

Private Antitrust Litigation

in 27 jurisdictions worldwide

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Editor-in-chief
Callum Campbell

Publisher
Richard Davey

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United States

T Mark McLaughlin, Andrew S Marovitz and Britt M Miller

Mayer Brown LLP

Legislation and jurisdiction

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

Private antitrust litigation in the United States continues to be robust. The Obama administration already has made clear that it will be active in antitrust enforcement which, in turn, could spawn more private antitrust litigation. In May 2009, for example, the United States Department of Justice rescinded its predecessor's September 2008 report related to single-firm conduct (monopolies) under section 2 of the Sherman Act explaining that it 'raised too many hurdles to government antitrust enforcement and favoured extreme caution and the development of safe harbours for certain conduct within the reach of section 2'. Christine Varney, the newly appointed assistant attorney general in charge of the Department's Antitrust Division, went on to state that the withdrawal of the report was the 'clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers'. Since then, the Antitrust Division is reportedly reviewing the activities of a number of major corporations.

Despite this recent focus on single-firm conduct, a significant percentage of private actions continue to be based upon horizontal conduct – for example, price-fixing, market allocation and bid-rigging – of the type that the Supreme Court has characterised as per se unlawful and therefore strictly forbidden by the Sherman Act. Recent years have also seen significant claims involving further litigation of the issues raised by the Supreme Court's 2004 decision in *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004), which held that plaintiffs who suffer foreign injury, independent of a domestic injury, may not sue under US antitrust laws.

Pleading standards and class certification have received the most attention over the past year. In *Ashcroft v Iqbal*, 129 S Ct 1937 (2009), for example, the Supreme Court expounded upon its prior landmark ruling in *Bell Atlantic Corp v Twombly*, 550 US 544 (2007), in which the Court had stated that to survive a motion to dismiss in antitrust suits, plaintiffs must allege sufficient factual matter to show that their claims are plausible. In *Iqbal*, the Court made clear that *Twombly's* plausibility standard applies to all federal civil cases, not just antitrust cases. The Court went on to explain that conclusory allegations are insufficient to satisfy a plaintiff's pleading requirements, and that the lower courts may draw upon their judicial experience and common sense to evaluate whether claims are plausible. Although the decision did not eviscerate the 'notice pleading' standard provided by the Federal Rules of Civil Procedure, it should help federal courts weed out, at an early stage, complaints that do not allege enough facts to set forth sufficiently plausible claims against defendants.

In *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305 (3rd Cir 2008), the US Court of Appeals for the Third Circuit re-defined the standard of proof required for class certification, holding that under rule 23 of the Federal Rules of Civil Procedure, the

plaintiffs must prove each requirement for class certification by a preponderance of the evidence. The court further held that district courts should resolve all issues regarding certification requirements, even when those issues overlap with the merits of the case. In resolving those issues, district courts must examine and weigh the expert testimony presented by all of the parties rather than simply deferring to the plaintiffs' experts.

The full impact of two earlier Supreme Court decisions – *Credit Suisse First Boston Ltd v Billing*, 551 US 264 (2007) and *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007) – is still unknown. *Credit Suisse*, which held that there was an 'incompatible' conflict between the federal securities laws and antitrust laws such that the securities laws controlled and the challenged conduct was immune from antitrust scrutiny, has yet to be extended beyond the federal securities arena. *Leegin*, which overruled the century-old per se rule articulated in *Dr Miles Medical Co v John D Park & Sons Co*, 220 US 373 (1911), prohibiting vertical minimum price restraints in favour of a case-by-case review of these restraints under the 'rule of reason', has come under heavy fire from lawmakers since its decision in 2007 and may ultimately be repealed by legislation. On 30 July 2009, for example, the House Judiciary Committee's Courts and Competition Policy Subcommittee approved HR 3190, which, if passed by Congress, would make resale price maintenance (RPM) unlawful per se. Earlier this year, Wisconsin Senator Herb Kohl introduced S.148, the Discount Pricing Consumer Protection Act, which, again, if passed by Congress, would re-establish the per se illegality of RPM. Both the US House of Representatives and the US Senate have recently convened hearings to discuss RPM. In addition, Federal Trade Commissioner and FTC Chairman Jon Leibowitz and DoJ Antitrust Division Assistant Attorney General Christine Varney both have expressed their support for a legislative response to *Leegin*. It also remains to be seen how the individual states will treat minimum price restraints in the wake of *Leegin*. In 2007, some 35 state attorneys general supported overruling *Leegin* through legislation. While many states require state conformity with federal antitrust law, some states expressly prohibit vertical price fixing, no matter the justification, and at least a few states have indicated that they will continue to prohibit minimum price restraints notwithstanding *Leegin*. See, for example, *New York v Herman Miller, Inc*, No 08 CV 2977 (SDNY, 21 March, 2008). One state – Maryland – passed legislation earlier this year expressly overruling the *Leegin* decision in state law contexts. See Md. Code Ann., Com. Law §11-204 (2009).

