizontal conspiracies and price-fixing arrangements).

2. For purposes of this Note, “standing” does not refer to the “case or controversy” requirement under Article III of the Constitution, U.S. CONST. art. III, § 2, but rather to statutory standing under the FTAIA and standing under the antitrust laws, where plaintiffs must have the sort of injury that antitrust laws are meant to correct. See *infra* Section I.A.

3. This direct purchaser rule generally limits standing under section 4 of the Clayton Act, 15 U.S.C. § 15 (2012), to those who purchased directly from antitrust violators. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

4. See *infra* Section I.A for a description of the pass-on effect.

U.S. consumers and department stores did not buy directly from Mono Polly, they are indirect purchasers in antitrust terms.<sup>5</sup> In the typical case in which all parties are located in the United States, indirect purchasers (and, accordingly, the U.S. consumers in this case) would generally be unable to sue Mono Polly under the Illinois Brick doctrine.<sup>6</sup>

When Computer Direct discovers the speaker price-fixing conspiracy, it wants to recover damages from Mono Polly. Unfortunately, Mono Polly's home nation does not allow civil damages for antitrust violations, and the laws in Computer Direct's home nation are similarly unhelpful. Knowing that the United States has particularly aggressive civil remedies for antitrust violations, Computer Direct would like to sue Mono Polly there.<sup>7</sup> Once Computer Direct brings suit in the United States, the major department stores and their customers become interested in recovering damages as well. Because the antitrust activities originated abroad, all parties seeking to bring suit must fit their cases within the confines of the Foreign Trade Antitrust Improvements Act (FTAIA).<sup>8</sup> The indirect purchasers in the United States, if not confronted with the direct purchaser rule, might have standing. As long as they could demonstrate the requisite statutory effects on American commerce, they would likely be able to show that those effects gave rise to their claim.<sup>9</sup> Computer Direct and other foreign direct purchasers would be unable to do that, however, because foreign conduct, independent of any effect on American commerce, caused their harm.<sup>10</sup> Although there were effects on American commerce, these effects (increased prices in the United States) were not the cause of Computer Direct's antitrust injury—"rather, it was the foreign effects of the price fixing scheme (increased prices abroad)."<sup>11</sup>

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5. *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 207 (1990) (defining indirect purchaser as anyone who is not the "immediate buyer[ ] from the alleged antitrust violator[ ]").

6. *See Ill. Brick*, 431 U.S. at 736 n.16 (mentioning a possible exception to this rule).

7. Section 4 of the Clayton Act permits plaintiffs to recover treble damages (three times the actual damages) and attorney's fees. 15 U.S.C. § 15(a).

8. *Id.* § 6a. The FTAIA creates a general rule that the antitrust laws (specifically, 15 U.S.C. §§ 1–7, the Sherman Act) "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," and then establishes exceptions to that rule. *Id.* § 6a. To bring a lawsuit under an exception, Computer Direct would have to show that Mono Polly's actions had "a direct, substantial, and reasonably foreseeable effect" on American commerce, and that such effect "gives rise to a claim" and antitrust injury (such as illegal price fixing and a reduction in competition) under the antitrust laws. *Id.*; *see also infra* Section I.B.

9. *See infra* Section I.B.

10. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 173 (2004); Section I.B, *infra*.

11. *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 539–40 (8th Cir. 2007); *see also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989 (9th Cir. 2008) (holding that increases in American prices must proximately cause the plaintiff's foreign injury); *In re Hydrogen Peroxide Antitrust Litig.*, 702 F. Supp. 2d 548, 555 (E.D. Pa. 2010) (referring to the proximate cause analysis under the FTAIA as a "serial process" in which the domestic effect happens first and the foreign antitrust claim comes after and because of the domestic effect).

This hypothetical implicates two major issues in federal antitrust law: indirect purchaser standing<sup>12</sup> and the application of U.S. antitrust laws to foreign conduct. Indirect purchaser standing evolved from an interpretation of section 4 of the Clayton Act.<sup>13</sup> Section 4 permits any “person . . . injured in his business or property by reason of anything forbidden in the antitrust laws” to bring suit to recover treble damages (amounting to three times actual compensatory damages) for antitrust violations.<sup>14</sup> In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*<sup>15</sup> and *Illinois Brick Co. v. Illinois*,<sup>16</sup> the Supreme Court generally limited the definition of such persons to direct purchasers, thereby denying indirect purchasers standing to sue for monetary damages under section 4.<sup>17</sup> American scholars and states alike have intensely criticized this standing requirement—but it still applies to federal antitrust claims.<sup>18</sup> The direct purchaser rule is not absolute, however; many exceptions have evolved since the Court decided *Illinois Brick* in 1977.<sup>19</sup> When one of these exceptions applies, indirect purchasers may be permitted to sue. Although there are many exceptions to the direct purchaser rule with varying degrees of judicial acceptance, this Note focuses on two that are particularly relevant in the FTAIA context: (1) when a direct purchaser is owned or controlled by its supplier (the “defendant control exception”), and (2) when the direct purchaser conspires with its supplier in violation of antitrust laws (the co-conspirator exception).<sup>20</sup>

While the direct purchaser rule is relatively straightforward, the international frame of the hypothetical complicates the application of U.S. antitrust law. Almost every product in modern America takes a transnational route to

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12. This Note refers to the rule that precludes indirect purchasers from suing under section 4 of the Clayton Act interchangeably as “indirect purchaser standing,” the “direct purchaser rule,” and the “*Illinois Brick* doctrine” (referring to *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

13. See *Ill. Brick*, 431 U.S. at 723–24.

14. 15 U.S.C. § 15 (2012).

15. 392 U.S. 481 (1968).

16. 431 U.S. 720 (1977). See *infra* Section I.A for a more detailed discussion of these cases.

17. See *infra* Section I.A for details regarding antitrust standing, the direct purchaser rule, and various exceptions. Note that the direct purchaser rule does not prevent lawsuits for injunctive relief, which are governed by a different statutory provision. 15 U.S.C. § 26.

18. See generally Christopher T. Casamassima & Tammy A. Tsoumas, *The Illinois Brick Wall: Standing Tall*, COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. STATE BAR CAL., Spring 2011, at 67, 67. Thirty-four states have passed statutes repealing *Illinois Brick* for state law antitrust claims. See Michael A. Lindsay, *Overview of State RPM*, ANTITRUST SOURCE, Oct. 2009, [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Oct09\\_LindsayChart10\\_23f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_LindsayChart10_23f.authcheckdam.pdf). These state statutes are not preempted by federal law. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

19. See *infra* Section I.A and Part II.

20. I discuss these exceptions in detail *infra* in Part II. See *infra* Section I.A for a discussion of many additional exceptions.

its final destination.<sup>21</sup> Like Mono Polly's speakers, many of these international goods are exposed to overseas antitrust activities.<sup>22</sup> In 1982, Congress enacted the FTAIA to resolve uncertainties about the "scope and effect" of U.S. antitrust laws over foreign conduct.<sup>23</sup> The FTAIA exempts all foreign nonimport commercial activity from the application of the antitrust laws<sup>24</sup> unless two conditions are met: (1) the activity sufficiently impacted American commerce, and (2) the impact on American commerce caused the plaintiff's antitrust injury.<sup>25</sup> Courts have struggled to interpret and apply the FTAIA, with minimal assistance from the Supreme Court.<sup>26</sup> This complexity is demonstrated by the Seventh Circuit's recent opinions in *Motorola Mobility LLC v. AU Optronics Corp.*: after vacating its first decision, it reheard the case and issued a second opinion, only to amend and reissue that opinion several months later.<sup>27</sup> On June 15, 2015, the Supreme Court denied a petition for a writ of certiorari.<sup>28</sup> The Court nevertheless seems likely to take an FTAIA case in an upcoming term, given the inconsistency that currently plagues the area.<sup>29</sup> Much of this Note untangles the various interpretations of the FTAIA.

21. *Motorola Mobility LLC v. AU Optronics Corp.* (*Motorola II*), 775 F.3d 816, 824 (7th Cir. 2014) ("Nothing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers."), *cert. denied*, 83 U.S.L.W. 3745 (2015).

22. *Id.* ("[T]he prices of many products exported to the United States doubtless are elevated . . . [by] anticompetitive acts that would be punished . . . if committed in the United States.").

23. H.R. REP. NO. 97-686, at 5-7 (1982); see *Empagran I*, 542 U.S. 155, 169 (2004) ("Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.").

24. The FTAIA refers specifically to 15 U.S.C. §§ 1-7 (exclusive of § 6a). 15 U.S.C. § 6a (2012). These provisions make up the Sherman Act. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 305(a), 90 Stat. 1383, 1397 (1976).

25. 15 U.S.C. § 6a; *Empagran I*, 542 U.S. at 162.

26. Craig C. Corbitt & Aaron M. Sheanin, *Appellate Courts Grapple with the Foreign Trade Antitrust Improvements Act—Plaintiffs' Perspective*, COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. STATE BAR CAL., Fall 2014, at 1, 2 ("[T]he Supreme Court . . . has not parsed the FTAIA [since 2004] . . ."); Ian Simmons & Bimal Patel, *One Hundred Years of (Attempted) Solitude: Navigating the Foreign Trade Antitrust Improvements Act*, ANTITRUST, Spring 2010, at 72, 72 ("[F]rom 1982 to 1997, no court construed the meaning of the FTAIA . . .").

27. 746 F.3d 842, 844 (7th Cir.), *vacated*, 773 F.3d 826 (7th Cir.), and *amended by* 775 F.3d 816 (7th Cir. 2014). I refer to the vacated decision as *Motorola I* and the final, amended version of the case as *Motorola II* throughout this Note.

28. *Motorola II*, 775 F.3d 816, *cert. denied*, 83 U.S.L.W. 3745.

