

# Private Antitrust Litigation New Perspectives from the US and the EU

Stephen Brown (London)

Dr. Hans-Georg Kamann (Frankfurt)

Britt M. Miller (Chicago)

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# What We'll Cover

- Recent developments in US and EU antitrust/competition law including:
  - The aftermath of recent US Supreme Court rulings, including *Twombly*, *Credit Suisse*, and *Leegin*.
  - The role of the Antitrust Criminal Penalty Enhancements and Reform Act in US civil litigation.
  - The new European Commission white paper on private litigation—does it signal a change in EU antitrust law?
  - The increase in third party funding and consumer class actions in the EU member states.

# Recent Developments in the US

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# New Supreme Court Precedents: *Twombly* – Then ....

- Decided in May 2007, the Supreme Court's decision in *Bell Atlantic v. Twombly* (Mayer Brown represented Bell South in the appeal) is generally regarded by scholars and practitioners alike as “having wide-reaching implications for federal antitrust litigation” and “signaling a victory for antitrust defendants in a variety of industries ....”
- Under *Twombly*, a plaintiff must plead enough factual matter to show his claim is “plausible.”
- Although the claim must contain enough facts to “raise a right of relief above the speculative level,” “specific facts are not necessary.”

# New Supreme Court Precedents: *Twombly* – ... and Now

- Over 12,000 citations to the *Twombly* opinion since its decision (precedential and commentary).
- The decisions are not limited to the area of antitrust; rather, the *Twombly* standard is being routinely cited as “the” pleading standard for all civil cases, including areas as varied as employment discrimination and civil rights.
- But questions still remain as to “how much” must be pled—even in antitrust cases—in order to survive a motion to dismiss—*i.e.*, what exactly is required to “nudge” a pleading over the line into the realm of “plausibility.”

# New Supreme Court Precedents: *Twombly* – ... and Now

- The uncertainty is resulting in disparate decisions across jurisdictions, with some courts subjecting complaints to rigorous scrutiny to determine whether there are sufficient facts alleged to support an antitrust claim, while other courts are allowing complaints with largely conclusory allegations of agreement to proceed. Compare the following two cases:
  - *In re: Parcel Tanker Shipping Services Antitrust Litigation* (D. Conn. Mar. 12, 2008)
  - *In re: Household Movers Antitrust Litigation* (D.S.C. Mar. 31, 2008)
- As the Third Circuit recently observed, “the issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.”

# New Supreme Court Precedents: *Credit Suisse* – Impact?

- On June 18, 2007, the Supreme Court handed down another landmark decision (this one argued by Mayer Brown's Steve Shapiro)—*Credit Suisse Securities (USA) LLC v. Billing*—in which the Court ruled that several major Wall Street firms were immune from a class-action lawsuit brought under federal antitrust laws over alleged conduct surrounding initial public offerings during the 1990s. The Court ruled 7-1 that federal securities regulations trump antitrust laws.
- Although many commentators had hoped that *Credit Suisse* would have been a more generic articulation of the guiding principles for determining the interplay between federal regulation and the antitrust laws (rather than one so specific to securities regulation), the decision, for now, seems limited to the federal securities context.

# New Supreme Court Precedents: *Leegin* – The End of RPM?

- Heralded as another decision (like 2006's *Illinois Tool Works* opinion) that “helps bring modern antitrust law into line with economic reality”—*Leegin Creative Leather Products, Inc. v. PSKS, Inc.* overruled the century-old *per se* rule against minimum resale price maintenance (“RPM”) agreements articulated in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), holding that the legality of such vertical minimum price restraints should be decided under the “rule of reason,” pursuant to which courts evaluate allegedly anticompetitive conduct on a case-by-case basis.
- Since its decision in June 2008, only 30 reported federal decisions have cited the Court’s opinion.
- *Leegin* did not make all minimum RPM agreements “lawful”—e.g., state laws
- The effect of power buyers—e.g., Wal-Mart—may effectively preclude manufacturers from imposing RPM restrictions.
- Possible legislative action to overturn *Leegin*.

# Antitrust Criminal Penalty Enhancements and Reform Act (ACPERA) in the US – Are Amnesty Candidates Reaping the Benefits? – Background

- In June 2004, President Bush signed into law the Antitrust Criminal Penalty Enhancements and Reform Act (“ACPERA”) in the US.
- The Act had two primary effects:
  - Substantially increased the maximum fines and jail sentences for violations of the Sherman Act:
    - from \$10 million to \$100 million for corporations (*Note however that the alternative fine provision—18 U.S.C. § 3571(d), under which the DOJ can seek twice the gain or twice the loss remains unchanged; it is through use of this provision that many of the DOJ’s record settlements have been obtained*);
    - \$350,000 to \$1 million for individuals;
    - from 3 years jail time to 10 years for individual violators.
  - Augmented the attractiveness the DOJ’s leniency program (the number of amnesty filings has increased from one per year to two per month).