Finally, companies and individuals accepted into the US Department of Justice's amnesty programme continue to seek to limit their liability in civil cases to single damages by agreeing to cooperate with civil plaintiffs in accordance with the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) (see, for example, *In re Urethanes Antitrust Litigation*, No. 2:04-MD-1616 (D Kan 22 June 2007), Chemtura's Motion for a Finding of 'Satisfactory Cooperation' and Limitation of Damages Pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act, and Sup-

porting Memorandum, filed under seal 22 June 2007 (Docket Nos. 598 and 600)). Originally set to expire in June of 2009, Congress has extended ACPERA's single damages provision until 22 June 2010. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Pub L No. 111-30, 123 Stat 1775 (2009).

- 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Sections 4 and 16 of the Clayton Act enable private parties to bring claims under the federal antitrust laws (15 USC, sections 15(a), 26). Private plaintiffs can also pursue relief, as appropriate, under various state antitrust laws.

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

Sections 4 and 16 of the Clayton Act provide antitrust plaintiffs with private rights of action. Section 4 allows 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws' to sue to collect treble damages and costs, including reasonable attorneys' fees. Section 16 of the Clayton Act provides for the possibility of injunctive relief. All such actions are brought in federal district courts.

A private party suing under a state antitrust law may bring suit in that state's courts, subject to possible removal to federal court.

- 4 In what types of antitrust matters are private actions available?

The Clayton Act authorises private actions to enforce the federal antitrust laws, including the Sherman Act, the Clayton Act and section 2 of the Robinson-Patman Act. Forbidden conduct includes monopolisation, attempted monopolisation, per se unlawful concerted conduct (for example, price fixing and market allocation among competitors), other agreements that unreasonably restrain trade and certain types of price discrimination.

- 5 What nexus with the jurisdiction is required to found a private action?

Both personal jurisdiction and subject matter jurisdiction are required to found a private action. The assertion of personal jurisdiction over any party must be 'fair and reasonable' and derive from 'minimum contacts' whereby a party 'purposely avails' itself of the privilege of conducting activities in the forum state. Section 12 of the Clayton Act governs venue and provides that any proceeding under the antitrust laws against a corporation 'may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business' (15 USC section 22).

Subject matter jurisdiction requires that a claim under the antitrust laws allege conduct 'in restraint of trade or commerce among the several states or with foreign nations'. The Foreign Trade Antitrust Improvement Act 1982 (FTAIA), governing antitrust suits involving non-import trade or commerce with foreign nations, mandates that the alleged conduct have a 'direct, substantial and reasonably foreseeable' effect on US domestic or import commerce which 'gives rise' to the plaintiff's alleged injuries and legal claim (15 USC sections 6a and 45(a)(3)). US antitrust laws, therefore, will apply to foreign commerce only where the unlawful conduct directly impacts the US (for example, if it artificially increased prices in the US).

Jurisdiction in state law actions generally involves similar nexus and impact standards under state-specific statutes.

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

Private actions can be brought against both corporations and individuals, including those from other jurisdictions. Under section 1 of

the Clayton Act, the term 'person' as used in the Act includes corporations, associations and individuals. As applied, the Clayton Act also covers partnerships and any other organisation not exempted by statute. Foreign 'persons' are subject to suit provided that the requirements of personal and subject matter jurisdiction are met.

