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# When Illinois Brick Goes Abroad

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There are few aspects of U.S. antitrust law as seemingly well settled as Illinois Brick's "indirect purchaser rule." The rule itself — indirect purchasers may not recover damages under federal antitrust laws — is about as straightforward as they come; there are only a few exceptions, and courts have adhered to the U.S. Supreme Court's instruction that these exceptions not be freely expanded or multiplied. If antitrust has any load-bearing doctrinal pillars, then Illinois Brick is surely among them.

But here is a not-entirely-settled question about Illinois Brick: To what extent does it apply to claims based on conduct occurring in foreign commerce? Part of the answer is easy: As an interpretation of the Clayton Act, Illinois Brick undisputedly applies to bar federal indirect purchaser claims based on foreign conduct. But does it also bar such claims when brought under state laws?

The knee-jerk response is "no," and the knee-jerk reason is "federalism." The Supreme Court's decision in California v. Arc America Corp.[1] says that states do not violate the Supremacy Clause by departing from Illinois Brick and conferring standing on indirect purchasers under their own laws, an option that today is exercised by roughly half of the states. But there is an important limitation to Arc America, and to the so-called "Illinois Brick repealer" statutes it engendered, that is consistently overlooked: Its reasoning applies only in the realm of domestic commerce, where the federal and state governments have always possessed overlapping powers, and holds no force with respect to foreign commerce, where the federal government's regulatory power is exclusive and absolute.

Arc America is based on "the presumption against finding pre-emption of state law in areas traditionally regulated by the States," which here refers to the "long history of state common-law and statutory remedies against monopolies and unfair business practices."[2] But that "long history" of state antitrust power has always been understood as confined to domestic commerce, and primarily to commerce occurring within the borders of each state.[3] Indeed, the 1890 Congress that enacted the Sherman Act was well aware of the inherent geographical limit to state laws, and viewed it as a primary justification for "supplementing" those laws by enacting a federal antitrust scheme that could regulate interstate and foreign commerce:

The legislative history [of the Sherman Act] reveals very clearly that Congress' perception of the limitations of its power under the Commerce Clause was coupled with an intent not to intrude upon the authority of the several States to regulate "domestic" commerce. ... [T]he legislative debates show that Congress' goal was to supplement such state efforts, themselves restricted to the geographic boundaries of the several States. As Senator Sherman stated: "Each State can deal with a combination within the State, but only the General Government can deal with combinations reaching not only the several States, but the commercial world."[4]

Thus, when Arc America concludes that the Sherman Act was not intended to occupy the field of antitrust law,[5] it can only be understood as referring to the context of domestic commerce. The 1890 Congress clearly did believe it was occupying the (previously empty) field of antitrust law as applied to foreign commerce. Indeed, if the Arc America court had been concerned with the issue of foreign commerce, it would have reached the opposite conclusion, inferring federal preemption “from the dominance of the federal interest in foreign affairs.”[6]

This distinction between domestic and foreign commerce is dictated by the U.S. Constitution. While the Commerce Clause gives the federal government power to regulate domestic interstate commerce, that power is necessarily limited by the sovereign rights of states to regulate domestic commerce within their respective borders. [7] The Foreign Commerce Clause,[8] by contrast, grants the federal government “plenary,”[9] “exclusive”[10] and “complete”[11] power to regulate foreign commerce. [12] The purpose of this absolute power is to ensure “uniformity” in the United States’ commercial relations with foreign countries by allowing the United States, through the mouthpiece of the federal government, to “speak with one voice” regarding matters involving foreign commerce.[13] The “negative” implication is that the states may not enforce laws with respect to foreign commerce that would interfere with existing federal law in that arena.[14] Put simply, there is no such thing as federalism in the realm of foreign commerce.