29. See Corbitt & Sheanin, *supra* note 26, at 2 ("With all this upheaval and some inconsistent results, a trip to the Supreme Court—which has not parsed the FTAIA in a decade—looks likely in the near future." (footnote omitted)).

The FTAIA is often invoked when foreign businesses like Computer Direct make purchases from price-fixing foreign suppliers like Mono Polly.<sup>30</sup> In these cases, neither party is located in the United States, but effects may still be felt in the United States (for example, by indirect purchasers)—and foreign businesses want to take advantage of U.S. antitrust laws. A plaintiff has standing to sue under the FTAIA when the effects on American commerce are substantial, and those effects cause the plaintiff's injury.<sup>31</sup> So under the FTAIA, even if Computer Direct could show the Mono Polly international cartel substantially affected American commerce, Computer Direct would probably still lack standing because it could not demonstrate that the effects on American commerce caused its injury.<sup>32</sup>

The Supreme Court has never addressed the convergence of indirect purchaser standing and the FTAIA. In the hypothetical, the interaction between *Illinois Brick* and the FTAIA could prevent all private plaintiffs from successfully recovering from Mono Polly in the United States, despite potentially substantial domestic effects.<sup>33</sup> *Illinois Brick* would block the indirect purchasers, while the FTAIA would block Computer Direct. This interaction undermines the deterrent effect of U.S. antitrust laws and harms American consumers.<sup>34</sup> Although these scenarios may be relatively rare, similar situations have occurred many times in the last fifteen years.<sup>35</sup> Most recently, two Federal Circuit Courts of Appeal have confronted this issue. One avoided the question, and the other faced it but raised more questions than it answered.<sup>36</sup>

Although courts would probably decline to create a new exception to *Illinois Brick* just because the direct purchaser is unable to sue under the

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30. See Simmons & Patel, *supra* note 26, at 72 (“[I]nterpretation of the FTAIA has been most prevalent in price-fixing cases, where U.S. courts are asked to adjudicate claims by customers who make purchases in foreign jurisdictions from foreign suppliers and where the defendants’ alleged anticompetitive conduct occurs in a foreign market or international commerce.”).

31. See 15 U.S.C. § 6a (2012); *Empagran I*, 542 U.S. 155, 173 (2004) (“[Section 6a] applies if the [foreign] conduct’s domestic effect gives rise to ‘a claim.’” (emphasis added by court) (quoting 15 U.S.C. § 6a(2) (2000))).

32. See *supra* notes 10–11 and accompanying text. See *infra* Section I.B for details on the requirements of the FTAIA.

33. See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party at 23, *Motorola II*, 775 F.3d 816 (7th Cir. 2014) (No. 14-8003), 2014 WL 4447001, at \*23 [hereinafter Brief in Support of Neither Party] (“[A]bsent a construction of the *Illinois Brick* doctrine that permits suit by the first purchaser in affected U.S. commerce, it is possible that no one could recover damages under the federal antitrust laws despite the tremendous harm in the United States threatened by offshore component price fixing.”).

34. *Id.*

35. See, e.g., *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395 (2d Cir. 2014); *Den Norske Stats Oljeselskap AS v. Heeremac VOF*, 241 F.3d 420 (5th Cir. 2001); *Info. Res., Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411 (S.D.N.Y. 2000).

36. See *Motorola II*, 775 F.3d at 816 (raising interesting questions about the interactions with *Illinois Brick* exceptions); *Lotes*, 753 F.3d at 413 n.7 (avoiding the question).

FTAIA,<sup>37</sup> the question remains: When a traditional exception to *Illinois Brick* would apply in the domestic context, should the indirect purchaser in the United States be allowed to sue under the FTAIA? In *Motorola Mobility LLC v. AU Optronics Corp. (Motorola II)*,<sup>38</sup> the Seventh Circuit seemed to imply that courts should not recognize any exceptions to *Illinois Brick*'s direct purchaser rule in the FTAIA context.<sup>39</sup>

This Note argues that *Motorola II* should not be interpreted so broadly, and the exceptions to *Illinois Brick*'s direct purchaser rule should apply with equal force when the anticompetitive conduct occurs overseas.<sup>40</sup> Part I lays the groundwork for the subsequent discussions of the FTAIA and standing in antitrust law. Part II argues that the defendant control and co-conspirator exceptions to the direct purchaser rule are as valid as the textual exceptions recognized in *Illinois Brick* because they satisfy *Illinois Brick*'s major policy rationales. Additionally, refusing to apply these exceptions when antitrust conduct occurs overseas effectively insulates foreign antitrust violators who target American consumers from civil liability simply because they have conspired with (or commanded) foreign direct purchasers to act as intermediaries. Part III argues that, assuming that *Illinois Brick* poses no bar, courts should interpret the FTAIA to allow indirect purchaser standing and interpret *Motorola II* to permit exceptions to the direct purchaser rule in the FTAIA context.

## I. ANTITRUST STANDING UNDER THE FTAIA

In the United States, individuals can bring lawsuits for antitrust violations only when they satisfy the requirements of antitrust standing.<sup>41</sup> Section 4 of the Clayton Act governs private plaintiff standing for civil complainants seeking to recover treble damages.<sup>42</sup> When anticompetitive conduct occurs in export or purely foreign commerce, however, plaintiffs must also satisfy the requirements of the FTAIA. Section I.A briefly covers the federal standards for establishing private plaintiff standing in antitrust law. Section I.B identifies the overlap between antitrust standing generally and the requirements under the FTAIA.

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37. Research for this Note uncovered only one argument for the creation of such an exception, in a Department of Justice (DOJ) brief to the Seventh Circuit. *See* Brief in Support of Neither Party, *supra* note 33, at 6. In the end, however, the DOJ asked the court to recognize the existence of the requisite effects on domestic commerce to preserve the DOJ's prosecutorial power under the FTAIA. *Id.* at 24; *see Motorola II*, 775 F.3d at 825. Other interpretations of the FTAIA and *Illinois Brick* have also been discussed in the literature. *See, e.g.*, Victor P. Goldberg, *The Empagran Exception: Between Illinois Brick and a Hard Place*, 2009 COLUM. BUS. L. REV. 785, 800 (2009).

38. 775 F.3d 816.

39. *See infra* Section III.B.

40. *See infra* Section III.B.

41. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983).

42. 15 U.S.C. § 15 (2012).

### A. Private Plaintiff Standing in Antitrust Law

To sue for treble damages under section 4 of the Clayton Act, private plaintiffs must show they have been “injured in [their] business or property by reason of anything forbidden in the antitrust laws.”<sup>43</sup> The Supreme Court has interpreted this language to require that plaintiffs show they suffered an antitrust injury and are the correct “persons” to bring the suit.<sup>44</sup>

First, plaintiffs must show they sustained an “antitrust injury” that Congress meant the antitrust laws to prevent.<sup>45</sup> This injury-in-fact must also be directly linked to the antitrust activity.<sup>46</sup> Courts also consider the remoteness of the claim, the speculative nature of the damages, and if denying standing would result in major antitrust activities going “undetected or unremedied” to determine whether the plaintiffs are the best enforcers of the antitrust laws.<sup>47</sup> A plaintiff must then show that the alleged antitrust violation was a material cause of the injury.<sup>48</sup>

Private plaintiffs must also show that they are the correct “persons” to bring the antitrust suit.<sup>49</sup> Except in limited circumstances, the direct purchaser rule prevents indirect purchasers from suing violators of antitrust laws for treble damages.<sup>50</sup> The Supreme Court established the direct purchaser rule in two steps: *Hanover Shoe*<sup>51</sup> and *Illinois Brick*.<sup>52</sup> In *Kansas v. UtiliCorp United Inc.*, the Court reaffirmed the doctrine.<sup>53</sup>

*Hanover Shoe* established the principle that antitrust defendants cannot strip direct purchasers of standing by showing that a direct purchaser has passed on the overcharge to indirect purchasers.<sup>54</sup> When anticompetitive conditions increase prices for direct purchasers, direct purchasers often pass on at least some of the cost to their own customers.<sup>55</sup> In *Hanover Shoe*, the

43. *Id.* § 15(a).

44. *Associated Gen. Contractors*, 459 U.S. at 540–44; *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

45. *Associated Gen. Contractors*, 459 U.S. at 540; *see also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487–88 (1977) (noting that to recover under 15 U.S.C. § 7, the plaintiffs had to show more than injury resulting from an illegal presence in the marketplace).

46. *Associated Gen. Contractors*, 459 U.S. at 540–42; *see also* *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 928–29 (3d Cir. 1999).

47. *See Associated Gen. Contractors*, 459 U.S. at 540–42.

48. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969).

49. *See* 15 U.S.C. § 15 (2012) (limiting private suits to persons who have been injured in their business or property).

50. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745–46 (1977); *see also* CRANE, *supra* note 1, at 174.

51. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968).

52. *Ill. Brick*, 431 U.S. at 746.

53. 497 U.S. 199, 204 (1990).

54. *Hanover Shoe*, 392 U.S. at 494; *see also* *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 206–07 (1990); CRANE, *supra* note 1, at 171.