- 7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Private actions arising out of the same basic set of facts may be brought against the same defendants by different plaintiffs in multiple jurisdictions – both state and federal. When multiple related federal actions are pending against common defendants, such actions, for pre-trial purposes, are typically consolidated by the Judicial Panel on Multidistrict Litigation (JPML) into a single proceeding to promote judicial economy (see *In re Live Concert Antitrust Litigation*, 429 F Supp 2d 1363 (JPML 2006)). Although there is no state equivalent to the JPML, the passage of CAFA permits the consolidation in federal court of certain indirect purchaser actions, which ordinarily would be filed in state court, with related federal direct purchaser actions.

Private action procedure

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

Litigation in the US, including antitrust litigation, may be funded by third parties. Contingency fees also are available. In class action cases, any award of fees is subject to judicial review and approval.

- 9 Are jury trials available?

Either plaintiffs or defendants may demand a jury trial in suits seeking money damages. Almost without exception, courts honour such demands. See, for example, *City of New York v Pullman Inc*, 662 F 2d 910, 920 (2d Cir 1981) and *Green Construction Co v Kansas Power & Light Co*, 1 F3d 1005, 1011 (10th Cir 1993). But see *In re Japanese Electronic Products Antitrust Litigation*, 631 F2d 1069, 1088 (3d Cir 1980) (ruling that highly complex antitrust suits may be 'beyond the ability of a jury to decide', such that the due process rights of the party opposing a jury trial can override the Seventh Amendment right (to a jury) of the other party).

Suits seeking only equitable relief (such as an injunction) are tried by the court.

- 10 What pre-trial discovery procedures are available?

Discovery methods allowed by the Federal Rules of Civil Procedure – depositions, requests for production, interrogatories and requests for admission – are available as part of pre-trial discovery in antitrust cases. States provide for similar discovery mechanisms under their respective procedures.

- 11 What evidence is admissible?

The Federal Rules of Evidence govern admissibility of evidence for all federal civil actions, including private antitrust suits. Private actions brought in state court are subject to the evidence rules of the individual states.

- 12 What evidence is protected by legal privilege?

Generally, legal privilege in the US encompasses the attorney-client privilege and the work product doctrine. Interpretation of these privileges varies by jurisdiction.

Attorney-client privilege generally protects oral and written com-

munications between clients (or their representatives) and their attorneys (or their representatives) made for the purposes of seeking legal advice. That legal advice must not be sought for the purposes of committing a crime or tort; if it is, the privilege will not apply. In addition, factual material is not privileged just because it has been communicated to an attorney. The right to assert the privilege belongs to the client, not the attorney, and the privilege can be waived or destroyed. If, for example, a third party not protected by the privilege is included in otherwise privileged communications, the privilege will not apply.

The work-product doctrine generally protects from discovery material collected by counsel in the course of preparation for possible litigation. The protection is qualified; an adversary may obtain discovery upon showing a sufficient need for the material. The greatest protection, if not absolute protection, is afforded an attorney's thinking – theories, analysis, mental impressions, beliefs, etc – even if not formulated in preparation for possible litigation (*Hickman v Taylor*, 329 US 495, 510 (1947)). Work product protections have been codified with respect to pre-trial matters. See Fed R Civ P 26(b)(3)(B).

In contrast to privileged communications in the EU (see *Akzo Nobel Chemicals and Ackros Chemicals v Commission of the European Communities* [2007]), attorney-client privilege in the US extends to both outside and in-house counsel. Further, while EU privilege protections apply only to written communications, US protections apply to both written and oral communications. With private antitrust actions becoming increasingly international in scope, it is important to note that the EU's legal professional privilege extends only to attorneys admitted to a bar in an EU member state. Thus, written communications between a US lawyer and an EU company may not be considered privileged in an EU proceeding.

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

Private actions are available where there has been a criminal conviction in respect of the same matter. Criminal convictions and even the mere public announcement of a criminal investigation can spark private litigation. Moreover, it is possible for criminal and civil actions to proceed simultaneously, although some courts have stayed civil proceedings pending the outcome of a criminal investigation.

14 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?

Absent extenuating circumstances, courts may admit in civil litigation evidence that was adduced during previous criminal proceedings (see Fed R Civ P 6(e)). Confidential grand jury materials, for example, may be disclosed in a subsequent private antitrust action upon a strong showing of a 'particularised need' (*United States v Sells Engineering*, 463 US 418, 443 (1983)).

