A SINGLE CALL: THE NEED TO AMEND THE PARENT-SUBSIDIARY RELATIONSHIP UNDER THE FTAIA IN VIEW OF *MOTOROLA MOBILITY*

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ABSTRACT

In *Motorola Mobility, LLC v. AU Optronics Corporation*, the Seventh Circuit dismissed Motorola's Sherman Act claims under the Foreign Trade Antitrust Improvement Act. In doing so, they held that Motorola's American parent corporation was a separate entity from their foreign subsidiaries, and thus barred from bringing suit under the indirect purchaser doctrine. The effect of the Seventh Circuit's decision precluded injured purchasers from recovering damages under the Sherman Act—Motorola's subsidiaries could not sue because their injuries occurred abroad, while Motorola could not sue because it did not make direct purchases from the antitrust violators.

Courts have often considered a parent and wholly owned subsidiary as a single economic entity for the purposes of antitrust laws, such as under the indirect purchaser doctrine and intra-enterprise conspiracy doctrine. While parents and subsidiaries are two distinct entities in a legal corporate context, there are certain economic benefits for considering them one unit, such as promoting economic efficiency, supporting the efficient use of international supply chains, and encouraging deterrence. Therefore, basic antitrust inquiries, such as the existence of market power and the possibility of conspiracy, require focusing on the substance, rather than the form, of corporations.

This Note seeks to explore why the Seventh Circuit chose not to treat Motorola's American parent company and wholly owned foreign subsidiaries as a single economic unit. It further analyzes the

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treatment of the parent-subsidiary relationship under the Sherman Act and Foreign Trade Antitrust Improvement Act. This Note proposes that an exception needs to be made under the Foreign Trade Antitrust Improvement Act to grant an indirect American parent corporation standing to sue under the Sherman Act when the direct purchaser is a wholly owned foreign subsidiary and the effects of a foreign anticompetitive conduct have a direct impact on United States commerce.

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INTRODUCTION

Beginning as early as 1998, and continuing through 2006, conspirators secretly agreed to fix liquid crystal display ("LCD") panel prices.[1] LCD panels, unlike other cellular telephone inputs, have no utility apart from their component value.[2] The result of this price-fixing was a highly effective cartel that consistently inflated LCD prices.[3] The conspirators accomplished this price-fixing scheme through targeted sales of those inflated LCD panels to Motorola Mobility, LLC ("Motorola"), an American mobile cell phone company that held a top share of the United States market and sold more phones in the United States than anywhere else.[4] Like many American companies, Motorola developed manufacturing operations in Asia to take advantage of lower production costs.[5] However, all aspects of Motorola's business began and ended in the United States: they designed the phones, selected the parts, determined the prices, and dictated the terms on which finished products were imported and sold to Motorola's customers in the United States.[6]

On the other hand, the conspirators did not sell the LCD panels directly into the United States. First, the conspirators sold the inflated LCD panels to Motorola's wholly owned foreign subsidiaries in China and Singapore, where the panels were incorporated into the mobile cell phones.[7] The subsidiaries then imported their LCD products into the United States for sale at a higher cost.[8] Through this avenue, the conspirators' anticompetitive conduct reached United States commerce.[9] This price-fixing conspiracy affected well over $23.5 billion worth of LCD panels imported into the United States, and enabled the

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1. Appellant's Opening Brief at 13, Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816 (7th Cir. 2014) (No. 14-8003), 2014 U.S. 7th Cir. Briefs LEXIS 277 [hereinafter Appellant's Opening Brief]. LCD panels, important components in mobile phones, use a liquid crystal film to display information on a thin surface. *Id.*
2. *Id.* at 12.
3. *Id.* at 13.
4. *Id.* at 5.
5. *Id.* at 7.
6. *Id.* at 16-17.
7. *Id.* at 21.
8. *Id.* at 26.
9. *Id.* at 14.

conspirators to impose overcharges of more than $2 billion on those imports.[10] But because these antitrust activities took place abroad, all parties seeking to bring suit had to first bring their case within the confines of the Foreign Trade Antitrust Improvements Act ("FTAIA").[11] The indirect purchasers in the United States, in this case Motorola's parent company, if not confronted with the indirect purchaser doctrine, might have standing if the company was able to show that "a direct, substantial, and reasonably foreseeable effect" on United States commerce gave rise to their claim.[12]

The above facts explain the background of a recent Seventh Circuit case: *Motorola Mobility v. AU Optronics Corporation*.[13] The Seventh Circuit's treatment of the parent-subsidiary relationship in *Motorola Mobility*, as compared to other antitrust doctrines, is the focus of this Note. While several antitrust doctrines, such as the intra-enterprise conspiracy doctrine and indirect purchaser doctrine, treat a parent and its wholly owned subsidiary as one entity, the Seventh Circuit declined to follow a similar approach in *Motorola Mobility*.[14] In fact, the Seventh

10. Brief for the American Antitrust Institute as Amicus Curiae in Support of Petitioner at 3, Motorola Mobility LLC v. AU Optronics Corp., 135 S. Ct. 2837 (2015) (No. 14-1122), 2015 WL 1798940, at *2-3 [hereinafter Brief for AAI].

11. 15 U.S.C. § 6a (2012). The FTAIA creates a general rule that antitrust laws under the Sherman Act shall not "apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." *Id.* To establish an exception, the American parent company would have to show that the conspirators' actions had "a direct, substantial, and reasonably foreseeable effect" on United States commerce, and that such an effect "gives rise to a claim." *Id.*; *see infra* Part I.B.

12. *See infra* Part III.A.

13. *See* Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816 (7th Cir. 2014).

14. The intra-enterprise conspiracy doctrine stated that a conspiracy in violation of section 1 of the Sherman Act exists where one individual owned or controlled separately incorporated conspiring companies. *See generally* United States v. Yellow Cab Co., 332 U.S. 218 (1947), *overruled by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). The doctrine was overturned in *Copperweld Corp.*, where the Supreme Court held that a parent corporation is incapable of conspiring with its wholly owned subsidiary. *See Copperweld Corp.*, 467 U.S. at 779. The indirect purchaser doctrine limits recovery of damages in antitrust violations only to those entities that dealt directly with the cartel, or when the direct purchaser is owned or controlled by another entity, such as a subsidiary. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 n.16 (1977). In contrast, the Seventh Circuit held in *Motorola Mobility* that the

Circuit refused to collapse Motorola's parent corporation and their foreign subsidiaries into one economic unit, arguing "corporate formalities should be respected unless one of the recognized justifications for piercing the veil, or otherwise deeming a parent and a subsidiary one, is present."[15] The inconsistent treatment of the parent-subsidiary relationship under the FTAIA and other antitrust doctrines under the Sherman Act is perplexing; there is no legitimate rationale for the difference.[16]

In *Motorola Mobility*, the Seventh Circuit decided to treat Motorola's parent and subsidiary companies as separate economic units, and dismissed Motorola's Sherman Act claims.[17] The court gave three rationales for its decision. First, the court determined that Motorola's antitrust claim failed because Motorola could not satisfy the "gives rise to" prong of the FTAIA.[18] Because Motorola's American parent company was injured abroad when it purchased the price-fixed component, the effect in the United States of the price-fixing was not enough to give rise to an antitrust claim.[19] Second, the court held that Motorola could not satisfy the *Illinois Brick* doctrine.[20] The price-fixed LCD panels were bought directly by Motorola's foreign subsidiaries, and then sold to Motorola, making Motorola an indirect purchaser.[21] Thus, Motorola was barred from bringing suit under *Illinois Brick*.[22] Lastly, the court observed that Motorola could not satisfy the choice-of-law rules.[23] Foreign-injured corporations ordinarily must sue in the

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American parent company could not sue for damages because the direct purchaser was a wholly owned foreign subsidiary. *See generally Motorola II*, 775 F.3d 816.

15. *Motorola II*, 775 F.3d at 820.

16. *See generally* Robert E. Connolly, *Repeal the FTAIA! (or at Least Consider It as Coextensive with Hartford Fire)*, CPI ANTITRUST CHRON., Sept. 2014.

17. *See Motorola II*, 775 F.3d at 820.

18. *See* Randy M. Stutz, *The FTAIA in Flux: Foreign Component-Goods Cases Have Tripped, But Have They Fallen?*, CPI ANTITRUST CHRON., Jan. 2015, at 4.

19. *See Motorola II*, 775 F.3d at 823. The court's reasoning reads as follows: "Remember that the [FTAIA] requires that the effect of an anticompetitive practice on domestic U.S. commerce must, to be subject to the Sherman Act, give rise to an antitrust cause of action. [Motorola] . . . would have been injured abroad when [it] purchased the price-fixed components." *Id.*

20. Stutz, *supra* note 18, at 4.

21. *Id.*

22. Ill. Brick Co. v. Illinois, 431 U.S. 720, 730 (1977) (barring indirect purchasers from bringing suit under section 1 of the Sherman Act).

23. Stutz, *supra* note 18, at 4.

country in which it is incorporated and operates, or the country where they took delivery of the cartelized goods.[24] Therefore, Motorola had standing to sue abroad, where the injury occurred, rather than in the United States.[25] Furthermore, the court noted the prevalence of global supply chains in the current economy and predicted that to extend application of the Sherman Act to the activities of the defendants in this case would result in an "enormous[] increase [in] the global reach of the Sherman Act, creating friction with many foreign countries."[26]

As the Seventh Circuit noted, international global supply chains are prolific in modern business. The many businesses that hope to remain competitive in the globalized economy have started to expand their operations abroad.[27] After all, "[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers."[28] A common organizational strategy involves a domestic parent company establishing a foreign subsidiary that acts as a link in the parent's global supply chain, such as the one that existed in *Motorola Mobility*.[29] These corporate structures provide the American parent company with many competitive advantages: increased sourcing, efficient manufacturing, cheaper transportation, and wider distribution.[30] However, the advantages end when the foreign subsidiary falls prey to anticompetitive conduct abroad.

Consider the following three scenarios: (1) an American company has a warehouse in China; it buys components in China and stores them briefly in the warehouse there before sending them on to the United States; (2) an American company owns a manufacturing plant in China; it buys components in China, manufacturers the products in China and then ships the finalized products into the United States to be assembled into the finished product; and (3) an American company in either scenario (1) or (2) does the same thing through a Chinese subsidiary. In

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24. *Id.*

25. *See* Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816, 818 (7th Cir. 2014).

26. *Id.* at 824.

27. *See id.*

28. *Id.*

29. *See id.* at 817.

