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# THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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EIGHTH EDITION

EDITOR  
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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ILENE KNABLE GOTTS

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# EDITOR'S PREFACE

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Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on') to public enforcement. In some jurisdictions (e.g., Lithuania, Romania, Switzerland and Venezuela), however, private actions remain very rare and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation pending in many jurisdictions throughout the world to provide a greater role for private enforcement and courts beginning to act in such cases. In Japan, for example, over a decade passed from adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. In other jurisdictions, the transformation has been more rapid. In Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the past few years, some jurisdictions have had decisions that clarified the availability of the pass-on defence (e.g., France and Korea) as well as indirect-purchaser claims (e.g., Korea). Moreover, we are at a critical turning point in the EU: by 2016, EU Member States are required to implement the EU's directive on private enforcement into their national laws. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights. Indeed, private enforcement developments in some jurisdictions have supplanted the EU's initiatives. The English and German courts, for instance, are emerging as major venues for private enforcement actions. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have also taken steps to facilitate collective action/class action legislation. Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court.

The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions; and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions, such as Hungary, seek to

provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low as compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*). Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful conduct. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions have not been available except to organisations formed to represent consumer members; a new class action law will come into effect by 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work product privileges in Japan; limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

**Ilene Knable Gotts**

Wachtell, Lipton, Rosen & Katz

New York

August 2015



## Chapter 27

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# UNITED STATES

*Chul Pak, Tiffany L Lee and Daniel P Weick<sup>1</sup>*

### I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The US Supreme Court significantly changed the private antitrust litigation landscape in 2006 by establishing a heightened ‘plausibility’ pleading standard that governs whether a complaint survives a motion to dismiss.<sup>2</sup> Subsequent decisions have clarified that:

- a* conduct must be directly linked to cognisable harm or injury gives rise to an antitrust claim;<sup>3</sup>
- b* activities inextricably intertwined with US Securities and Exchange Commission regulatory activity are immune from antitrust attack;<sup>4</sup>
- c* plaintiffs bringing antitrust actions under state law in federal court may pursue class actions or class-action remedies not otherwise available in state court;<sup>5</sup>
- d* a federal court’s denial of class-certification for a proposed class does not preclude a state court from later adjudicating another plaintiff’s proposed class;<sup>6</sup>

---

1 Chul Pak, Tiffany L Lee and Daniel P Weick are members of the antitrust practice at Wilson Sonsini Goodrich & Rosati.

2 *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); see also *Wood v. Moss*, 134 S. Ct. 2056 (2014).

3 *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009); *WeyerHaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

4 *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007).

5 *Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010).

6 *Smith v. Bayer*, 131 S. Ct. 2368 (2011).

- e* arbitrators may not impose class arbitration on parties unless it is contractually permissible;<sup>7</sup>
- f* express arbitration clauses trump class-action rights, even in antitrust cases;<sup>8</sup>
- g* expert testimony does not overcome lack of commonality in class actions;<sup>9</sup>
- h* class certification requires that plaintiffs establish that damages can be proven with class-wide evidence to satisfy FRCP 23(b)(3)'s predominance requirement;<sup>10</sup>
- i* individual corporate entities that are part of a joint venture may be subject to antitrust 'rule-of-reason' scrutiny;<sup>11</sup>
- j* an order disposing of one discrete case consolidated in an MDL under 28 USC Section 1407 is an appealable final decision under 28 USC Section 1291;<sup>12</sup> and
- k* that *stare decisis* may have less than 'usual force in cases involving the Sherman Act'.<sup>13</sup>

The lower federal courts apply these Supreme Court cases, deciding issues related to antitrust injury, standing requirements, the statute of limitations, class actions, discovery and pleading standards.

## II LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private plaintiffs may bring suit in federal court for violations of federal antitrust law under two provisions of the Clayton Act of 1914. Section 4 allows private plaintiffs to sue for money damages, including reasonable attorneys' fees as well as prejudgment interest on actual damages at a court's discretion if such an award is 'just' under the circumstances.<sup>14</sup> Section 16 allows private plaintiffs to sue for injunctive relief.<sup>15</sup>

### **i Statute-of-limitations limit the period of potential recovery**

A four-year statute-of-limitations applies to Section 4 claims.<sup>16</sup> The limitations period commences when the cause of action accrues, which generally occurs when the plaintiff suffers injury and damages become ascertainable.<sup>17</sup> Section 16 claims may also be subject to a four-year statute of limitations. Some courts have held that Section 4B also applies to

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7 *Stolt-Nielsen v. Animal Feeds*, 130 S. Ct. 1758 (2010).

8 *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

9 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

10 *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013).

11 *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010).

12 *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015).

13 *Kimble v. Marvel Entertainment*, 576 U.S. \_\_\_\_ (2015).

14 15 U.S.C. Section 15(a).

15 *Id.*, Section 26.

16 *Id.*, Section 15(b).

17 *E.g., Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338–39 (1971).

Section 16 claims, while others have held that Section 4B does not apply.<sup>18</sup> The defence of laches nevertheless bars Section 16 claims four years after accrual of the cause of action, unless the court finds equitable reasons to allow the claim.<sup>19</sup>

The statute of limitations may be tolled by government antitrust actions,<sup>20</sup> the filing of a class action,<sup>21</sup> fraudulent concealment,<sup>22</sup> duress,<sup>23</sup> or equitable estoppel.<sup>24</sup> Where a series of overt acts rather than one definitive act causes new injury to plaintiffs, the ‘continuing violation’ doctrine restarts the statute of limitations period.<sup>25</sup> Some courts allow the tacking of tolling periods.<sup>26</sup>

## ii State antitrust claims

Most US states and territories have adopted antitrust statutes. They generally mirror the federal scheme and prohibit monopolies and unreasonable agreements (like the Sherman and Clayton Acts) and unfair and deceptive trade practices (like the Federal Trade Commission (FTC) Act). The vast majority provide for private rights of action. Statute of limitations periods vary by state.

The statutes and courts’ interpretations of them differ on various points, such as the availability of treble damages,<sup>27</sup> restitution, class actions, and availability of recovery for indirect purchasers.