Depending on the case, a final criminal or civil judgment in a government antitrust action may have either a prima facie or conclusive (collateral estoppel) effect in subsequent private litigation. Under section 5(a) of the Clayton Act, judgments in prior DoJ actions are subject to collateral estoppel, while those from prior FTC actions are not. The trial court retains broad discretion to decide whether collateral estoppel would be fair in any particular case. The Supreme Court has set out guidelines to assist lower courts in exercising that discretion:

- 'a plaintiff could easily have joined in the earlier action';
- the defendant was previously sued for minimal damages, so had 'little incentive to defend vigorously';
- the judgment relied on is itself inconsistent with one or more previous judgments in defendant's favour; or
- the present action provides the defendant procedural opportunities unavailable in the first action that could cause a different result (*Parklane Hosiery Co v Shore*, 439 US 322, 330–31 (1979)).

If a court ultimately declines to apply collateral estoppel, the prior final judgment may nonetheless be offered as prima facie evidence of liability in private litigation under section 5(a) of the Clayton Act. Although a guilty plea is admissible as prima facie evidence of wrongdoing, a 'no contest' judgment is not.

Leniency or amnesty applicants are not exempt from or fully protected from civil litigation. They may, however, reduce their damages exposure under the recently renewed Antitrust Criminal Penalty Enforcement and Reform Act (ACPERA), which allows a leniency or amnesty candidate that cooperates with the plaintiffs in any related private litigation to limit its liability to actual rather than treble damages.

15 What is the applicable standard of proof for claimants and defendants?

Under section 4 of the Clayton Act, a direct purchaser antitrust plaintiff must prove, by a preponderance of the evidence, the existence of 'a causal connection' between the defendant's antitrust violations and the plaintiff's injury. This requires a showing that:

- the defendant violated the antitrust laws;
- the plaintiff suffered actual economic injury;
- the defendant's illegal behaviour caused the injury; and
- the antitrust violation was a material and substantial cause of the plaintiff's loss.

A plaintiff must also prove 'antitrust injury' – an injury 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful' (*Brunswick Corp v Pueblo Bowl-O-Mat Inc*, 429 US 477, 489 (1977)).

The fact of injury must be proven with a 'reasonable degree of certainty' (see, for example, *Mostly Media Inc v US West Communications*, 186 F3d 864, 865 (8th Cir 1999) and *Greater Rockford Energy & Tech Corp v Shell Oil Co*, 998 F2d 391, 401 (7th Cir 1993)), meaning that a plaintiff must show that the violation was a material factor in producing the injury. Once a private antitrust plaintiff successfully proves by a preponderance the fact of its injury, it faces a less stringent standard in establishing the amount of its damages. A jury 'may make a just and reasonable estimate of the damage based on relevant data', so long as it is not based upon 'speculation or guesswork' (*Bigelow v RKO Radio Pictures*, 327 US 251, 264–65 (1946)).

Generally speaking, indirect purchasers do not have standing to sue for alleged antitrust injuries under federal law. See *Hanover Shoe v United Shoe Machinery Corp*, 329 US 481 (1968); and *Illinois Brick Co v Illinois*, 431 US 720 (1977). Similarly, defendants cannot assert a pass-on defence in federal antitrust proceedings (id). State antitrust laws, however, are not pre-empted by federal antitrust laws, and 28 states currently allow indirect purchaser claims of some sort, including class actions. In addition, state law indirect purchaser actions may be brought in federal court when the state law claims are supplemental to federal causes of action, see question 23. The standard of proof for such claims vary by state but are, in many instances, similar to the federal standard.

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

There is no typical timetable for civil antitrust suits. Each case is unique and its progress is determined by a host of factors, including court scheduling, the number of parties involved and the amount of pre-trial discovery that is necessary. Although class certification must be decided by the court 'at an early practicable time' (Fed R Civ P 23(c)(1)(A)), the process requires the parties to file motions, engage in class discovery, prepare and submit expert reports and present argument to the court. The court's decision on class certification may also be appealed on an interlocutory basis. Ordinarily, bringing a suit as a class action adds at least one or two years to the litigation.

Although there is no formal mechanism by which to accelerate civil proceedings, some economies can be recognised in cases where judges run expedited dockets or where preliminary injunctive relief is sought such that merits issues are considered at an early stage.