There is no question that Illinois Brick is the federal government's "voice" on the issue of indirect purchaser standing for claims based on foreign commerce. In fact, theU.S. Department of Justice’s Antitrust Division is sufficiently concerned about the effect of Illinois Brick on its ability to prosecute foreign conduct that it recently asked the Seventh Circuit to create a new exception to Illinois Brick that would apply whenever the direct purchase was made in foreign commerce[15] (a request the Seventh Circuit ostensibly ignored). But if Illinois Brick is a federal law regulating foreign commerce, and it surely is, why should it not automatically, by direct operation of the “negative” or “dormant” Foreign Commerce Clause, trump contradictory state laws to the extent they purport to apply to foreign commerce?

It might be argued here that a state law conferring standing on indirect purchasers, even when applied to conduct occurring in foreign commerce, does not in fact regulate foreign commerce because it only provides redress to those who made downstream purchases within the state’s borders. But this argument confuses the conduct being regulated with the injury being redressed. Simply put, state laws “repealing” Illinois Brick regulate foreign commerce to the extent they purport to create liability for foreign commercial conduct. And when the scope of that liability contradicts federal policy, it threatens to interfere with the Federal Government’s exclusive say in matters of foreign commerce.

As it turns out, this "single voice" argument is not novel — indeed, it has been recently and unanimously adopted by courts applying another (though not necessarily unrelated) facet of federal antitrust law, the Foreign Trade Antitrust Improvements Act of 1982. The FTAIA, by its terms, limits the application of the Sherman Act to foreign commerce and thus, like Illinois Brick, nominally applies only to federal claims.

Nevertheless, every court to consider the issue has held that the FTAIA, as the official federal policy concerning an issue of foreign commerce, trumps inconsistent state antitrust laws. [16] Put another way, the FTAIA imposes the exact same territorial limits on state antitrust laws as it does on federal laws.

The key point, which courts have yet to reach, is that this reasoning applies equally to any state law to the extent it contradicts federal law on an issue of foreign commerce, which includes state laws granting standing to indirect purchasers. The dormant Foreign Commerce Clause demands uniformity and federal exclusivity, neither of which could obtain if states were allowed to differ with federal law on the standing requirements for claims based on foreign commerce. Indeed, the issue of indirect purchaser standing is perhaps the single most significant point of conflict between federal and state antitrust laws.

Even putting aside this constitutional argument, though, there is a further argument that the FTAIA itself applies Illinois Brick to state law claims based on foreign commerce. The statute provides that U.S. antitrust laws do not apply to conduct in foreign commerce unless, among other things, the conduct had a “direct effect” on United States commerce. Courts have thus far chosen to view this as an effectively metaphysical concept, denoting either “an immediate consequence” with no “uncertain intervening developments”[17] or, alternatively, a “reasonably proximate causal nexus.”[18] But there is no reason to assume Congress meant to create a vague new causation standard here. Congress was fully aware of Illinois Brick (and its predecessors) when it enacted the FTAIA, and, it could be argued, surely knew that an adjective like “direct” when uttered in an antitrust context would conjure the familiar distinction between direct and indirect purchasers.

The purposes of the FTAIA support this straightforward reading of “direct effect.” Above all else, the statute is designed to embody principles of international comity by limiting the reach of U.S. antitrust laws so as to avoid "interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own borders."[19] In this regard, the Supreme Court has embraced a robust conception of "interference,” which can occur not only where U.S. and foreign laws disagree on issues of liability or appropriate remedies,[20] but also where applying U.S. laws would tend to hinder the effectiveness of a foreign antitrust enforcement scheme — for example by disincentivizing participation in a foreign leniency program.[21] Perhaps most importantly, the FTAIA requires that the judicial process for determining whether foreign interference exists be as simple and streamlined as possible. This is because a context-driven, case-by-case interference analysis would give rise to "procedural costs and delays" that would "themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system."[22]