## III EXTRATERRITORIALITY

### i General jurisdictional rule

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits the extraterritorial reach of the Sherman Act to foreign anti-competitive conduct that either involves US import commerce or has a ‘direct, substantial, and reasonably foreseeable effect’ on US

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18 E.g., *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 556 (4th Cir. 1974).

19 E.g., *ITT v. GTE*, 518 F.2d 913, 929 (9th Cir. 1975), overruled on other grounds by *California v. American Stores Co.*, 495 U.S. 271 (1990).

20 15 U.S.C. Section 16(i).

21 *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

22 E.g., *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 536–38 (6th Cir. 2008); *In re Linerboard Antitrust Litigation*, 305 F.3d 145, 160 (3d Cir. 2002).

23 E.g., *Willmar Poultry Co. v. Morton-Norwich Products*, 1974-2 Trade Cas. (CCH) Paragraph 75,292, at 97,896 (D. Minn. 1 October 1974), aff’d 520 F.2d 289 (8th Cir. 1975); *PhilCo Corp v. RCA*, 186 F. Supp. 155, 161–62 (E.D. Pa. 21 June 1960).

24 E.g., *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974).

25 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

26 E.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460–61 (2d Cir. 1974), abrogated on other grounds by *Goldberger v. Integrated Resources Inc.*, 209 F.3d 43 (2d Cir. 2000).

27 Compare Cal. Bus. & Prof. Code Sections 16750, 16761, 17070, & 17082 with N.Y.S. Gen. Bus. Law Sections 340(5) & 349(h). A plaintiff that brings state-law claim brought in federal court a plaintiff has access to the procedures available under Federal Rule of Civil Procedure Rule 23. *Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

import or domestic commerce.<sup>28</sup> Courts have construed this to require a ‘reasonably proximate causal nexus’ between the conduct and the effect of US commerce or import commerce, a standard similar to a proximate causation standard.<sup>29</sup> A plaintiff’s injury must occur in the US rather than a foreign market to ‘give rise to’ a claim under the Sherman Act.<sup>30</sup> Although the US effects requirement is sometimes characterised as a jurisdictional issue, it has been treated as a substantive element of the Sherman Act.<sup>31</sup>

When a plaintiff alleges other antitrust claims, such as under the Clayton Act, the extraterritoriality test applies,<sup>32</sup> subject to territorial limitations found in the substantive provision asserted. For example, Section 3 of the Clayton Act only reaches transactions in which the products are sold for use, consumption or resale in the US.<sup>33</sup> Additionally, the FTAIA extends the Sherman Act’s extraterritoriality test to apply to the FTC Act.<sup>34</sup>

A circuit split has arisen as to whether the FTAIA bars Sherman Act claims arising out of foreign conduct of a cartel. While the Seventh Circuit interpreted the FTAIA as barring the Sherman Act claims,<sup>35</sup> the Ninth Circuit held that the conduct of the same cartel was within the reach of the Sherman Act.<sup>36</sup> The US Supreme Court recently denied

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- 28 15 U.S.C. Section 6a. Where conduct involves import trade or commerce, the FTAIA does not apply and courts instead apply the common law ‘intended effects’ test, requiring that the foreign anti-competitive conduct was intended to and actually affected US trade or commerce. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993); *United States v. Aluminum Co. of America*, 148 F.2d 416, 443–44 (2d Cir. 1945). Some courts supplement the effects test with considerations of comity. See *Timberlane Lumber Co. v. Bank of America National Trust & Savings Association*, 549 F.2d 597, 611–15 (9th Cir. 1976).
- 29 *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, No. 13-2280, slip op. (2d Cir. 4 June 2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 683 F.3d 845, 857 (7th Cir. 2014) (*en banc*); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (*en banc*); *In re Dynamic Random Access Memory (DRAM)*, 546 F.3d 981 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-La Roche Ltd*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).
- 30 *F. Hoffman-La Roche Ltd v. Empagran SA*, 542 U.S. 155 (2004); *Empagran S.A. v. F. Hoffmann-La Roche Ltd*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).
- 31 *Minn-Chem, Inc. v. Agrium Inc., et al.*, 683 F.3d 845 (7th Cir. 2012); *Animal Science Products, Inc. v. China Minmetals Corp. et al.*, 654 F.3d 462 (3d Cir. 2011), cert. denied, 132 S.Ct. 1744 (2012); *In re TFT-LCD Antitrust MDL*, No. 1827, 2011 U.S. Dist. LEXIS 33364 (N.D. Cal. 16 March 2011); *contra United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (*en banc*) (the FTAIA’s limitations are jurisdictional in nature).
- 32 E.g., *United Phosphorus Ltd v. Angus Chemical Co.*, No. 94 C 2078, 1994 WL 577246, at \*5 (N.D. Ill. 18 October 1994); *The In Porters SA v. Hanes Printables Inc.*, 663 F. Supp. 494, 498 n.4 (M.D.N.C. 11 June 1987).
- 33 15 U.S.C. Section 14.
- 34 *Id.*, Section 45(a)(3).
- 35 *Motorola Mobility v. AU Optronics Corp., et al.*, 775 F.3d 816 (7th Cir. 2014).
- 36 *United States v. Hui Hsiung*, 778 F.2d 738 (9th Cir. 2015).

a petition for certiorari to resolve this issue so lower courts will continue to develop the law to clarify how these decisions apply.

## ii Comity considerations

A court may employ comity considerations to decline jurisdiction, even when the FTAA's requirements have been satisfied.<sup>37</sup> Comity considerations generally come into play when domestic and foreign law are in conflict, such as where one law requires a defendant to engage in acts prohibited by other laws.<sup>38</sup>

## iii Exemptions

Foreign sovereigns are presumptively immune from US courts' jurisdiction under the Foreign Sovereign Immunities Act (FSIA).<sup>39</sup> To rebut the presumption, a plaintiff must show that one of the FSIA's seven exceptions applies.<sup>40</sup> The most common exemption in antitrust cases is the commercial activity exception, which precludes FSIA immunity where a foreign sovereign state's commercial activity has a 'nexus' with the US.<sup>41</sup> The scope of 'commercial' activity, 'foreign state', and the specific nexus required to meet this exception has been extensively litigated.<sup>42</sup>

The act-of-state doctrine requires US courts to recognise the validity of public acts performed by authorised agents of foreign sovereign states within their jurisdictions.<sup>43</sup> Thus, where a plaintiff's claim depends on the invalidity of a foreign sovereign state's domestic act, the act-of-state doctrine may absolve the defendant of liability. Various exceptions apply, such as where an extant treaty provides applicable legal standards, where the act involves a commercial function, or where US foreign policy interests would not be advanced by application of the doctrine.