55. *See supra* note 4 and accompanying text for a description of how the pass-on effect fits in with the motivating hypothetical. Although indirect purchasers are ultimately harmed



plaintiffs alleged that the defendants had “monopolized the shoe machinery industry” in violation of the antitrust laws.<sup>56</sup> The defendants, however, tried to use a “‘passing-on’ defense” and claimed that the plaintiff “suffered no legally cognizable injury . . . [because] the illegal overcharge . . . was reflected in the price charged for shoes” that were sold by the plaintiff.<sup>57</sup> The Supreme Court rejected this defense in part due to the complexity of determining the various causes of price changes and the impact those changes have on sales.<sup>58</sup> The Court also considered the absence of incentives for “ultimate consumers” to bring antitrust class action lawsuits: direct purchasers with more money at stake could more efficiently enforce the antitrust laws.<sup>59</sup>

*Illinois Brick* expanded the holding in *Hanover Shoe*, generally prohibiting the use of the pass-on theory to establish indirect purchaser standing.<sup>60</sup> In *Illinois Brick* the plaintiffs (the state of Illinois and others) were “indirect purchasers of concrete block” from the defendant.<sup>61</sup> The defendant had sold concrete to masonry contractors, who submitted bids to general contractors that in turn served the plaintiffs.<sup>62</sup> The plaintiffs argued they had standing because the direct purchasers (the various contractors) had passed on the overcharge, injuring them.<sup>63</sup> Although the Court recognized that the plaintiffs might have been harmed, the Court held that *Hanover Shoe* limited standing to direct purchasers who had been overcharged, excluding others in manufacturing or the distribution chain,<sup>64</sup> on the basis of three fundamental policy concerns. First, allowing indirect purchasers to recover would create a “serious risk of multiple liability for defendants,” given that the rule in *Hanover Shoe* would let the direct purchaser sue as well.<sup>65</sup> Second, calculating the distribution of the overcharge through the supply chain would overly complicate “already protracted treble-damages proceedings.”<sup>66</sup> Finally,

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by pass-on effects, other policy considerations led the Supreme Court to reject a pass-on theory of antitrust standing in *Hanover Shoe* and *Illinois Brick*. *Hanover Shoe*, 392 U.S. at 492–94; *Ill. Brick*, 431 U.S. at 745–47.

56. *Hanover Shoe*, 392 U.S. at 483.

57. *Id.* at 487–88.

58. *Id.* at 492–94.

59. *Id.* at 494.

60. *Ill. Brick*, 431 U.S. at 728.

61. *Id.* at 726.

62. *Id.*

63. *Id.* at 726–27.

64. *Id.* at 728 n.7, 729.

65. *Id.* at 730.

66. *Id.* at 732; see also *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170 (8th Cir. 1998) (“Precisely what part of the overcharge will be borne by the direct purchaser, and what part will be borne by the indirect purchaser, is ‘an example of what is called incidence analysis, and is famously difficult.’” (quoting *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997))).

permitting direct purchasers to recover the full amount of the overcharge would optimally motivate direct purchasers to enforce the antitrust laws.<sup>67</sup>

Most recently, *Kansas v. UtiliCorp United, Inc.* reaffirmed the Court's commitment to the *Illinois Brick* doctrine.<sup>68</sup> In *UtiliCorp*, the defendants allegedly conspired to increase the price of gas supplied to utility companies.<sup>69</sup> The utilities (the direct purchasers) then sold the gas to their customers (the indirect purchasers) in several states.<sup>70</sup> The states asserted *parens patriae* claims on behalf of those customers.<sup>71</sup> The Court held that the plaintiffs lacked standing; the plaintiffs' claims implicated the same policy concerns as those emphasized in *Illinois Brick* because the plaintiff states represented indirect purchasers.<sup>72</sup> The Court soundly rejected the idea of creating market-based exceptions to the direct purchaser rule.<sup>73</sup>

Although the *UtiliCorp* Court declined to create a new exception, *Illinois Brick* explicitly mentioned two exceptions: the cost-plus contracts exception and the own-or-control exception.<sup>74</sup> The cost-plus exception established by *Hanover Shoe* and confirmed by *Illinois Brick* allows indirect purchasers to sue when there is a pre-existing cost-plus contract between the direct and indirect purchasers.<sup>75</sup> A cost-plus contract fixes the quantity of sales so the direct purchaser is "insulated from any decrease in its sales as a result of attempting to pass on the overcharge," simplifying the apportionment of damages.<sup>76</sup> *UtiliCorp* described this exception as applying to situations in which "market forces" are suspended.<sup>77</sup>

A second exception mentioned in *Illinois Brick* allows the pass-on theory to be used "where the direct purchaser is owned or controlled by its customer."<sup>78</sup> When the indirect purchaser and the direct purchaser act as a single entity, courts grant indirect purchasers standing because it preserves "an undiluted incentive in the hands of the most likely enforcer" of the antitrust laws.<sup>79</sup> If an employee directly purchases an overcharged product and is subsequently reimbursed by her employer (the indirect purchaser), the direct

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67. *Ill. Brick*, 431 U.S. at 735 ("[A]ntitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers . . .").

68. *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 204 (1990).

69. *Id.*

70. *Id.* at 204–05.

71. *Id.* at 204.

72. *Id.* at 204–13.

73. *Id.* at 216–17 ("In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.").

74. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 732 n.12, 736 n.16 (1977).

75. *Id.* at 732 n.12.

76. *Id.* at 736; *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 497 F. Supp. 218, 225 (C.D. Cal. 1980) (affirming the *Illinois Brick* exceptions).

77. *UtiliCorp*, 497 U.S. at 218.

78. *Ill. Brick*, 431 U.S. at 736 n.16.

79. Matthew M. Duffy, Note, *Chipping Away at the Illinois Brick Wall: Expanding Exceptions to the Indirect Purchaser Rule*, 87 NOTRE DAME L. REV. 1709, 1733 (2012).

purchaser “retain[s] no independent harm.”<sup>80</sup> This avoids the policy problems of concern in *Illinois Brick*.

Other exceptions have arisen either from unquestioning judicial consensus or from the logical implications of the own-or-control exception.<sup>81</sup> Meanwhile, suits for injunctive relief and criminal charges fall outside of the purview of section 4 of the Clayton Act because they are not brought by parties seeking treble damages, thereby bypassing concerns about duplicative monetary recovery and complex damage calculations, since no damages are sought or awarded.<sup>82</sup> Outside of these well-established exceptions, the creation of a “new” exception is a rare occurrence.<sup>83</sup> This Note addresses whether and how these exceptions should apply in the FTAIA context.

### B. *The FTAIA: Interpretation and Controversy*

The FTAIA sets a “general rule placing *all* (nonimport) activity involving foreign commerce outside” the reach of the antitrust laws,<sup>84</sup> and then makes an exception for when “the conduct *both* (1) sufficiently affects American commerce . . . and (2) has an effect of a kind that the antitrust law considers harmful, *i.e.*, the effect must ‘giv[e] rise to a [Sherman Act] claim.’”<sup>85</sup> The notoriously vague language in the statute has created several circuit splits and interpretive challenges.<sup>86</sup> This Section explains interpretations of the FTAIA that implicate the *Illinois Brick* doctrine and determine the application of U.S. antitrust laws to foreign conduct.

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80. *Id.* at 1733–34; *cf.* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that a corporate parent and its wholly owned subsidiary cannot “agree” for purposes of section 1 of the Sherman Act).

81. The express assignment exception, when direct purchasers assign their rights to sue to indirect purchasers, is unquestioned. *See* *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 438–39 (3d Cir. 1993). The defendant-control exception was also widely accepted almost immediately after *Illinois Brick*. *See, e.g., In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 19 (3d Cir. 1978). *See infra* Part II for a deeper analysis of the defendant-control exception.

82. *See* 15 U.S.C. § 26 (2012) (governing private injunctive suits); *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 856 (7th Cir. 2012) (en banc) (“If this were an action by the Department of Justice or the Federal Trade Commission, we would not need to worry about *Illinois Brick* . . .”).

83. *See infra* Part II for a discussion of the development and purposes of the “co-conspirator” exception.

84. *Empagran I*, 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. § 6a (2004)). The FTAIA applies to claims under the Sherman Act, 15 U.S.C. §§ 1–7 (exclusive of § 6a). 15 U.S.C. § 6a (2012).

85. *Empagran I*, 542 U.S. at 162 (quoting 15 U.S.C. § 6a (2000)).

86. *See* Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 329 (2007). One such controversy—whether the FTAIA is jurisdictional or substantive—was arguably resolved by the Court’s holding in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). *See* *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 406 (2d Cir. 2014) (noting that every court since *Arbaugh* has held the statute non-jurisdictional). This issue is outside the scope of this Note.

Foreign conduct falls within the Sherman Act when it involves import commerce or when it falls under the FTAIA's "effects exception."<sup>87</sup> As the FTAIA states, "[the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."<sup>88</sup> This import exception applies "when a foreign cartel fixes the price of goods sold *directly* to U.S. customers"<sup>89</sup> and when the antitrust violators "target import goods or services."<sup>90</sup> In addition to falling outside of the FTAIA's restrictions, the people and businesses in the United States that directly import the goods will also generally have standing under *Illinois Brick* as direct purchasers. When the conduct involves export or foreign commerce, the more complicated "effects exception" determines if the plaintiff's claim is reachable under the FTAIA and Sherman Act.<sup>91</sup> The effects exception requires a cognizable antitrust violation with "direct, substantial, and reasonably foreseeable" domestic effects (the "effects test"), and a plaintiff whose injury was caused by the domestic effects (the "causation element").<sup>92</sup>

Congress designed the FTAIA to strike a balance between protecting commerce and consumers while "avoiding unreasonable interference with the regulation of foreign markets by other countries" in respect of comity.<sup>93</sup> In the FTAIA context, comity is "not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed 'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws."<sup>94</sup> In adjudicating FTAIA claims, courts may consider the goodwill and respect concerns implicated by international comity.<sup>95</sup> Perhaps they should—applying antitrust laws to foreign conduct risks "interfere[nce] with a foreign nation's ability independently to regulate its own commercial affairs."<sup>96</sup> For example, in the hypothetical, Computer Direct's home country made a policy choice against the award of civil damages for antitrust violations.<sup>97</sup> Perhaps, in deciding to base its business there, Computer Direct sought to

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87. 15 U.S.C. § 6a.

88. *Id.*

89. Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing En Banc at 8, *Motorola II*, 775 F.3d 816 (7th Cir. 2014) (No. 14-8003), 2014 WL 1878995, at \*8 [hereinafter Brief in Support of Rehearing]; see *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 854–55 (7th Cir. 2012) (en banc).

90. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011); see Brief in Support of Neither Party, *supra* note 33, at 8–9.

91. Brief in Support of Rehearing, *supra* note 89, at 8.

92. 15 U.S.C. § 6a; *Empagran I*, 542 U.S. 155, 163–64 (2004).

93. Supplemental Brief for the United States as Amicus Curiae at 1, *Motorola II*, 775 F.3d 816 (7th Cir. 2014) (No. 14-8003) [hereinafter Supplemental Brief].

94. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

95. *Id.* at 798 (majority opinion).

96. *Empagran I*, 542 U.S. at 165.

97. See *Motorola II*, 775 F.3d 816, 826 (7th Cir. 2014) ("[F]oreign antitrust laws rarely authorize private damages actions."), *cert. denied*, 83 U.S.L.W. 3745 (2015).

benefit from the very policies that failed to protect it from Mono Polly. In *Motorola II* for example, several nations filed amicus briefs with the Seventh Circuit, expressing “worr[y] about the implications of Motorola’s suit for their own competition policies.”<sup>98</sup>

Nevertheless, the Supreme Court has held that the FTAIA’s relative infringement on foreign sovereigns is “nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as [it] reflect[s] a legislative effort to redress *domestic* antitrust injury” caused by anticompetitive foreign conduct.<sup>99</sup> Considering that foreign governments may benefit from cartels based in their own countries that export the price-fixed goods, they “often have no incentive” to punish such antitrust activity.<sup>100</sup> Courts do, however, still consider comity when interpreting and applying the FTAIA.<sup>101</sup>

The FTAIA generally avoids implicating comity concerns by requiring that foreign antitrust activity create “direct, substantial, and reasonably foreseeable effect[s]” on American commerce in order to fall within the Sherman Act.<sup>102</sup> There are currently two interpretations of the requirement that the effects be “direct” under the FTAIA: the Ninth Circuit’s immediate consequence test, and the competing “reasonably proximate causal nexus” interpretation.<sup>103</sup> These interpretations have significant ramifications for private individuals suing for treble damages and the Department of Justice (DOJ) bringing injunctive and criminal charges.<sup>104</sup> The inquiries into substantiality and reasonable foreseeability are separate from directness; effects can be direct and still fail the substantiality or reasonable foreseeability prongs. Although federal circuit courts have not explicitly disagreed about what makes an effect “substantial,” they have also not offered any definite tests.<sup>105</sup> Substantiality may require injuries to a market rather than to individuals, or it may be indicated by the monetary size of the injury.<sup>106</sup> The DOJ has, for example, used the volume of sales that were impacted to determine substantiality: “billions of dollars of affected commerce” would be enough to show

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98. *Id.* at 817.

99. *Empagran I*, 542 U.S. at 165.

100. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 860 (7th Cir. 2012) (en banc).

101. *See, e.g., Motorola II*, 775 F.3d at 824–25. *See infra* Section III.B for a deeper discussion of the implications of comity for FTAIA purposes relating to *Motorola II*.

102. 15 U.S.C. § 6a (2012); *see United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (“[A] statute should not be interpreted to cover acts abroad which have no consequence here.”).

103. *See infra* Section III.A.

104. *See infra* Section III.A.

105. Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What is a “Direct, Substantial, and Reasonably Foreseeable Effect” Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT’L L.J. 11, 18 (2003).

106. *See id.*

substantial impact.<sup>107</sup> The test for foreseeability seems less contested—the effects should be measured by an objective standard.<sup>108</sup>

Although courts and scholars continue to debate the proper interpretation of the effects test, the Supreme Court has helpfully clarified the “give[ ] rise to a claim” causation element of the FTAIA.<sup>109</sup> In *F. Hoffmann-La Roche Ltd. v. Empagran S.A. (Empagran I)*, the plaintiff was an entirely foreign actor with an injury occurring outside the United States.<sup>110</sup> The plaintiff claimed that it should be permitted to sue under the FTAIA’s effects exception because (1) the foreign anticompetitive conduct satisfied the effects test, and (2) the substantial effects in the United States gave rise to a claim under the Sherman Act.<sup>111</sup> This interpretation would have permitted the plaintiff to sue using the effects exception to the FTAIA even though it was not injured by the effects in the United States. In *Empagran I*, however, the Court held that “‘gives rise to a claim’ means ‘gives rise to *the plaintiff’s* claim.’”<sup>112</sup> The Court based its decision on the premise that “Congress would not have intended the FTAIA’s exception to bring independently caused foreign injury within the Sherman Act’s reach.”<sup>113</sup> This interpretation limited the scope of the FTAIA to claims that were sufficiently related to adverse effects on American commerce, taking into account the importance of “comity and history.”<sup>114</sup> Every circuit court that has considered cases after *Empagran I* has decided that the domestic effects must proximately cause the plaintiff’s injury.<sup>115</sup>

When foreign direct purchasers fail *Empagran I*’s causation test, American indirect purchasers could still theoretically qualify to bring suit under the FTAIA’s effects exception.<sup>116</sup> The direct purchaser rule may stand in their way, however.<sup>117</sup> The remainder of this Note argues that exceptions to the direct purchaser rule that satisfy all the policy concerns of *Illinois Brick* should apply with equal force in both domestic and international cases.

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107. Brief in Support of Neither Party, *supra* note 33, at 12.

108. *Id.*

109. 15 U.S.C. § 6a (2012); *see Empagran I*, 542 U.S. 155, 173–74 (2004).

110. *Empagran I*, 542 U.S. at 163–65.

111. *Id.* at 160.

112. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 414 (2d Cir. 2014) (quoting *Empagran I*, 542 U.S. at 173).

113. *Empagran I*, 542 U.S. at 173.

114. *Id.* at 174.

115. *Lotes*, 753 F.3d at 414 (agreeing with the Eighth, Ninth, and D.C. Circuits); *see In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

116. Assuming that the effects test is met, American indirect purchasers who are harmed by the anticompetitive conduct in the United States can likely show that their harm is proximately caused by the adverse effect on American commerce. There is debate, however, about whether indirect purchasers can ever suffer direct effects. *See infra* Section III.A.

117. *See infra* Part III for the argument that the *Illinois Brick* doctrine applies in full to FTAIA cases.

## II. CONTROLLERS, CO-CONSPIRATORS, AND CALMING *ILLINOIS BRICK* CONCERNS

In the hypothetical at the start of this Note, Computer Direct was a victim of international price fixing—but what if it had been an accomplice? Although *UtiliCorp* seemingly disfavors new exceptions,<sup>118</sup> lower courts have created exceptions to the direct purchaser rule to deal with situations in which the direct purchaser is in cahoots with the antitrust violator.

This Part focuses on the exceptions permitting indirect purchasers to sue when (1) the direct purchaser is a co-conspirator (the “co-conspirator exception”), or (2) the direct purchaser is owned or controlled by the antitrust violator (the “defendant control exception”).<sup>119</sup> Essentially, this Note argues that the defendant control and the co-conspirator exceptions should be considered equal to the exceptions explicitly mentioned in *Illinois Brick*—the traditional own-or-control exception and the cost-plus exception—when determining which should apply in the FTAIA context.<sup>120</sup> The defendant control and co-conspirator exceptions have particular relevance in the FTAIA context. Ordinarily, foreign antitrust violators that sell products directly into the United States are subject to U.S. antitrust laws under either the FTAIA’s import commerce exception or effects exception (because they satisfy *Illinois Brick*).<sup>121</sup> Foreign antitrust violators that target American consumers should not be able to get around this liability simply by conspiring with (or commanding) foreign direct purchases to act as intermediaries. One way to close this loophole is to recognize the defendant control and co-conspirator exceptions in the FTAIA context.

Section II.A analyzes the development and distinctive features of the defendant control and co-conspirator exceptions. Section II.B argues that these two exceptions arose because they satisfied *Illinois Brick*’s concerns of prohibiting duplicative liability, encouraging efficient enforcement of the antitrust laws, and avoiding overly complex proceedings. All exceptions that satisfy these concerns should apply with equal force in the United States and in the FTAIA context.

### A. *Exceptional Definitions: Two as One*

The Supreme Court has never officially recognized the defendant control exception or the co-conspirator exception.<sup>122</sup> Still, they both developed

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118. *Kansas v. UtiliCorp United Inc.*, 479 U.S. 199, 219 (1990).

119. See *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1292 (D. Md. 1981); see also *In re Mercedes-Benz Anti-Trust Litig.*, 157 F. Supp. 2d 355, 366 (D.N.J. 2001) (“It is also well-established that the rationale of *Illinois Brick*’s bar to indirect purchaser suits does not apply where the supposed intermediary is controlled by one or the other of the parties.”).

120. See *supra* Section I.A (describing these exceptions).

121. See *supra* notes 89–90 and accompanying text.

122. The Supreme Court has consistently denied certiorari to cases that recognize these exceptions. *E.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997) (discussing the defendant control exception), *cert. denied*, 522 U.S. 1153 (1998); *In*

from the intuitive notion that when the direct purchaser conspires with (or is owned or controlled by) the antitrust violator, the so-called “indirect” purchaser is really buying *directly* from a single conspiring entity made up of the direct purchaser and the original violator.<sup>123</sup> These are persuasive and intuitive exceptions that should be recognized as authoritative and should apply in the FTAIA context.

