Private Antitrust Litigation

Contributing editor
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GETTING THE DEAL THROUGH

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Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

Private antitrust litigation in the United States has seen a relatively steady decline in civil complaints brought on by the Supreme Court's 2007 decision in *Bell Atlantic Corp v Twombly*. That case, and others such as *Ashcroft v Iqbal* and *Verizon Communications v Law Offices of Curtis v Trinko, LLP*, have made it more difficult for plaintiffs to maintain antitrust claims. The trend of reduced antitrust litigation is expected to continue in light of Supreme Court decisions requiring rigorous analysis of antitrust class actions in the US, such as *Wal-Mart Stores, Inc v Dukes* and the more recent *Comcast Corp v Behrend*.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Under federal law, direct purchasers and rivals who suffer 'antitrust injury', as defined in question 15, may bring private lawsuits for antitrust violations. Indirect purchasers may seek injunctive relief, but may not bring private antitrust suits for damages under federal law, even if the direct purchaser passes on the full amount of the overcharge to the indirect purchaser. See *Illinois Brick Co v Illinois*, 431 US 720 (1977). In 2007, the Antitrust Modernization Commission recommended legislatively overturning this rule, but to date Congress has not done so.

Many states have enacted what are known as '*Illinois Brick* repealer' statutes, which allow indirect purchasers to sue for damages under state law. At this time, more than half of the states authorise a private cause of action to indirect purchasers who suffer antitrust injury. The Supreme Court has held that state causes of action for indirect purchasers are not pre-empted by federal law.

Other actors such as employees, shareholders and creditors generally lack standing to sue under antitrust law.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Section 4 of the Clayton Act authorises private plaintiffs to seek damages for violations of antitrust laws. A plaintiff is entitled to recover treble damages plus costs and reasonable attorneys' fees. Section 16 of the Clayton Act permits plaintiffs to seek injunctive relief to stop or prevent the illegal conduct. Indirect purchasers have standing to seek injunctive relief even though they lack standing to sue for damages.

Federal courts have exclusive jurisdiction over federal antitrust claims. State antitrust claims can be heard in state courts but may be removed to a federal court if they supplement a federal claim. Since 2005, the Class Action Fairness Act has also permitted certain class action litigations that would otherwise be heard in a state court to be removed to a federal court.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

Private actions are available for most types of anti-competitive conduct. Actionable violations can take the form of coordinated conduct (such as price-fixing, market division and group boycotts), single-firm conduct (such as tying, predatory pricing and other exclusionary conduct), and mergers that would substantially lessen competition in a relevant US product and geographic market. Private causes of action are available to antitrust plaintiffs regardless of whether the government has also taken action.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

There are three requirements that must be met before a court can hear a given case. First, the court must find whether it can exercise 'personal jurisdiction' over the parties. Second, the court must determine whether it has 'subject matter jurisdiction' over the issues raised in the lawsuit. And third, the court must be the proper venue for the litigation.

The question of personal jurisdiction addresses a specific court's ability to adjudicate a dispute between a specific set of parties. Personal jurisdiction is also governed by a two-part test. First, a defendant must purposefully avail himself of the benefits of doing business in the forum state. Second, requiring the defendant to appear must comport with principles of fair play and substantial justice.

Subject matter jurisdiction, on the other hand, deals with the specific court's ability to hear the type of case that is being brought. As noted above, federal courts have exclusive jurisdiction over federal antitrust claims (ie, Sherman Act and Clayton Act claims). As the globalisation of business continues to grow, multinational antitrust actions are becoming more and more common. The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA):

> *initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, ie, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, ie, the 'effect' must 'giv[e] rise to a [Sherman Act] claim'.*
>
> *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004) (citing 15 USC section 6(a)).