17 What are the relevant limitation periods?

Section 4(b) of the Clayton Act provides a four-year statute of limitations. That period begins to run when ‘a defendant commits an act that injures a plaintiff’s business’ (*Zenith Radio Corp v Hazeltine Research Inc*, 401 US 321, 338 (1971)). Additional claims may accrue from later overt acts in furtherance of the conspiracy.

Certain events may ‘toll’ (suspend the running of) the statute of limitations. Under section 5(i) of the Clayton Act, ‘the running of the statute of limitations in respect to every private or state right of action [...] shall be suspended’ during the pendency of government civil or criminal proceedings to prevent, restrain or punish violations of the antitrust laws (except those brought to redress injury to the United States itself) (15 USC section 16(i)). Plaintiffs must then bring suit within one year of the termination of the government’s action or within the original four-year period, whichever is longer. In addition, the statute of limitations may be tolled for equitable reasons, such as fraudulent concealment, duress and equitable estoppel. The commencement of a class action tolls the running of the statute for all class members who make timely motions to intervene after the court finds the suit inappropriate for class treatment (*American Pipe & Constr Co v Utah*, 414 US 538, 553 (1974)).

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

In federal court, final judgments may be appealed to the applicable court of appeals (Fed R Civ P 23(f)). Appeals of interlocutory orders, such as orders granting or denying class certification, are also available under limited circumstances (see 28 USC section 1292). State procedure governs state appeals.

A party can appeal both factual and legal findings. Generally, factual findings are given substantial deference; appellate courts typically evaluate whether a trial judge’s findings were clearly erroneous, whether a jury’s findings were unreasonable or whether an administrative agency’s findings were not supported by substantial evidence. Legal findings generally are reviewed *de novo*. Certain types of rulings, like rulings on class certification, are reviewed for abuse of discretion. See, for example, *California v Yamasaki*, 442 US 682, 703 (1979).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Class proceedings are available in private antitrust claims brought in federal courts and most state courts. A federal plaintiff must meet the class certification requirements under Federal Rule of Civil Procedure 23. Federal class action jurisdiction was recently expanded by CAFA, bringing into the federal courts certain indirect customer antitrust class actions that previously had been litigated in state courts.

20 Are collective proceedings mandated by legislation?

Class proceedings are not mandated by legislation. Federal Rule of Civil Procedure 23 permits, rather than requires, private antitrust class actions to be brought.

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

Under Federal Rule of Civil Procedure 23(a), a party seeking class certification must make a motion to the court and satisfy four

prerequisites:

- numerosity – the class must be so numerous that joinder of all members is impractical;
- commonality – the members of the class must share a common question of law or fact;
- typicality – the claims or defences of the class representatives must be typical of the claims or defences of the members of the class; and
- adequacy – the representative parties must be capable of fairly and adequately protecting the interests of the class.

If these requirements are met, the class proponents must then satisfy rule 23(b), most commonly by showing that questions of law or fact shared among the members of the purported class predominate over individual questions, and that the proposed class action would be superior to other methods of adjudication.

As noted above, the Third Circuit recently reemphasised that Rule 23’s requirements ‘are not mere pleading rules’, and instead require district courts to undertake a rigorous analysis of evidence to determine whether the Rule’s requirements have been met (*In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305 (3d Cir. 2008)). According to the Third Circuit, Rule 23 requires proof of each certification requirement by a ‘preponderance of the evidence’.

22 Have courts certified collective proceedings in antitrust matters?

Many federal and state courts have certified private antitrust classes. Recent federal cases include:

- *McDonough v Toys ‘R’ Us, Inc*, 2009 WL 2055168 (E D Pa 15 July 2009). In an action alleging a conspiracy between retail chain Babies ‘R’ Us, Inc (BRU) and certain baby-product manufacturers to restrict competition using the imposition of vertical price restraints, the court overruled the defendants’ challenge to predominance (the requirement that issues common to the class predominate over individual issues) under Rule 23(b)(3), and certified several subclasses of customers who purchased specific products from BRU. Relying heavily on the Third Circuit’s *Hydrogen Peroxide* decision, the Court conducted a full analysis of the evidence presented and found that plaintiffs had carried their predominance burden with respect to each element of their claim: ‘*In re Hydrogen Peroxide teaches that for Rule 23(b)(3) certification a plaintiff must explain how the case will be tried and demonstrate that proof can be made using common evidence. A defendant may then poke holes in the plaintiffs’ case under Rule 23 using expert testimony, empirical evidence, or other methods. Having resolved their disputes and analysed all relevant evidence, [the Court concludes] that the plaintiffs have carried their burden under each requirement of Rule 23(a) and (b)(3).*’
- *In re Wellbutrin SR Antitrust Litigation*, 2008 WL 1946848 (ED Pa 2 May 2008), plaintiffs alleged that a drug manufacturer unlawfully extended its monopoly over a drug by filing sham lawsuits against generic drug manufacturers seeking to market less expensive versions of the drug. Once the court found the Rule 23(a) elements – numerosity, commonality, typicality and adequacy of representation – were easily met, it considered the requirements of Rule 23(b)(3). The defendant’s primary challenge was to the ‘predominance’ requirement; it contended that the putative class members’ alleged damage would have to be shown through individualised proof. The court rejected this argument stating that, at the class certification stage, the question is not whether plaintiffs would ultimately be able to establish common impact, but whether they ‘have presented a colourable method for doing so’. If the latter, then predominance would be met. The court held that plaintiffs had presented more than one ‘colourable’ method for calculating damages and had thus satisfied the predominance requirement of Rule 23(b)(3).

Update and trends

We anticipate that the new administration will be active in the US antitrust arena. In rescinding its predecessor's September 2008 report related to single-firm conduct (monopolies) under section 2 of the Sherman Act, the Department of Justice's Antitrust Division stated that the withdrawal of the report was the 'clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers'. In *Federal Trade Commission v CCC Holdings, Inc*, Civ Action No 2008-CV-2043 (DDC 18 March 2009), the FTC won its first preliminary injunction in a federal district court in seven years.

While this much-heralded governmental activism may embolden the private plaintiffs' bar, new private antitrust suits will be held to the higher standards of the Supreme Court's *Iqbal* decision and the Third Circuit's class certification decision in *Hydrogen Peroxide*. In *Ashcroft v Iqbal*, 129 S Ct 1937 (2009), the court made clear the Court's 2007 decision in *Bell Atlantic v Twombly*, 550 US 544 (2007) raised the pleading bar for antitrust cases (and all other federal civil cases), requiring plaintiffs to plead some facts, rather than bare legal conclusions, that plausibly establish a defendant's civil liability.

In other words, courts will require 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation' (*Iqbal* 129 S Ct at 1949). This decision should help to minimise legal expenses by weeding out, at the earliest stage, claims that simply parrot the governing legal standard but present little specificity.

In class action cases, the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305 (3d Cir 2008) will force antitrust plaintiffs to focus greater attention on motions for class certification. In *Hydrogen Peroxide* the court made clear that certification is not a sure thing (particularly in antitrust cases) and that the burden of meeting each of the requirements of Federal Rule of Civil Procedure 23 falls squarely on plaintiffs. In meeting that burden, plaintiffs are now required to satisfy each element of the Rule 23 by a preponderance of the evidence. By placing the evidentiary onus on plaintiffs and requiring that district courts resolve all issues regarding class certification requirements prior to certification (even when those issues overlap with the merits of the case), the court made clear that its intent was to reduce the 'unwarranted pressure to settle nonmeritorious claims' (*id* at 310).

Class certification in antitrust suits is not always certain. In *In re Copper Antitrust Litigation*, 196 FRD 348 (WD Wis 2000), although the court found that many of Rule 23's prerequisites were satisfied, there were 'insurmountable obstacles' in the way of class certification, including the 'impracticability' of being able to distinguish between directly and indirectly injured parties and the 'difficulties' 'inherent in the nature of the copper business' that prevented plaintiffs from proceeding as a class. Similarly, in *Piggly Wiggly Clarksville Inc v Interstate Brands Corp*, 215 FRD 523 (ED Tex 2003), the court found that while the Rule 23(a) requirements were met, 'the amount of damages resulting from [the alleged] injury will require some degree of investigation into facts specific to each plaintiff and potentially facts specific to each plaintiff's numerous negotiations and transactions over the course of many years', such that it would be 'impossible to present evidence in a common manner as to the price each plaintiff would have paid but for the conspiracy'.