Within three years of *Illinois Brick*, at least two circuits recognized that the “own-or-control” exception should apply when the antitrust violators control the direct purchasers, creating the defendant control exception.<sup>124</sup> The original own-or-control exception applies when the direct and indirect purchasers function as one entity, and the defendant control exception applies when the direct purchaser and the supplier function as one entity. When applying the own-or-control exception, “the unanimous view is that the exception applies not only where the direct purchaser is owned or controlled by its customer, but also where it is owned or controlled by its supplier.”<sup>125</sup> This exception is different from the co-conspirator exception,<sup>126</sup> but similarly permits indirect purchasers to sue when “there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.”<sup>127</sup>

The “more contentious” co-conspirator exception<sup>128</sup> comes in two forms. The indirect purchaser can sue the co-conspirators in either a traditional horizontal conspiracy or, relevant here, in a vertical conspiracy.<sup>129</sup> A vertical conspiracy is one in which the two sides of a conspiracy “operate at different levels of production or distribution,” such as a supplier and its customer.<sup>130</sup> The vertical co-conspirator exception “is not really an exception at all” because “[i]f the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect

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*re* Midwest Milk Monopolization Litig., 730 F.2d 528, 530–32 (8th Cir. 1984) (noting that some courts within the Ninth Circuit recognize the co-conspirator exception), *cert. denied*, 469 U.S. 924 (1984).

123. See *In re* ATM Fee Antitrust Litig., 686 F.3d 741, 750 (9th Cir. 2012).

124. See *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 497 F. Supp. 218, 226 (C.D. Cal. 1980) (citing *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980); *In re* Sugar Indus. Antitrust Litig., 579 F.2d 13, 19 (3d Cir. 1978)).

125. *In re* Mid-Atl. Toyota Antitrust Litig., 516 F. Supp. 1287, 1292 (D. Md. 1981); see also *In re* Mercedes-Benz Anti-Trust Litig., 157 F. Supp. 2d 355, 366 (D.N.J. 2001) (“It is also well-established that the rationale of *Illinois Brick*’s bar to indirect purchaser suits does not apply where the supposed intermediary is controlled by one or the other of the parties.”).

126. *Casamassima & Tsoumas*, *supra* note 18, at 69–70, 73; *Duffy*, *supra* note 79, at 1734, 1742.

127. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1145–46 (9th Cir. 2003) (citing *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980)).

128. *Duffy*, *supra* note 79, at 1734.

129. See *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980); Jerome Musheno, Note, *Should Standing Be an Issue for the Indirect Purchaser in a Vertical Conspiracy?*, 72 TEMP. L. REV. 251, 267 (1999). The horizontal co-conspirator exception is more contentious, and is outside the scope of this Note.

130. *CRANE*, *supra* note 1, at 18.



purchasers (that is, there is no pass-on theory involved).<sup>131</sup> The Federal District Court for the District of Arizona first recognized the vertical co-conspirator exception in 1977, the same year the Court decided *Illinois Brick*.<sup>132</sup> Since then, many courts have held that the alleged co-conspirator must be named and joined in the lawsuit for the exception to apply, in order to reduce the risk of duplicative recovery.<sup>133</sup> If both co-conspirators were not joined, then “inconsistent adjudications on the existence of a vertical conspiracy would enable both indirect purchasers and middlemen to recover for a single overcharge.”<sup>134</sup>

### B. *Exceptional Policies: Applying Illinois Brick*

The Court recognized two explicit exceptions in *Hanover Shoe* and *Illinois Brick* (the cost-plus and own-or-control exceptions) because they satisfied the three policy concerns implicated when indirect purchasers are permitted to sue for treble damages in antitrust lawsuits.<sup>135</sup> When applying or creating any exception to *Illinois Brick*, courts usually reference more than one of these policy reasons and often discuss all three: prohibiting duplicative liability, encouraging efficient enforcement of the antitrust laws, and avoiding overly complex proceedings.<sup>136</sup> The defendant control and co-conspirator exceptions are no different. U.S. courts applying the defendant control and co-conspirator exceptions justify their application by reference to the policy considerations in *Illinois Brick*.<sup>137</sup> Even though federal courts

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131. *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 750 (9th Cir. 2012); see also M.E., Recent Developments, *Price Fixing—Proving Injury Under Section 4 of the Clayton Act by Indirect Purchasers Relaxed by Expansion of Exceptions to Illinois Brick*, 60 WASH. U. L.Q. 716, 721 (1982).

132. See *Gas-A-Tron of Ariz. v. Am. Oil Co.*, No. CIV 73-191-TUC-WCF, 1977 WL 1519, at \*2 (D. Ariz. Dec. 7, 1977); M.E., *supra* note 131, at 720.

133. See, e.g., *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 931 (3d Cir. 1986); *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 530–33 (8th Cir. 1984); *In re Coordinated Pretrial Proceedings in Petrol. Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982). But see *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980) (requiring only the naming of the co-conspirators in the complaint); *Gas-A-Tron*, 1977 WL 1519, at \*1.

134. M.E., *supra* note 131, at 721 (citing *In re Beef Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979)).

135. See *supra* Section I.A for a discussion of these exceptions. Because the Supreme Court has explicitly recognized these exceptions to the direct purchaser rule, it is not necessary to justify them here. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 732 n.12, 736 n.16 (1977).

136. E.g., *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211–12 (9th Cir. 1984); *In re Mercedes-Benz Anti-Trust Litig.*, 157 F. Supp. 2d 355, 366–67 (D.N.J. 2001); *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1295–96 (D. Md. 1981).

137. See, e.g., *Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593, 598 (D.C. Cir. 1997) (basing its analysis on the inapplicability of the reasons from *Illinois Brick* without any specific exception to rely on); *Shamrock Foods*, 729 F.2d at 1213 (establishing the co-conspirator exception based on *Illinois Brick* policy).

widely apply these exceptions, the Supreme Court has never explicitly considered them.<sup>138</sup> This Section explains why these exceptions nevertheless assuage the Supreme Court's concerns from *Illinois Brick*.

First, both the defendant control and co-conspirator exceptions are intended to avoid liability of multiple defendants for treble damages, one of the primary policy concerns of *Illinois Brick*.<sup>139</sup> The defendant control exception and co-conspirator exception leave a small possibility that the controlled direct purchaser or co-conspirator will eventually bring a suit against the supplier, although many courts have argued that the multiple recovery consideration is fully addressed in the co-conspirator exception.<sup>140</sup> In *Royal Printing Co. v. Kimberly-Clark Corp.*, the Ninth Circuit admitted that there would be a chance of duplicative recovery under the co-conspirator exception but was not overly concerned because it was unlikely.<sup>141</sup> In applying these exceptions, courts have taken steps to minimize the chances for duplicative recovery. For example, courts have held that clear ownership in the form of a subsidiary relationship or clear actual control as indicated by credit or stock arrangements are the only acceptable circumstances in which to invoke the defendant control exception,<sup>142</sup> and many have required the conspiring direct purchaser to be joined as a defendant before applying the co-conspirator exception.<sup>143</sup> Joining the co-conspirator (direct purchaser) as a defendant prevents the direct purchaser from bringing a separate suit to try to clear its name and recover damages later on.

The co-conspirator and the defendant control exceptions are most effective at encouraging the efficient enforcement of antitrust laws. If there is little chance of duplicative recovery because the direct purchaser is unlikely to sue, then there is also the chance that "barring [the indirect purchaser's] suit would close off every avenue for private enforcement of the antitrust laws in such cases," which would be "intolerable."<sup>144</sup> Without the defendant control and co-conspirator exceptions, antitrust violators could avoid liability by creating a subsidiary or otherwise controlled "middleman" to take the fall for them, thereby preventing indirect purchasers from bringing suit.<sup>145</sup>

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138. See *supra* note 122.

139. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 474–75 (1982); *Musheno*, *supra* note 129, at 267.

140. Compare *In re Mid-Atl. Toyota*, 516 F. Supp. at 1295–96 ("[T]he risk of duplicative liability is negligible in that the dealer defendants would be foreclosed from recovery . . ."), with *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 372 (3d Cir. 2005) (finding there was no risk of duplicative recovery or inconsistent judgments), and *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 969 (3d Cir. 1983) (finding that the risk of duplicative recovery precluded the application of the co-conspirator exception).

141. *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980) ("But because as a practical matter the chance of a direct-purchaser suit is so small, the correspondingly small risk of multiple recovery does not disturb us.").

142. *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1162 (5th Cir. 1979).

143. See *supra* note 133.

144. *Royal Printing Co.*, 621 F.2d at 327.

145. *Id.* at 326; *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 19 (3d Cir. 1978).

These subsidiaries or co-conspirators would not be inclined to bring anti-trust actions against their controllers or conspirators, thereby insulating those that would otherwise be held liable for antitrust violations.

Both the defendant control exception and the co-conspirator exception generally avoid the problems associated with overly complex “incidence analysis”<sup>146</sup>—or tracing the path of the overcharge—that is, determining how much of the overcharge was passed on through the distribution chain. In both instances, because the direct purchaser and the antitrust violator are acting as one entity, it should be easy to show that the entire overcharge was passed to the indirect purchaser. In co-conspirator cases, the price has been preset so the co-conspirator does not incur additional supply-and-demand costs from passing on the costs to customers.<sup>147</sup> This means that the calculations for apportionment are simple: the non-conspirator is the only party that has suffered harm and the pass-on theory is inapplicable. In cases in which the middleman is owned or controlled by the initial seller, the same is likely to be true.

Although satisfying all three *Illinois Brick* considerations is important for a viable exception, avoiding overly complex antitrust proceedings is vital. *Illinois Brick* suggests that avoiding complexity is the most important consideration: even if all parties could be joined to eliminate duplicative recoveries, “the complexity thereby introduced into treble-damages proceedings argues strongly for retaining the *Hanover Shoe* rule.”<sup>148</sup> Accordingly, avoiding complex apportionment is “the most persuasive”<sup>149</sup> policy consideration. Based on an analysis of the various exceptions, avoiding complex apportionment may be possible only when two of the parties act as a single entity or when there is a clear cost-plus contract explicitly demonstrating that the direct purchaser did not suffer any losses from lost sales.