Federal courts remain split on whether the FTAIA constitutes a question of subject-matter jurisdiction or should be assessed as a substantive element of an antitrust claim. Compare, for example, *Minn-Chem, Inc v Agrium, Inc*, 683 F3d 845 (7th Cir 2012) ('[T]he FTAIA's criteria relate to the merits of a claim, and not to the subject-matter jurisdiction of the court.'); *Animal Science Prods, Inc v China Minmetals Corp*, 654 F3d 462, 466 (3d Cir 2011) ('[T]he FTAIA imposes a substantive merits limitation rather than a jurisdictional bar.'), cert denied, 132 S Ct 1744 (2012), with *In re Monosodium Glutamate (MSG) Antitrust Litig*, 477 F3d 535, 537 (8th Cir 2007) (reviewing the case as a matter of subject-matter jurisdiction); *United States v LSL Biotechnologies*, 379 F3d 672, 683 (9th Cir 2004) ('The FTAIA provides the standard for establishing when subject-matter jurisdiction exists over a foreign restraint of trade.'); *Filetech SA v France Telecom SA*, 157 F3d 922, 929-31 (2d Cir 1998); *Caribbean Broad Sys, Ltd v Cable & Wireless PLC*, 148 F3d 1080, 1085 (DC Cir 1998) (assessing the FTAIA as a question of subject-matter jurisdiction). The Supreme Court has yet to address this issue, and it is currently an open question.

There are two additional appellate court cases decided within the last year with FTAIA implications. One is in the Seventh Circuit, which held an en banc rehearing of Motorola's suit against AU Optronics. (*Motorola Mobility LLC v AU Optronics Corp*, 773 F3d 826 (7th Cir 2014)). Another is in the Ninth Circuit (*United States v Hui Hsiung*, 778 F3d 738 (9th Cir 2015), amend'g 758 F3d 1074 (9th Cir 2014)). Both address the 'directness' prong of the FTAIA. The FTAIA is discussed in detail in 'Update and trends'.

Once the hurdles of personal jurisdiction and subject matter jurisdiction are crossed, plaintiffs have wide latitude to choose the venue for the proceedings, subject to certain limitations. Section 4 of the Clayton Act authorises suit in any district in which the defendant is found or has an agent, and section 12 (15 USC section 22) adds any jurisdiction in which the defendant transacts business. Of course, private antitrust suits by nature often have many plaintiffs across multiple jurisdictions. To reduce the burden on the defendant as well as the court, the cases may be consolidated and the resulting multi-district litigation may be heard in a different venue than that which the plaintiff chose.

Finally, even if the plaintiff satisfies all of the above requirements, a court may dismiss a suit on forum non conveniens grounds, if there is another available forum that is better suited to hearing the case.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Section 1 of the Clayton Act authorises private causes of action against individuals, corporations, and associations, including those from foreign jurisdictions, as long as subject matter and personal jurisdiction would otherwise be proper.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

Third parties may fund private antitrust litigation. Plaintiff's attorneys are allowed to work under a contingency fee arrangement, subject to court approval.

8 Are jury trials available?

In suits for damages, the plaintiff and defendant are both ordinarily entitled to a jury trial if they desire it. The right to a jury trial is protected by the Seventh Amendment of the United States Constitution. Suits for equitable relief are tried by the court.

9 What pretrial discovery procedures are available?

In federal court, pretrial discovery procedures are governed by the Federal Rules of Civil Procedure. The Rules permit oral and written depositions (FED R CIV P 28–32), interrogatories (FED R CIV P 33), requests for admission (FED R CIV P 36), and production of documents and electronically stored information (FED R CIV P 34). State discovery procedures are governed by state law, but often closely track their federal counterparts.

The discovery process can become extremely expensive and time-consuming for defendants. Recognising this, the Supreme Court requires an antitrust plaintiff in a federal court to show more than mere speculation based on circumstantial evidence in order to even reach discovery. In *Bell Atlantic Corp v Twombly*, 550 US 544 (2007), the Court explained that a complaint must cross 'the line between possibility and plausibility'. See also *Ashcroft v Iqbal*, 556 US 662 (2009) ('threadbare recitals of a cause of action's elements, supported by mere conclusory statements' are insufficient).

10 What evidence is admissible?

In a federal court, admissibility of evidence is governed by the Federal Rules of Evidence. The Rules contain many nuances and exceptions, but generally prohibit evidence that is irrelevant, misleading, unduly prejudicial, privileged or hearsay. A particularly important rule for corporations is Rule 801(d)(2)(D), which allows statements made by an employee to be used against the company as long as the statement addressed a matter within the scope of the employment relationship.

States apply their own evidentiary rules to antitrust suits in state courts, although, like the procedural rules, state evidentiary rules are often similar to the federal ones.

11 What evidence is protected by legal privilege?

Federal and state evidentiary rules prevent many different types of privileged communications from being introduced in court, but that most relevant to civil antitrust litigation is the attorney–client privilege. The attorney–client privilege protects confidential communications between a client and his or her attorney made for the purpose of seeking legal advice. When corporations seek legal counsel, the privilege generally belongs to the corporation rather than the individual employees who speak to the attorney (*Commodity Futures Trading Comm'n v Weintraub*, 471 US 343 (1985)). In the United States, attorney–client privilege extends to in-house counsel as well.