23 Are 'indirect claims' permissible in collective and single party proceedings?

With modest exceptions, indirect purchaser suits for monetary damages are generally barred by federal antitrust laws and thus such actions cannot be brought on either a class or non-class basis. See *Illinois Brick Co v Illinois*, 431 US 720, 729 (1977). In *Illinois Brick* and the Supreme Court's earlier decision in *Hanover Shoe Inc v United Shoe Machinery Corp*, 392 US 481 (1968), the court held that only direct purchasers who overpay for goods that are the subject of a price-fixing conspiracy may recover damages. Members of the conspiracy cannot reduce damages owed to direct purchasers by showing that the overcharges were 'passed on' down the chain of commerce. Likewise, persons who buy from the direct purchasers cannot bring a federal claim alleging that they absorbed part of the alleged overcharge. According to the court, '[p]ermitting the use of pass on theories under section 4 essentially would transform treble damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers'. Injunctive relief is available to indirect purchaser classes under federal law, and a nationwide class action claim for injunctive relief can be joined to state law claims for monetary damages in federal court. See, for example, *In Re OSB Antitrust Litigation*, 2007 WL 2253419 (ED Pa 3 August 2007).

State antitrust laws, however, are not pre-empted by federal antitrust laws. Twenty-four states have adopted statutes that allow indirect purchaser claims of some sort, including in the class action

context. The courts of another four states have allowed indirect purchaser claims under those states' case law. In addition, state law indirect purchaser actions may be brought in federal court when the state law claims are supplemental to the federal cause of action.

Under CAFA, indirect purchaser class actions now can be filed in (or removed to) federal court when the total amount in controversy for all class members exceeds US\$5 million and any class member is a citizen of a different state than any defendant, though not when at least two-thirds of class members and the primary defendants are all citizens of the state in which the suit is filed. State plaintiffs may try to file suit in defendants' home states to avoid removal to federal court.

24 Can plaintiffs opt out or opt in?

Plaintiffs can only opt out, they cannot opt in. In any action in which a class is certified on grounds of commonality of questions of law or fact and superiority of the class action procedure under rule 23(b)(3), plaintiffs must be given the opportunity to opt out. The notice provided to potential class members must specify the means for opting out and the deadline by which exclusion must be requested (Fed R Civ P 23(c)(2)).

25 Do collective settlements require judicial authorisation?

Class settlements do require judicial authorisation. The 'court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defences of a certified class' and must direct the manner of notice of the settlement to all class members (Fed R Civ P 23(e)(1)(A)). Under the CAFA, coupon settlements are subject to heightened scrutiny and appropriate state and federal officials must be served with notice of the proposed settlement.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

A national antitrust class may be certified under the federal antitrust statutes. A nationwide antitrust class may also be certified under some state antitrust statutes as long as it accords with federal due process standards.

27 Has a plaintiffs' collective-proceeding bar developed?

There are a number of major plaintiffs' firms that specialise in antitrust class actions.

Remedies

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

Section 4 of the Clayton Act allows private plaintiffs to recover treble their actual damages, along with costs and attorneys' fees. The plaintiff must show that the damages were caused by an antitrust violation, in contrast to damages that stem from the rigours of competition itself, mismanagement, recession, or other general business conditions. Further, the plaintiff has a duty to mitigate damages.

29 What other forms of remedy are available?

Section 16 of the Clayton Act provides for injunctive relief in private antitrust actions. A court may also grant a preliminary injunction in certain limited circumstances – namely, if the plaintiff demonstrates the threat of irreparable harm in the absence of a preliminary injunction and a likelihood of success on the merits.

30 Are punitive or exemplary damages available?

There are no separate statutory provisions that grant punitive or exemplary damages. Treble damages are intended to serve a punitive function and deter future misconduct.

31 Is there provision for interest on damages awards?

Sections 4 and 4A of the Clayton Act state that, when the defendant has acted in bad faith to delay the proceedings, a plaintiff can recover pre-judgment interest for the period covering the date of service of the complaint to the date of judgment or for any shorter period as the court finds just under the circumstances. By contrast, the award of post-judgment interest is mandatory and is computed daily from the date of judgment to the date of payment (28 USC section 1961 (1994)).

