

Private Antitrust Litigation

Consulting editor
Francesca Richmond



2019

GETTING THE
DEAL THROUGH 

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Francesca Richmond
Baker McKenzie LLP

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CONTENTS

Temporal scope of follow-on claims in the air-transport sector: the English High Court rules in favour of Air Cargo defendants, subject to pending appeal	5	Netherlands	74
Geert Goeteyn Shearman & Sterling		Erik Pijnacker Hordijk and Willem Heemskerk Pels Rijcken & Droogleever Fortuijn	
Belgium	8	Norway	79
Tom Schoors and Lauren Rasking Allen & Overy (Belgium) LLP		Svein Terje Tveit Advokatfirmaet Thommessen AS	
China	15	Russia	85
Ding Liang DeHeng Law Offices		Anna Maximenko, Evgeny Samoylov and Elena Klutchareva Debevoise & Plimpton LLP	
England & Wales	21	Scotland	89
Elizabeth Morony and Ben Jasper Clifford Chance LLP		Catriona Munro, Jennifer Marshall and Sam Parry Dentons UK and Middle East LLP	
France	46	Spain	97
Mélanie Thill-Tayara, Marion Provost Dechert LLP		Pedro Suárez Fernández, Antonio de Mariano Sánchez-Jáuregui and Javier Pérez Fernández Ramón y Cajal Abogados	
Germany	52	Sweden	102
Alexander Rinne Milbank, Tweed, Hadley & McCloy LLP		Stefan Perván Lindeborg, Sarah Hoskins and Mårten Andersson Mannheimer Swartling	
Greece	58	Switzerland	107
Dimitris Loukas and Konstantinos Gloumis-Atsalakis Potamitis Verkris Law Firm		Daniel Emch, Anna-Antonina Gottret and Stefanie Schuler Kellerhals Carrard	
Japan	64	Turkey	112
Hideto Ishida and Takeshi Suzuki Anderson Mōri & Tomotsune		M Fevzi Toksoy, Bahadır Balkı and Ertuğrul Can Canbolat ACTECON	
Mexico	69	United States	118
Lucía Ojeda Cárdenas, José Enrique Espinosa Velasco, Felipe García Cuevas, Mariana Carrión Valencia, Ernesto Álvarez Castillo and Priscila Monge Kincaid SAI Law and Economics		Paul Eckles, Karen Hoffman Lent, Matthew Martino, Tara Reinhart and Anjali Patel Skadden, Arps, Slate, Meagher & Flom LLP	

Preface

Private Antitrust Litigation 2019

Sixteenth edition

Getting the Deal Through is delighted to publish the sixteenth edition of *Private Antitrust Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Greece and Norway.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, Francesca Richmond of Baker McKenzie LLP, for her continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
July 2018

United States

Paul Eckles, Karen Hoffman Lent, Matthew Martino, Tara Reinhart and Anjali Patel

Skadden, Arps, Slate, Meagher & Flom LLP

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. Reduced antitrust litigation is expected to continue under the rigorous analysis of antitrust class actions established by *Wal-Mart Stores Inc v Dukes* and *Comcast Corp v Behrend*. More recent cases indicate this trend of reduced antitrust class actions: *In DirecTV Inc v Imburgia*, the Supreme Court held that DirecTV customers were bound by an arbitration clause that waived their right to proceed as a class. And in *Tyson Foods Inc v Bouaphakeo*, while the Supreme Court allowed the use of statistical evidence under the facts of the case, it reiterated that this was a narrow decision, and that the case in no way creates a categorical rule governing the use of representative and statistical evidence in class actions.

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. A case addressing this issue is currently under Supreme Court review. *Apple Inc v Pepper*, No. 14-15000, 846 F3d 313 (9th Cir 2017), cert granted, No. 17-204 (18 June 2018) (see 'Update and Trends').

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? What is the effect of a finding of infringement by a competition authority on national courts?

Private actions are available for most types of anticompetitive 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 governed by a two-part test. First, a defendant must purposefully avail himself or herself 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 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); and *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).

