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Rejects Fermat's Principle of Least Time

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Judge Posner Speaks on the FTAIA: Rejects Fermat's Principle of Least Time

James R. Martin[1]

A few months ago, I argued that the law should employ Pierre de Fermat's "principle of least time" when applying the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to private antitrust actions brought in the U.S. courts.[2] Fermat's principle states that a ray of light will choose a path between two points that can be traversed in the least time. The purpose of the analogy was to show that the path of least resistance to determine which victims can seek treble damages was to use long-established principles of standing rather than a twisted application of the FTAIA.

Perhaps the reference was too arcane, as one of the most recent FTAIA decisions, *Motorola Mobility LLC v. AU Optronics Corp.*, cited at length a well-written article by another practitioner titled *Repeal the FTAIA!*[3] (a sentiment with which I could not agree more) that argued the same legal principles. Perhaps a more apt analogy is this: Using the FTAIA to determine which private plaintiffs can seek treble damages for hard-core violations is like trying to pound a nail with a wrench. Sometimes it can be done, sloppily, but there are more effective tools readily available to make sure the job is done right.

In *Motorola*, Judge Posner and the Seventh Circuit perpetuated the mistaken use of the FTAIA as a tool of standing analysis. The facts in *Motorola* are straightforward. A cartel of foreign suppliers agreed to, and did, increase the prices of liquid crystal display ("LCD") panels sold in a global marketplace. LCD panels are used for, among other things, screens in cellphones.

Motorola is a U.S. company that negotiated (from its U.S. offices) a single worldwide price for LCD panels purchased by its subsidiaries around the world. Motorola's subsidiaries, most of which are located in Asia and therefore nearer to the LCD panel production facilities, issued the purchase orders and took delivery of the panels outside the United States at the negotiated prices, took delivery outside the United States, and incorporated those panels into cellphones outside the United States. The affiliates then "sold" the cellphones to their parent company in the United States at internally set transfer prices that reflected the artificially high LCD panel prices. Motorola then sold the cellphones to consumers in the United States, again at prices that reflected the effects of the conspiracy.

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[2] James Martin, *Fermat's Principle and the FTAIA: What Courts Can Learn From Optics,)*, 9(1) CPI ANTITRUST CHRON. (September 2014).

[3] Robert Connolly, *Repeal the FTAIA! (Or At Least Consider It as Coextensive with Hartford Fire)*, 9(1) CPI ANTITRUST CHRON. (September 2014).

There is no question that the conduct—the price agreement among horizontal competitors—was unlawful under the laws of the United States as well as virtually every other country that has an antitrust regime, including the countries in which Motorola's subsidiaries acquired the LCD panels. The Seventh Circuit agreed that the cartel exerted a direct, substantial, and reasonably foreseeable effect on U.S. commerce. But then the Seventh Circuit made the same mistake so many courts before it have made; it viewed the FTAIA as a tool to determine "who may bring a suit based on" the Sherman Act violation.[4]

The Seventh Circuit found that the FTAIA's import commerce exception would allow Motorola to pursue treble damages "had the defendants conspired to sell LCD panels to Motorola in the U.S. at inflated prices."[5] Apparently, that meant Defendants had to ship the LCD panels directly to the United States because the Seventh Circuit ruled that Motorola could not claim any damages if the LCD panels were delivered to foreign affiliates located near the production site for assembly into cellphones before those cellphones were transferred to Motorola in the United States for sale here.

The Seventh Circuit accepted as true an economist's finding that (1) the cartel inflated the price that Motorola paid (via its subsidiaries) to the cartelists, (2) the cartel inflated the price that Motorola in the United States paid for LCD panels as a component of the cellphones that they received from their affiliates at transfer prices, and (3) U.S. consumers paid higher prices for cellphones as a result of the conspiracy.[6]

If one understands that Congress created a private right of action for victims of antitrust violations to seek treble damages as a way to deter cartel formation, then one would expect that **someone** should be permitted to seek damages for this conduct. As the Supreme Court wrote in *Pfizer,*[7] treble damage remedies serve to deter violators, deprive them of the fruits of their illegality, and compensate victims of antitrust violations for their injuries. Denying a plaintiff injured by an antitrust violation the right to sue would defeat those purposes and permit price fixers to escape full liability for their illegal actions.[8]

Not so in the Seventh Circuit, where the Court decided Motorola must deal with the consequences of its decision to use a global supply chain rather than some less efficient method of production and delivery. If the countries in which Motorola took delivery of the LCD panels did not have adequate antitrust laws, "these are consequences that Motorola committed to accept by deciding to create subsidiaries that would be governed by the laws of those countries."[9] The Seventh Circuit treated the antitrust laws as a business tort rather than a statute grounded in public policy.

The Court then applied the *Illinois Brick* indirect purchaser rule to prevent anyone other than the first purchaser—Motorola's foreign subsidiary—from seeking treble damages. Explaining the purpose of the *Illinois Brick* rule, the Supreme Court wrote "it may result in a

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[4] *Motorola Mobility LLC v. AU Optronics Corp.*, -- F.3d. --, 3015 WL 137907 at *2 (7th Cir., Jan. 12, 2015).

[5] *Id * 3.*

[6] *Id * 3.*

[7] *Pfizer, Inc.[7] v. Government of India*, 434 U.S. 308, 314-15 (1978).

[8] *Id* 314-15.

[9] *Motorola * 4.*

windfall for the direct purchaser, but preserves the deterrent effect of antitrust damages liability while eliding complex issues of apportionment."[10] The Court never addressed the perverse consequence of blending the FTAIA's supposed rule against foreign recovery with the *Illinois Brick* rule to deprive **anyone** of a remedy. How could that possibly preserve the deterrent effect of treble damages?

It does not. The wrench cannot pound this nail.

Consider, alternatively, how the case might be analyzed if the Seventh Circuit applied the U.S. Supreme Court's decision in *Associated General Contractors* ("AGC")[11] —the leading case on antitrust standing[12] to the facts. AGC identifies 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."[13] 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.[14] Courts may also consider notions of comity to limit interference with the laws of other countries.[15]

Note that these factors do not ask **whether** someone should be able to seek damages for a Sherman Act violation. They ask instead **which victim** is the most appropriate plaintiff. Applying these factors, one could forcefully argue that Motorola's subsidiaries should be granted standing as direct purchasers and victims of conduct that unquestionably exerted a direct, substantial, and foreseeable effect on U.S. commerce and which are the most direct victims. Alternatively, even if the foreign subsidiaries could somehow be precluded from seeking damages, the parent company would be next in line, and the next best plaintiff.

The U.S. Department of Justice ("DOJ") argued some variation of this analysis in its *amicus* briefs. Although the DOJ unfortunately took the position that the FTAIA should be used to cut off private remedies for plaintiffs located outside the United States,[16] it nevertheless argued that Courts should create an exception to *Illinois Brick* so that U.S. consumers could bring claims.[17]

Thus, the Seventh Circuit failed to add any clarity to a confused and muddled area of the law. One can only hope that the U.S. Supreme Court agrees to grant *certiorari* so that it can revisit and repair the damage done by *Empagran* and the subsequent series of cases that put the FTAIA wrench closer at hand than the hammer of standing.

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[10] *Id * 5.*

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

[12] *Id. at* 14.

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

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

[15] 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).

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

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