30. *See* Jeffrey H. Smith, Note, *Call Me, Maybe? The Seventh Circuit's Call in Motorola Mobility*, 90 NOTRE DAME L. REV. 2063, 2063 (2015).

all three of these scenarios, the substance of the transactions is the same (the American company is importing products manufactured abroad), but the form is different (the relationship between the American company and manufacturing plant). This Note argues that regardless of the form, all three scenarios should all be treated similarly.

This Note will explore why the Seventh Circuit chose not to treat Motorola's American parent company and wholly owned foreign subsidiary as a single economic unit. Part I of this Note outlines the history of the Sherman Act, focusing primarily on the rationale behind the creation of the FTAIA. Part II analyzes the treatment of the parent-subsidiary relationship in other antitrust contexts; specifically, the indirect purchaser doctrine and the intra-enterprise conspiracy doctrine. Part III proposes that an exception needs to be made under the FTAIA to provide an indirect American parent corporation standing to sue under the Sherman Act when the direct purchaser is a wholly owned foreign subsidiary and the effects of foreign anticompetitive conduct have a direct impact on United States commerce.

I. A BRIEF HISTORY: THE PURPOSE OF THE SHERMAN ANTITRUST ACT AND RATIONALE FOR THE CREATION OF THE FTAIA

A. THE SHERMAN ACT AND ITS FUNCTION

United States antitrust law "covers foreign conduct producing a substantial intended effect in the United States."[31] The purpose of the Sherman Act is to promote competition and to prohibit the monopolization and restraint of trade.[32] One of the Sherman Act's express goals, according to Senator Sherman, is "to combat the trusts and cartels which . . . 'were imported from abroad.'"[33] As a result, the

31. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797 & n.24 (1993).

32. Section 1 of the Sherman Act is directed toward anticompetitive contracts, combinations, and conspiracies, and as such, requires more than one actor. Section 2 is designed to prevent monopolization and can therefore apply to unilateral conduct. *See* 15 U.S.C. §§ 1-2 (2012).

33. *Hearings on H.R. 2326 before the Subcomm. on Monopolies & Commercial Law of the H. Judiciary Comm.*, 97th Cong. 42 (1981) (statement of Prof. James A. Rahl).

Sherman Act is applied to foreign conduct by international conspiracies to the extent they cause anticompetitive effects in the United States.[34]

Section 1 of the Sherman Act applies to "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[35] Similarly, section 2 of the Sherman Act applies to the monopolization of "any part of the trade or commerce among the several states, or with foreign nations."[36] The pre-FTAIA Sherman Act is silent on its application to conduct occurring outside the United States.[37]

In *American Banana Co. v. United Fruit Co.*, the Supreme Court first considered the international reach of the Sherman Act.[38] There, the Court held that the Sherman Act did not govern anticompetitive acts that took place in Panama and Costa Rica.[39] The Court articulated an "almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[40] Over time, the strict territorial interpretation of the Sherman Act softened and courts began to exercise jurisdiction over certain extraterritorial actions that affected competition in the United States.[41] Then, in *United States v. Aluminum Co. of America* ("*Alcoa*"), Judge Learned Hand developed an effects test for determining when extraterritorial activity could be subject to liability under the Sherman Act.[42] Under this test, the extraterritorial activities at issue must have been intended to affect imports and must have actually affected them in

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34. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593, 600 (1951), *overruled by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); United States v. Nat'l Lead Co., 332 U.S. 319, 348 (1947), *abrogated by* Cont'l T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); United States v. Am. Tobacco Co., 221 U.S. 106, 172, 182 (1911).

35. Sherman Act of 1890 § 1, 15 U.S.C. § 1.

36. Sherman Act of 1890 § 2, 15 U.S.C. § 2.

37. *See* 15 U.S.C. § 1 (1974).

38. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

39. *See id.*

40. *Id.* at 356.

41. Joseph P. Bauer, *The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?*, 65 ME. L. REV. 3, 7-8 (2012).

42. *See generally* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982 § 402, 15 U.S.C. § 6a (2012).

order to fall within the reach of the Sherman Act.[43] Judge Hand distinguished *American Banana* and asserted that it was "settled law" that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[44] Under this test, "the Sherman Act applie[d] to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[45]

B. ANTITRUST STANDING UNDER THE FTAIA

Following *Alcoa*, the effects test was applied in a variety of forms, as numerous courts struggled to create a framework for analyzing the international reach of the antitrust laws.[46] Seeking to resolve the conflicts regarding the application of the Sherman Act's extraterritorial reach, Congress passed the FTAIA in 1982.[47] The FTAIA was part of the congressional attempt to state clear rules for identifying the applicability of the antitrust laws to certain foreign activities.[48]

Congress had two primary concerns in passing the statute: (1) that United States courts would be overwhelmed with lawsuits regarding actions that had minimal effects on domestic commerce and primarily served foreign interests; and (2) that the inconsistent application of the Sherman Act was having a detrimental effect on international commerce.[49] Congress further stated that the purpose of the FTAIA was to address the "apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote

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43. *Id.* at 444.

44. *Id.* at 443.

45. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

46. *Compare* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 610-13 (9th Cir. 1976) (applying a test that balances considerations of international comity with domestic effects, yet noting that "[e]ven among American courts and commentators, however, there is no consensus on how far the jurisdiction should extend."), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982 § 402, 15 U.S.C. § 6a, *as recognized in* McGlinchy v. Shell Chem. Co., 845 F.3d 802 (9th Cir. 1988) (en banc), *with* Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981) (applying an effects test similar to that used in *Alcoa*).

47. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246.

48. Export Trading Company Act of 1982, Pub. L. No. 97-290, § 307(a), 96 Stat. 1233, 1237.

49. H.R. REP. NO. 97-686, at 2-3 (1982).

efficiencies in the export of American goods and services."[50] For these reasons, the FTAIA was enacted to protect American companies from the application of the antitrust laws when their allegedly anticompetitive activities affected only foreign markets while also preserving the Sherman Act claims of American companies and consumers with respect to conduct that caused domestic harms.[51]

The FTAIA is consistent with the longstanding view of how the Sherman Act applies to foreign conduct, the anticompetitive effects of which at home and abroad are "inextricably bound up."[52] In such cases, even wholly foreign plaintiffs can invoke the protections of the Sherman Act.[53] Furthermore, the FTAIA clarifies that conduct affecting only foreign commerce is outside the scope of the Sherman Act regardless of whether the defendant is an American company or not, thus "assur[ing] foreign countries and their citizens that they would not be swept into a U.S. court to answer under U.S. law for actions that were of no legitimate concern to the United States."[54] However, this would imply that if a foreign antitrust violation creates domestic harm, this conduct could be brought under the FTAIA.[55]

Despite the passage of the FTAIA, controversy about the appropriate scope of the antitrust laws has not ended. Lower courts have

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50. *Id.*

51. Supplemental Brief for Petitioner Motorola Mobility, LLC at 11, Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816, 818 (7th Cir. 2014) (No. 14-8003), 2014 WL 3586199, at *11 [hereinafter Petitioner's Supplemental Brief] (citing Export Trading Company Act of 1982 § 102(b), 15 U.S.C. § 4001); *see also* H.R. REP. NO. 97-686, at 7-8 (stating that the FTAIA was passed to allow U.S. businesses to freely compete in overseas markets, so as to increase United States exports of products and services.) This is confirmed by Supreme Court case law. *See, e.g.*, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004) ("[A]pplication of our antitrust laws to foreign anticompetitive conduct [under the FTAIA] is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.").

52. *Empagran*, 542 U.S. at 171-72 (citation and emphasis omitted).

53. *Id.*

54. United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 962 (7th Cir. 2003) (en banc) (Wood, J., dissenting), *overruled by* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012).

55. *See* 15 U.S.C. § 6a.

accurately described the FTAIA as "convoluted,"[56] and an "inelegantly phrased"[57] "web of words."[58] The statute provides as follows:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has direct, substantial and reasonably foreseeable effect—
>
> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.[59]

The FTAIA begins by placing all extraterritorial activity other than import trade and import commerce outside the reach of the Sherman Act.[60] It then pulls some activity back within the Sherman Act's reach when two requirements are met.[61] First, the conduct must have a "direct,

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56. Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 300 (3d Cir. 2002), *overruled by* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011).

57. Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 69 (3d Cir. 2000) (quoting United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997)), *overruled by Animal Sci. Prods.*, 654 F.3d 462.

58. United States v. Hui Hsiung, 758 F.3d 1074, 1086 (9th Cir. 2014), *amended by* 778 F.3d 738 (9th Cir. 2015).

59. 15 U.S.C. § 6a.

60. This is known as the "import trade or commerce" exception. The Sherman Act will apply where the defendants are involved in import trade or import commerce. *See* 15 U.S.C. § 6a. Several courts applying the FTAIA have held that what is relevant under the import provisions is "whether the alleged *conduct by the defendants* 'involved' import trade or commerce, not . . . whether the *plaintiff's* conduct, which is not being challenged as violative of the Sherman Act, 'involved' import trade or commerce." *Carpet Grp.*, 227 F.3d at 71; *see also Turicentro*, 303 F.3d 293; Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002), *abrogated by* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

61. 15 U.S.C.§ 6a(2).

substantial, and reasonably foreseeable effect" on domestic commerce.[62] Second, the effect must "give[] rise to" a Sherman Act claim.[63] Congress did not intend the FTAIA to depart from the long-settled rule that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[64]

II. ONE OR NONE: HOW TO TREAT THE PARENT-SUBSIDIARY ISSUE

Courts have often considered a parent and wholly owned subsidiary as a single economic unit for the purposes of antitrust law.[65] While parents and subsidiaries are two distinct entities in a corporate context, there are certain economic benefits for considering them one unit under antitrust law.[66] Consider the three scenarios mentioned in the introduction: while the form of the three corporations were all different and distinct, the substance was the same—the components were bought and manufactured abroad and then shipped into the United States.[67] To promote economic efficiency, a corporation will choose the least costly form.[68] Therefore, while there are corporate law implications for creating subsidiaries, reliance on this separation is not needed in an antitrust context given that economic efficiencies must be taken into account.[69]

The legal form of a corporation defines "the scope of its liabilities but does not circumscribe economic units in the marketplace."[70] However, the "discrepancy between the scope of legal entities (form) and economic units (substance)" has caused confusion among many courts.[71] Courts do not "fully recognize that corporations use the legal form for many purposes that do not define their economic substance."[72]