Two additional appellate court cases were decided in recent years with FTAIA implications. One in the Seventh Circuit held an en banc rehearing of Motorola’s suit against AU Optronics (*Motorola Mobility LLC v AU Optronics Corp*, 775 F3d 816 (7th Cir 2015), amending 773 F3d 826 (7th Cir 2014), cert denied, 135 S Ct 2837 (15 June 2015)). The other was in the Ninth Circuit (*United States v Hui Hsiung*, 778 F3d 738 (9th Cir 2015), amending 758 F3d 1074 (9th Cir 2014)). Both decisions addressed the ‘directness’ prong of the FTAIA. Both courts held that the domestic effect on commerce had to be relatively immediate on the United States. In the end, the outcomes in each case depended on the role that foreign subsidiaries and purchasers played with respect to the finished products before they reached the United States. In 2015, the Supreme Court declined to grant certiorari to a case on this issue (*Motorola Mobility LLC v AU Optronics Corp*, 775 F3d 816 (7th Cir 2015), amending 773 F3d 826 (7th Cir 2014), cert denied, 135 S Ct 2837 (15 June 2015)); therefore, there remains a circuit split.

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. Plaintiffs’ 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 US 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. The most recent amendments to the

Federal Rules of Civil Procedure adopted a proportionality standard for setting the scope of discovery in order to further ameliorate the burden of excessive discovery (Fed R Civ P 26(b)(1)). Recognising the need to address the burden of discovery, 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, although 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 enquiry 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 road map 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 section 16(a)). Even a consent decree may satisfy this criterium, 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 Federal Trade Commission (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 US Department of Justice's antitrust division 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. In the absence of 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. But recently, the Supreme Court ruled in a tolling case that when class certification is denied, unnamed class members may not start new, successive class actions beyond the original statute of limitations (*China Agritech Inc v Resh et al*, Case No. 17-432 (2018)) (see 'Update and Trends').

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

Update and trends

Private antitrust litigation continues to be robust. Over the past year, there have been a number of important developments, as discussed below.

Plenty of action in class actions

Antitrust class actions remain active. Courts continue to look at factors like the ascertainability of the class, the quality of proposed damage calculation models and the viability of defined relevant time periods in making certification decisions.

One pending case concerns an alleged no-hire agreement between the Duke University and University of North Carolina schools of medicine. *Seaman v Duke University*, et al, Case No. 1:15-cv-00462 (MDNC). In February 2018, North Carolina district judge Catherine C Eagles certified a class of 5,400 faculty members from the two medical schools. The faculty claimed that an alleged no-hire agreement between the two schools negatively impacted their compensation and prevented them from accessing certain job opportunities. Judge Eagles considered the faculty's common legal theory and the fact their case would require the court to look at common evidence regarding violation, impact and damages in finding class treatment appropriate. But she declined to extend the class to include non-faculty, because doing so would have introduced too much complexity and confusion for the jury in an otherwise complicated case. North Carolina has settled, but Duke remains in the case.

In July 2017, in a rare move, the Second Circuit de-certified two classes of investors who claimed that Brazilian oil company Petrobras's long-term acceptance of kickbacks and bribes, and the resulting criminal investigation, damaged the company's market value and drove down share prices. *In re: Petrobras Securities Litigation*, Case No. 1:14-cv-09662 (2d Cir 2017). While not an antitrust case, the decision has implications for antitrust class actions, as it concerned the disputed ascertainability requirement for identifying the members of a proposed class. Defendants argued that there was no administratively feasible manner for putative class members to prove that they purchased the notes in question in 'domestic transactions,' which is required for US securities laws to apply. The Second Circuit rejected defendants' arguments that there is an implied requirement that membership in a class be ascertainable in an 'administratively feasible' manner. It held that a class is ascertainable if defined by 'objective criteria that establish a membership with definite boundaries'. In declining to impose the heightened standard, the Second Circuit sided with the Sixth, Seventh, Eighth and Ninth Circuits, and disagreed with the Third Circuit. While it rejected the ascertainability requirement, the Second Circuit found that the requirement that individual class members prove that they purchased the notes in 'domestic transactions' was still relevant to the predominance requirement under Rule 23(b)(3) and vacated the lower court decision on the basis that the decision failed to address how class members would satisfy that element of their claim on a class-wide basis. This decision is an important reminder that Circuit courts can de-certify a class if they determine that the lower court failed to consider all relevant factors.

