GETTING THE DEAL THROUGH

Private Antitrust Litigation

in 27 jurisdictions worldwide

2008

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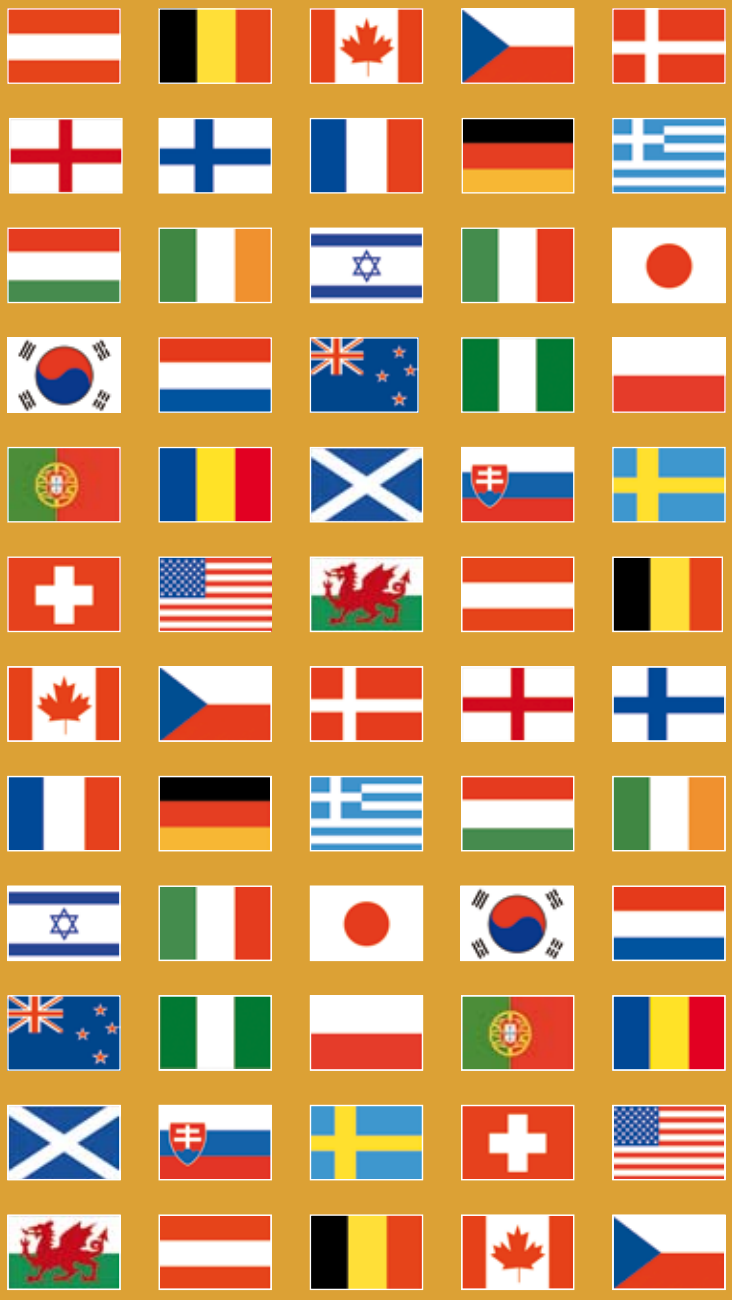

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GLOBAL COMPETITION REVIEW

United States

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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. Although many cases flow from government investigations and prosecutions, others arise independent of any such proceedings. Notably, with the passage of the Class Action Fairness Act 2005 (CAFA), many indirect purchaser class actions that might have been filed in state courts are originating instead in federal courts, thereby facilitating the coordination of such cases with their direct purchaser counterparts.

A significant percentage of private actions continues 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 vertical conduct and 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. In 2006, the Supreme Court in *Illinois Tool Works Inc v Independent Ink Inc*, 126 S Ct 1281 (2006), re-examined the "presumption of per se illegality of a tying arrangement involving a patented product". The Supreme Court concluded that there no longer will be a presumption that a patent confers market power, and that the plaintiff is required to "prove that the defendant has market power in the tying product."

Just this year, the Supreme Court issued three particularly significant antitrust opinions. In *Bell Atlantic Corp v Twombly*, 127 S Ct 1955 (2007), the Court held that to survive a motion to dismiss, a section 1 complaint (one alleging an antitrust conspiracy) must allege "enough factual matter (taken as true) to suggest that an agreement was made". A complaint's allegations must go beyond "labels" and "conclusions" that an agreement existed, raising instead "a right to relief above the speculative level". It must create "a reasonable expectation that discovery will reveal evidence of illegal agreement". Therefore, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"; the allegations "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct".

In *Credit Suisse First Boston Ltd v Billing*, 127 S Ct 2383 (2007), the Court held, in the context of antitrust suits challenging underwriter conduct during initial public offerings of stock (IPOs), that there was a conflict between the federal securities laws and antitrust laws – rising to the level of "incompatibility" – such that the securities laws controlled and the challenged conduct was immune from antitrust scrutiny.

Finally, in *Leegin Creative Leather Products Inc v PSKS Inc*, 127 S Ct 2705 (2007), the Court overruled the century-old per se rule articulated in *Dr Miles Medical Co v John D Park & Sons Co*, 220 US 373 (1911), holding that the legality of vertical minimum price restraints should be decided under the "rule of reason", pursuant to which courts evaluate allegedly anti-competitive conduct on a case-by-case basis.

In addition, 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 (see, eg, *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 Supporting Memorandum, filed under seal 22 June 2007 (Docket Nos. 598 and 600)).