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62. This is known as the "direct effect" prong. *Id.* § 6a(1).
63. This is known as the "gives rise to" prong. *Id.* § 6a(2).
64. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795-96 (1993).
65. *See infra* Part II.C.
66. *See infra* Part II.C.
67. *See supra* Introduction.
68. *See* Smith, *supra* note 30, at 2063-64, 2064 n.8.
69. *Id.*
70. *See* Barak Orbach, *The Durability of Formalism in Antitrust*, 100 IOWA L. REV. 2197, 2206 (2015).
71. *Id.*
72. *Id.*

For example, when corporations are affiliated, such as wholly owned subsidiaries, a court's "reliance on the legal form may distort antitrust analysis."[73] Additionally, basic antitrust inquiries, such as the existence of market power, require clear definitions of market participants that focus on the substance, rather than the form, of corporations.[74] Therefore, these legal and economic implications must be factored into a court's analysis for the purposes of antitrust violations.[75]

A. THE PARENT-SUBSIDIARY RELATIONSHIP UNDER THE SHERMAN ACT

Courts have often considered a parent and wholly owned subsidiary as a single economic entity for the purposes of antitrust laws, such as under the indirect purchaser doctrine and intra-enterprise conspiracy doctrine.[76] While parents and subsidiaries are two distinct entities in a legal corporate context, there are certain economic benefits for considering them one unit, such as promoting economic efficiency, supporting the efficient use of international supply chains, and encouraging deterrence.[77] However, the Seventh Circuit's decision in *Motorola Mobility* is inconsistent with these antitrust doctrines, holding that Motorola's parent company and wholly owned subsidiaries were two separate entities, and thus barred from bringing a claim under the FTAIA.[78]

1. Indirect Purchaser Doctrine

The indirect purchaser doctrine prohibits indirect purchasers of goods or services from recovering antitrust damages from violators.[79] The doctrine evolved from section 4 of the Clayton Act.[80] It was created through two separate Supreme Court decisions that considered antitrust

73. *Id.*
74. *Id.*
75. *Id.*
76. *See infra* Part II.C.1-2.
77. Orbach, *supra* note 70, at 2206.
78. *See* Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816, 820 (7th Cir. 2014).
79. *See generally* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).
80. Section 4 of the Clayton Act permits "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antirust laws" to bring suit for treble damages. Clayton Act § 4, 15 U.S.C. § 15 (2012).

problems associated with multiparty supply chains. The first case provides that a direct purchaser can recover the full amount of an illegal overcharge, regardless of whether that cost is passed on to downstream buyers.[81] The second provides that downstream buyers do not have standing regardless of how much of the overcharge is passed on to them.[82]

The Supreme Court's decisions in *Hanover Shoe v. United Shoe Machinery Corp.*[83] and *Illinois Brick Corp. v. Illinois*[84] limited recovery of damages in cases of supra-competitive overcharges to only those entities that dealt directly with the cartel responsible for the overcharge, or the "direct purchaser."[85] The result left subsequent, or "indirect purchasers," who often suffer substantial harm, without a remedy or standing to sue.[86] The rule serves to avoid the difficulties of "apportion[ing] recovery among all potential plaintiffs . . . from direct purchasers to middlemen to ultimate consumers."[87] It further seeks to eliminate the possibility of duplicative recovery and promotes enforcement by purchasers who have been most directly injured by the alleged violation.[88]

To understand the Supreme Court's decision in *Illinois Brick*, it is important to first consider the decision in *Hanover Shoe.* There, a shoe manufacturer sued a manufacturer of shoe machinery who had monopolized the shoe machinery industry in violation of section 2 of the Sherman Act.[89] The defendant argued that it should be allowed to show that the plaintiff had not been injured by the antitrust violation because the plaintiff had passed on the costs of the violation to its consumers, the purchasers of the shoes, and thus was not harmed.[90] The Court had to address whether an alleged illegal monopolist could use this "passing-

81. *See generally* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
82. *See generally Ill. Brick*, 431 U.S. 720.
83. *Hanover Shoe*, 392 U.S. 481.
84. *Ill. Brick*, 431 U.S. 720.
85. *See generally id.*
86. *See id.* at 738-42.
87. *See id.* at 728-33.
88. *See id.* at 731 n.11.
89. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
90. *See id.* at 491-92.

on" defense.[91] The Court rejected this argument, holding that there is no "passing-on" defense to a suit by a direct purchaser.[92] If the defense were effective, antitrust violators "would retain the fruits of their illegality."[93] Instead, the Court decided to grant the direct purchaser the entire award, acknowledging that this would be a windfall.[94] The rationale for this windfall was that concentrating the full recovery for the overcharge in the direct purchasers would more effectively enforce the antitrust laws, rather than allowing every potential plaintiff to sue only for the amount it could show that it individually absorbed.[95]

In *Illinois Brick*, the Supreme Court dealt with the flip side of the "passing-on" defense: offensive "passing-on."[96] There, the plaintiffs, represented by the State of Illinois suing on behalf of itself and local governmental entities, claimed overcharges in connection with various construction projects.[97] The defendants, manufacturers and distributors of concrete block alleged to be in collusion, sold the block to masonry contractors who submitted bids to general contractors.[98] The general contractors in turn submitted bids to customers such as the plaintiffs.[99] Rather than facing an antitrust violator seeking to reduce its liability by asserting a "passing-on" defense, the Court addressed whether an indirect purchaser could recover damages by proving overcharges had been passed on.[100] The Court considered two ways to avoid multiple liabilities: (1) allow indirect purchasers to sue by overruling *Hanover Shoe;* or (2) retain *Hanover Shoe* and preclude indirect purchasers from suing.[101] The Court chose the latter.[102]

Like *Hanover Shoe*, the *Illinois Brick* opinion was grounded on policy considerations.[103] The overriding consideration was symmetry.[104]

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91. The "passing-on" defense is a claim that the direct purchaser was not injured because it raised its prices in response to the monopolist's price increase, absorbing none of the increased costs itself. *See id.* at 491-94.

92. *See id.*

93. *Id.* at 494.

94. *See id.* (providing the full damage award to the direct purchaser).

95. *See id.*

96. Ill. Brick Co. v. Illinois, 431 U.S. 720, 753 (1977).

97. *Id.* at 726-27.

98. *Id.* at 726.

99. *Id.*

100. *Id.* at 727-28.

101. *Id.* at 736.

102. *Id.*

103. *See id.* at 736-39.

If a defendant manufacturer or supplier was not permitted to employ a "passing-on" defense, as was held in *Hanover Shoe*, an indirect purchaser plaintiff would not be permitted to recover passed-on damages from that constrained manufacturer or supplier.[105] As the Court noted in *Hanover Shoe*, if they had permitted the "passing-on" defense to be utilized by defendants, to ensure a return to optimal levels of deterrence, plaintiffs other than the direct purchaser would need to be allowed to sue the monopolist for damages.[106] And the Court was unwilling to "open the door to duplicative recoveries" due to the uncertainties and difficulties in analyzing price and output decisions, as well as the cost to the judicial system.[107] The Court reasoned that the "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers"[108] because wrongdoers would be less likely to retain the fruits of their illegality for want of an economically motivated challenger to bring suit.[109]

a. Exceptions to the Indirect Purchaser Doctrine

While the direct purchaser standing requirement of *Illinois Brick* has faced criticism from scholars, as well as states, the standing requirement continues to apply to federal antitrust claims.[110] However, the indirect purchaser doctrine is not absolute. There have been many exceptions that have evolved over the past several decades, such as the "own or control" exception and the "co-conspirator" exception.[111] When

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104. *See id.* at 736-740, 737 n.18.

105. *See id.* at 736-47.

106. *Id.* at 745-47.

107. *Id.* at 730-31 (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972)).

108. *Id.* at 734-35.

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

110. *See generally* Christopher T. Casamassima & Tammy A. Tsoumas, *The* Illinois Brick *Wall: Standing Tall*, COMPETITION, Spring 2011, at 67.

111. Another famous exception to the *Illinois Brick* doctrine is the cost-plus exception. This exception is not relevant to this Note, so it is not discussed in more detail. The cost-plus exception states that the *Illinois Brick* rule does not apply where an indirect purchaser buys a predetermined quantity of price-fixed goods from a direct purchaser operating under a "cost-plus" contract as the "pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser." *Ill. Brick*, 431 U.S. at 732 n.12. The direct

applying an exception to *Illinois Brick*, courts often discuss policy reasons such as prohibiting duplicative liability, encouraging efficient enforcement of the antitrust laws, and avoiding overly complex proceedings.[112] The "own or control" and "co-conspirator" exceptions share a common logic: where the relationship between the parties in a multi-tiered distribution chain is such that plaintiffs are the first injured parties of alleged anticompetitive agreements, the rationale for the *Illinois Brick* bar disappears.[113] Therefore, when one of these exceptions applies, indirect purchasers may be permitted to sue.[114]

Under the "own or control" and "co-conspirator" exceptions, courts have often considered a parent corporation and its subsidiaries as a single entity.[115] The Supreme Court expressly recognized an "own or control" exception to *Illinois Brick*, and courts have "expanded [the exception] to include instances where the defendant owns or controls the intermediary that sold the goods to the indirect-purchaser plaintiff."[116] When the indirect purchaser and direct purchaser act as a single entity, courts grant indirect purchasers standing to sue for antitrust damages because it preserves "an undiluted incentive in the hands of the most likely enforcer" of the antitrust laws.[117] Additionally, under the "co-conspirator" exception, courts have held that "*Illinois Brick* does not limit suits [where] . . . [t]he consumer plaintiff is a direct purchaser from the dealer who . . . has conspired illegally with the manufacturer with

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purchaser, in setting the price at which to sell to the indirect purchaser, automatically adds a contractually predetermined sum to the price he paid the initial seller. *Id.*

112. *See, 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).

113. *See* Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 327 (9th Cir. 1980) ("[The indirect purchaser] cannot sue . . . only for the portion of the overcharge that was passed on to it. . . . The only alternatives are to allow [it] to sue . . . for the entire amount of the overcharge . . . or not to allow [it] to sue. . . . [The latter] would be intolerable.").

114. *See Ill. Brick*, 341 U.S. at 735.

115. *See, e.g.*, *Royal Printing Co.*, 621 F.2d 323; Animal Sci. Prods. Co. v. Hebei Welcome Pharm. Co. (*In re* Vitamin C Antitrust Litig.), 279 F.R.D. 90 (E.D.N.Y. 2012).