Since *Illinois Brick*, the Supreme Court and several circuit courts have declined to create new or expanded exceptions to the direct purchaser rule, particularly when an exception would unduly complicate proceedings and apportionment.<sup>150</sup> Even if an exception aligns with the *Illinois Brick* policies, *UtiliCorp* makes clear that although the “economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case,” it is an “unwarranted and counterproductive exercise to litigate a series of exceptions.”<sup>151</sup>

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146. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997) (“Tracing a price hike through successive resales is an example of what is called ‘incidence analysis,’ and is famously difficult.”).

147. *See In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 750 (9th Cir. 2012).

148. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 731 n.11 (1977).

149. *In re Mid-Atl. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1291 (D. Md. 1981).

150. *See e.g., Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 210 (1990) (“If we were to add indirect purchasers to the action, we would have to devise an apportionment formula. This is the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid.”); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 439–40 (3d Cir. 1993) (declining to expand an exception because of complexities in apportioning losses).

151. *UtiliCorp*, 497 U.S. at 217.

Courts have, however, interpreted *Illinois Brick*'s exceptions to be nonexclusive.<sup>152</sup> The dissenting opinion in *UtiliCorp* advocates for creating an exception in cases in which the policy rationales of *Illinois Brick* are satisfied.<sup>153</sup> The defendant control exception and the co-conspirator exception are relatively well-established and satisfy the policy rationales of *Illinois Brick*. Accordingly, like the exceptions mentioned in *Illinois Brick*, they should apply with equal force to domestic and international anticompetitive conduct.

### III. THE APPLICATION OF *ILLINOIS BRICK* EXCEPTIONS UNDER THE FTAIA

Although the FTAIA does not mention the direct purchaser rule, it seems clear that the basic *Illinois Brick* rule applies in the FTAIA context.<sup>154</sup> The question remains, however, whether and how the *exceptions* to the *Illinois Brick* doctrine may apply. Section III.A advocates for interpreting “direct” effects under the FTAIA to require a reasonably proximate causal nexus, particularly given that standard’s effects on the criminal deterrence of foreign cartels. Section III.B analyzes the recent *Motorola Mobility LLC v. AU Optronics Corp.* decision. Section III.C concludes that, because the policy concerns are not fundamentally different when the direct purchaser happens to be located overseas, the exceptions that satisfy all of *Illinois Brick*’s concerns should be applied with equal force when there is a foreign direct purchaser in the FTAIA context.

#### A. “Directly” Interpreting the FTAIA

In interpreting “direct” under the FTAIA, the Ninth Circuit required that direct effects “follow[ ] as an immediate consequence” of anticompetitive conduct, meaning only direct purchasers can experience *direct* effects under the FTAIA.<sup>155</sup> This parallelism has tempted several courts.<sup>156</sup> The Seventh and Second Circuits, however, have opted for the more flexible “reasonably proximate causal nexus” interpretation of “direct.”<sup>157</sup> Under this standard, causal connections that are “so attenuated that the consequence is

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152. See *Mid-Atl. Toyota*, 516 F. Supp. at 1292 (“Analysis of the policy considerations underlying *Illinois Brick* reveals quite clearly that the exceptions therein announced were not meant to be necessarily exclusive.”); see also *UtiliCorp*, 497 U.S. at 219 (White, J., dissenting) (“*Illinois Brick* did not hold that, in all circumstances, indirect purchasers lack § 4 standing.”).

153. *UtiliCorp*, 497 U.S. at 219–24 (White, J., dissenting).

154. *Motorola II*, 775 F.3d 816, 821 (7th Cir. 2014) (indicating that Motorola’s attempts to argue otherwise are unsupported), *cert. denied*, 83 U.S.L.W. 3745 (2015).

155. *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004).

156. See *Motorola I*, 746 F.3d 842, 844 (7th Cir.), *vacated*, 773 F.3d 826 (7th Cir.), and *amended by* 775 F.3d 816 (7th Cir. 2014); *Info. Res., Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 414 (S.D.N.Y. 2000) (“[The plaintiff’s] injury, while real, is derivative of the injury suffered by its foreign joint ventures and subsidiaries . . . and [does] not give it antitrust standing.”).

157. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 410 (2d Cir. 2014) (quoting *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc)).

more aptly described as mere fortuity” would be indirect.<sup>158</sup> Applying this analysis, it is possible for an *indirect* purchaser to suffer *direct* effects.<sup>159</sup> This interpretation would therefore permit indirect purchasers to have standing to sue under the FTAIA, assuming that they can get around *Illinois Brick*. This test is similar to a proximate cause analysis; it can involve inquiring into the natural and probable consequences of an act, the scope of the risk of the anticompetitive activity, or whether there was a superseding cause.<sup>160</sup>

Under the *direct means direct* theory of the FTAIA, antitrust claims would be impossible “for [the] price fixing of products [first] sold abroad, no matter how massively and predictably U.S. consumers were harmed.”<sup>161</sup> This interpretation could have disastrous effects, however, because the FTAIA applies equally to private civil cases and the criminal prosecution of international cartels.<sup>162</sup> Normally, because *Illinois Brick* applies only to suits brought for treble damages under the Clayton Act, the DOJ has no standing issues. This definition, however, would create one by tying the direct purchaser doctrine to the FTAIA requirement for direct effects.<sup>163</sup> If the FTAIA limits direct effects to first purchasers, the DOJ would be powerless against foreign anticompetitive conduct that had a substantial effect on American indirect purchasers.<sup>164</sup> Although the Supreme Court has not considered the extent of DOJ jurisdiction in international cases, the First Circuit has held that the DOJ may prosecute foreign entities when their activities have a “substantial and intended effect within the United States,” mirroring the FTAIA.<sup>165</sup>

Also, the Ninth Circuit’s requirement that direct effects “follow[ ] as an immediate consequence” of anticompetitive conduct<sup>166</sup> seems to exclude any indirect purchaser claims and, perhaps, related DOJ claims because it would mean that two steps removed from the initial source might be too remote. No other circuits have followed this standard. This Section argues for a more flexible definition of “direct” in *direct* effects—one that is different from the definition in *direct* purchaser.

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158. Brief in Support of Rehearing, *supra* note 89, at 9 (quoting *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014)).

159. See *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399–401 (3d Cir. 2000).

160. Brief in Support of Neither Party, *supra* note 33, at 6, 13–14 (citing *Lotes*, 753 F.3d at 412).

161. Brief in Support of Rehearing, *supra* note 89, at 2; see also *Motorola I*, 746 F.3d at 844.

162. *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 856 (7th Cir. 2012) (en banc) (“[R]egardless of whether the case is brought by the government or in private litigation, it is essential to meet the criteria spelled out by the FTAIA.”).

163. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 (1983).

164. See Brief in Support of Rehearing, *supra* note 89, at 10.

165. *Developments in the Law, Extraterritoriality: Comity and Extraterritoriality in Antitrust Enforcement*, 124 HARV. L. REV. 1269, 1274 (2011) (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997)).

166. *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004).

Courts should interpret “direct” in the FTAIA as requiring only “a reasonably proximate causal nexus” to the anticompetitive activity.<sup>167</sup> The text of the statute, its purpose, and the practical impact on the DOJ favor the reasonably proximate causal nexus standard.

The reasonably proximate causal nexus standard is a better textual understanding of the FTAIA because it “gives effect” to all parts of the statute and accordingly avoids rendering much of the FTAIA superfluous.<sup>168</sup> The statutory interpretation rule against surplusage arises out of a court’s “duty to give effect, where possible, to every word of a statute.”<sup>169</sup> To interpret “direct” to mean “immediate” would violate the rule against surplusage in two ways. First, “[r]eading ‘direct’ as ‘immediate’ would rob the separate ‘reasonabl[e] foreseeab[ility]’ requirement of any meaningful function, since [it is difficult] . . . to imagine any domestic effect that would be both ‘immediate’ and ‘substantial’ but not ‘reasonably foreseeable.’”<sup>170</sup> Second, demanding an “‘immediate’ consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA’s coverage.”<sup>171</sup> It would make the import exception “superfluous[ ] . . . or insignificant” since it already covers the instances in which Americans are the direct purchasers.<sup>172</sup> “Superimposing the idea of ‘immediate consequence’ on top of the full phrase results in a stricter test than the complete text of the statute can bear.”<sup>173</sup>

Although unified definitions of “direct” in the two contexts are appealing, the definitions may diverge for several reasons. Arguably, because they are both used in the same area of the law, they should be interpreted with the same meaning by analogy to the tendency of courts to read different related statutes as if they were one law (*in pari materia*). This canon of statutory interpretation reflects the assumption that “a legislative body generally uses a particular word with a consistent meaning in a given context” across various statutes.<sup>174</sup> That analogy, however, overlooks the key fact that the direct purchaser rule is not a statute. It is a common law doctrine developed by the Supreme Court before the passage of the FTAIA. Although Congress

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167. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 410 (2d Cir. 2014) (quoting *Minn-Chem*, 683 F.3d at 857).

168. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2248 (2011) (“[T]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute.” (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

169. *Duncan v. Walker*, 533 U.S. 167, 167 (2001).

170. *Lotes*, 753 F.3d at 411 (alterations in original).

171. *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc).

172. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan*, 533 U.S. at 174); see Supplemental Brief, *supra* note 93, at 4 (“[I]t would reach only conduct that involves import commerce and is, thus, excluded from [the FTAIA’s] limitations entirely.”); Corbitt & Sheanin, *supra* note 26, at 8–9.

173. *Minn-Chem*, 683 F.3d at 857.

174. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

was presumably aware of *Illinois Brick*,<sup>175</sup> Congress's complete failure to mention the direct purchaser rule in the text of the FTAIA indicates that it may not have been thinking of the potential dual meaning of "direct" in that context.