In a case that has important implications on tolling in class actions, the Supreme Court ruled in June that its *American Pipe* decision, which provides for tolling of the statute of limitations during the pendency of a class action, does not allow a putative class member, after a denial of class certification, to start a new, successive class action after the original statute of limitations would have expired. *China Agritech, Inc v Resh et al*, Case No. 17-432 (2018). If class certification is denied, unnamed class members must join an existing suit or file an individual action. The decision reversed the Ninth Circuit, but validated the First, Second, Fifth and Eleventh.

A victory for rideshare companies

In May 2018, the Ninth Circuit held that a Seattle ordinance that allows for-hire drivers to bargain collectively is not covered by state action immunity and therefore is subject to antitrust challenge. *United States Chamber of Commerce, et al v City of Seattle*, et al, DC No. 2:17-cv-00370-RSL (9th Cir 2018). The decision hinged on whether the ordinance was foreseeable when the state initially enacted its transportation regulations. Judge Milan Smith found no plain evidence that the state legislature had imagined allowing that sort of anti-competitive agreement among drivers and that the ordinance was not made pursuant to a clearly articulated state policy. The City of Seattle has asked for a rehearing en banc (a rehearing in front of the full Ninth Circuit), arguing that the three-judge panel did not properly interpret Supreme Court precedent regarding state action immunity.

Animal Science: foreign governments' interpretations of law not binding

The Supreme Court recently ruled that foreign governments' interpretations of their own laws are entitled to substantial, but not conclusive, weight in US courts. *Animal Science Products, Inc et al v Hebei Welcome Pharmaceutical Co Ltd, et al*, Case No. 16-1220 (2018). US purchasers of Vitamin C originally secured a \$147 million price-fixing judgment against two Chinese pharmaceutical companies, which had argued that Chinese law compelled them to fix prices and exempted them from certain aspects of US antitrust law. After the Second Circuit vacated that judgment, the Supreme Court granted certiorari. In unusual practice, the court heard amici curiae argument from the Chinese Ministry of Commerce, a privilege typically only granted to the US government. The court then reversed and remanded, finding that the appellate court had deferred too heavily to the Chinese government's interpretation of its own laws.

Jeld-Wen: third parties may be awarded damages, even after mergers clear

In 2012, home hardware company Jeld-Wen acquired Craftmaster Manufacturing, Inc, in a merger that reduced the number of door skin manufacturers from three to two. The Department of Justice (DOJ) opened a preliminary investigation into the acquisition, but took no action to prevent it, and at the time, no customers complained about the merger. But six years later, Jeld-Wen customer Steves and Sons, which originally indicated to the DOJ that it did not oppose the merger, filed suit, alleging that it had begun to receive less favorable price terms, lower product quality and worse service as a result of the deal, and that the merger violated antitrust laws. It recently won \$58.6 million in damages and awaits an upcoming ruling in the federal district court as to whether Jeld-Wen must divest some of its assets to restore industry competition. *Steves and Sons, Inc v Jeld-Wen, Inc*, Case No. 3:16-cv-545 (ED Va). This case serves as an important reminder that private antitrust litigation is a source of continued merger enforcement, even after a deal is consummated.

Reverse payment cases continue

In the wake of *Actavis* in 2013, reverse payments remain an important area. In August 2017, the Third Circuit issued decisions on two separate reverse payment suits; reversing one and affirming another. In *In re: Lipitor Antitrust Litigation*, Case No. 14-4202 (3d Cir 2017), the court reversed the lower court's dismissal, holding that plaintiffs had plausibly alleged schemes to artificially inflate the price of the drugs Lipitor and Effexor XR and that the lower court had imposed too stringent a pleading standard in dismissing them. Drugmakers Pfizer and Teva Pharmaceuticals appealed the *Lipitor* decision to the Supreme court, arguing that under *Actavis*, antitrust scrutiny should only apply to large and unjustified reverse payments. But in February 2018, the Court declined their petitions. *Pfizer Inc, et al v Rite Aid Corp, et al*, Case No. 17-752 (2018); *Wyeth LLC, et al v Rite Aid Corp, et al*, Case No. 17-771 (2018).

Separately, in *In re: Wellbutrin XL Antitrust Litigation, et al*, Case No. 13-3559 (3d Cir 2017), the court found that plaintiff purchasers of a drug had failed to show actual injury resulting from alleged reverse payment settlements between drug companies and affirmed the lower court's holding.