116. *In re Vitamin C Antitrust Litig.*, 279 F.R.D. at 101 (citing *In re* Industrial Diamonds Antitrust Litig., 119 F. Supp. 2d 418, 421 (S.D.N.Y. 2000)).

117. 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).

respect to the very price paid by the consumer."[118] Both of these exceptions help avoid one of the primary concerns of *Illinois Brick*: liability to multiple defendants for treble damages.[119]

Under the "co-conspirator" exception, a co-conspirator does not need to be named if the co-conspirator is a subsidiary of another defendant.[120] In *Royal Printing Company v. Kimberly-Clark Corporation*, the Ninth Circuit held that *Illinois Brick* does not bar an indirect purchaser's suit where the direct purchaser is a division or subsidiary of a co-conspirator.[121] There, a printing company and other small businesses brought suit against ten manufacturers of paper products.[122] The plaintiffs had never bought paper products directly from any of the defendants, but instead purchased through various wholesalers.[123] The Ninth Circuit permitted the suit to proceed on the basis that plaintiffs could demonstrate that the wholesaler was a subsidiary of one of the defendants.[124] For those wholesalers that were not wholly owned or controlled by the defendants, plaintiffs had no standing to sue because they were indirect purchasers.[125] Thus, the "co-conspirator" exception applies when "there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation."[126]

Under the "own or control" exception, it is well established that the indirect purchaser doctrine does not apply where the supposed intermediary is controlled by one of the disputed parties.[127] In fact, courts applying *Illinois Brick* have held that where an agent does not function as an independent economic entity in the chain of distribution,

118. Brennan v. Concord EFS, Inc. (*In re* ATM Fee Antitrust Litig.), 686 F.3d 741, 750 (9th Cir. 2012) (quoting 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 346h (3d ed. 2007)).

119. Blue Shield of Va. v. McCready, 457 U.S. 465, 474-75 (1982).

120. *See, e.g.*, Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 931 (3d Cir. 1986).

121. Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980).

122. *Id.* at 324.

123. *Id.*

124. *Id.* at 326.

125. *Id.* at 327-28.

126. Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1145-46 (9th Cir. 2003).

127. *In re* Mercedes-Benz Anti-Trust Litig., 157 F. Supp. 2d 355, 366 (D.N.J. 2001) (citing Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 n.16 (1977)).

the purchaser is a direct purchaser from the seller.[128] In *In re Sugar Industry Antitrust Litigation*, a candy wholesaler purchased candy from a manufacturer who was involved in a price-fixing scheme in the sugar industry.[129] While the price-fixed commodity, sugar, had been combined with other ingredients to form a different product, candy, the price-fixing enhanced the profits of the candy manufacturers.[130] Because the alleged price-fixer owned the direct purchaser, the court held that the claims were properly asserted.[131] Therefore, without the "own or control" exception, antitrust violators could avoid liability by creating a subsidiary or otherwise controlled "middlemen" to take the fall, thereby preventing indirect purchasers from bringing suit.[132]

The Supreme Court first recognized this exception in footnote sixteen of *Illinois Brick*, which stated that the original "own or control" exception to the indirect purchaser doctrine applies when the direct and indirect purchasers function as one entity.[133] 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."[134] Thus, where an indirect purchaser and 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

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128. *See In re* NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 505 (S.D.N.Y. 1996) (quoting Diskin v. Daily Racing Form, Inc., No. 92 Civ. 6347, 1994 WL 330229, at *4 (S.D.N.Y. July 7, 1994)) (questioning "whether use of the agent constitutes a separate step in the vertical distribution of the . . . product.").

129. Stotter & Co. v. Amstar Corp. (*In re* Sugar Indus. Antitrust Litig.), 579 F.2d 13, 15 (3d Cir. 1978).

130. *Id.* at 17-18.

131. *Id.* at 19.

132. *See id.*

133. Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 n.16 (1977) ("Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer."); *see also In re* Coordinated Pretrial Proceedings in Petrol. Prods. Antitrust Litig., 497 F. Supp. 218, 226 (C.D. Cal. 1980) (first citing *In re Sugar Indus. Antitrust Litig.*, 579 F.2d at 19; then citing Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980)).

134. *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.").

antitrust laws.[135] If an employee directly purchases an overcharged product and is subsequently reimbursed by her employer (the indirect purchaser), the direct purchaser "retain[s] no independent harm."[136] This exception is different from the "co-conspirator" exception,[137] 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."[138]

The subsequent interpretations of footnote sixteen seemingly fit the description of Motorola in *Motorola Mobility*.[139] The footnote sixteen exception applies where the consumer owns or controls the intermediary and where the seller owns or controls the more direct purchaser.[140] The comparison can be further strengthened because while most courts often contemplate the application of the "own or control" exception in the context of wholly owned subsidiaries, some see no reason why it could not exist through a contractual agency relationship.[141] However, in *Motorola Mobility*, Motorola owned the intermediary foreign subsidiary, thus meeting this requirement.

Often, the "own or control" exception is applied when the direct purchaser is owned or controlled by the violator.[142] Every rationale for *Illinois Brick* vanishes in this situation because apportionment is irrelevant when direct purchasers are unwilling to sue, and deterrence will be underserved unless the only likely plaintiffs, indirect purchasers, are allowed to sue.[143] Contrarily, other courts, such as the one in *Jewish Hospital Association of Louisville, Kentucky, Inc. v. Stewart Mechanical Enterprises, Inc.*, expanded the exception beyond the parent-subsidiary

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135. Duffy, *supra* note 117, at 1733.

136. *Id.* at 1733-34.

137. Under the "co-conspirator" exception, courts have held that when there are allegations of a horizontal price-fixing conspiracy, a plaintiff's claim is not barred by *Illinois Brick*. *See* Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1211 (9th Cir. 1984).

138. Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1145-46 (9th Cir. 2003).

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

140. *See In re* Mercedes-Benz Anti-Trust Litig., 157 F. Supp. 2d 355, 366 (D.N.J. 2001) (citing *Ill. Brick*, 431 U.S. at 736 n.16).

141. *Id.*

142. *See, e.g.*, Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980).

143. *See* Duffy, *supra* note 117, at 1743.

relationship to cases where there is a "functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser [such] that there effectively has been only one sale."[144] While most cases involve a unity between the direct purchaser and defendant, there is no reason that this exception should not similarly apply to the plaintiff.[145] Furthermore, footnote sixteen of *Illinois Brick* hints that the exception can apply to a plaintiff.[146]

2. Intra-enterprise Conspiracy Doctrine

The intra-enterprise conspiracy doctrine rested on the premise that certain multidivisional business enterprises contain enough actors necessary to meet section 1 of the Sherman Act's conspiracy requirement.[147] It provided that a parent company and its wholly owned subsidiary could satisfy the requirements of a conspiracy that could unlawfully restrain trade under the Sherman Act.[148] Internal decisions made among these subsidiaries or with the parent company were, therefore, subject to section 1 liability as an illegal conspiracy if they restrained trade from outsiders.[149]

The parent-subsidiary relationship had been treated as a single entity within the economic doctrine of the intra-enterprise conspiracy. In *Copperweld Corp. v. Independence Tube Corp.*,[150] the Supreme Court reversed the Seventh Circuit's finding that a parent and wholly owned subsidiary, who conspired to restrain trade in the structural steel tubing market by warning several prospective suppliers and customers against dealing with a potential competitor, violated section 1 of the Sherman Act.[151] The Seventh Circuit's rationale was that the liability of a parent and its wholly owned subsidiary was appropriate "when there is enough separation between the two entities to make treating them as two

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144. Jewish Hosp. Ass'n v. Stewart Mech. Enters., Inc., 628 F.2d 971, 975 (6th Cir. 1980).
145. *See* Duffy, *supra* note 117, at 1743.
146. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 n.16 (1977).
147. *See* Ann I. Jones, Comment, *Intraenterprise Antitrust Conspiracy: A Decision-making Approach*, 71 CALIF. L. REV. 1732, 1732-34 (1983).
148. *See generally id*.
149. *Id.* at 1733.
150. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
151. *Id.* at 755-58.

independent actors sensible."[152] However, the Supreme Court reversed this decision, limiting the inquiry to the narrow issue of whether a parent and its wholly owned subsidiary are capable of conspiring in violation of section 1 of the Sherman Act.[153] In doing so, the Supreme Court established a different way of viewing when a parent and its wholly owned subsidiary would be considered a single entity.[154] According to the Supreme Court, the intra-enterprise conspiracy doctrine provided that section 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership.[155] Thus, *Copperweld* held that, for the purpose of section 1 of the Sherman Act, a parent corporation is incapable of conspiring with its wholly owned subsidiaries.[156]

Underlying *Copperweld*'s rejection of the intra-enterprise conspiracy doctrine was the Court's assumption that the Sherman Act treats unilateral actions under section 2 of the Sherman Act less harshly than concerted action under section 1.[157] This is because certain agreements, such as horizontal price-fixing, are thought so inherently anticompetitive that they are *per se* illegal without inquiry into the harm they actually cause.[158] Conversely, vertical price-fixing agreements hold the promise of increasing a firm's efficiency and enabling it to compete more efficiently.[159] Therefore, these combinations are judged under a "rule of reason" analysis.[160] This "rule of reason" gives "the courts adequate latitude to examine the substance rather than the form of an arrangement."[161] In other words, the corporate interrelationships of the conspirators are not indicative of the applicability of the Sherman Act.[162]

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152. *Id.* at 759 (citation omitted).
153. *Id.* at 767.
154. *See id.*
155. *Id.* at 759.
156. *Id.* at 777.
157. *Id.* at 767-68.
158. *Id.* at 768 (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).
159. *Id.*
160. *Id.* (citing Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); Chi. Bd. of Trade v. United States, 246 U.S. 231, 238-40 (1918)).
161. *Id.* at 778 (Stevens, J., dissenting).
162. *Id.* at 760 (majority opinion) (citing Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61, 376-77 (1933)).