A private party whose conduct was compelled (and not merely sanctioned or assisted) by a foreign sovereign state will generally be immune from antitrust liability

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37 HR Rep. No. 97-686, at 13 (1982), reprinted in 1982 USCCAN 2487, 2498.

38 *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798–99 (1993).

39 28 U.S.C. Section 1604.

40 Id. Section 1605.

41 The commercial activity exception, Section 1605(a)(2), states that immunity does not apply when 'the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States'.

42 E.g., *Kato v. Ishihara*, 360 F.3d 106, 108 (2d Cir. 2004); *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1380–82 (8th Cir. 1993); *Tubular Inspectors Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 183–86 (5th Cir. 1992).

43 *WS Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990); see also *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976).

under the assumption that the defendant's activity was effectively foreign sovereign state activity.<sup>44</sup>

## IV STANDING

### i Standing under Section 4 of the Clayton Act

To maintain a lawsuit under Section 4 of the Clayton Act, an antitrust plaintiff must allege:

- a* the plaintiff is a 'person' under Section 1 of the Clayton Act;<sup>45</sup>
- b* the defendant violated the 'antitrust laws';<sup>46</sup>
- c* antitrust injury ('impact' or 'fact of damage'),<sup>47</sup> that is, harm to competition<sup>48</sup> to plaintiff's 'business or property' proven by direct or circumstantial evidence or inference<sup>49</sup> with a reasonable degree of certainty;<sup>50</sup> and
- d* the antitrust violation was a material and substantial cause of the injury.<sup>51</sup>

Finally, plaintiff must satisfy the remoteness doctrine, which requires a plaintiff's injury to not be too remote from defendant's conduct, via a five-factored inquiry:

- a* causal connection between the violation and the harm to the plaintiff, and whether defendants intended to cause the harm;
- b* nature of the injury, including whether the plaintiff is a consumer or competitor;
- c* directness of the injury, and how speculative or tenuous the damages are;

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44 E.g., *Mannington Mills v. Congoleum Corporation*, 595 F.2d 1287, 1293 (3d Cir. 1979).

45 15 U.S.C. Section 15. Section 12(a) defines 'persons' as 'corporations and associations existing under or authorized by laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country'. Courts have also interpreted 'persons' to include individual consumers (e.g., *Reiter v. Sonotone Corporation*, 442 U.S. 330, 340–42 (1979)), partnerships (e.g., *Coast v. Hunt Oil Co.*, 195 F.2d 870, 871 (5th Cir. 1952)), states (e.g., *Standard Oil Co. v. Arizona*, 738 F.2d 1021, 1023 (9th Cir. 1984)), and foreign governments (*Pfizer v. Government of India*, 434 U.S. 308, 318–20 (1978)). Section 4 of the Clayton Act (15 U.S.C. Section 15(b)) generally limits recovery by foreign governments to actual, instead of treble, damages. While the United States and state attorneys general are not considered 'persons' under the Clayton Act, they are nonetheless entitled to sue on their own behalf under Sections 4A and 4C of the Clayton Act (15 U.S.C. Sections 15a, 15c).

46 E.g., 15 U.S.C. Sections 12(a) and 15.

47 *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

48 E.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 488 (1977); see, e.g., *Southeast Missouri Hospital v. C.R. Bard, Inc.*, 616 F.3d 888 (3d Cir. 2010); *Race Tires America v. Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010); But see *Palmyra Park Hospital v. Phoebe Putney Memorial Hospital*, 604 F.3d 1291 (11th Cir. 2010).

49 *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969).

50 *Mostly Media v. US W Communications*, 186 F.3d 864, 865–66 (8th Cir. 1999); *OK Sand & Gravel v. Martin Marietta Technologies*, 36 F.3d 565, 573 (7th Cir. 1994).

51 E.g., *Tal v. Hogan*, 453 F.3d 1244, 1258 (10th Cir. 2006).

- d* potential for duplication of recovery or complex apportionment of damages; and
- e* whether more direct victims exist.

The doctrine generally limits the plaintiff class to consumers and competitors, and denies standing to creditors, employees, officers, shareholders and suppliers of antitrust victims. The remoteness doctrine may bar an indirect purchaser<sup>52</sup> from bringing a Section 4 claim unless it is a competitor.<sup>53</sup> Some courts require that the plaintiff is an ‘efficient enforcer’.<sup>54</sup>

## ii Standing under Section 16 of the Clayton Act

A plaintiff who has standing to bring an antitrust action under Section 4 will also have standing under the more lenient requirements of Section 16, which are as follows:<sup>55</sup>

- a* the plaintiff is a ‘person, firm, corporation, or association’;<sup>56</sup>
- b* the defendant violated the ‘antitrust laws’;<sup>57</sup>
- c* the threatened loss or damage proximately results from the alleged antitrust violation;<sup>58</sup> and
- d* the ‘antitrust injury’, that is threatened loss or injury, is due to harm to competition.<sup>59</sup>

But there are differences. Section 16 requires ‘threatened loss or damage’<sup>60</sup> that is a ‘significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur’<sup>61</sup> rather than actual loss.<sup>62</sup> Unlike Section 4 claims, the threatened loss or injury in a Section 16 claim is not limited to injury to business or property.<sup>63</sup> Finally, courts do not impose the remoteness doctrine on Section 16 claims so indirect purchasers may sue for injunctive relief, even though they may not sue for monetary damages.<sup>64</sup>

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52 *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998).

53 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977).

54 *Sunbeam Television Corp. v. Nielson Media Research, Inc.*, 711 F.3d 1264 (11th Cir. 2013).

55 *Palmmyra Park Hospital v. Phoebe Putney Memorial Hospital*, 604 F.3d 1291 (11th Cir. 2010).