Additionally, the use of "direct" in each instance is fundamentally different. In "direct purchaser," "direct" refers to the relationship between the purchaser and the seller, not the relationship between the injury and the anticompetitive conduct. Although "remote" can be used to describe either effects with loose causal connections or the distance of several degrees, "remote" need not have the same meaning in both instances. Merely traveling through one additional link in the distribution chain, absent other considerations, should not transform direct causal effects into indirect ones.<sup>176</sup> In a price-fixing scenario, it is difficult to imagine a complete pass on of an overcharge from the direct purchaser to the indirect purchaser resulting in anything other than a direct effect.<sup>177</sup> Even when the price fixing occurs on a component part, it could still cause "significant harm in the downstream consumer markets."<sup>178</sup> Even *Illinois Brick* recognizes that preventing indirect purchasers from suing will deny recovery to indirect purchasers who may have been "actually injured by antitrust violations."<sup>179</sup> Being *actually* injured by something indicates direct causation. There is "nothing inherent in the nature of . . . international supply chains" that would "render any and all domestic effects impermissibly remote and indirect."<sup>180</sup>

Given that there are two distinct definitions of "direct" in the dictionary, Congress could easily have applied one in the FTAIA context, while the Court applied the other in developing the direct purchaser rule. *Webster's Third New International Dictionary* defines "direct" as *both* (1) "proceeding from one point to another in time or space without deviation or interruption," and (2) "characterized by or giving evidence of a close especially logical, causal, or consequential relationship."<sup>181</sup> The fact that *United States v. LSL Biotechnologies* relied on the first definition for the immediate consequence test<sup>182</sup> and the courts in *Lotes Co. v. Hon Hai Precision Industry Co.* and *Minn-Chem, Inc. v. Agrium, Inc.* relied on the second, citing *Webster's Third*, indicates that both are judicially accepted definitions of "direct."<sup>183</sup>

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175. See H.R. REP. NO. 97-686, at 11 (1982) (citing *Illinois Brick* as an example of ways that antitrust standing is limited under section 4 of the Clayton Act—but making *no* reference to the direct purchaser rule or how it should fit in with the FTAIA).

176. Brief in Support of Rehearing, *supra* note 89, at 9 ("[T]he existence of several steps in the causal chain does not alone render an effect indirect or too remote.").

177. See Beckler & Kirtland, *supra* note 105, at 19.

178. Brief in Support of Rehearing, *supra* note 89, at 11.

179. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

180. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014).

181. *Id.* at 410 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1981)).

182. 379 F.3d 672, 680 (9th Cir. 2004).

183. *Lotes*, 753 F.3d at 410; *Minn-Chem Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc).

The second definition “is more consistent with the language of the statute” and “addresses the classic concern about remoteness” through a proximate cause analysis and should be adopted for the FTAIA’s effects exception.<sup>184</sup>

Congressional intent also indicates that courts should not interpret the statute so narrowly. Although Congress recognized that the FTAIA implicated international comity concerns, “Congress’ foremost concern in passing the antitrust laws was the protection of Americans.”<sup>185</sup> James Atwood, former deputy legal advisor of the U.S. Department of State, informed Congress that “it is simply too important from the standpoint of American interests” to abandon the enforcement of U.S. antitrust laws when there are adverse effects within the United States.<sup>186</sup> The FTAIA was “not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist.”<sup>187</sup> Additionally, Congress meant to “preserve[ ] antitrust protections in the domestic marketplace for all purchasers.”<sup>188</sup> Substantial and predictable anticompetitive effects on American markets are adverse whether they occur to direct or indirect purchasers, and limiting the definition of direct would undermine the purpose of the FTAIA to balance these concerns.<sup>189</sup>

Interpreting “direct” to apply only to purchases by direct purchasers in the United States “risks constraining the government’s ability to prosecute offshore component price fixing that threatens massive harm to U.S. commerce and consumers.”<sup>190</sup> In the modern world, this would make the American marketplace unacceptably vulnerable to exploitation.<sup>191</sup> It is not difficult to imagine a situation in which an overseas price fixer increases prices for its direct purchaser (also overseas), who then passes on the entire amount to consumers in the United States. In such a case, the overseas direct purchaser might fail to show that substantial, reasonably foreseeable effects on American commerce gave rise to its claim, precluding it from suing under the FTAIA.<sup>192</sup> In this situation, even if indirect purchasers are not permitted to

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184. *Minn-Chem*, 683 F.3d at 857; Brief in Support of Rehearing, *supra* note 89, at 8.

185. *Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 314 (1978).

186. Supplemental Brief, *supra* note 93, at 5 n.3 (quoting *Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 86, 92 (1981) (statement of James R. Atwood, former Deputy Legal Advisor, U.S. Department of State)).

187. H.R. REP. NO. 97-686, at 13 (1982).

188. *Id.* at 10.

189. See Supplemental Brief, *supra* note 93, at 1.

190. Brief in Support of Neither Party, *supra* note 33, at 6.

191. See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014) (“[W]e expect that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States.”).

192. See *id.* (holding that when the direct purchaser’s injury is not a result of the effects on American commerce, such effects do not give rise to its claim); see also *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 539–40 (8th Cir. 2007).



bring suit under *Illinois Brick*, the DOJ should still be able to prosecute anticompetitive conduct overseas given the importance of maintaining cartel deterrence.<sup>193</sup>

Additionally, the concerns with comity that arise in the context of the FTAIA do not apply with equal force to the DOJ.<sup>194</sup> Through prosecutorial discretion, “[t]he United States carefully considers international comity and exercises prudence before bringing any antitrust enforcement actions that might implicate the interests of a foreign jurisdiction.”<sup>195</sup> Private plaintiffs, meanwhile, are not generally trusted to carefully weigh deference to foreign governments when determining whether to sue for civil damages.<sup>196</sup> To ensure that DOJ can continue to deter criminal antitrust conduct overseas in compliance with the FTAIA, it is necessary to avoid adopting the “direct means direct” understanding of *Illinois Brick* and antitrust standing requirements.

Interpreting “direct” to require a reasonably causal nexus will *not* cause all foreign conduct to be swept into the FTAIA’s effects exception. First, it will not always be possible to establish substantial and reasonably foreseeable effects when foreign-produced, antitrust-violating components are built into finished products sold in the United States. In some situations there may be so many degrees of separation that the connection between the price fixing and the domestic effect is “highly attenuated, insignificant, or unpredictable”—but just one additional step in the distribution chain should not necessarily yield that result.<sup>197</sup> Still, it is possible that there could be a “close, significant, and predictable causal connection” between a “major component made and sold” in foreign commerce and finished products in American commerce; indirect purchasers should not be unilaterally excluded from the effects exception.<sup>198</sup> The “gives rise to” prong of the effects exception under *Empagran I* also substantially limits the breadth of the exception: all independently caused foreign harm will fall outside of the scope of the antitrust laws. “The direct effect requirement helps ensure that the [antitrust laws are] not used to police anticompetitive conduct whose impact, as a practical matter, is limited to foreign markets and, thus, is best addressed by foreign nations.”<sup>199</sup> Finally, courts are also free to invoke the principle of comity to deny standing.<sup>200</sup>

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193. See Corbitt & Sheanin, *supra* note 26, at 8–10.

194. *Motorola II*, 775 F.3d 816, 826–27 (7th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3745 (2015).

195. Supplemental Brief, *supra* note 93, at 10.

196. See *e.g.*, *Motorola II*, 775 F.3d at 826–27.

197. Supplemental Brief, *supra* note 93, at 2.

198. *Id.* at 5.

199. *Id.* at 3.

200. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993).

### B. *Interpreting Motorola II: Comity and Implications*

In November 2014, the Seventh Circuit held that Motorola could not bring a section 4 Clayton Act claim against foreign cell phone screen manufacturers that had allegedly sold price-fixed screens to Motorola subsidiaries overseas.<sup>201</sup> The court assumed *arguendo* that there had been direct, substantial, and reasonably foreseeable effects on American commerce, and proceeded to find that the effects did not give rise to Motorola's claims on behalf of its subsidiaries.<sup>202</sup> *Motorola II* may be the first case of its kind to directly tackle the issues raised by the direct purchaser rule and the FTAIA. Although the Seventh Circuit seemed to reject the application of the own-or-control exception when the case fell under the FTAIA,<sup>203</sup> this Section differentiates *Motorola II* from a true example of the own-or-control exception, and concludes that traditional exceptions to *Illinois Brick* should still apply when the requirements of the FTAIA's effects exception are met.

Although the *Motorola II* court discussed the own-or-control exception, the facts of the case did not satisfy the *reasons* for the own-or-control exception. The own-or-control exception is meant to apply to cases in which the owner or controller of the direct purchaser specifically reimbursed the exact amount to its subsidiary. In *Motorola II*, the relationship between Motorola and its subsidiaries was not so clear cut. The Seventh Circuit examined the footnote from *Illinois Brick* creating the own-or-control exception—noting that because the Court said only that there “might be” an exception, the Seventh Circuit was at liberty not to apply one in that case.<sup>204</sup> Judge Posner, writing for the court, explained that even if he were to hypothetically apply the own-or-control exception and treat Motorola as “one” with its subsidiaries, Motorola would still fail under the second prong of the effects test.<sup>205</sup> Because the subsidiaries made purchases overseas and incurred damages from the price fixing overseas, the possible domestic effect on American commerce did not give rise to Motorola's claim on the subsidiaries' behalf. Strangely, Motorola “argued only that its foreign subsidiaries overpaid” for the screens and did not argue that it paid more for the phones as a result,<sup>206</sup> so Motorola essentially failed to allege that it was damaged. Additionally, the court emphasized how difficult it would be to apportion the damages, one of the key policy matters in deciding to apply *Illinois Brick* exceptions and an indication that the own-or-control exception was not truly applicable in the first place.<sup>207</sup>

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201. *Motorola II*, 775 F.3d at 817–18.

202. *Id.* at 819 (“[T]he cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce.”).

203. *See id.* at 823.

204. *Id.*

205. *Id.* at 823–24.