The privilege belongs to the client and may not be waived without the client's consent, but confidentiality is important. If the client communicates with the attorney in the presence of third parties (not including agents for the attorney), the privilege may be waived inadvertently. See, for example, *United States v Gann*, 732 F2d 714, 723 (9th Cir 1984).

Legal privilege does not cover the underlying information conveyed in the communication; it only covers the communication itself. See *Fisher v United States*, 425 US 391 (1976). For instance, an incriminating document is still discoverable even if it is given to a lawyer.

Attorney–client privilege also does not apply for communications made in furtherance of a crime. *United States v American Tel & Tel Co*, 86 FRD 603 (DDC 1979). For instance, if a client asks a lawyer to help destroy evidence, that communication would not be privileged.

In civil antitrust litigation, joint defence groups are common because plaintiffs often sue multiple defendants simultaneously. In these cases, defendants must be able to coordinate their litigation strategies. Attorney–client communications made in the presence of other members of the joint defence group are protected by the joint defence privilege as long as the communications are made in furtherance of the joint defence effort.

The attorney work-product doctrine, though not technically a privilege, is a related concept that exempts from discovery materials that were prepared in anticipation of or in preparation for litigation. The key inquiry is whether the materials were created in the normal course of business or for the purpose of preparing for litigation. The requesting party can overcome the exemption for otherwise unprivileged information by showing a substantial need and an inability to obtain equivalent information without undue burden. This is a difficult standard to meet, however.

Trade secrets are not legally privileged but courts can take steps to limit outside disclosure of the sensitive information.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions are available after a criminal conviction. Indeed, private actions become more likely in the aftermath of a conviction. This is because potential plaintiffs have knowledge of evidence that arose in the criminal proceedings, which makes it easier to get past the complaint stage. Further, defendants may be estopped in some circumstances from contesting liability in a subsequent civil proceeding if they have already been convicted of the same conduct in a criminal trial.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence introduced at a criminal antitrust trial will almost certainly be admissible during a subsequent civil proceeding, although a civil plaintiff will still need to obtain that evidence through the ordinary discovery process. The public trial record often provides a roadmap to plaintiffs regarding where to find critical pieces of evidence.

The result of a government antitrust action, criminal or civil, may ordinarily be introduced as prima facie evidence of a defendant's guilt in a subsequent civil proceeding as long as the result represents a final judgment (15 USC section16(a)). Even a consent decree may satisfy this criteria, but not if it was reached before any testimony was taken in the case. If the original action was brought by the Department of Justice specifically (but not the FTC), the Clayton Act even permits district courts in follow-on civil litigation to give conclusive effect to the original judgment. As a practical matter, this rule can preclude a defendant from even contesting findings in follow-on litigation if the prior factual determinations are 'critical and

necessary' to the original judgment. Courts are especially likely to accept the use of offensive collateral estoppel in the follow-on litigation if the initial proceeding resulted in criminal liability, since the defendant likely had even greater incentive to litigate the issue the first time.

Under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), a corporate amnesty applicant may avoid treble damages in follow-on civil litigation if it provides 'satisfactory cooperation' to the civil plaintiffs. In light of the US provision for treble damages, ACPERA creates a very important incentive for antitrust conspirators to self-report. ACPERA is currently scheduled to run until 2020.

Because government agencies routinely access sensitive business information in the course of their investigations, they do not generally disclose the documents and testimony they obtain to the public.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

An antitrust proceeding may be stayed for the same reasons as any other civil litigation. For instance, courts will sometimes grant stays in civil antitrust litigation to prevent the civil case from interfering with an ongoing criminal investigation into the same conduct; the United States Department of Justice's antitrust division (DoJ) frequently supports such stays. It may also stay a proceeding to allow a higher court to decide an interlocutory appeal or settle an important legal issue in a separate case.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Private antitrust plaintiffs must prove each element of a claim by a preponderance of the evidence. Section 4 of the Clayton Act requires the plaintiff to prove that the defendant violated the antitrust laws, and that the illegal conduct caused the plaintiff's economic injury. The second element has some important qualifications, however. For one thing, not just any injury will suffice. The injury must be an 'antitrust injury', that is an injury 'of the type the antitrust laws were intended to prevent' (*Brunswick Corp v Pueblo Bowl-O-Mat Inc*, 429 US 477, 489 (1977)). Lost profits caused by too much competition, for example, do not constitute antitrust harm. In addition, although the illegal conduct need not be the only cause of the plaintiff's injury, it must be a material cause (*Zenith Radio Corp v Hazeltine Research, Inc*, 395 US 100 (1969)).