56 15 U.S.C. Section 26.

57 *Id.*

58 *Zenith Radio Corp v. Hazeltine Research*, 395 U.S. 100, 130 (1969).

59 *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 112–13 (1986); *Zenith*, 395 U.S. at 130.

60 1675 U.S.C. Section 26.

61 395 U.S. at 130; but see *Freedom Holdings v. Cuomo*, 624 F.3d 38 (2d Cir. 2010), cert. denied sub nom. *Freedom Holdings v. Schneider*, 31 S. Ct. 1810 (2011).

62 15 U.S.C. Section 15.

63 *Cargill*, 479 U.S. at 111.

64 E.g., *In re Relafen Antitrust Litigation*, 221 F.R.D. 260, 273–74 (D. Mass. 12 May 2004).

iii Indirect purchaser standing

Generally, indirect purchasers who purchase from a defendant but indirectly through a downstream distributor cannot recover under federal antitrust laws unless:<sup>65</sup>

- a the direct purchaser had a pre-existing ‘cost-plus’ contract with an overcharge, shifting the entire overcharge to the indirect purchaser;<sup>66</sup>
- b the ownership-control exception where the direct purchaser is owned or controlled by the defendant or the indirect purchaser;<sup>67</sup> or
- c the direct purchaser was a co-conspirator.<sup>68</sup>

Indirect purchasers may recover under the *Illinois Brick* repealer statutes of 26 states as well as state consumer protection statutes.<sup>69</sup>

V DISCOVERY

The scope of discovery in antitrust cases is broad and expansive. Federal Rule of Civil Procedure (FRCP) 26 allows discovery of a reasonable time, geographical and subject matter if requested information is relevant to any claim or defence and outweighs the burden imposed on the responding party. What is relevant for discovery is broader than what is admissible as evidence at trial.

Courts may restrict ‘unduly burdensome’ discovery requests where the burden and expense outweigh the prospective benefit of the requests.<sup>70</sup> FRCP 26(c) allows courts to restrict discovery of confidential business information or trade secrets and privileged attorney–client communications or attorney work product. Grand jury materials are only discoverable if the party has strongly demonstrated a ‘particularised need’ for the materials.<sup>71</sup>

In deciding whether to allow discovery from non-party market participants, courts consider the relevance of and need for the information, whether the information is protected as trade secrets or confidential commercial information, and whether the

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65 *Illinois Brick v. Illinois*, 430 U.S. 720, 735 (1977).

66 *Hanover Shoe, Inc. v. United Machine Corp.*, 392 U.S. 481, 484 (1968); *Illinois Brick*, 431 U.S. at 736.

67 *Illinois Brick*, 431 U.S. at 736 n.16.

68 E.g., *Paper Systems v. Nippon Paper Industries Co.*, 281 F.3d 629, 631 (7th Cir. 2002); *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1233 (11th Cir. 1999); *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171, n.4 (8th Cir. 1998); *Arizona v. Shamrock Foods*, 729 F.3d 1208, 1212–14 (9th Cir. 1984).

69 E.g., *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002).

70 FRCP 26(b)(2)(C)(iii); e.g., *In re ATM Fee Antitrust Litigation*, No. C 04-02676 CRB, 2007 WL 1827635, at \*2 (N.D. Cal. 25 June 2007).

71 E.g., *United States v. Sells Engineering*, 463 U.S. 418, 443 (1983).



request will cause the non-party undue hardship.<sup>72</sup> A party that refuses to comply with a court order may face sanctions.<sup>73</sup>

Courts generally grant requests to compel discovery from domestic or foreign affiliates or subsidiaries of corporations that are parties to the antitrust case.<sup>74</sup> Generally, a foreign party subject to personal jurisdiction in the US is subject to discovery.<sup>75</sup> Foreign blocking statutes do not excuse a corporation present in the US to resist producing documents located abroad.<sup>76</sup>

## VI USE OF EXPERTS

Plaintiffs may use expert testimony to establish various elements of a private antitrust claim. Expert testimony is often key in certifying a class,<sup>77</sup> and on substantive antitrust issues like market or monopoly power, anti-competitive harm, antitrust injury, and damages.

Expert testimony is only admissible if:<sup>78</sup>

- a* the expert has sufficient specialised knowledge and expertise with respect to the field in question;
- b* the methodology and data used to reach the expert's conclusions are sufficiently reliable; and
- c* the expert's testimony is sufficiently relevant to assist the trier of fact.

Reliability is the most common basis on which expert testimony has been excluded. Several factors are considered to determine whether the proffered testimony is reliable, such as whether the expert's methodology has been tested, is subject to peer review or is widely accepted by the relevant scientific community.<sup>79</sup>

## VII CLASS ACTIONS

### i Requirements

FRCP 23 governs class actions, where one representative sues on behalf of all other similarly situated plaintiffs. To proceed, a class must be certified under FRCP 23(a) and 23(b).

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72 E.g., *ACT Inc. v. Sylvan Learning Sys*, No. CIV A 99-63, 1999 WL 305300, at \*1 (E.D. Pa. 14 May 1999).

73 FRCP 37.

74 E.g., *In re ATM Fee Antitrust Litigation*, 233 F.R.D. 542, 544–45 (N.D. Cal. 5 December 2005).

75 E.g., *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522 (1987); *Strauss v. Credit Lyonnais*, 242 F.R.D. 199 (E.D.N.Y. 25 May 2007).

76 E.g., *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976).

77 See Section VII, *infra*.

78 FRCP 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593–94 (1993).

79 *Id.*

Rule 23(a) requires that the plaintiff establish that:<sup>80</sup>

- a* the class is so numerous that joinder of all members would be impracticable;
- b* common questions of law and fact to the class;
- c* the claims or defences of the representative parties are typical of the claims or defences of the class; and
- d* the representative parties will fairly and adequately protect the interests of the class.

Additionally, Rule 23(b) requires that the plaintiff establish one of the following:<sup>81</sup>

- a* separate actions would create a risk of ‘inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class’;
- b* separate actions would create a risk of adjudications that ‘would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests’;
- c* ‘the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole’; or
- d* ‘questions of law or fact common to class members predominate over any questions affecting only individual members’, and ‘a class action is superior to other available methods for fairly and efficiently adjudicating the controversy’.