In *Copperweld*, the Court cited several economic reasons to treat a parent and subsidiary as one entity. Corporations delegate responsibilities to autonomous units to minimize costs and provide efficiencies from decentralization.[163] Indeed, creating a rule that would punish corporations from this decentralization would serve no useful antitrust purpose.[164] Furthermore, the coordinated activity of a parent and its subsidiaries must be treated as a single unit for the purposes of section 1 of the Sherman Act.[165] This is because a parent and its wholly owned subsidiary have a complete unity of interest: common objectives, one corporate consciousness, and the same course of action.[166] Because of these similarities, there is no sudden joining of corporate resources, and therefore no justification of section 1 scrutiny.[167] A section 1 "agreement" may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."[168] Because a parent and wholly owned subsidiary always have a "unity of purpose," the term "agreement" within section 1 of the Sherman Act lacks meaning.[169] If this unity starts to waiver and the subsidiary fails to act in the parent's best interest, the parent may assert full control over the subsidiary and "rein" in their actions.[170]

In making its decision to overrule the intra-enterprise conspiracy doctrine in *Copperweld*, the Supreme Court looked at substance rather than form. The doctrine looked at the form of the enterprise's structure, and thus "ignore[d] the reality."[171] Antitrust liability, the Court held,

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163. *See id.* at 771.
164. *Id.*
165. *Id.*
166. *Id.*
167. *See id.* (citing Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)).
168. *Id.*
169. *Id.*
170. *Id.* at 771-72. Some courts apply a "single entity" test, that sets forth various criteria for evaluating whether a given parent and subsidiary are capable of conspiring with one another. However, when a subsidiary is wholly owned, the factors in the test are insufficient to describe a separate economic entity for purposes of the Sherman Act. Therefore, the parent and subsidiary must be viewed as a single economic unit. *Id.* at 772 n.18 (citing Ogilvie v. Fotomat Corp., 641 F.2d 581, 588-89 (8th Cir. 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-18 (9th Cir. 1979); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 727 (7th Cir. 1979)).
171. *Id.* at 772.

should not depend on how a corporate subunit is structured.[172] The economic or legal considerations that lead a corporate management to choose one structure over the other bears no relevance to whether the conduct threatens competition.[173] A corporation has complete power to maintain a wholly owned subsidiary regardless of the form and may adopt a form for valid management purposes.[174] "If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions."[175] This would serve no valid antitrust goals, and would merely deprive consumers and producers of the benefits that the subsidiary form may yield.[176]

B. THE PARENT-SUBSIDIARY RELATIONSHIP UNDER THE FTAIA

1. Motorola Mobility Background

Motorola Mobility involved an American parent company whose foreign subsidiaries were part of a global supply chain involved in the production of mobile phones.[177] The defendants in the litigation allegedly participated in anticompetitive conduct by fixing the prices of LCD panels, a necessary component of the phones.[178] Motorola filed suit for damages in Illinois, and the action was consolidated with other cases in a California multi-district litigation ("MDL").[179] The California MDL court divided the purchase of the LCD panels into three categories: (1) purchases of LCD panels by Motorola that were delivered directly to Motorola facilities in the United States ("Category 1," about 1% of purchases); (2) purchases of LCD panels by Motorola's foreign affiliates

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* (citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)).
176. *Id.* at 771.
177. *See* Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816, 817 (7th Cir. 2014).
178. Motorola Mobility, Inc. v. AU Optronics Corp., No. 09 C 6610, 2014 WL 258154, at *1 (N.D. Ill. Jan. 23, 2014). Unlike some inputs, LCD panels have no utility apart from their component value. Appellant's Opening Brief, *supra* note 1, at 4.
179. Appellant's Opening Brief, *supra* note 1, at 11.

that were delivered to the foreign affiliates' manufacturing facilities abroad, where they were incorporated into mobile phones that were later sold to the United States ("Category 2"); and (3) purchases of LCD panels by Motorola's foreign affiliates that were delivered to the foreign affiliates' manufacturing facilities abroad and were later incorporated into mobile phones sold outside the United States ("Category 3").[180]

It was not disputed that the Category 1 purchases were subject to the Sherman Act.[181] The issue was whether the price-fixing of either Category 2 or Category 3 panels were actionable under the Sherman Act.[182] The defendants argued that Motorola could not recover under United States law for any panels that were initially delivered abroad because these deliveries created only "foreign injury" not subject to United States antitrust law.[183] Conversely, Motorola argued that they were domestically injured by defendant's conduct through the increased price Motorola was paying to manufacture and import its LCD products for sale in the United States.[184]

The California MDL court initially sided with the defendants, holding that the defendants' conduct could not involve imports because it was Motorola, not the defendants, who imported the price-fixed panels.[185] However, Motorola was granted leave to amend and file a second amended complaint to add new allegations concerning the defendants' conduct in the United States, how Motorola was specifically targeted, the extent of Motorola's control over its subsidiaries, and "the method by which global prices were negotiated and set by Motorola's procurement team in Illinois and the connection to Motorola's foreign injury."[186] The defendants' motion to dismiss the second amended complaint was denied,[187] as was their motion for partial summary judgment,[188] and the case was remanded to the Northern District of

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180. *Id.*
181. *Motorola II*, 775 F.3d at 817.
182. *Id.* at 817-18.
183. Appellant's Opening Brief, *supra* note 1, at 11.
184. *Id.* at 12.
185. *Id.* at 12-13.
186. *In re* TFT-LCD (Flat Panel) Antitrust Litig., 785 F. Supp. 2d 835, 837, 844 (N.D. Cal. 2011).
187. *Id.* at 847.
188. *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. C 09-5840 SI, 2012 WL 3276932, at *3 (N.D. Cal. Aug. 9, 2012).

Illinois.[189] On remand, the court granted the defendants' motion for reconsideration of the MDL court's ruling and dismissed Motorola's claims based on overseas purchases by its foreign subsidiaries.[190] The court reasoned that even if there was a sufficient domestic effect, there was not a "substantial" effect on American domestic or import commerce, as required by the FTAIA.[191]

Without receiving any briefing, and without oral argument, the Seventh Circuit issued a brief, unanimous opinion affirming the lower court.[192] First, the court held that there was no direct effect on United States commerce.[193] The court reasoned that the "effect of component price-fixing on the price of the product of which it is a component is indirect."[194] Second, the court held that the effect on domestic commerce did not give rise to Motorola's antitrust claim.[195] Finally, the court concluded by noting the prevalence of global supply chains in the current economy and predicted that to extend application of the Sherman Act to the activities of the defendants in this case would result in an "enormous[] increase [in] the global reach of the Sherman Act, creating friction with many foreign countries."[196] However, if the Seventh Circuit considered Motorola's American parent company and foreign subsidiaries as one unit, then the effect of the price-fixed LCD panels would be direct, rather than indirect, and would give rise to Motorola's antitrust claim.[197]

Motorola petitioned for rehearing en banc, arguing that the panel's decision conflicted with *Minn-Chem, Inc. v. Agrium, Inc.*[198] and *F.*

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189. Motorola Mobility, Inc. v. AU Optronics Corp., No. 09 C 6610, 2014 WL 258154, at *1 (N.D. Ill. Jan. 23, 2014).

190. *Id.* at *10.

191. *Id.* at *9-10.

192. *See* Motorola Mobility LLC v. AU Optronics Corp. (*Motorola I*), 746 F.3d 842 (7th Cir.), *vacated & reh'g granted*, 775 F.3d 816, 824 (7th Cir. 2014).

193. *Id.* at 844.

194. *Id.*

195. *Id.* at 845.

196. *Id.* at 846.

197. *See generally* Ill. Brick Co. v. Illinois, 431 U.S. 720, 723 (1977).

198. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (en banc). The Seventh Circuit held in *Minn-Chem* that the FTAIA "reaffirm[s] the well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce." *Id.* at 858.

Hoffman-LaRoche Ltd. v. Empagran S.A.,[199] and would weaken antitrust enforcement by the government.[200] In *Minn-Chem*, the court recognized that the "direct effect" requirement of the FTAIA simply addresses whether the domestic effect is too remote from the ultimate effects on United States commerce.[201] Furthermore, the Supreme Court in *Empagran* held that the "gives rise to" requirement of the FTAIA precludes cases where the plaintiff's claims rests solely on independent foreign harm.[202] Thus, the FTAIA only "remove[s] from the Sherman Act's reach . . . commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce [or] import commerce,"[203] as Motorola argued was the case here.

Motorola asserted that the fact that the panels were purchased and delivered abroad was not dispositive.[204] Motorola claimed that the price-fixing activity abroad raised the prices of mobile cell phones in the United States, thereby directly causing a domestic effect and satisfying the "direct effect" requirement of the FTAIA.[205] Furthermore, Motorola argued that it satisfied the proximate cause standard of the "gives rise to" requirement of the FTAIA because the foreign and domestic prices "arise from the same, *plaintiff-specific* negotiations and acts of conspiratorial price-fixing."[206]

The Seventh Circuit's opinion, after rehearing, followed the same general line of reasoning as its vacated opinion.[207] The court assumed that Motorola met the "direct effect" prong of the FTAIA, but failed

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199. F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 159 (2004). The court concluded that a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm. *Id.*

200. *See* Craig C. Corbitt & Aaron M. Sheanin, *Appellate Courts Grapple with the Foreign Trade Antitrust Improvements Act—Plaintiffs' Perspective*, COMPETITION, Fall 2014, at 9.

201. *Minn-Chem*, 683 F.3d at 858.

202. *Empagran*, 542 U.S. at 159.

203. *Id.* at 161.

204. Appellant's Reply Brief at 10-12, Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816, 824 (7th Cir. 2014) (No. 14-8003), 2014 WL 5510635, at *10-12.

205. *Id.*

206. *Id.* at 17-18.

207. *Compare Motorola II*, 775 F.3d at 817-18, *with* Motorola Mobility LLC v. AU Optronics Corp. (*Motorola I*), 746 F.3d 842 (7th Cir. 2014).

under the "gives rise to" prong.[208] The court stated that the effect of fixing the price of a component on the price of the final product was less direct than the conduct in *Minn-Chem* where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product wanted in the United States, and then . . . *sold that product to U.S. Customers*."[209] However, the court also found that the facts of *Motorola Mobility* did not rise to the level of those in *Minn-Chem*, which definitely precluded liability under the Sherman Act: the "situation in which action in the foreign country filters through the layers and finally causes a few ripples in the United States."[210] As a result, the court provided no guidance for determining when an effect is direct, and instead simply assumed that Motorola had satisfied the "direct effect" requirement.[211] Additionally, rather than discuss in detail whether the "gives rise to" prong of the FTAIA was satisfied, the bulk of the opinion was dedicated to the *Illinois Brick* doctrine.[212]

The Seventh Circuit concluded that Motorola could not recover from the foreign cartel members because it was an indirect purchaser of the LCD panels and did not meet the requirements of the FTAIA.[213] Additionally, the court held that the parent company and its foreign subsidiaries were two separate entities, so that the FTAIA can prevent "unreasonable interference with the sovereign authority of other nations."[214] Lastly, the court held that if Motorola and its foreign subsidiaries were to be seen as a single entity, it would have been

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208. *Motorola II*, 775 F.3d at 818-20.