A plaintiff that suffers an 'antitrust injury' may still lack antitrust standing if the nexus between the violation and the injury is too remote (*Blue Shield of Virginia v McCready*, 457 US 465 (1982)) or if the plaintiff is an indirect purchaser (*Illinois Brick Co v Illinois*, 431 US 720 (1977)). Because only direct purchasers are permitted to sue, there is no 'passing on' defence for antitrust defendants in federal court. However, many states do allow indirect purchasers to sue, which can make 'passing on' relevant for damages exposure (see question 2).

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The timetable for civil antitrust litigation can vary widely from case to case. The court could dismiss a lawsuit fairly quickly if the plaintiff fails to plead sufficiently specific facts to state a claim under the *Twombly* standard. Absent dismissal at the pleading stage, a lawsuit can drag on for years, with extensive discovery, a jury trial and numerous appeals (both interlocutory and post-trial).

The parties generally cannot accelerate proceedings on their own without conceding important issues, but proceedings tend to be shorter when the plaintiff is an individual rather than a class, when discovery is not extensive and when the court operates with short deadlines.

17 What are the relevant limitation periods?

Under section 4(b) of the Clayton Act, a plaintiff has four years from the time of injury to bring a civil antitrust suit. The statute of limitations does not begin to run until damages are capable of being proven and may be suspended during government civil or criminal proceedings on the same matter. Plaintiffs have at least one year from the conclusion of the government proceedings to bring their claims.

The statute of limitations may be tolled for other reasons as well, including fraudulent concealment and filing of a class action. If the defendant affirmatively prevents the plaintiff from learning of the cause of action despite exercising due diligence, the statute does not run until the plaintiff knew or should have known about the harm. When plaintiffs file a class action, the statute tolls for potential class members in the event class certification is denied.

18 What appeals are available? Is appeal available on the facts or on the law?

Once a federal district court judgment becomes final, it can be appealed as of right to a US court of appeals. While the district court proceedings are still ongoing, appeals are usually not permitted except in limited circumstances. These interim, or interlocutory, appeals of collateral orders are available when a district court order is conclusive, resolves important questions completely separate from the merits and renders an important question unreviewable on final judgment appeal. See *Digital Equipment Corp v Desktop Direct, Inc*, 511 US 863 (1994). Examples of permitted interlocutory appeals include orders asserting personal jurisdiction and orders granting class certification.

Both factual findings and legal conclusions are appealable. Appeals courts generally give substantial deference to district courts' factual findings, but review legal conclusions without regard to the district court's decision (de novo).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings are available for civil antitrust claims, and are known as 'class action' litigation in the United States. The Class Action Fairness Act of 2005 (CAFA) greatly expanded federal jurisdiction over large class actions. Under CAFA, class action litigations that meet thresholds like the US$5 million amount-in-controversy requirement can be removed to a federal court even if they would otherwise be heard in a state court.

20 Are collective proceedings mandated by legislation?

No. Federal Rule of Civil Procedure 23 authorises, but does not require, parties to bring class action litigation. Under the US 'opt-out' class action system, when a court certifies a class, potential class members are automatically included unless they affirmatively opt out of the class.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Federal Rule of Civil Procedure 23 establishes four requirements that class members must satisfy in order to be certified. First, the class must be so numerous that joinder of all members under Federal Rules of Civil Procedure 19 or 20 is impracticable (FED R CIV P 23(a)(1)). Second, the proceeding must address questions of law or fact that are common to the class (FED R CIV P 23(a)(2)). Third, 'the claims or defences of the representative parties [must be] typical of the claims or defences of the class' (FED R CIV P 23(a)(3)). Finally, the law requires that 'the representative parties will fairly and adequately protect the interests of the class'.

In addition to the prerequisites, putative classes must also satisfy Federal Rule of Civil Procedure 23(b) in order for the class action to proceed, which governs the types of class actions allowed. Class action antitrust plaintiffs typically attempt to certify classes under Rule 23(b)(3), which requires that 'the questions of law or fact common to class members predominate over any questions affecting only individual members'. To meet the predominance requirement, putative class members must show class-wide antitrust impact and a common methodology to quantify class-wide damages (*Comcast Corp v Behrend*, 133 S Ct 1426, 1430 (2013)). See question 22 for additional detail regarding the trend toward increasing rigour in analysing class certification.