Additionally, while not private antitrust litigation, the Federal Trade Commission (FTC)'s Administrative Law Judge recently issued a ruling in the agency's first complete reverse payment trial since *Actavis*. *In re: Impax Labs, Inc*, Docket No. 9373 (2018). The administrative law judge's decision is one of the first to apply a full rule-of-reason analysis after *Actavis*, finding that the benefits of the companies' agreement outweighed any potential anti-competitive harms. FTC commissioners have granted an appeal. It will be interesting to see how the Commission treats the ALJ's decision and how that affects private litigation in the future.

Illinois Brick: modern applications

The Supreme Court recently granted a petition for certiorari filed by Apple following its loss at the 9th Circuit. A class of consumer plaintiffs sued Apple, alleging its closed-system App Store allowed it to monopolise a purported market for iPhone app distribution, resulting in high prices for consumers. The District Court dismissed the suit under *Illinois Brick*, which prohibits indirect purchasers from recovering monetary damages. On appeal, the Ninth Circuit reversed, holding that consumers had a direct relationship with Apple because they purchased apps through the App Store. Apple appealed to the Supreme Court,

which asked the US Solicitor General to weigh in. The Solicitor General submitted a brief in support of Apple's position, arguing that *Illinois Brick* turns on the plaintiffs' theory of harm. If plaintiffs' alleged a pass-on theory of harm, as the plaintiffs in *Apple, Illinois Brick* bars recovery. The Supreme Court just recently granted certiorari and will hear this case. *Apple Inc v Pepper*, No. 14-15000, 846 F 3d 313 (9th Cir 2017), cert granted, No. 17-204 (18 June 2018).

Illinois Brick is under fire at the DOJ's Antitrust Division as well. Makan Delrahim, Assistant Attorney General for Antitrust, recently stated his desire to repeal both *Illinois Brick* and *Hanover Shoe*, two long-standing Supreme Court decisions that often keep indirect purchasers from recovering antitrust damages. Private litigants should be mindful of this moving forward, as it would be a marked change from decades of established precedent.

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 defenses of the representative parties [must be] typical of the claims or defenses 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), 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)). The Supreme Court recently clarified this ruling in *Tyson Foods Inc v Bouaphakeo*, where plaintiffs sought compensation for overtime work in compliance with the Fair Labor Standards Act of 1938. 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*, 133 S Ct 1426 (2013) and *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 19 June 2013) and *In re Urethane Antitrust Litig*, 2013 WL 2097346, at *2 (D Kan 2013), aff'd, 768 F3d 1245 (10th Cir 2014)). Examples of recent cases in which class certification was granted include:

- *In re Asacol Antitrust Litigation*, Case No. 1:15-cv-12730 (D Mass 9 November 2017): end payors were granted class certification in their antitrust claim against drug-maker Allergan and related companies. The plaintiffs' claim is that Allergan blocked generic competition for its drug Asacol by temporarily pulling it from the market before the drug's patents expired, which forced patients to switch to an entirely different treatment, rather than to a competitor. US District Judge Denise J Casper found that the class members had established common proof of antitrust impact and further held that defendants' arguments regarding the flaws in the plaintiffs' damages model were questions for a jury.
- *Beltran, et al v Interexchange Inc, et al*, Case No. 1:14-cv-03074 (D Colo 2 February 2018): a class of approximately 91,000 au pairs were granted class certification by US District Judge Christine M Arguello in a case alleging collusion to set low pay rates. Plaintiffs claim that several sponsor agencies of a US cultural exchange programme conspired to fix wages well below the minimum wage. Judge Arguello found the class members' claims similar enough to satisfy the typicality requirement and certified the class.

Cases to watch

There are currently several large price-fixing civil class actions to watch as they continue to develop:

- *Automotive Parts Antitrust Litigation*, Case No. 2:12-md-02311 (ED Mich), Judge Marianne O Battani.
- *In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, Case No. 2:16-md-02724 (ED Pa), Judge Cynthia M Rufe.
- *In re: German Automotive Manufacturers Antitrust Litigation*, Case No. 3:17-md-02796 (JPML), Judge Charles R Breyer.

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 Jepsen*, 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 pre-trial stages of the litigation.

26 Has a plaintiffs' collective-proceeding bar developed?

Yes. The US 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 of the 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.

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34 Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

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. 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 through 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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