206. *Id.*

207. *See id.* at 821.

A true own-or-control example might pass muster under *Motorola II*. If, instead of some nebulous relationship with its subsidiaries, Motorola had simply sent an agent to China to purchase its screens, and then, upon that agent's return to the United States, paid her for her entire expenditure, it seems likely the exception would apply. Assuming a direct, substantial, and reasonably foreseeable effect on American commerce, the injury to Motorola would have been a part of that anticompetitive effect in the United States or perhaps considered as import commerce and therefore exempt from the FTAIA altogether.

The Seventh Circuit failed to set broader rules for when and how courts should apply the exceptions to *Illinois Brick*, but left room for them to apply the exceptions in the FTAIA context. First, *Motorola II*'s comity concerns, even if valid, would not apply in most situations implicating *Illinois Brick* exceptions. The court stated that because the direct purchasers were incorporated and regulated under foreign law, comity principles prevented American courts from interfering and demanded that such direct purchasers seek redress in their countries of incorporation.<sup>208</sup> This, however, was a problem in *Motorola II* mainly because Motorola seemed to be suing on its subsidiaries' behalf and not for the amount it overpaid in the United States.<sup>209</sup> Such comity principles would probably not apply if the indirect purchaser had evidence of its own harm, thus demonstrating an injury that occurred in the United States rather than abroad and satisfying the effects exception under the FTAIA. Similarly, if the foreign direct purchaser were owned or controlled by, or co-conspirators with, the price fixer (instead of its customer, as in *Motorola II*), the court's specific comity analysis would not apply since the American customer might not have had easy access to the foreign antitrust enforcement system.

Properly understood, exceptions to the direct purchaser rule do not infringe on comity by expanding the reach of the FTAIA. Parties overseas who incurred injuries independent of (or prior to) effects on American commerce will still be prevented from suing by *Empagran I* and the second prong of the effects exception. The federal courts should create a rule that allows all of the exceptions to the direct purchaser rule to apply to the FTAIA. This would decrease the probability that international cartels would be able to conspire with impunity to reach American consumers through foreign subsidiaries (defendant control) or co-conspirators. The rule would also capture cases in which, although technically indirect purchasers, American companies have bought at fixed prices from agents whom they control.

Although *Motorola II* rejected a broad exception to *Illinois Brick* when "applying the doctrine would prevent any American company from suing," the case is best understood as holding that Motorola did not meet the second prong of the FTAIA effects exception because it did not show that the effects on domestic commerce actually injured it.<sup>210</sup> Therefore, in cases in

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208. *Id.* at 827.

209. *See id.* at 823–24.

210. *Id.* at 823–24.

which an Illinois Brick exception is actually satisfied, *Motorola II* still permits American indirect purchasers to sue when they can show the requisite effects gave rise to their claims.

C. *International Policy: Justifying Exceptions*

Applying the exceptions to the direct purchaser rule (such as the co-conspirator and defendant control exceptions) in the FTAIA context reaps the same benefits as the generic *Illinois Brick* exceptions: apportionment of damages is simplified, the risk of multiple recovery is reduced significantly, and American consumers are encouraged to engage in active and efficient enforcement of U.S. antitrust laws.

First, exceptions to the direct purchaser rule should apply in the FTAIA context because they will not complicate damages calculations any more than they would in the domestic context. Even assuming international antitrust cases are more complex than domestic cases, the FTAIA explicitly sweeps international conduct into the clutches of the antitrust laws when plaintiffs satisfy the effects exception.<sup>211</sup> In the domestic context, *Illinois Brick* is concerned that permitting indirect purchasers to sue will “greatly complicate and reduce the effectiveness of already protracted” legal proceedings.<sup>212</sup> Applying exceptions such as the defendant control and co-conspirator exceptions, however, should avoid complicating the process by treating the direct purchaser and antitrust violator as one entity.<sup>213</sup> Because these exceptions to the direct purchaser rule do not further complicate antitrust cases, they are valid in the international context and, therefore, indirect purchasers should be permitted to sue in such cases.

Permitting indirect purchasers to sue under *Illinois Brick* exceptions also encourages the efficient enforcement of the antitrust laws while avoiding duplicative recovery. In the FTAIA context, duplicative recovery has two sides, international and domestic. In the international context, there is no foolproof way to avoid all overlap between judgments in foreign countries for direct purchasers and judgments in the United States for indirect purchasers. For several reasons, this potential overlap is not overly concerning. First, *Illinois Brick* and *Hanover Shoe* were especially concerned with duplicative private damages awards,<sup>214</sup> but most foreign countries do not allow any private damages for antitrust violations.<sup>215</sup> Even if a foreign state did permit private antitrust damages, the exceptions to *Illinois Brick* should allow indirect purchasers to sue only when it would be unlikely for the direct

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211. 15 U.S.C. § 6a (2012).

212. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 732 (1977).

213. *See supra* Section II.A.

214. *Ill. Brick*, 431 U.S. at 731.

215. *See Motorola II*, 775 F.3d 816, 826 (7th Cir. 2014) (“[F]oreign antitrust laws rarely authorize private damages actions.”), *cert. denied*, 83 U.S.L.W. 3745 (2015).

purchaser to bring suit.<sup>216</sup> Finally, if direct purchasers are owned by or conspiring with antitrust violators, it seems unlikely that foreign courts would believe they were truly harmed and award them damages.

Precisely because direct purchasers are very unlikely to sue if they are co-conspirators or owned by the antitrust violator, there is also little danger of duplicative recovery in the United States, which is “[a] primary consideration of the courts in deciding whether or not to carve an exception to *Illinois Brick*.”<sup>217</sup> Foreign direct purchasers may also have difficulty demonstrating that the injury in the United States gave rise to their claim under the FTAIA—perhaps precluding them from suing in the United States altogether and preventing duplicative recovery. Even if duplicative recovery in the United States were possible, courts could require safeguards similar to those already limiting the co-conspirator exception. For example, the application of the exception could be limited to instances in which the direct purchaser can be joined, like the co-conspirator exception,<sup>218</sup> or instances in which the direct purchaser has already been denied standing under the FTAIA’s causation element through a binding judgment.

If direct purchasers are unlikely to sue because they fall into the scope of one of the exceptions, then permitting indirect purchasers to sue under the FTAIA would also further the goal of enforcing the antitrust laws through private plaintiffs. The threat of treble damages in the United States might have the valuable impact of deterring foreign anticompetitive conduct that reaches the United States. Although the FTAIA was meant to limit the scope of the antitrust laws<sup>219</sup>—and thereby limit the number of individuals qualified to sue for treble damages under section 4 of the Clayton Act—a reasonable Congress would not have intended to create a loophole for conspiring international entities. *Illinois Brick* “was concerned not merely that direct purchasers have sufficient incentive to bring suit . . . but rather that at least some party have sufficient incentive to bring suit.”<sup>220</sup> When the requirements for the *Illinois Brick* exceptions are met, the only individuals with incentives and standing to bring civil suits may be American indirect purchasers.

Whether the defendant violated U.S. antitrust laws abroad or domestically, the exceptions to *Illinois Brick* discussed in this Note are equally valid and effective. These exceptions avoid overly complicating the apportionment of damages, prevent duplicative recovery, and encourage the enforcement of

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216. See *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980) (“But because as a practical matter the chance of a direct-purchaser suit is so small, the correspondingly small risk of multiple recovery does not disturb us.”).

217. *Musheno*, *supra* note 129, at 267.

218. See *supra* Part II.

219. H.R. REP. NO. 97-686, at 4 (1982); see *Empagran I*, 542 U.S. 155, 169 (2004) (“Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce.”).

220. *California v. ARC Am. Corp.*, 490 U.S. 93, 102 n.6 (1989).

the antitrust laws. Accordingly, courts should apply them with equal force in both the domestic and the FTAIA contexts.

#### CONCLUSION

American consumers suffering direct, substantial, and reasonably foreseeable effects of anticompetitive activity are “those individuals whose protection is the fundamental purpose of the antitrust laws.”<sup>221</sup> *Illinois Brick* recognized the limits of this stance by admitting that actual harm to indirect purchasers in the United States would go unaddressed because of the direct purchaser rule.<sup>222</sup> Still, the Supreme Court deemed deterrence and judicial efficiency best served by having direct purchasers sue.<sup>223</sup> Many states, scholars, and even Congress have criticized this rule, although neither Congress nor the Court has ever overturned it.<sup>224</sup> The policies in *Illinois Brick* control, and they do not appear to be changing.<sup>225</sup> Accordingly, the courts will have to grapple with them in the FTAIA context.

In the domestic context, the traditional exceptions to *Illinois Brick* and the defendant control and co-conspirator exceptions are widely considered to satisfy the *Illinois Brick* policy concerns. In the FTAIA context, these exceptions should still apply. The policy concerns are comparable, and the result avoids a significant civil loophole for international cartels. Sooner or later, the Supreme Court will grant a petition for a writ of certiorari to clarify these rules and the application of the FTAIA.<sup>226</sup> When the case arises, the Supreme Court should clarify that the traditional exceptions, the defendant control exception, and the co-conspirator exception to the direct purchaser rule will apply to FTAIA cases that satisfy the policy considerations of *Illinois Brick*.

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221. *Mid-W. Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 581 (3d Cir. 1979) (quoting *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 505 (3d Cir. 1976)).

222. *Ill. Brick Co.*, 431 U.S. at 746 (“It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations.”).

223. *Id.*

224. See Musheno, *supra* note 129, at 264 n.110. *California v. ARC America Corp.* holds that the thirty-four state statutes repealing *Illinois Brick* are not preempted by federal law. 490 U.S. 93, 101 (1989); see Lindsay, *supra* note 18.

225. See generally Casamassima & Tsoumas, *supra* note 18, at 67.

226. See, e.g., Corbitt & Sheanin, *supra* note 26, at 10.