22 Have courts certified collective proceedings in antitrust matters?

Yes, in the past, courts routinely certified classes for class-action antitrust litigations. However, the standard for class certification continues to grow more and more stringent, and the Supreme Court has held that lower courts must undertake a rigorous analysis in all aspects of class certification, including issues of liability, causation and damages and has recently reversed lower courts' certifications of classes (see *Comcast Corp v Behrend*,

Update and trends

The past year has seen continued private antitrust litigation across a variety of industries. Some areas of antitrust law have been evolving rapidly, while others have remained at a standstill. As reported last year, issues related to the international reach of US antitrust law and the legality of reverse payment settlements in the wake of the *Actavis* decision remain muddled. Government enforcement in connection with foreign exchange markets, credit card companies' rules for merchants, and drug-makers' product offerings has led to an onslaught of private, 'follow-on' suits in those industries.

The Supreme Court refuses to settle the confusion surrounding the FTAIA

The Foreign Trade Antitrust Improvements Act (FTAIA) excludes non-import foreign activity from the reach of US antitrust law unless that activity satisfies the two prongs of the Act's 'domestic effects' exception. Anti-competitive conduct is subject to US law if it has a 'direct, substantial, and reasonably foreseeable effect' on US commerce and 'gives rise to a claim' under the Sherman Act. The Act's first prong has not be consistently applied since the law was enacted in 1982, but in recent years, courts' confusion has been magnified by a circuit split over the meaning of the word 'direct'.

In 2004, the Ninth Circuit became the first court to offer a definition by deeming a domestic effect 'direct' when it 'follows as an immediate consequence' of a defendant's foreign conduct. (*United States v LSL Biotechnologies*, 379 F3d 672 (9th Cir 2004)). In 2012, the Seventh Circuit established its own, ostensibly broader, definition that requires a 'reasonably proximate causal nexus' between a defendant's conduct and the alleged effect on US commerce. (*Minn-Chem, Inc v Agrium, Inc,* 683 F3d 845 (7th Cir 2012)). In *Lotes Co, Ltd v Hon Hai Precision Indus Co*, 753 F3d 395 (2nd Cir 2014), the Second Circuit expressly adopted this standard.

The 'reasonably proximate causal nexus' articulation of the FTAIA's first prong has arguably undergone transformations within the Seventh Circuit itself. In April 2014, the Seventh Circuit decided a case in which Motorola alleged foreign manufacturers had fixed the prices of LCD panel component parts purchased abroad that were incorporated into finished products sold in the United States. Judge Posner, writing for a three-judge panel, held that the defendants' sales of LCD panels that were allegedly price-fixed to foreign purchasers did not give rise to a Sherman Act antitrust claim. (*Motorola Mobility LLC v AU Optronics Corp*, 746 F3d 842 (7th Cir 2014)). Although Judge Posner relied on *Minn-Chem* to distinguish the facts of *Motorola*, his opinion did not use the phrase 'reasonably proximate causal nexus' and instead emphasised the 'remoteness' alleged by Motorola to contrast the first prong's 'directness' requirement. In November 2014, the Seventh Circuit reheard the case en banc and again held that the FTAIA excluded Motorola's claims. (*Motorola Mobility LLC v AU Optronics Corp*, 773 F3d 826 (7th Cir 2014). Judge Posner did not reprise his 'remoteness' analysis relating to the first prong in the en banc opinion, which said little about the directness element overall; instead, Judge Posner assumed that the first prong had been met but rejected Motorola's claims under the second, 'gives rise to' prong (which he had also done in the vacated opinion).

FTAIA jurisprudence looks to remain fractured for the foreseeable future. In January 2015, the Seventh Circuit rejected Motorola's petition for a second rehearing. In June 2015, the Supreme Court likewise declined to take up the case. This continues the Justices' silence on the FTAIA, which it last considered in 2004 in *F Hoffman-LaRoche, Ltd v Empagran SA*, 542 US 155 (2004). Notably, the High Court has never addressed the meaning of the Act's first prong.