32 Are the fines imposed by competition authorities taken into account when settling damages?

Fines imposed by competition authorities are not taken into account in determining civil damages. Fines have no legal effect on civil proceedings and the jury will not be permitted to hear about them. The rationale for this exclusion is that fines paid to the government do not compensate private plaintiffs for their antitrust damages.

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

As in all federal cases, a prevailing party (plaintiff or defendant) can recover some of its 'costs' – a defined term that includes items such as

photocopying and transcripts but not attorneys' fees. Under section 4 of the Clayton Act, however, a prevailing plaintiff may recover its reasonably incurred attorneys' fees.

34 Is liability imposed on a joint and several basis?

Since participants in a conspiracy have acted in concert, courts traditionally impose liability on a joint and several basis upon any defendants found liable under the law. Defendants who have been accepted into the criminal amnesty programme of the Antitrust Division and have agreed to provide assistance to plaintiffs in a civil action may be excused from joint and several liability.

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

Antitrust defendants have no right of contribution from co-defendants under statute or federal common law (*Texas Industries v Radcliff Materials Inc*, 451 US 630 (1981)). Yet, courts have upheld agreements (often called judgment-sharing agreements) between defendants to share in the payment of damages (*In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 221853 (ND Ill 1995)). Indemnification is possible only if a defendant can show that it is an 'innocent actor whose liability stems from some legal relationship with the truly culpable party' (*Wills Trucking Inc v Baltimore and Ohio Railroad Co*, 1999 WL 357775, at *3 (6th Cir 1999)).

36 Is the 'passing-on' defence allowed?

Generally, there is no 'pass-on' defence under the Sherman Act (see *Illinois Brick Co v Illinois*, 431 US 720, 731-33 (1977); and *Hanover Shoe, Inc v United Shoe Machinery Corp*, 392 US 481 (1968)). Therefore, an antitrust defendant typically cannot defend on the ground that the plaintiff shifted the cost of the defendant's wrongdoing to the plaintiff's customers. Some state laws, however, do permit a 'pass-on' defence.

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

There are numerous affirmative defences available. In some instances, the availability of a given defence will depend on the jurisdiction in which the matter is pending. For example, courts appear to be split as to the availability of the defence of *in pari delicto*, which applies if the plaintiff participated in unlawful activities with the defendant and attempts to recover the resulting damages. Compare *Lamp Liquors, Inc v Adolph Coors Co*, 563 F2d 425, 431 (10th Cir. 1977) (the defence is not recognised) with *Columbia Nitrogen Corp v Royster Co*, 451 F3d 3, 15-16 (4th Cir 1971) (allowing the limited version of

MAYER • BROWN

T Mark McLaughlin
Andrew S Marovitz
Britt M Miller

mmclaughlin@mayerbrown.com
amarovitz@mayerbrown.com
bmiller@mayerbrown.com

71 South Wacker Drive
Chicago, Illinois 60606
United States

Tel: +1 312 782 0600
Fax: +1 312 701 7711
www.mayerbrown.com

the defence). The same is true with respect to the question of whether the defence of unclean hands can be asserted in suits seeking injunctive relief (compare *La Petroleum Retail Dealers Inc v The Tx Co*, 148 F Supp 334, 336 (WD La 1956) (allowing the defence) with *Credit Bureau Reports Inc v Retail Credit Co*, 358 F Supp 780, 797 (SD Tx 1971) (refusing to allow the defence)). Examples of generally available defences include a statute of limitations defence (if the plaintiff files suit after the four-year limitations period has run), sovereign immunity, petitioning the government for redress (including the filing of a lawsuit) or compulsion or approval of a challenged action by the US or a foreign government.

Partial or complete statutory defences also may be available including, for example, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) which grants leniency or amnesty candidates limited protection from civil liability.

38 Is alternative dispute resolution available?

Arbitration and mediation are available as alternative means of dispute resolution. Since the Supreme Court first approved the arbitration of antitrust claims in international transactions (*Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985)), it has been employed with more frequency. Generally, if the parties have contractually agreed to arbitrate their dispute, the court will enforce that agreement. See *JLM Industries v Stolt-Nielsen SA*, 387 F3d 163 (2d Cir 2004); *Kristian v Comcast Corp*, 446 F3d 25, 35-36 (1st Cir 2006).

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