Most antitrust class action suits are certified under the fourth provision. Only ‘common’ questions under 23(b)(2) are relevant to the 23(b)(3) predominance analysis.<sup>82</sup>

Plaintiffs must establish that damages can be proven with class-wide evidence, that is, the case is susceptible to resolution by common proof, to satisfy 23(b)(3)’s requirement that common issues predominate.<sup>83</sup> Plaintiffs also must prove class-wide impact – that all class members suffered injury to their business or their property – using common proof.<sup>84</sup> Courts have recently required more rigorous qualitative and quantitative assessments of plaintiffs’ proposed common methodology for analysing class-wide impact and merits-related issues related to class certification. While the depth and breadth of expert testimony and the scope of pre-certification discovery necessary is decided on a case-by-case basis,<sup>85</sup> a ‘rigorous analysis’ of expert opinions is required.<sup>86</sup>

Plaintiffs’ ability to meet, rather than an intention to meet, the FRCP 23 requirements must be demonstrated by a preponderance of the evidence at the class certification stage. Thus, courts generally resolve all factual and legal disputes, including expert disputes, relevant to their certification decision at the time of class certification.

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80 FRCP 23(a).

81 FRCP 23(b).

82 *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541 (2011).

83 *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013).

84 2A P. Areeda & H. Hovenkamp, *Antitrust Law*, 398a, at 438–39 (3d ed. 2007).

85 *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 310 (3d Cir. 2009).

86 *Comcast*, 133 S. Ct. at 1432–35; *Wal-Mart*, 131 S. Ct. at 2553–54.

Class representatives may have to establish other threshold requirements, including:

- a* that the class is in existence, ascertainable and definable with reasonable specificity;<sup>87</sup> and
- b* that at least one class plaintiff is able to demonstrate standing.<sup>88</sup>

## ii Appointment of class counsel

After certification, the court must appoint class counsel to adequately and fairly represent the interests of the entire class.<sup>89</sup>

## iii Limitations on class-action settlements

### *Pre-certification settlements*

Rule 23 also allows a settlement class to be certified prior to a ruling on class certification for trial purposes. To certify a settlement class, plaintiffs must satisfy the requirements of 23(a) and meet one requirement of 23(b). However, a district court need not inquire whether the case, if tried, would present intractable management problems, allowing settlement classes to be certified where potential conflicts would defeat class certification for trial.<sup>90</sup>

### *Court approval of class settlements required*

To prevent abuse by class representatives, Rule 23(e) requires court of approval of class action settlements and voluntarily dismissals. Proposed class-action settlements, voluntary dismissals, or compromise proposals are generally approved if (1) the class meets the 23(a) and 23(b) requirements and (2) the settlement is ‘fair, reasonable, and adequate’.<sup>91</sup> Under the latter inquiry, relief under the settlement will be evaluated against the class’s expected relief at trial and its likelihood of success.<sup>92</sup> The settlement may be rejected if the court has concerns that the damages are inadequate or concerns regarding the class standing of the plaintiffs.<sup>93</sup>

### *Notice*

Upon certification, 23(b)(3) requires notice to be provided<sup>94</sup> ‘in a reasonable manner’ to all class members who would be bound by the proposal.<sup>95</sup> Typically, plaintiffs bear the cost of notice.

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87 *Zeltser v. Hunt*, 90 F.R.D. 65, 66–67 (S.D.N.Y. 9 March 1981).

88 E.g., *Prado-Steinman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000).

89 FRCP 23(g).

90 FRCP 23(b)(3)(d); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); e.g., *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 301 (3d Cir. 2011).

91 FRCP 23(e)(2); *Amchem*, 521 U.S. at 621.

92 E.g., *Wal-Mart Stores Inc. v. Visa USA Inc.*, 396 F.3d 96, 118–19 (2d Cir. 2005).

93 E.g., *In re Online DVD Rental Antitrust Litigation*, No. 4:09-CV-2029-PJH (N.D. Cal. 11 March 2011), *Refrigerant Compressors Antitrust Litigation* (E.D. Mich. 13 June 2011).

94 FRCP 23(c)(2).

95 FRCP 23(e)(1).

## VIII CALCULATING DAMAGES

### i Types of damages cognisable

A fact finder may assess damages where the plaintiff can provide ‘probable and inferential’ proof of a ‘just and reasonable estimate’ of damages.<sup>96</sup> Damages cannot be proven through ‘speculation or guesswork’.<sup>97</sup> The court will award the plaintiff treble the damages amount. Courts do not allow punitive damage awards because antitrust plaintiffs already receive treble damages.<sup>98</sup>

### ii Calculation of damages

The appropriate measure of damages depends on the type of antitrust violation alleged. Common approaches to damages are as follows:

- a* The difference between the plaintiff’s purchase price and the price the purchaser would have paid if not for the violation is a common approach where the alleged effect of the violation is an overcharge, such as cartel claims (e.g., price fixing, bid rigging, market allocations or output limitation agreements) or monopolisation.<sup>99</sup>
- b* The difference between the plaintiff’s purchase price and the price the purchaser would have paid on the open competitive market is a common measure of damages in tying cases.<sup>100</sup> A plaintiff may be entitled to recovery only when the fair market value of the tying and tied products exceeds their combined purchase price.<sup>101</sup>
- c* The plaintiff’s lost profits is a common measure of damages in cases where the plaintiff is a competitor excluded from the market or is a disfavoured purchaser in a price-discrimination case.<sup>102</sup> Damages are usually limited to lost net profits, though some courts may award lost gross profits if lost net profits are negligible.<sup>103</sup> When the plaintiff’s business has been almost or completely destroyed, courts may measure damages by lost goodwill or going concern value (i.e., the present value of lost future profits).<sup>104</sup>

### iii Mitigation

A plaintiff must mitigate damages and cannot recover losses that could have been avoided.<sup>105</sup>

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96 *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969).

97 *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

98 *McDonald v. Johnson & Johnson Co.*, 722 F.2d 1370, 1381 (8th Cir. 1983).