Continued Exposure for Pharmaceutical Manufacturers

District courts' interpretations of what may constitute an illegal reverse payment settlement between brand-name and generic drug-makers have continued to multiply within the last year. In its landmark June 2013 ruling in *FTC v Actavis*, the Supreme Court held that reverse payment settlements are subject to the rule of reason and could be subject to antitrust scrutiny. (133 S Ct 2223 (2013)). While the Supreme Court's decision focused on the monetary payments at issue in that case, the Court did not explicitly say its decision was so limited, raising a number of interesting issues as the lower courts continue to grapple with *Actavis* and how to interpret and apply the law.

In September 2014, Judge William E Smith of the District of Rhode Island dismissed a putative class action relating to oral contraceptive Loestrin 24, holding that *Actavis* only applied to monetary forms of consideration and citing public policy reasons for avoiding 'a cavalier extension of the *Actavis* holding'. *In re Loestrin 24 Antitrust Litigation*, MDL No. 13-2472-S-PAZ, 2014 WL 4368924 (DRI 4 September 2014).

A number of district courts, however, have been willing to extend the Supreme Court's holding to nonmonetary compensation, at least under specific circumstances. See *In re Niaspan Antitrust Litigation*, MDL No. 2460, 2014 WL 4403848 (ED Pa 5 September 2014) (accepting a definition of 'payment' that embraces exchanges transferring any 'valuable thing') and *In re Lidoderm Antitrust Litigation*, 3:14-MD-02521-WHO (ND Cal 17 November 2014) (rejecting the argument that *Actavis* applies only to cash transfers but cautioning that a plaintiff's complaint must demonstrate it is possible to calculate the value of nonmonetary settlements in order to survive dismissal). Most recently, a three-judge panel of the Third Circuit held that a settlement involving a 'no-AG' agreement, whereby a brand-name manufacturer agrees not to launch an authorised generic version of its branded product for some period of time, could be subject to *Actavis* as it 'may represent an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer and may therefore give rise to the inference that it is a payment to eliminate the risk of competition'. (*Louisiana Wholesale Drug Co Inc v SmithKline Beecham Corp*, No. 14-1243, slip op at 10 (3d Cir 26 June 2015), *rev'g In re Lamictal Direct Purchaser Antitrust Litig*, 18 F Supp 3d 560 (DNJ 2014)).

Further guidance on the applicability of *Actavis* to non-monetary forms of consideration may be forthcoming, as the First Circuit considers the *Loestrin* plaintiffs' pending appeal and the Third Circuit considers appeals regarding *In re: Effexor XR Antitrust Litigation*, No. 15-1184 (3d Cir) and *In re: Lipitor Antitrust Litigation*, No. 14-4202 (3d Cir).

Allegations of market manipulation expand to the foreign exchange market

In addition to continuing litigation over the alleged rigging of the London Interbank Offered Rate (LIBOR), the past year has seen a number of government settlements and private follow-on actions alleging manipulation of the foreign exchange market (Forex). In May 2015, Citibank, Barclays, the Royal Bank of Scotland and JPMorgan pled guilty to charges alleging top traders conspired to rig Forex benchmarks by sharing proprietary information related to the banks' clients. Those banks, along with UBS (which settled civil charges), paid out a total of $5.6 billion to US and British regulators.

The settlements have fuelled an ongoing class action litigation in New York. The plaintiffs in *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 1:13-CV-07789 (SDNY 2013) are seeking amendments to their complaint that would implicate more banks in the conspiracy and press new allegations that Forex manipulation was more extensive than first thought. Specifically, the plaintiffs now claim that rate-rigging went on throughout the day and not just at the market closing, as was originally alleged. A number of the defendant banks have already reached multimillion-dollar settlements to escape the suit, and it remains to be seen who else will be drawn in by the amended complaint.

Conclusion

In 2016, there will be a number of interesting areas to monitor in antitrust litigation in the US, including in private antitrust litigation. Given the Supreme Court's decision not to hear another FTAIA case, it will be interesting to see which of the existing appellate FTAIA decisions in the component part cases lower courts will follow. In the areas of market manipulation and pharmaceuticals, additional guidance is likely to be forthcoming as new cases are filed and pending cases are decided, particularly at the appellate level.

133 S Ct 1426 (2013), *Wal-Mart Stores, Inc v Dukes*, 131 S Ct 2541 (2011)). A district court also has the authority to review, modify and even decertify a previously certified class at any time during the litigation (see eg, *In re Flonase Antitrust Litig*, 2013 WL 3060591, at *6 (ED Pa Jun 19, 2013); *In re Urethane Antitrust Litig*, 2013 WL 2097346, at *2 (D Kan 2013), aff'd, 768 F.3d 1245 (10th Cir 2014)).