Allowing indirect U.S. purchasers to bring suit based on foreign conduct, where the direct purchase occurred in a foreign jurisdiction, would undermine these goals. Foreign violators are less likely to cooperate with foreign antitrust enforcers if the threat of a treble-damages suit by U.S. indirect purchasers continues to hang over their heads. The availability of indirect purchaser suits in the United States would also make it more likely that complex and uncertain issues of comity and pass-on will find their way into foreign proceedings, making them less attractive to claimants. And “procedural costs and delays” would certainly arise if the applicability of U.S. laws turned ultimately on whether overcharges were actually passed on to an indirect U.S. purchaser. That complex issue commonly goes unresolved until trial (if it is ever resolved at all), meaning that years of costly interference with foreign enforcement would occur in the interim.

The other core purpose of the FTAIA is to promote “certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions.”[23] Such “certainty” is

not possible if those involved in international commerce must assess an array of differing legal consequences under federal and state laws, depending not on where they sold their goods, but on where those goods might one day be resold by others. Indeed, the dormant Foreign Commerce Clause's requirement of legal uniformity in foreign commerce exists precisely to avoid this prospect.[24] By contrast, a straightforward reading of the FTAIA's "direct effect" requirement draws a bright line between transactions that fall within the scope of U.S. laws and those that do not.

The bottom line is that any interpretation of the FTAIA's "direct effect" language that permits state law indirect purchaser suits based on foreign conduct necessarily presumes that Congress was OK with a world in which foreign commerce is subject to one set of rules under federal law and another set of rules under state laws. The text and objectives of the statute — not to mention the exclusive federal power created by the Foreign Commerce Clause — suggest exactly the opposite.

The most enduring objection to applying Illinois Brick to state law claims based on foreign commerce is likely to be that it could allow foreign violators to avoid liability (under U.S. law, at least) for downstream harm caused to U.S. purchasers. But this is not an objection to applying Illinois Brick in the context of foreign commerce; it is an objection to Illinois Brick itself. The indirect purchaser rule necessarily leaves a potential gap in antitrust enforcement whenever and wherever it applies, a gap the Supreme Court long ago decided is an acceptable price to pay for the systemic benefits of limiting standing to direct purchasers.

This is not to say that the balance struck by the Illinois Brick court is free from controversy. Dissatisfaction with the indirect purchaser rule, originally intense, has been muted in recent years by the wide availability of indirect purchaser suits under many state laws. If it turns out that, as this article argues, these state laws provide claimants no refuge from the indirect purchaser rule in the increasingly important context of foreign commerce, it is inevitable that much of the original controversy will be revived. But that is as it should be. If we are going to debate the propriety of the indirect purchaser rule, we should do it with a complete understanding of the rule's scope.

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[1] 490 U.S. 93 (1989).

[2] Id. at 101.

[3] See Healy v. Beer Inst., 491 U.S. 324, 336 (1989) ("the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State") (internal punctuation omitted).

[4] Cantor v. Detroit Edison Co., 428 U.S. 579, 632-633 (1976) (quoting 21 Cong. Rec. 2456, 2460 (1890)); see id. at 633 ("Congress has no authority to deal, generally, with the subject [of antitrust violations] within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations.") (quoting H.R. Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890)).

[5] 490 U.S. at 101-102.

[6] See Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 719 (1985) (Congressional intent to preempt state laws can be inferred "from the dominance of the federal interest in foreign affairs[,] because the supremacy of the national power in the general field of foreign affairs is made clear by the Constitution and the regulation of that field is intimately blended and intertwined with the responsibilities of the national government"; contrasting "health and safety matters" which are traditionally "matters of local concern" regulated by the states) (internal quotations and punctuation omitted) (quoting Hines, 312 U.S. at 62, 66).

[7] Id. at 448 n. 13 ("Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty," but "[i]t has never been suggested that Congress' power to regulate foreign commerce could be so limited."); Clark, 435 F.3d at 1113 ("Federalism and state sovereignty concerns do not restrict Congress's power over foreign commerce"); Bd. of Trustees of Univ. of Ill., 289 U.S. at 57 ("The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.").