209. *Id.* at 819 (quoting Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 860 (7th Cir. 2012) (en banc)).

210. *Id.* (quoting *Minn-Chem*, 683 F.3d at 860) (explaining that this case "doesn't seem like 'many layers' resulting in just 'a few ripples' in the United States cellphone market.").

211. *Id.* ("We'll assume that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied.").

212. *Id.* at 819-27. *Illinois Brick* did not deal with price-fixing as applied to a global supply chain, and there is dicta in that case that might indicate it should not be applied to Motorola's situation. *See infra* Part III.B.1.

213. *Motorola II*, 775 F.3d at 824.

214. *Id.* (quoting F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004)). The Seventh Circuit assumed the cartel met the substantive requirements of the FTAIA, but that Motorola did not meet the second FTAIA requirement that the conduct "gives rise to" Motorola's claim. *Id.*

injured abroad when it purchased the price-fixed components.[215] However, the court failed to explain how the purchase of the price-fixed components and subsequent import of cell phones into the United States did not involve import trade or commerce, merely stating "[i]t was Motorola, rather than the defendants, that imported these [LCD] panels into the United States."[216]

2. The Parent-Subsidiary Relationship in Motorola Mobility

One of Motorola's several claims was that it functioned with its subsidiaries as a single enterprise.[217] "That is true both as a technical matter—because Motorola . . . imported its LCD products for sale at a higher cost—and as a matter of substance, because the corporate distinction between Motorola and its subsidiaries ha[d] no antitrust-economics relevance in either the LCD-panel or mobile-phone market."[218] The defendants' anti-competitive conduct directly affected Motorola in its capacity as an American parent company, not only because Motorola controlled the purchases of its subsidiaries and absorbed the higher manufacturing costs, but also because Motorola was forced to pay taxes in the United States on its "repatriated" profits.[219]

The defendants argued that Motorola and its subsidiaries were not a single entity, but rather separate corporations that Motorola created in order to take advantage of foreign labor markets and foreign regulatory

215. *Id.* at 823.

216. *Id.* at 818. *But cf.* United States v. Hui Hsiung, 778 F.3d 738, 756 (9th Cir. 2014) (stating that the argument that AU Optronics is not an "importer" misses the point; the panels were sold into the United States, falling squarely within the scope of the Sherman Act); Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011) (stating that "[f]unctioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite," and that the exclusion could be satisfied because "defendants' conduct target[ed] import goods or services"). The Third Circuit further held that the "import [exclusion] is not limited to importers, but also applies if defendants' conduct is directed at an import market." *Animal Sci. Prods*, 654 F.3d at 471 n.11. In *Motorola Mobility*, it could be argued that defendants targeted the U.S. market. However, a full discussion of Motorola's target theory is outside the scope of this Note.

217. Appellant's Opening Brief, *supra* note 1, at 46.

218. *Id*. at 9 (citation omitted).

219. Petitioner's Supplemental Brief, *supra* note 51, at 6.

environments.[220] Their rationale was that any such increased costs were incurred at the time of the foreign purchase of the LCD panels and that Motorola did not pay any overcharges again when the phones with LCD components were shipped to the United States.[221] However, the defendants knew that all aspects of Motorola's mobile phone business began and ended with the American parent company.[222] Further, they admitted that "Motorola [stood] in the shoes of its subsidiaries for purposes of asserting their claims."[223] The defendants' constant emphasis on the separate existence of Motorola and its subsidiaries "obscured the substantive reality of an integrated, company-wide process for designing, building, importing, and selling Motorola phones."[224] Ultimately, the Seventh Circuit held that Motorola did not have standing under the FTAIA.[225] The court instead held that Motorola's American parent corporation and its foreign subsidiaries were not a single integrated enterprise.[226]

The Seventh Circuit's decision in *Motorola Mobility* precludes any injured purchasers from recovering damages under the Sherman Act from a cartel that had significantly harmed the United States economy.[227] Direct purchasers are barred by the FTAIA, and indirect purchasers (including United States consumers) are barred by *Illinois Brick*, even where foreign conduct causes a severe domestic effect and a mild foreign effect.[228] As a result, Motorola suffered all of the injury

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220. Brief of Defendants-Appellees at 34, *Motorola II*, 775 F.3d 816 (No. 14-8003), 2014 WL 5510636, at *34. Defendants further argue that Motorola cannot ignore their separate existence simply because it prefers U.S. antitrust remedies to foreign remedies. *Id.*

221. *Id.* at 35.

222. Appellant's Opening Brief, *supra* note 1, at 7.

223. Brief of Defendants-Appellees, *supra* note 220, at 4 (citing Coplay Cement Co. v. Willis & Paul Grp., 983 F.2d 1435, 1442 (7th Cir. 1993)).

224. Appellant's Opening Brief, *supra* note 1, at 9.

225. *Motorola II*, 775 F.3d at 827.

226. *Id*. at 820. The court's rationale for this is that "American law does not collapse parents and subsidiaries (or sister corporations) in that way." *Id.* While this may be true legally, it is not true economically. *See infra* Part II.C.

227. Brief for the United States & the Federal Trade Commission as Amici Curiae in Support of Neither Party at 6, *Motorola II*, 775 F.3d 816 (No. 14-8003), 2014 WL 4678234, at *6 [hereinafter Brief for the United States].

228. *See generally Motorola II*, 775 F.3d 816.

associated with the defendants' anticompetitive behavior in its capacity as an American parent company.[229]

a. The Seventh Circuit's Misunderstanding of the FTAIA

The Seventh Circuit's decision to treat Motorola as a distinct entity from its subsidiaries further impacted Motorola's antitrust standing under the FTAIA. This was in part due to a misunderstanding of the "direct effect" prong of the FTAIA. The circuits are split on how they interpret the definition of "direct" within the "direct effect" prong as well as the meaning of the "gives rise to" prong.[230]

The Seventh Circuit, similar to the Second Circuit, has interpreted "direct" to mean "reasonably proximate causal nexus."[231] In contrast, the Ninth Circuit defines direct to mean "immediate consequence" or "characterized by or giving evidence of a close especially logical, causal, or consequential relationship."[232] The issue with the Seventh Circuit's definition is that it does not satisfy the goal of deterrence.[233] The text of the FTAIA couples "direct" with "reasonably foreseeable" and "substantial."[234] That an effect must be "reasonably foreseeable" is to require that it is reasonable to expect a company to be aware what conduct would cause further harm.[235] A foreign company cannot be deterred from harming United States commerce if it does not realize that its actions would have such an effect.[236] Therefore, the Ninth Circuit's definition of "direct" serves the objective of deterrence because if

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229. Petitioner's Supplemental Brief, *supra* note 51, at 6. However, Motorola could have sued abroad, where the injury took place. *Motorola II*, 775 F.3d at 823.

230. *Compare* Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 398 (2d Cir. 2014), *and* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 857 (7th Cir. 2012) (en banc), *with* United States v. LSL Biotechs., 379 F.3d 672, 674, 680-81 (9th Cir. 2004).

231. *See Lotes Co.*, 683 F.3d at 857; *Minn-Chem, Inc.*, 683 F.3d at 857; *see also* Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 430 (2005).

232. *LSL Biotechs.*, 379 F.3d at 698.

233. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2nd. Cir. 1945) ("We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.").

234. 15 U.S.C. § 6a(1) (2012).

235. *LSL Biotechs.*, 379 F.3d at 680.

236. *See* Joseph E. Harrington, *Motorola Mobility and the FTAIA: A Deterrence-Based Definition of "Direct" Effect*, CPI ANTITRUST CHRON., Sept. 2014, at 4.

foreign companies anticipate that they will be held liable when their conduct caused harm, then they will be less inclined to pursue the conduct that causes the harm.[237]

As for the "gives rise to" prong, in *Empagran*, the Supreme Court explained that it is supposed to do no more than incorporate an antitrust injury inquiry into the FTAIA.[238] The question in *Empagran* was whether an anticompetitive price-fixing activity, that was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, gave rise to a Sherman Act claim.[239] The Court held that a domestic purchaser could bring a claim under the Sherman Act and FTAIA, but a foreign purchaser could not bring a claim based solely on foreign harm.[240] The Court characterized "independent foreign harm" as foreign harm caused by a foreign anticompetitive effect that is independent of any domestic anticompetitive effect.[241]

In light of this characterization, the Seventh Circuit's application of the "gives rise to" requirement misreads *Empagran*.[242] The Supreme Court in *Empagran* found that when plaintiffs claim independent foreign harm, the FTAIA should be read to require: (1) "a domestic effect give rise to 'a claim' for antitrust injury;" and (2) "a domestic effect give rise to the plaintiff's *own* claim *at issue*."[243] In other words, the plaintiff must have antitrust standing to assert, and, in fact must assert, the antitrust injury it proffers as having arisen from a domestic effect.[244] Although Motorola did not claim independent foreign harm, "the fact that a domestic effect did not give rise to Motorola's *own* claim or the claim *at issue* should not have prevented Motorola from asserting that a domestic effect gave rise to 'a claim.'"[245] As a result, Motorola should have been able to satisfy the "gives rise to" prong of the FTAIA with

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237. *See id.*
238. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 173-74 (2004).
239. *Id.* at 155.
240. *Id.* at 159.
241. *Id.* at 156.
242. Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816, 824 (7th Cir. 2014).
243. Stutz, *supra* note 18, at 6.
244. *Empagran*, 542 U.S. at 165; *see also* Stutz, *supra* note 18, at 6.
245. Stutz, *supra* note 18, at 7.

"*any* cognizable antitrust injury arising from a domestic effect" because it claimed that foreign harm proximately caused a United States domestic effect, not that there was independent foreign harm.[246]

III. PROTECTING AMERICAN COMPANIES IN A GLOBAL SOCIETY: PERMITTING THE FIRST AFFECTED UNITED STATES PURCHASER TO SUE IN THE AFTERMATH OF *MOTOROLA MOBILITY*

A. WRONGFULLY DISTINGUISHING *MOTOROLA MOBILITY* FROM *COPPERWELD* AND *ILLINOIS BRICK*

The interpretation of *Motorola Mobility* is inconsistent with *Copperweld* and *Illinois Brick*. This section will discuss why the Seventh Circuit improperly applied the precedent from these prior antitrust cases.