Examples of recent cases in which class certification was granted or affirmed on appeal include:

- *In re Nexium Antitrust Litigation*, 777 F3d 9 (1st Cir 2015): AstraZeneca and other drug-makers appealed the District of Massachusetts's certification of a class of individual consumers, third-party payors, union plan sponsors and insurance companies involved in the purchase of

the drug Nexium. The First Circuit affirmed certification and reasoned that 'Comcast did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage' and, further, that '"[r]igorous analysis" of the evidence does not show that the number of uninjured class members is more than de minimis'.

- *In re VHS of Michigan*, 601 Fed. Appx 342 (6th Cir 2015): The district court certified a class of registered nurses working at eight Detroit-area hospitals in a wage suppression suit against the hospitals, holding they all had identical responsibilities and were compensated through similar pay structures. The Sixth Circuit affirmed, holding that 'the district court correctly concluded that this case does not implicate the concerns of *Comcast* — that a defendant should not be held liable for damages not attributable to the theory of liability accepted for class-action treatment.' It also held, however, that a generic damages model is permissible if plaintiffs offer evidence grounding the model in a theory that has been accepted for class-action treatment.
- *Laumann v National Hockey League*, No. 1:12-CV-01817 (SDNY 2015); *Lerner v Office of the Commissioner of Baseball*, No. 1:12-CV-03704 (SDNY 2015): Comcast and DirecTV subscribers claimed they overpaid to watch baseball and hockey games and sought class certification in suit against NHL, MLB and broadcasters. The Southern District of New York held the subscribers could proceed as an injunctive class to compel the defendants to change their subscription policies, but denied certification on the plaintiffs' damages claim because economic analysis offered to prove how much the plaintiffs' overpaid was inadmissible.

23 Can plaintiffs opt out or opt in?

Under the US 'opt out' system, members are included in a class unless they affirmatively opt out of it (ie, exclude themselves from the class).

24 Do collective settlements require judicial authorisation?

Any settlement after a class has been certified requires judicial authorisation. Judicial authorisation is also required for voluntary dismissals or compromises after certification (FED R CIV P 23(e)).

Once a proposed settlement has been reached between the parties, a three-stage process generally ensues: a preliminary approval hearing, class notice and the mandatory final approval hearing. In the preliminary approval phase, the parties will submit the proposed settlement agreement to the court for review; if the court preliminarily approves the settlement as proposed, it will order the parties to notice the class. The parties must then provide notice to all class members subject to the settlement. For class action proceedings under Rule 23(b)(3), the district court may also require the parties to provide class members with a renewed chance to 'opt out' of the class; however, in most instances, the notice of class certification and proposed settlement is distributed at the same time. After the notice period ends, the parties will go to the court for a final approval hearing, or a 'fairness hearing'. At the fairness hearing, the court must determine if the settlement is 'fair, adequate and reasonable.' *Girsh v Jepson*, 521 F2d 153 (3d Cir 1975), is a leading appellate court case identifying the following nine factors to be analysed when reviewing a proposed settlement:

> *(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; 6) the risks of maintaining a class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.*

Putative class members will have the opportunity to object to the proposed settlement; any such objections may be withdrawn with court approval.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Nationwide class-action proceedings are available to plaintiffs. If multiple private actions are pending simultaneously, the parties may centralise the case and consolidate pretrial proceedings by asking the Judicial Panel for Multidistrict Litigation (JPML) to transfer the cases to a single federal district court. The JPML will determine whether consolidation is appropriate to preserve party and court resources and, if so, which court is best suited to hear the matter, at least during the pretrial stages of the litigation.

26 Has a plaintiffs' collective-proceeding bar developed?

Yes. The United States class-action system has led to the development of a very active class-action plaintiffs' bar. The perceived abuses of the US system have been expressly noted by governments and agencies in other jurisdictions, most notably in Europe, which has led to proposals for private antitrust litigation targeted at avoiding such abuses.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

Section 4 of the Clayton Act provides that prevailing US antitrust plaintiffs can recover three times their total compensatory, or actual, damages, known as 'treble damages,' as well as costs incurred and reasonable attorneys' fees.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Section 16 of the Clayton Act also entitles private plaintiffs to injunctive relief:

> *In order to seek injunctive relief under section 16 of the Clayton Act, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.*
>
> *Fair Isaac Corp v Experian Information Solutions, Inc*, 650 F3d 1139, 1146 (8th Cir 2011) (citing *Cargill, Inc v Monfort of Colo, Inc*, 479 US 104, 113 (1986)).