[8] U.S. Const., Art. I, Sec. 8, cl. 3.

[9] Bd. of Trustees of Univ. of Ill., 289 U.S. at 56 ("It is an essential attribute of [Congress' power over foreign commerce] that it is exclusive and plenary."); California Bankers Ass'n v. Shultz, 416 U.S. 21, 46 (1974) (stating that Congress's plenary authority over foreign commerce "is not open to dispute").

[10] Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 193 (1824) (the words of the Foreign Commerce Clause "comprehend every species of commercial intercourse between the United States and foreign nations.").

[11] Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904) (describing the "complete power of Congress over foreign commerce").

[12] Id. at 448 ("Although the Constitution grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."); see also Antilles Cement Corp. v. Fortuno, 670 F.3d 310, 328 (1st Cir. 2012) ("the dormant Foreign Commerce Clause places stricter constraints on states than its interstate counterpart."); Wunnicke, 467 U.S. at 100 ("It is a well-accepted rule that State restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny.").

[13] See, e.g., Japan Line Ltd. v. County of L.A., 441 U.S. 434, 448, 453-454 (1979); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 100 (1984); Bd. Of Trustees of Univ. of Ill. v. United States, 289 U.S. 48, 59 (1933) ("with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); Bowman & Chicago & N.W. Ry. Co., 125 U.S. 465, 482 ("The organization of our state and federal system of government is such that people of the several states can have no relations with foreign powers in respect to commerce, or any other subject, except through the government of the United States, and its laws and treaties.").

[14] Japan Line, Ltd., 441 U.S. at 449 (discussing "dormant" aspect of Foreign Commerce Clause); U.S. v. Clark, 435 F.3d 1100, 1103 (9th Cir. 2006) ("the need for federal uniformity is no less paramount in

assessing the so-called dormant implications of congressional power under the Foreign Commerce Clause.") (quotations omitted); Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (state laws should not be allowed to interfere with federal laws "which concern the exterior relation of this whole nation with other nations and governments"); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 68-69 (1st Cir. 1999) (Massachusetts "anti-Burma" statute violated dormant Foreign Commerce Clause by interfering with federal government's ability to speak with "one voice" with respect to foreign commerce) (aff'd on other grounds by Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)).

[15] See Brief for the United States and the Federal Trade Commission as Amici Curiae, Motorola Mobility LLC v. AU Optronics, et al., Case No. 14-8003, Dkt. No. 89 (7th Cir. September 5, 2014).

[16] See, e.g., In re Intel Corp. Microprocessor Antitrust Litig., 476 F.Supp. 2d 452, 457 (D. Del. 2007) ("Congress' intent [in enacting the FTAIA] would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not."); In re Potash Antitrust Litig., 667 F.Supp.2d 907, 927-928 (N.D. Ill. 2009) (noting the potential for conflict if "state antitrust laws reached foreign commercial activity that federal laws did not"); SRAM, 2010 WL 5477313 at *4 (FTAIA applies equally to state law claims; "foreign commerce is 'pre-eminently a matter of national concern' on which the federal government has historically spoken with 'one voice.'").

[17] U.S. v. LSL Biotechnologies, 379 F.3d 672, 680-681 (9th Cir. 2004).

[18] See Lotes Co. Ltd. v. Hon Hai Precision Industry, Co., 753 F.3d 395, 398 (2d Cir. 2014).

[19] Empagran SA v. F. Hoffman-LaRoche Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005).

[20] Id.

[21] Id. at 168.

[22] Id. at 168-169.

[23] H.R. REP. NO. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2494.3.

[24] See Japan Line Ltd., 441 U.S. at 453 (if states were allowed to tax containers shipped in international commerce where federal law did not, "foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make 'speaking with one voice' impossible.").

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