1. Copperweld

The defendants in *Motorola Mobility* argued that the principle of *Copperweld*—that a single corporate conglomerate cannot conspire with itself in violation of section 1 of the Sherman Act—had no bearing in the case because Motorola was not defending itself against a section 1 conspiracy claim.[247] The defendants further argued that the injured parties, Motorola's subsidiaries, were foreign corporations complaining about foreign injuries.[248] However, the focus on the corporate relationship between Motorola and its subsidiaries missed the issue at hand.[249] When it comes to protecting the American economy from international cartels, the inquiry should not be whether Motorola structured its own corporate relationships as "subsidiaries" or "unincorporated divisions."[250] In fact, the Supreme Court stated in *Copperweld* that "[a]ntitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary."[251] Furthermore, *Copperweld* condemned an antitrust rule that would treat subsidiaries and divisions differently where it

246. *Id.* at 7 (emphasis added).
247. Brief of Defendants-Appellees, *supra* note 220, at 34-35.
248. *Id.*
249. Appellant's Opening Brief, *supra* note 1, at 26.
250. *Id.* at 27.
251. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 772 (1984).

"serves no valid antitrust goals [and] merely deprives consumers and producers of the benefits [of] the subsidiary form."[252] The Court was concerned about the potential of such a rule to turn antitrust inquiries into decisions made on the basis of corporate structure.[253] The Court made clear that, when it comes to antitrust law, the consequences of corporate-organizational decisions should be determined based on questions of antitrust policy and economics.[254]

In breaking with the intra-enterprise conspiracy doctrine, the Court in *Copperweld* noted that its economic entity approach was consistent with other areas of potential section 1 liability.[255] The Court acknowledged that a corporation and its officers are separate actors, and that a corporation and its divisions are formally separate.[256] Nevertheless, the Court did not hold a corporation and its officers or divisions as "conspirators" when they carry out their business.[257] Instead, the Court treated them as a single economic entity, subject to less rigorous scrutiny, thereby ensuring that the Sherman Act does not dampen their "competitive zeal."[258] Although *Motorola Mobility* does not involve a parent-subsidiary relationship among conspirators, but rather victims, the rationale in *Copperweld* should equally apply. The only consideration that should have mattered in the outcome of *Motorola Mobility*, regardless of the form in which Motorola chose to organize its corporation, was that Motorola's claims related directly to conduct that deliberately harmed the United States.[259] Thus, Motorola and its subsidiaries should have been seen as one entity. If that were the case, the direct effect of the price-fixed LCD panels on the United States market should have been sufficient for Motorola to bring its claim.[260]

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252. *Id.* at 774.
253. *Id.*
254. *Id.* at 777.
255. *Id.*
256. *Id.* at 770-71 (1984).
257. *Id.* at 769 n.15.
258. *Id.* at 768.
259. Appellants Opening Brief, *supra* note 1, at 13.
260. 15 U.S.C. § 6a(1) (2012).

2. Illinois Brick

The fact that Motorola and its subsidiaries functioned as a single economic unit means that the indirect purchaser doctrine likewise cannot be sensibly applied.[261] In *Motorola Mobility*, Motorola's subsidiaries were wholly owned.[262] Given the nature of the wholly owned subsidiary, it has been suggested that "courts should invoke the ["own or control"] exception only to ensure that sellers do not insulate themselves from suit . . . by strong-arming direct purchasers into choosing not to sue."[263] In this instance, the direct purchasers do not have standing to sue because they are located in a foreign country, and thus cannot complain about effects on United States commerce because they are "upstream" from any effects that follow from importing the finished product.[264] However, Motorola cannot raise its own claim because it is "downstream" from the direct-purchaser subsidiaries, and so, it is barred by *Illinois Brick*.[265] This means that no one can recover damages for the defendants' conduct, despite its substantial harm on United States commerce.[266]

If Motorola and its foreign subsidiaries were properly seen as a single entity, then the *Illinois Brick* doctrine would not apply.[267] The Court in *Illinois Brick* recognized that exceptions to the *Hanover Shoe*

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261. *See, e.g.*, Jewish Hosp. Ass'n v. Stewart Mech. Enters., Inc., 628 F.2d 971, 975 (6th Cir. 1980) (citing *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1162 (5th Cir. 1979)) (*Illinois Brick* does not apply where there is "such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale.").

262. *Cf.* Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969) (holding that the defendant could not avoid liability under the Robinson-Patman Act for price discrimination merely by channeling the illegal discount through its sixty percent-owned subsidiary); *In re* W. Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973) (holding that defendants controlled their direct customers either by acquiring their stock or by arranging to finance their purchases). This can be contrasted with subsidiaries that are partially-owned, and thus would not follow the same logic as is argued in this Note. However, partially-owned subsidiaries fall outside the content of this Note.

263. Barbara H. Bares, Cecilia M. Fanelli, Todd I. Gordon & William F. Murphy II, *Scaling the* Illinois Brick *Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 328-29 (1978).

264. Appellant's Reply Brief, *supra* note 204, at 16.

265. *Id.* at 20.

266. Appellant's Opening Brief, *supra* note 1, at 18.

267. *See generally* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

rule[268] have been urged for in other situations in which most of the overcharge is purportedly passed on—for example, "where a price-fixed good is a small but vital input into a much larger product, making the demand for the price-fixed good highly inelastic."[269] However, the Court in *Illinois Brick* rejected these exceptions.[270]

The significance of these two cases therefore depends on whether Motorola and its subsidiaries were seen as a single unit.[271] In *Hanover Shoe*, the court did not endorse the "passing-on" defense against middlemen who did not alter the goods they purchased before reselling them.[272] If Motorola's subsidiaries were seen as a separate entity from the parent company, they would fall under this "middlemen" category.[273] However, if Motorola and its subsidiaries were seen as one entity, then, similar to *Illinois Brick*, the "passing-on" defense would be unavailable to the defendants because Motorola itself bought the LCD panels and converted them into cell phones.[274] Therefore, under *Hanover Shoe*, Motorola would be able to recover damages.[275]

The defendants in *Motorola Mobility* rejected the notion that Motorola and its subsidiaries were a single entity and argued that neither Motorola nor its subsidiaries have a claim because Motorola was barred by downstream recovery.[276] However, if the "own or control" exception

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268. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 488 n.6. Citing a lower court opinion, the Court agreed that "it is unnecessary to determine whether [the plaintiff] had passed on the illegal burden because [the plaintiff's] injury was complete" when it purchased the price-fixed commodity. *Id*. This is because "the general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Id.* at 490 n.8.

269. *Ill. Brick*, 431 U.S. at 743-44; *see also* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 745-46 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (arguing that the pass-on theory should be permitted for middlemen that resell goods without altering them).

270. *Ill. Brick*, 431 U.S. at 744.

271. *See id.* at 735 n.15. In that instance, the "middlemen" were the shoe machinery manufacturers, who were not permitted to assert a "passing-on" defense against its customers. *See Hanover Shoe*, 392 U.S. at 488 n.6.

272. *See Ill. Brick*, 431 U.S. at 735.

273. *See Hanover Shoe*, 392 U.S. at 488 n.6.

274. Appellant's Reply Brief, *supra* note 204, at 19.

275. *Id.*

276. *Id*. at 20.

applies,[277] and *Illinois Brick*'s bar on pass-through claims does not, Motorola has antitrust standing and injury because it complains about a "prototypical" antitrust harm, collusive price-fixing, that passed through to it.[278] Furthermore, the Supreme Court has held that injured parties in downstream markets do have relevant injuries and antitrust standing under the FTAIA.[279] Therefore, Motorola has a viable claim for the harm it suffered as a purchaser of the tainted cell phones in import commerce, and has standing to sue under the FTAIA.

B. THE EFFECT OF THE SEVENTH CIRCUIT'S DECISION IN *MOTOROLA MOBILITY*

The primary focus of the United States antitrust laws is to deter behaviors that harm United States commerce.[280] The Seventh Circuit's decision fails to consider the adverse effects it would have on two economic policy goals: deterrence of cartels and promotion of the efficient use of international supply chains relied upon by American companies and consumers.[281] The facts of *Motorola Mobility* are increasingly common in today's interconnected global economy.[282] It is not unusual that an American company, which owns and controls foreign subsidiaries as part of its supply chain, finds itself victimized by a global cartel.[283] In the last twenty-five years, international price-fixing conspiracies have cost consumers around the globe more than $1 trillion.[284] The particular price-fixing conspiracy in *Motorola Mobility* affected well over $23.5 billion in sales of LCD panels imported into the United States and enabled conspirators to impose overcharges of more

277. Defendants do not contest that Motorola owned and controlled the relevant subsidiaries, or that Motorola's downstream injuries would therefore be actionable even under *Illinois Brick*. *Id.* at 21.

278. *Id.* at 20.

279. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004) ("[A]pplication of our antitrust laws to foreign anticompetitive conduct [under the FTAIA] is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.").

280. *See, e.g.*, Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 314 (1978).

281. *See* Smith, *supra* note 30, at 2063.

282. Duffy, *supra* note 117, at 1711-12.

283. *Id.*

284. Brief for AAI, *supra* note 10, at 2.

than $2 billion on those imports.[285] Consequently, both effective cartel deterrence and the efficient use of international supply chains are policy goals of exceptional public importance that have been hindered by the Seventh Circuit's decision.[286]

A number of prominent economists and academic organizations submitted an amicus brief on behalf of Motorola.[287] They argued that as a matter of economic policy, purchases by foreign affiliates of American companies "should be permitted to seek treble damages in U.S. courts to deter the formation of cartels that harm U.S. consumers and businesses."[288] The American Antitrust Institute ("AAI") echoed these policy concerns, arguing that the Seventh Circuit panel's decision undermines deterrence of foreign cartels that harm American businesses and consumers.[289] The AAI further criticized the panel's decision "for adopting a 'super *Illinois Brick* rule' that would preclude indirect purchasers in the United States from recovery for injury caused by foreign cartels."[290] In this manner, they argued, the panel was determined to combat an "explosion of litigation against international cartels," based on its belief that American consumers were harmed so often that to permit recovery would open the floodgates.[291]

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.[292] In the FTAIA context, comity is "'prescriptive comity': the respect sovereign nations afford each other by limiting the

285. *Id.* at 2-3.

286. *See generally* Smith, *supra* note 30.

287. *See generally* Brief of Amicus Curiae Economists & Professors in Support of Petitioner, Motorola Mobility LLC v. AU Optronics Corp., 135 S. Ct. 2837 (2015) (No. 14-1122), 2015 WL 1777073 [hereinafter Brief of Economists & Professors].