Furthermore, in order to obtain injunctive relief, 'a plaintiff must face a threat of injury that is both 'real and immediate,' not 'conjectural' or 'hypothetical' [...] There must be some immediacy or imminence to the threatened injury' (Idem (citing *In re New Motor Vehicles Canadian Exp Antitrust Litig*, 522 F3d 6, 14 (1st Cir 2008)).

29 Are punitive or exemplary damages available?

Antitrust law does not explicitly allow for punitive damages; however, the availability of treble damages under Section 4 of the Clayton Act serves a similar function.

As noted above, amnesty applicants can, under the ACPERA, qualify for single damages in follow-on civil litigation if they provide 'satisfactory cooperation' to the civil plaintiffs.

30 Is there provision for interest on damages awards and from when does it accrue?

Section 4 of the Clayton Act also provides that the trial court has the discretion to award a prevailing plaintiff 'simple interest on actual damages' for the time between the service of the complaint to the date of judgment. In determining whether awarding interest is appropriate, courts are required to consider:

> *(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defences so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith; (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.*
>
> (Section 4 Clayton Act.)

31 Are the fines imposed by competition authorities taken into account when setting damages?

No. Any criminal fines paid by an antitrust defendant are not considered when determining the amount of civil damages.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

As noted above, Section 4 of the Clayton Act provides that a prevailing plaintiff can recover its reasonable attorneys' fees and costs.

Federal Rule of Civil Procedure 11 also provides a defendant with the opportunity to recoup some of its legal expenses if the plaintiff is 'sanctioned'. Rule 11 requires attorneys to conduct some minimal preliminary inquiry commencing a lawsuit; plaintiffs' counsel who fail to do so can be subject to monetary and disciplinary sanctions.

33 Is liability imposed on a joint and several basis?

Yes. Co-conspirators can be found jointly and severally liable for the entire amount in controversy, with no right of contribution.

34 Is there a possibility for contribution and indemnity among defendants?

The antitrust laws do not provide for a right of contribution among defendants (see *Texas Indus, Inc v Radcliff Materials Inc*, 451 US 630, 646 (1981) ('[N]either the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution')). Further, co-conspirators cannot agree among themselves to any indemnification agreements for illegal conduct. However, indemnity may be available where a defendant's liability is purely the result of its relationship with an offending party (see *Wills Trucking, Inc v Baltimore and Ohio R Co*, 181 F3d 106, *3 (6th Cir 1999) ('[I]ndemnity is available only when the party seeking indemnification is an innocent actor whose liability stems from some legal relationship with the truly culpable party; for example, an employer held vicariously liable for the tortious actions of his employee may seek indemnification from the employee.').

35 Is the 'passing on' defence allowed?

As noted above, the federal antitrust laws permit only direct purchasers to sue and recover for antitrust injuries (see *Illinois Brick v Illinois*, 431 US 720 (1977)). In holding so, the Supreme Court sought to prevent duplicative recoveries under Section 4 of the Clayton Act (Id at 731). Many individual states have, however, passed '*Illinois Brick* repealer' statutes, which provide indirect purchasers with the right to bring antitrust claims.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Antitrust defendants can assert the same defences available to other private litigants.

37 Is alternative dispute resolution available?

Yes. Courts generally favour resolution thorough non-judicial means as a way to reduce the burden on the courts. Alternative dispute resolution is encouraged, but not mandated.

Where parties have agreed to arbitrate any disputes, courts will require the parties to arbitrate their antitrust claims, even when an individual plaintiff's cost of doing so is high. See *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304 (2013) (holding that the Federal Arbitration Act prohibits courts from invalidating class-action waivers agreed to by parties in arbitration agreements). The Supreme Court's decision in *American Express*, like its decision in *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2011), is based on the Federal Arbitration Act, which allows companies to include broad class-action waivers in their contractual agreements with others. Specifically, the *American Express* majority found that the antitrust laws 'do not guarantee an affordable procedural path to the vindication of every claim', such that parties that agreed to arbitrate a claim are bound by their agreement, even if proceeding with arbitration would be cost-prohibitive (*Italian Colors*, 133 S Ct at 2309).

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