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 (eg, price fixing and market alloca-

tion 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, 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 defendant(s) by different plaintiffs in multiple jurisdictions – both state and federal. When multiple related federal actions are pending against the same defendant, 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 Payment Card Interchange Fee & Merchant Disc Antitrust Litig*, 398 F Supp 2d 1356 (JPML 2005)). Although there is no state equivalent to the JPML, the passage of the 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 Are contingency fees available?

Contingency fees 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. Most courts honour such demands. See, for example, *City of New York v Pullman Inc*, 662 F 2d 910, 920 (2d Cir 1981); *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 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.

13 Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

Absent extenuating circumstances, courts may admit evidence adduced during criminal proceedings in subsequent civil litigation (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 "particularized 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.

14 What is the applicable standard of proof and who bears the burden?

Under section 4 of the Clayton Act, a private 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); *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)).

15 What is the typical timetable for class and non-class 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.

16 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" (ie, 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)).

17 What appeals are available?

In federal court, final judgments may be appealed to the applicable court of appeals. 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.

Class proceedings

18 Are class proceedings available in respect of antitrust claims?

Class proceedings are available in private antitrust claims brought in both federal 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 the CAFA, bringing into the federal courts certain indirect customer antitrust class actions that previously had been litigated in state courts.

19 Are class 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.

20 If class 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 members must be typical of the claims or defences 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 one of rule 23(b)'s requirements, the most common of which is that the members of the purported class share questions of law or fact and that a class action is the superior method of adjudication.

21 Have courts actually certified class proceedings in antitrust matters?

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

- *In re Hydrogen Peroxide Antitrust Litigation*, 240 FRD 163 (ED Pa 2007). In an action alleging a horizontal price-fixing conspiracy, the court certified a class, finding at least seven common questions of law and fact, including the effect of the alleged conspiracy on prices, duration of the alleged conspiracy, and whether the alleged conspiracy violated the Sherman Act. Application of the rule 23(a) factors was not controversial, but the 23(b)(3) requirements of "predominance" and "superiority" were "hotly contested" with defendants arguing that plaintiffs could not show that "common proof predominates with respect to antitrust injury or impact." The Court rejected these arguments, finding that "[a]t least with regard to violations of the antitrust laws and impact on plaintiffs […] most of plaintiffs' proof will be common rather than specific" and they could be "best" adjudicated in a class setting.
- *Behrend v Comcast Corp*, 2007 WL 1300725 (ED Pa 2 May 2007). Plaintiffs sought to represent a class consisting of cable television customers who had subscribed to certain Comcast video programming services in the Philadelphia area since December 1999. Comcast argued that, because plaintiffs had "diverging interests", the requirements of typicality and adequacy could not be met. The court disagreed and certified the class, stating that "factual differences […] are insufficient to defeat typicality so long as there is a strong similarity of legal theories and the named plaintiffs do not have unique circumstances."

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 the 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".

22 Are 'indirect claims' permissible in class and non-class proceedings?

With modest exceptions, indirect purchaser suits are generally precluded under 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".

State antitrust laws, however, are not pre-empted by federal antitrust laws, and more than 20 states allow indirect purchaser claims of some sort, including in the class action context. 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 the CAFA, indirect purchaser class actions can now be filed in 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.

23 Can plaintiffs opt out?

Plaintiffs can opt out. 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)).

24 Do class 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.

25 If the country is divided into multiple jurisdictions, is a national class 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.

26 Has a plaintiffs' class-proceeding bar developed?

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

Remedies

27 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.

28 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.

29 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.

30 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. 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)).

31 Are 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.

32 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.

Update and trends

Two decisions this year from the Supreme Court will have profound effects upon the adjudication of antitrust claims in the United States:

- The *Twombly* decision requires that complaints allege "enough factual matter (taken as true) to suggest that an agreement was made". No longer may plaintiffs survive motions to dismiss by simply parroting the statutory language of the Sherman Act in their pleadings. They now must provide more detail, and cannot rest on general labels and conclusions that an unlawful agreement was reached.
- The *Leegin* decision directs courts to use the 'rule of reason test' – the predominant test in US antitrust law – to evaluate the procompetitive and anti-competitive effects of vertical minimum price restraints. For the past 95 years, such restraints were deemed 'per se' unlawful under the *Dr Miles* case.

Both decisions will have significant consequences for US businesses (or foreign companies doing business in the US). Stricter pleading standards may dissuade potential litigants from filing antitrust cases unless they have sufficient facts to satisfy *Twombly*'s requirements. And stricter proof standards may dissuade distributors and resellers from filing resale price maintenance claims unless they believe that they can muster sufficient economic proof to demonstrate that the anti-competitive effects of such restraints outweigh the pro-competitive benefits of stimulated interbrand competition.

33 Is liability imposed on a joint and several basis?

Liability can be imposed on a joint and several basis. Because participants in a conspiracy have acted in concert, courts traditionally impose liability on a joint and several basis. 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.

34 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 Litig*, 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)).

35 Is the 'passing on' defence taken into account?

Generally, there is no "pass on" defence under the Sherman Act (see *Illinois Brick Co v Illinois*, 431 US 720, 731-33 (1977)); *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.

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

There are numerous affirmative defences available. One example is 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. Another example is a statute of limitations defence if the plaintiff files suit after the four-year limitations period has run. Other defences include 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.

37 Are there alternative means of 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); *Currency Conversion Fee Antitrust Litig*, 361 F Supp 2d 237 (SDNY 2005), appeal granted, order amended, 2005 WL 1871012 (SDNY 2005).

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