288. *Id.* at 32.

289. Corbitt & Sheanin, *supra* note 200, at 9 (citing Brief for AAI, *supra* note 10, at 2).

290. *Id.* (citing Brief for AAI, *supra* note 10, at 5).

291. Stutz, *supra* note 18, at 8.

292. Supplemental Brief for the United States as Amicus Curiae at 1, Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816 (7th Cir. 2014) (No. 14-8003), http://www.justice.gov/atr/case-document/file/505311/download [http://perma.cc/2DXK-8KHB].

reach of their laws."[293] While there is a strong presumption that federal statutes are to be construed to avoid interference with the sovereign interests of other nations, the increasingly global economic and multi-layered supply chains have made the protection of United States commerce that much more important.[294] There is no reason to believe that Congress would have intended the FTAIA to depart from long-settled precedent that applies the Sherman Act to cartels that harm the United States, but to instead largely immunize foreign cartels from liability for the damage they cause American companies and consumers.[295]

Furthermore, antitrust penalties imposed on international cartels "are collectively inadequate to deter international cartels, in part because many nations do not even have laws against international price-fixing cartels." [296] The Seventh Circuit's ruling creates an incentive to inefficiently reorganize a supply chain to change the purchaser to the American parent company and the delivery location to the Untied States for legal reasons. [297] This would result in the loss of benefits a corporation would otherwise stand to gain from locating near key foreign suppliers. [298] It would likewise force American companies to forgo potential benefits from moving production offshore.[299] Consider this: it would be efficient for Motorola to purchase LCD panels delivered in the United States, but not for LCD panels delivered abroad to Motorola's foreign subsidiaries. Therefore, in response to the legal rule crafted by Seventh Circuit barring an antitrust claim based on LCD panels delivered abroad, "Motorola would be incentivized to switch its purchasing behavior to have its parent company, and not its foreign subsidiaries, make future purchases and take delivery in the United

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

294. *See Motorola II*, 775 F.3d at 824 (stating that "[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought to foreign manufacturers"); Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 412 (2d Cir. 2014) (acknowledging the "complex manufacturing process is increasingly common in our modern global economy, and [that] antitrust law has long recognized that anticompetitive injuries can be transmitted through multi-layered supply chains.").

295. Appellant's Opening Brief, *supra* note 1, at 12.

296. Brief of Economists & Professors, *supra* note 287, at 4.

297. Appellant's Opening Brief, *supra* note 1, at 24.

298. *Id.* at 25.

299. *Id.*

States."[300] The outcome from the Seventh Circuit's decision thus creates economic inefficiencies that leave American consumers worse off.

Moreover, there is a chance that the Seventh Circuit's ruling has the unintended consequence of encouraging the creation of cartels by foreign countries to attract business.[301] The rule would allow such countries to permit the exploitation of American parent companies' supply chains by selling to foreign subsidiaries barred from pursuing an antitrust claim in United States courts, as was the case in *Motorola Mobility*.[302] The result would lead to increased production costs and, ultimately, higher prices of final United States consumer goods.[303]

Regardless of where the LCD panels were purchased or delivered, this price-fixing conduct resulted in the elevation of the price of LCD panels, which in turn elevated the price of the finished cellphones by the exact same amount.[304] This is where the example provided in the beginning of this Note rears its head.[305] It does not matter whether an LCD panel was sent to the United States and then manufactured into a Motorola phone, manufactured into a Motorola phone in Asia and then sent to the United States, or manufactured into a Motorola phone in Asia and sold into the United States, because the substance of these transactions is all the same.[306] Rather, the only thing that should matter is the substance of the actions: a price-fixed commodity was placed in a product and shipped to the United States, effectively harming American consumers.[307]

C. RESOLUTION: PERMITTING THE FIRST AFFECTED PURCHASER TO SUE

Courts should recognize an exception to the FTAIA in cases where an antitrust violation makes its way through a wholly owned foreign subsidiary into United States commerce. There is nothing within the language of the FTAIA to prevent such an exception.[308] Rather, the

300. *Id.* at 25-26.
301. *Id.* at 26.
302. *Id.*
303. *Id.*
304. *Id.*
305. *See supra* Introduction.
306. *Id.*
307. *Id.*
308. 15 U.S.C. § 6a (2012).

FTAIA sets a "general rule placing *all* (nonimport) activity involving foreign commerce outside" the reach of the antitrust laws, and then makes exceptions for when "the conduct *both* (1) sufficiently affects American commerce . . . and (2) has an effect of a kind that antitrust law considers harmful."[309] Therefore, courts could abide by the FTAIA by recognizing an exception that allows the first affected American purchaser standing to sue when the antitrust activity originally occurs abroad, but ultimately affects United States commerce provided that the direct purchaser is a wholly owned entity of the first affected purchaser.

Given that $2 billion in overcharges on the import of LCD panels resulted in *Motorola Mobility*,[310] an exception to the *Illinois Brick* doctrine is warranted when a wholly owned foreign subsidiary of an American parent corporation is the direct purchaser of a price-fixed commodity. Several courts have observed that the bar to indirect purchaser damages claims does not "apply when no purchaser could obtain damages, for then there is no risk of double recovery (and no need to calculate elasticities in order to apportion damages among multiple tiers)."[311] A new exception would permit damages claims by the first purchaser affected in United States commerce when section 6(a)(2) of the FTAIA bars the direct purchasers' claims.[312] This construction would also permit enforcement of the antitrust laws without implicating *Illinois Brick*'s concerns regarding multiple recoveries.[313] If courts do not recognize this exception, *Motorola Mobility* may have the effect of excluding any private plaintiff from recovering damages under the federal antitrust laws.[314]

This new exception would help resolve the standing issue presented in *Motorola Mobility*.[315] Under *Motorola Mobility*, Motorola's subsidiaries could not sue pursuant to the Sherman Act because their

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309. F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004).

310. Brief for the AAI, *supra* note 10, at 2-3.

311. *See, e.g.*, U.S. Gypsum Co. v. Ind. Gas. Co., 350 F.3d 623, 627 (7th Cir. 2003); *see also* California v. ARC Am. Corp., 490 U.S. 93, 102 n.6 (1989) (emphasizing that *Illinois Brick* "was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws . . . but rather that at least some party have sufficient incentive to bring suit.").

312. Brief for the United States, *supra* note 227, at 6.

313. *Id.*

314. *Id.*

315. Motorola Mobility LLC v. AU Optronics Corp. (*Motorola II*), 775 F.3d 816, 821 (7th Cir. 2014).

injuries occurred abroad.[316] In turn, Motorola could not sue because it did not make direct purchases from the cartel.[317] This interpretation creates somewhat of a paradox where no private party can sue for the antitrust violations in the United States, allowing the cartel to get away with its antitrust violations.[318] Although the application of the Sherman Act should avoid "creating friction with many foreign countries,"[319] United States antitrust law needs to take an interest in protecting American parent companies like Motorola from antitrust violations abroad.

While Motorola's American parent company should have fallen under the "own or control" exception to *Illinois Brick*, the court rejected this theory because the subsidiaries were incorporated under foreign law.[320] Given that the sole reason Motorola was prevented from claiming the "own or control" exception is due to the location of its subsidiary, the recognition of an exception under the FTAIA would help to resolve this dilemma.[321] If Motorola's subsidiaries did not have a claim because their injuries occurred abroad, Motorola should then have its own claim as an American corporation that actually imported the goods tainted by price-fixing into the United States for sale.[322] This claim is justified in both form and substance because Motorola's parent corporation acted alone in purchasing the phones while functioning with its subsidiaries as a single entity.[323] The key point is that Motorola is both the first purchaser in the United States and is the parent of its corporate family, and is therefore the ideal party to sue to correct the antitrust injuries to that family.[324] Thus, an administrable exception to the indirect purchaser

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316. *Id.*

317. *Id.* While Motorola could have sued abroad, they preferred to sue in the United States, whose antitrust remedies were more favorable.

318. Petition for a Writ of Certiorari at 18, Motorola Mobility LLC v. AU Optronics Corp., 135 S. Ct. 2837 (2015) (No. 14-1122), 2015 WL 1223711, at *29-30.

319. *Motorola II*, 775 F.3d at 824.

320. *Id.* at 823.

321. This exception would allow for indirect purchasers to sue if the direct purchaser is a wholly owned foreign subsidiary and the antitrust violation has an impact on United States commerce.

322. Appellant's Reply Brief, *supra* note 204, at 18.

323. *Id*.

324. Appellant's Opening Brief, *supra* note 1, at 18-19.

doctrine, under the FTAIA, could be recognized to permit the first affected purchaser in United States commerce to seek damages.

As with any doctrine, there is always a concern for over broadening the indirect purchaser doctrine to a point where the exceptions swallow the rule. However, this new exception would be narrowly limited to granting only the first affected American purchaser standing to sue when the antitrust activity originally occurs abroad, but ultimately affects United States commerce provided that the direct purchaser is a wholly owned entity of the first affected purchaser. Under this framework, the exception would limit the doctrine's expansion while simultaneously allowing the indirect purchaser doctrine to evolve with the modern globalized society. Moreover, the recognition of this exception would uphold the broad purposes of *Illinois Brick*: avoiding duplicative liability while promoting deterrence and compensating antitrust victims.[325]

CONCLUSION

Given the increasing commonality of international supply chains, the current FTAIA does not adequately protect the welfare of American consumers. The current penalties in place by the FTAIA are insufficient to deter foreign cartels, leading to substantial harms within the United States market. For these economic reasons, American parent corporations should be able to seek damages pursuant to the antitrust laws for violations that occur abroad between wholly owned foreign subsidiaries and international cartels. Given that parents and subsidiaries are seen as a single economic entity in other antitrust contexts, maintaining this economic outlook, despite the legal corporate differences that may exist, would help resolve this apparent conflict. Furthermore, creating an exception to allow for an indirect parent corporation to sue on behalf of its direct wholly owned foreign subsidiary would not go against the purpose of *Illinois Brick*: given that it is the same umbrella corporation, there is no risk of duplicative recovery. This exception would not unduly broaden the reach of the Sherman Act, but rather allow American corporations to sue for antitrust violations when those actions directly affect United States commerce. The result would therefore protect the welfare of American consumers and maintain the original purpose of the Sherman Act by promoting

325. Ill. Brick Co. v. Illinois, 431 U.S. 720, 745-47 (1977).

competition while combating international cartels and conspiracies that cause anticompetitive effects in the United States.