99 E.g., *Howard Hess Dental Labs Inc. v. Dentsply International Inc.*, 424 F.3d 363, 374 (3d Cir. 2005).

100 E.g., *Crossland v. Canteen Corp.*, 711 F.2d 714, 722 (5th Cir. 1983).

101 E.g., *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672–73 (7th Cir. 1985).

102 E.g., *Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 484 (7th Cir. 1980).

103 Id.

104 E.g., *Faulkner’s Auto Body Center Inc. v. Covington Pike Toyota Inc.*, 50 Fed. Appx. 664, 667–69 (6th Cir. 2002).

105 E.g., *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 436 (5th Cir. 1985); *Litton Sys Inc. v. AT&T Corp.*, 700 F.2d 785, 820 n.47 (2d Cir. 1983).

iv **Disaggregation**

A plaintiff may only collect damages for losses caused by the defendant's antitrust violation. Therefore, the plaintiff must provide the fact finder a basis to disaggregate the losses caused by other factors.<sup>106</sup> If it does not, a damage award may be overturned on the grounds it is based on speculation and guesswork.<sup>107</sup>

iv **Other costs**

Section 4 also awards successful plaintiffs court costs, reasonable attorneys' fees, prejudgment interest on actual damages (awarded at the court's discretion if the court finds it 'just in the circumstances'), and mandatory post-judgment interest.<sup>108</sup>

**IX PASS-ON DEFENCES**

Antitrust defendants are barred from asserting pass-on defences against direct purchasers. Therefore, defendants may not introduce evidence that indirect purchasers, rather than the direct purchasers,<sup>109</sup> were in fact harmed by the defendants' antitrust violations. This bar against pass-on defences is analogous to the earlier-noted bar against claims by indirect purchasers, preventing the defensive and offensive use of the pass-on theory to prevent duplicate recovery against defendants.<sup>110</sup>

Lower courts, however, have recognised three narrow exceptions to this general ban against pass-on defences and indirect purchaser claims:

- a* for pre-existing, fixed-quantity, cost-plus contracts, because the plaintiff may show that the indirect purchaser, not the direct purchaser, was harmed by any anti-competitive overcharge;<sup>111</sup>
- b* where the direct purchaser (i.e., the intermediary) is owned or controlled by either the defendant or the indirect purchaser such that the relationship involved 'such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale';<sup>112</sup> and

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106 E.g., *Blue Cross & Blue Shield United v. Marshfield Clinic*, 152 F.3d 588, 592–93 (7th Cir. 1998).

107 E.g., *US Football League v. NFL*, 842 F.2d 1355, 1377–79 (2d Cir. 1988).

108 15 U.S.C. Section 15(a); 28 U.S.C. Section 1961 (2000).

109 *Hanover Shoe Inc. v. United Machinery Corp.*, 392 U.S. 481, 491–94 (1968).

110 See Section IV, *supra*; *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730–31 (1977).

111 *Illinois Brick*, 431 U.S. at 735–36; *Mid-West Paper Prods Co. v. Continental Group Inc.*, 596 F.2d 573, 577 (3d Cir. 1979).

112 *Jewish Hospital Association of Louisville v. Stewart Mechanical Enterprises Inc.*, 628 F.2d 971, 974–75 (6th Cir. 1980).

c where the intermediary is a direct participant in a conspiracy with the defendant, such that the intermediary and defendant are then viewed as a single entity from which the plaintiff is a direct purchaser.<sup>113</sup>

## X FOLLOW-ON LITIGATION

### i Prima facie evidence

A government judgment or decree may be *prima facie* evidence in a private antitrust suit if the government judgment or decree is: (1) final, (2) rendered in a civil or criminal proceeding brought by or on behalf of the United States, (3) under the antitrust laws to the effect that a defendant has violated said laws, and (4) is not a consent judgment or decree entered before any testimony has been taken.<sup>114</sup> Additionally, the private plaintiff must be injured in fact by the antitrust violation proven in the government action.<sup>115</sup> Guilty pleas to a DoJ indictment generally are admissible as evidence in subsequent private litigation.<sup>116</sup> Since DoJ and FTC consent decrees are typically for settlement purposes, they do not constitute an admission by the defendant that the law has been violated.<sup>117</sup>

The *prima facie* effect is given to all matters ‘distinctly put in issue and directly determined’ and ‘necessarily decided’ against the defendant in the government proceeding,<sup>118</sup> but is limited to the period, products and geographical scope adjudicated in the prior government action.<sup>119</sup>

### ii Collateral estoppel

The collateral estoppel doctrine applies in private antitrust suits.<sup>120</sup> Generally, the doctrine bars the retrying of issues that have already been determined by a court, and gives them conclusive effect in subsequent suits that involve a party to the prior litigation.<sup>121</sup> A defendant can use collateral estoppel doctrine defensively to prevent a plaintiff from re-litigating issues previously decided and lost by the government,<sup>122</sup> while a plaintiff can

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113 E.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 604 (7th Cir. 1997).

114 15 U.S.C. Section 16(a); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951).

115 E.g., *Theatre Enterprises Inc. v. Paramount Film Distribution Corp.*, 346 U.S. 537, 543 (1954).

116 FRE 410. A guilty plea is not admissible if a plea is later withdrawn or is a *nolo contendere* (‘no contest’) plea.

117 *United States v. ITT Continental Baking Co.*, 440 U.S. 223 (1975).

118 15 U.S.C. Section 16(a).

119 E.g., *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 184 (D.C. Cir. 1965); *Michigan v. Morton Salt Co.*, 259 F.Supp. 35, 68, 74 (D. Minn. 28 July 1966).

120 15 U.S.C. Section 16(a) (‘Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel’).

121 E.g., *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

122 *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322, 325–26 (4th Cir. 2004).

use collateral estoppel offensively to bar a defendant from re-litigating issues lost in prior government actions. Collateral estoppel applies to prior DoJ actions, but not to findings made by the FTC.<sup>123</sup>

Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)<sup>124</sup> offers criminal defendants who participate in the DoJ's Corporate Leniency Program the opportunity to limit civil liability to single rather than treble damages if they provide 'satisfactory cooperation' to civil claimants. To qualify, defendants must provide a full account of relevant facts, furnish all relevant documents, and participate in interviews and depositions reasonably requested by the plaintiff. ACERPA does not affect the plaintiff's right to recover costs, attorneys' fees and prejudgment interest provided under the Clayton Act.