# Antitrust Criminal Penalty Enhancements and Reform Act (ACPERA) in the US – Are Amnesty Candidates Reaping the Benefits? – Background

- Under ACPERA, a cartel participant that is the first cartel member to cooperate with the DOJ's investigation can avoid criminal prosecution so long as it lives up to its agreement to cooperate with the government.
- Others that follow are not granted amnesty, but may obtain reductions in their sentences.
- The new legislation limits to actual or single damages the private litigation exposure of the first cartel member that cooperates (*Note: the detrebling feature will sunset in 2009*). Section 103 of the Act provides that cooperation shall include: providing a full account of all known, relevant facts, furnishing all relevant documents, and making relevant witnesses available for interviews, depositions, or testimony in connection with the civil action.

# Antitrust Criminal Penalty Enhancements and Reform Act (ACPERA) in the US – Are Amnesty Candidates Reaping the Benefits? – The Act as Applied

- To date there are very few cases discussing application of ACPERA. Some of the more notable include:
  - *In re: Sulfuric Acid Antitrust Litigation* (N.D. Illinois) (used to reduce settlement amount paid by amnesty defendants)
  - *In re: Ready-Mixed Concrete Antitrust Litigation* (S.D. Indiana) (raised in context of discovery constraints)
  - *In re: International Air Transportation Surcharge Antitrust Litigation* (N.D. California) (used to reduce settlement amount paid by amnesty defendant)
  - *In re: Urethane Antitrust Litigation* (D. Kansas) (motion for “satisfactory cooperation” finding mooted by settlement that accounted for ACPERA cooperation)

# Recent Developments in the EU

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## **The European Union's White Paper – Creating a Competition Culture not a Litigation Culture ...**

# The European Union's White Paper— Motivation

- Damages are an additional way to deter and effectively control anticompetitive behavior.
- Everyone who suffers harm as a result of anticompetitive behavior shall be entitled to damages.
- Opportunities for claiming monetary damages for breaches of EC Antitrust Law in the Member States are underutilized.
- The EU has already levied billions of Euros in damage fines.

# The European Union's White Paper—Objectives

- Improve legal conditions under which victims can exercise their rights
  - Full compensation (but no treble damages)
  - Deterrence of future infringements
- Develop balanced solutions that are rooted in the European legal culture and traditions.
- Private enforcement should complement, but not substitute or jeopardize common official enforcement.

# The European Union's White Paper—Overview of Proposed Measures

- Any alleged victim can claim damages individually or collectively
- There are rules on disclosure of evidence
- Decisions by the Commission or NCAs are binding
- In effect it is a strict liability standard
- Definition of available damages and limitation periods
- Pass-on defense
- Proposals on costs
- Protection of leniency

# The European Union's White Paper—Standing and Collective Redress

## Goal

- Redress of grievances of any individual, particularly individuals with small claims

## Proposals

- Indirect purchasers should have a right to claim damages
- Representative action
  - Bodies designated in advance or *ad hoc* claim damages for their members
- Opt-in collective action
  - Claimants combine their claims individually in one single action

# The European Union's White Paper—Access to Evidence

## Goal

- Overcome asymmetry of information; balance of interests concerning confidential information

## Proposals

- Introduction of minimum level of disclosure and strict judicial control on disclosure. Requirements are as follows:
  - 1) Claimant has to bring all evidence reasonably available;
  - 2) He has to show that he has no possibility of gaining the evidence envisaged without disclosure;
  - 3) There are precise categories of the information/evidence wished to be disclosed;
  - 4) Disclosure is relevant, necessary and proportional in scope.
- Sanctions for refusal to produce evidence

# The European Union's White Paper—Binding Decisions

## Goal

- Increase coherence of different national court decisions

## Proposals

- Commission or NCAs decisions on a particular case are binding on a national court in a follow-up damage suit.
- All appeals of the decision must be exhausted.

# The European Union's White Paper—Damages

## Goal

- Full compensation without unjust enrichment

## Proposals

- Claimants should obtain single damages
  - actual loss
  - loss of profit
  - interest
- Commission will provide guidance to facilitate calculation
- No multiple (or trebled) damages

# The European Union's White Paper—Pass-on Defense

## Goal

- No unjust enrichment of purchasers that passed on illegal overcharges and no payment of multiple compensation by infringers

## Proposals

- Defendants should be entitled to invoke the passing on defense, but must satisfy same standard of proof as claimants
- Rebuttable presumption for indirect purchasers that the whole illegal overcharge was passed on to them

# The European Union's White Paper—Costs

## Goal

- No discouragement of meritorious actions

## Proposals

- Design procedural rules fostering settlements as a way to reduce costs
- Set appropriate court fees that are not a disproportionate disincentive to damages claims
- Give national courts the power to grant derogations from normal costs rules

# The European Union's White Paper—Protection of Leniency

## Goal

- Protect leniency programs under Article 81

## Proposals

- Corporate statements submitted by all applicants for leniency, successful or otherwise should not be disclosed or discoverable in damage actions
- Civil liability of companies that have been granted immunity should be limited to claims by their direct and indirect contractual partners

# **Third Party Funding in the EU**

# Third Party Funding in the EU

- Now permissible in some jurisdictions
- Early days for funding of competition claims

# Conclusion

## Questions & Answers

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[sbrown@mayerbrown.com](mailto:sbrown@mayerbrown.com)

Dr. Hans-Georg Kamann (Frankfurt)

[hgkamann@mayerbrown.com](mailto:hgkamann@mayerbrown.com)

Britt M. Miller (Chicago)

[bmiller@mayerbrown.com](mailto:bmiller@mayerbrown.com)

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