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Pierre de Fermat was a professional lawyer and amateur mathematician. Say what you will about our noble profession, Fermat's greatest contributions to society occurred during his off-hours. In 1662, Fermat stated his "principle of least time:" light follows the path that takes the least amount of time to travel. This principle has broad application beyond the world of quantum electrodynamics. Ants, for example, take the fastest route when traveling from point A to point B. If judges and United States prosecutors would apply this fundamental principle to the house-of-mirrors erected by the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), the law would be in far better shape than it is today.

Couched in "convoluted language," the FTAIA essentially states that the Sherman Act does not apply to purely foreign conduct unless that conduct exerted a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce *and* "such effect gives rise to a claim under the Sherman Act."[2] The FTAIA applies equally to civil and criminal cases.[3]

The Sherman Act is a criminal statute and does not provide a private right of action. Rather, Clayton Act Section 4 states that any person injured "by reason of anything forbidden in the antitrust laws" may sue for damages.[4] Structurally, the fact of a Sherman Act violation is a condition precedent to a private civil action. In fact, the version of the FTAIA passed in 1982 by the House Judiciary Committee actually used the phrase "such effect is the basis of ***the violation*** alleged."[5] Peter Rodino, then Chairman of the House Judiciary Committee, unilaterally changed that phrase at the eleventh hour to the current language cited above, believing that he was making a "minor clarification" that would make it "absolutely clear" that the domestic effect of the antitrust violation had to be an *anticompetitive* one.

Unfortunately, courts—including the U.S. Supreme Court—have viewed Chairman Rodino's misguided clarification almost exclusively through the refractory lens of private damage

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[2] *See, e.g., Animal Science Prods., Inc. v. China Minmetals, Corp.*, 654 F.3d 462, 465 (3d Cir. 2011); 15 U.S. C. § 6a.

[3] See, e.g., *U.S. v. Hui Hsiung*, 758 F.3d 1074, 1092 (9th Cir. 2014).

[4] 15 U.S.C. §15(a).

[5] H.R. Rep. No. 97-686 at 18 (emphasis added).

actions.[6] In these and other similar cases, the question posed has not been whether the conduct violated the Sherman Act but whether a particular plaintiff should be permitted to seek treble damages. Those, of course, are entirely different questions and the analyses of each will travel along different paths of least resistance. Trying to solve the first question with tools designed to answer the second, and *vice versa*, will only cause confusion.

The recent criminal and civil cases growing out of the liquid crystal display ("LCD") price-fixing cartel neatly illustrate the problem and the solution. In that case, a group of producers located primarily in Asia agreed to artificially inflate prices in the global market for LCD panels used in products like notebook computers and flat-screen televisions.

The United States Department of Justice Antitrust Division ("DOJ") obtained numerous guilty pleas from producers and persuaded a jury in San Francisco that a cartel producer, Taiwan-based AU Optronics ("AUO"), violated the Sherman Act. The Ninth Circuit affirmed the verdict in *U.S. v. Hui Hsiung*.[7] Presented with an opportunity to clarify the law, the Ninth Circuit merely recited the Ninth Circuit rule that "gives rise to a claim" means "causes *the plaintiff's* injury."[8] It then ducked the question and concluded that because the conduct involved import commerce the Sherman Act applied.[9] (One cannot criticize the Ninth Circuit for choosing the path of least resistance, but one can question why the Ninth Circuit chose to briefly focus on the issue at all.)

One United States-based victim of the conspiracy, Motorola Mobility LLC, sought treble damages arising, in part, from overcharges that its subsidiaries paid to AUO and other conspirators for LCD panels that its subsidiaries assembled into cellphones and shipped to the United States for sale to consumers. The Defendants argued that the FTAIA barred those damage claims because the overcharges did not arise from a U.S. effect.

The MDL judge, United States District Judge Susan Ilston, rejected the Defendants' argument. On remand to the transferor court, however, United States District Judge Joan Gottschall agreed with the Defendants and, without hearing oral argument, dismissed those aspects of Motorola's damage claims.[10] Then, in a remarkably terse opinion written by Judge Richard Posner, the Seventh Circuit summarily upheld Judge Gottschall's decision without even allowing Motorola to brief the issue.[11] The Seventh Circuit then vacated its opinion and directed the parties to submit briefs on the merits.[12]

The DOJ filed a brief as *amicus curiae* taking the position that the FTAIA's "gives rise to a claim" language should be flexibly interpreted so courts can weed out civil claims for foreign

[6] *See, e.g. F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005); *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395 (2d Cir. 2014).

[7] *U.S. v. Hui Hsiung*, *supra* note 3.

[8] *Id.* at 1094 (emphasis added).

[9] *Id.*

[10] *Motorola Mobility, Inc. v. AU Optronics Corp. et al.*, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014).

[11] *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014).

[12] *Motorola Mobility LLC v. AU Optronics Corp.*, Order dated July 1, 2014, Case No. 09 C 6610.

injury.[13] The DOJ argued that foreign jurisdictions' concerns about private damages claims are best addressed by this aspect of the FTAIA. Unable to cite legislative history or statutory authority to support its position, the DOJ instead turned to the U.S. Supreme Court's decision in *Associated General Contractors*[14] —the leading case on antitrust standing.[15] Thus, stuck on an Island of Standing, the United States then argued that *somebody* should be able to sue and therefore courts could create an exception to the *Illinois Brick* rule limiting standing to direct purchasers so that U.S. consumers could bring claims.[16] It is a convoluted theory that even carpenter ants would reject. Whatever the Seventh Circuit ultimately decides, *Motorola* seems destined to go before the U.S. Supreme Court.

The much simpler, and mathematically sensible, approach would be to acknowledge that the cartelists' guilty pleas and jury verdict already established that the Sherman Act applies to the conduct, i.e. the agreement among horizontal competitors to limit price competition in the global market for LCD panels. From there, Fermat's principle would counsel in favor of applying *Associated General Contractors* and its sequelae to the specific facts of Motorola's case.

Indeed, that is precisely why that line of cases exist. This approach give courts a set of factors to consider in deciding which victims of antitrust violations should be allowed to seek "the Clayton Act's rich bounty of treble damages."[17] These factors include:

1. the causal connection between the violation and the plaintiff's injury,
2. the type of harm the plaintiff suffered,
3. the directness of the plaintiff's injury,
4. whether more direct victims existed, and
5. whether the claim could create problems identifying and apportioning damages.[18]

Courts may also consider notions of comity.[19]

Thus, the Seventh Circuit need not consult the FTAIA at all in *Motorola,* nor should any court have to wander into the FTAIA's sinister house of mirrors to answer questions of standing.

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[13] Brief for the United States and the Federal Trade Commission as *Amici Curiae* in Support of Neither Party (Sep. 5, 2014), available at http://www.justice.gov/atr/cases/f308400/308451.pdf.

[14] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)

[15] *Id. at* 14.

[16] *Id. at 20-21.*

[17] *In re LIBOR-Based Financial Instruments Antitrust Litig.*, 935 F.Supp.2d 666, 686 (S.D.N.Y. 2013).

[18] *Associated General Contractors* at 536-45.

[19] H.R. Rep. No. 97-686, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2498 (citing *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612-13 (9th Cir. 1976).