## XI PRIVILEGES

### i Attorney–client privilege

The attorney–client privilege protects confidential communications between an attorney and client made for the purpose of rendering or receiving legal advice, and applies in the antitrust context to the same extent as in other contexts. The privilege extends to confidential communications between corporate employees and the corporation's lawyer when those communications are necessary to facilitate the provision of legal advice to the corporation,<sup>125</sup> and covers communications with current and former employees,<sup>126</sup> subsidiaries, and affiliates.<sup>127</sup> It does not extend to communications with a lawyer acting in a business capacity.<sup>128</sup>

### ii Waiver of attorney-client privilege

Privilege is waived if the communication is voluntarily disclosed to a third party,<sup>129</sup> unless disclosure is necessary to provide legal advice (e.g., a secretary or an interpreter) or is part of the community-of-interest (or joint defence) privilege.<sup>130</sup> Privilege may be waived if the corporation voluntarily discloses communications to third-party government agencies.<sup>131</sup>

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123 15 U.S.C. Section 16(a).

124 Antitrust Criminal Penalty Enhancement & Reform Act of 2004, Section 213, 15 U.S.C. Section 1 note.

125 *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981).

126 E.g., *In re Allen*, 106 F.3d 582, 605–06 (4th Cir. 1997).

127 E.g., *United States v. AT&T Co.*, 86 F.R.D. 603, 616–18 (D.D.C. 18 April 1979).

128 E.g., *In re Allen*, 106 F.3d at 600–05.

129 E.g., *In re Qwest Communications International Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006).

130 E.g., *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 217 (S.D.N.Y. 30 April 2001).

131 *In re Qwest*, 450 F.3d at 1187–88.

**iii The crime-fraud exception**

Communications made between clients and their attorneys for the purpose of furthering a current or future crime or fraud, such as an antitrust law violation, are not privileged.<sup>132</sup> To invoke the exception, the moving party must make a *prima facie* showing that the allegation of a crime or fraud is founded in fact and was intended to further that crime or fraud.<sup>133</sup>

**iv Foreign communications and documents**

Attorney–client communications that occur in a foreign country or involve foreign attorneys or proceedings and attorney work for foreign proceedings is governed by common law principles.<sup>134</sup> Principles of international comity determine dictate that the law of the country with the most ‘predominant’ or ‘direct and compelling’ interest in whether those communications should remain confidential applies, unless it would be contrary to public policy.<sup>135</sup> The ‘predominant’ jurisdiction is usually the jurisdiction in which the attorney–client relationship was formed or where relationship was centred at the time the privileged communication was sent.<sup>136</sup>

The Hague Evidence Convention allows discovery of foreign evidence, however, Article 11 safeguards privileged and protected evidence under the law of the ‘state of execution’ or ‘state of origin’.

**v Attorney work product doctrine**

The work product doctrine protects all documents and tangible materials prepared by or for the attorney in anticipation of litigation.<sup>137</sup> Ordinary fact work product includes materials in which the attorney merely records or summarises information, while opinion work product includes materials that reflect the attorney’s mental impressions, opinions, judgments or legal conclusions.<sup>138</sup> While opinion work product is virtually immune from discovery,<sup>139</sup> a discovering party may obtain fact work product if it shows substantial need for the work product and undue hardship in obtaining the information from another source.<sup>140</sup> The crime-fraud exception applies to ordinary attorney fact work

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132 E.g., *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Antitrust Grand Jury*, 805 F.2d at 164–68.

133 E.g., 289 U.S. at 15.

134 FRE 501.

135 E.g., *Astra Aktiebolag v. Andrx Pharma, Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 1 June 2002) (quoting *Golden Trade SrL v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 17 August 1992)).

136 *Id.*

137 FRCP 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495 (1947).

138 E.g., 805 F.2d at 163.

139 E.g., 329 U.S. at 513.

140 FRCP 26(b)(3)(A).



product, but courts will maintain the immunity given the more sacrosanct opinion work product if the lawyer had no knowledge of the client's crime or fraud.<sup>141</sup>

## XII SETTLEMENT PROCEDURES

Federal policy generally favours settlement over continued litigation. FRCP 16 allows federal judges to mandate pretrial conferences among the parties to, *inter alia*, facilitate settlement, and allows them to impose sanctions on parties for failing to appear or for failing to participate in good faith at such conferences.<sup>142</sup> With the exception of class action settlements, courts typically accept a party's stipulation to settle without review. However, FRCP 23 requires that proposed class-action settlements be reviewed and approved by the court only if they are 'fair, reasonable, and adequate' as class section settlements affect the rights of all class members.<sup>143</sup> Due process requirements – giving notice to the absent class members and holding a hearing in which any such absent class member who wishes to may object to the proposed settlement – must be met prior to settlement approval.<sup>144</sup>

## XIII ARBITRATION

Federal policy favours arbitration and federal antitrust claims arising out of both international and domestic transactions generally may be arbitrated.<sup>145</sup> Arbitration clauses are construed broadly<sup>146</sup> and refuse to recognise attempts by parties to limit the statutory remedies and procedures available to arbitrators, invalidating, for example, portions of arbitration agreements where the parties attempted to waive rights to treble damages or class or consolidated actions.<sup>147</sup> In the context of class actions, arbitrators may not impose class arbitration on parties unless it is contractually permissible.<sup>148</sup> The Supreme Court also made express arbitration clauses trump class-action rights, even in antitrust cases.<sup>149</sup>

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141 E.g., 805 F.2d at 163-64.

142 FRCP 16(a)(5), (f)(1).

143 FRCP 23(e).

144 *Id.*

145 E.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

146 E.g., *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004).

147 *Kristian v. Comcast Corp.*, 446 F.3d 25, 46–48, 55–62 (1st Cir. 2006).

148 *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

149 *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

## XIV INDEMNIFICATION AND CONTRIBUTION

### i Joint and several liability

Under the doctrine of joint and several liability, each guilty defendant is liable for all the damages caused by the conduct of the entire conspiracy, not just those attributable to its own conduct.<sup>150</sup> Antitrust co-conspirators can be held jointly and severally liable for damages predicated on sales by members of the conspiracy and damages caused by entities outside the conspiracy caused by the conspiracy.

### i No right to contribution

An antitrust defendant may not seek contribution from other participants in the anti-competitive scheme.<sup>151</sup> Combined with joint and several liability for antitrust damages among defendants, the absence of the right to seek contribution from others has important practical consequences for defendants in their settlement strategies.

### ii Indemnification

Most courts prohibit a defendant from seeking indemnification from other participants of an anti-competitive conspiracy, treating contribution and indemnification analogously.<sup>152</sup> However, indemnification may be available to ‘an innocent actor whose liability stems from some legal relationship with the truly culpable party’.<sup>153</sup>

## XV ENFORCEMENT OF MONETARY JUDGMENTS AGAINST FOREIGN COMPANIES

Monetary judgments issued by US courts generally become enforceable promptly after entry, and taking an appeal from the judgment does not ordinarily stay enforcement.<sup>154</sup> To stay enforcement pending appeal, the losing defendant (or ‘judgment debtor’) must ordinarily post a bond for the full amount of the monetary judgments.<sup>155</sup> Enforcement of monetary judgments in US federal courts is governed by FRCP 69.<sup>156</sup>

The principal device contemplated by that rule is the ‘writ of execution’ (i.e., an order authorising the US marshals to seize and sell property of the judgment debtor within

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150 E.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

151 Id. at 639–46.

152 *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186–87 (8th Cir. 1979), abrogated on other grounds by *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981); *Mortgages, Inc. v. US District Court for District of Nevada*, 934 F.2d 209, 212 n.3 (9th Cir. 1991).

153 *Wills Trucking, Inc. v. Baltimore & Ohio RR Co.*, No. 97-4067, 1999 WL 357775, at \*3 (6th Cir. 1999).

154 FRCP 62(a).

155 FRCP 62(d).

156 Judgments awarding injunctions are enforced by the issuing court through its power to hold a party that violates its orders in contempt. See 18 U.S.C. § 401.

the territory of the district court).<sup>157</sup> The holder of a monetary judgment (or ‘judgment creditor’) may register the judgment in other district courts, in which case the judgment is treated as though it had issued from the court in which it has been registered.<sup>158</sup> Rule 69 authorises proceedings in aid of enforcement, including post-judgment discovery as to the judgment debtor’s assets.<sup>159</sup> The US Supreme Court recently held that such discovery may extend to assets held abroad because the judgment creditor may be able to secure execution in the countries where the assets are held.<sup>160</sup>

US courts generally do not have authority to execute against assets outside the US.<sup>161</sup> However, the enforcement law of the state of New York authorises orders requiring any judgment debtor or third party over which it has personal jurisdiction to bring money or personal property belonging to the judgment debtor into the state for execution.<sup>162</sup> The constitutionality of this approach remains an open question.<sup>163</sup>

## XVI FUTURE DEVELOPMENTS AND OUTLOOK

Private antitrust litigation continues to be active in the United States, both in class action litigation for consumers against companies that have engaged in anti-competitive conduct and for private companies challenging the practices of other companies as anti-competitive. Additionally, follow-on litigation to government enforcement action, particularly in cartel matters, continues to be a large part of US antitrust litigation.

US courts continuously evaluate the scope of the antitrust laws and the legal framework in which plaintiffs may bring private litigation. Likewise, the appellate courts continue to interpret *Bell Atlantic v. Twombly*<sup>164</sup> and clarify what allegations are sufficient to create a ‘reasonably grounded expectation that discovery will reveal relevant evidence of an illegal agreement’ to survive dismissal.<sup>165</sup>

In its next term, the Supreme Court will decide issues implicating class action litigation:<sup>166</sup> first, it will decide whether a class can be certified where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in the sample. Second, it will address whether

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157 See *Aetna Cas. & Sur. Co. v. Markarian*, 114 F. 3d 346, 349 (1st Cir. 1997).

158 See 28 U.S.C. § 1963.

159 See Fed. R. Civ. P. 69(a)(2).

160 *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).

161 *Id.*

162 *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533, 538-41 (2009); *Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 41 A.D.3d 25, 31 (N.Y. App. Div. 1st Dep’t 2007).

163 *Koehler*, 12 N.Y.3d at 544-45 (Smith, J., dissenting) (noting potential Constitutional objections).

164 550 U.S. 544 (2007).

165 *Evergreen Partnering Group, Inc. v. Forrest*, No. 12-1730 (1st Cir. 2013); *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314 (2d Cir. 2010).

166 *Tyson Foods v. Peg Bouaphakeo*, No. 14-1146, 765 F.3d 791 (8th Cir. 2015), cert. granted. 2015 U.S. Lexis 3860 (8 June 2015)(No. 14-1146).

a class can be certified where the class includes uninjured members who lack a right to legal damages. Thus, appellate courts will continue to clarify the class certification requirements following *Walmart v. Dukes* and *Comcast v. Behrend*.<sup>167</sup> The evolution of these standards are likely to impact how and when class-action plaintiffs must obtain discovery and use experts in pursuing antitrust suits.

Over the past year the US Supreme Court has rendered several decisions implicating substantive antitrust law. Notably, it clarified that a board can invoke state-action immunity only if it is subject to active supervision by the state.<sup>168</sup> Also, the Court determined that the federal Natural Gas Act does not pre-empt state law claims against gas pipelines for alleged manipulation of market price indices.<sup>169</sup>

Additionally, pending appeal before the Second Circuit, is whether the doctrines of act of state and international comity can immunise conduct of foreign companies which is compelled by foreign governments.

The development of the law on the procedures for bringing antitrust actions, including the seeming relaxation of some of the stringent pleading standards regarding claim sufficiency and class certification and the ability to seek class certification for state law claims in federal court, and the continued enforcement by the federal antitrust agencies against cartel activities and monopolisation across industries, virtually assures that private litigation will remain a robust and complex area of activity in the United States.

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167 See Section VII, *supra*; e.g., *In re Freight Rail Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 3 May 2013).

168 *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015).

169 *Oneok Inc. v. Learjet, Inc.*, 134 S. Ct. 2899 (2014).

## Appendix 1

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