

# UNITED STATES

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## I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Nearly every year over the past decade, the US Supreme Court has significantly changed the private antitrust litigation landscape. Starting with the establishment of 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 to give 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>
- 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 damage can be proven with class-wide evidence to satisfy Federal Rule of Civil Procedure (FRCP) 23(b)(3)’s predominance requirement;<sup>10</sup>

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2 *Bell Atlantic v. Twombly*, 550 US 544 (2007); *Ashecroft v. Iqbal*, 556 US 662 (2009); see also *Wood v. Moss*, 134 S Ct 2056 (2014).

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

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

5 *Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co*, 559 US 393 (2010).

6 *Smith v. Bayer*, 564 US 299 (2011).

7 *Stolt-Nielsen v. Animal Feeds*, 559 US 662 (2010).

8 *AT&T Mobility v. Concepcion*, 563 US 333 (2011); *American Express Co v. Italian Colors Restaurant*, 570 US 228 (2013).

9 *Wal-Mart Stores, Inc v. Dukes*, 564 US 338 (2011).

10 *Comcast Corporation v. Behrend*, 569 US 27 (2013).

- 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 a multi-district litigation under 28 USC Section 1407 is an appealable final decision under 28 USC Section 1291;<sup>12</sup>
- k* stare decisis may have less than ‘usual force in cases involving the Sherman Act’;<sup>13</sup>
- l* courts must include both sides of a two-sided credit card market (merchants and cardholders) in defining a relevant market and evaluating anticompetitive effects;<sup>14</sup>
- m* US federal courts are not bound to defer to a foreign governments’ official interpretation of its own laws, but owe the foreign government’s interpretation ‘respectful consideration’;<sup>15</sup> and
- n* the Supreme Court’s ruling in *Illinois Brick Co v. Illinois*, which bars antitrust suits by indirect purchasers, did not apply to consumers who purchased apps from Apple’s App Store, even though Apple only collected a commission on the apps and did not set their prices.<sup>16</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 GENERAL INTRODUCTION TO THE 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>17</sup> Section 16 allows private plaintiffs to sue for injunctive relief.<sup>18</sup>

### **i Statute of limitations limits the period of potential recovery**

A four-year statute of limitations applies to Section 4 claims.<sup>19</sup> The limitations period commences when the cause of action accrues, which generally occurs when the plaintiff suffers injury and damages become ascertainable.<sup>20</sup> Section 16 claims may also be subject to a four-year statute of limitations. Some courts have held that the four-year limitation period

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11 *American Needle, Inc v. National Football League*, 560 US 183 (2010).

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

13 *Kimble v. Marvel Entertainment*, 135 S Ct 2401 (2015).

14 *Ohio v. American Express Co*, 138 S Ct 2274 (2018).

15 *Animal Science Products v. Hebei Welcome Pharmaceuticals Co*, 138 S Ct 1865 (2018).

16 *Apple v. Pepper*, 139 S Ct 1514 (2019).

17 15 USC Section 15(a).

18 *id.*, Section 26.

19 *id.*, Section 15(b).

20 *e.g.*, *Zenith Radio Corp v. Hazeltine Research*, 401 US 321, 338–39 (1971).

also applies to Section 16 claims, while others have held that it does not.<sup>21</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>22</sup>

The statute of limitations may be tolled by government antitrust actions,<sup>23</sup> the filing of a class action,<sup>24</sup> fraudulent concealment,<sup>25</sup> duress<sup>26</sup> or equitable estoppel.<sup>27</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>28</sup> Some courts allow the tacking of tolling periods.<sup>29</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>30</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 anticompetitive conduct that either involves US import commerce or has a ‘direct, substantial, and reasonably foreseeable effect’ on US import or

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21 e.g., *Weinberger v. Retail Credit Co*, 498 F2d 552, 556 (4th Cir 1974).

22 e.g., *ITT v. GTE*, 518 F2d 913, 929 (9th Cir 1975), overruled on other grounds by *California v. American Stores Co*, 495 US 271 (1990).

23 15 USC Section 16(i).

24 *Crown, Cork & Seal Co v. Parker*, 462 US 345 (1983).

25 e.g., *In re Scrap Metal Antitrust Litigation*, 527 F3d 517, 536–38 (6th Cir 2008); *In re Linerboard Antitrust Litigation*, 305 F3d 145, 160 (3d Cir 2002).

26 e.g., *Willmar Poultry Co v. Morton-Norwich Products*, 1974-2 Trade Cas (CCH) ¶ 75,292, at 97,896 (D Minn 1 October 1974), aff’d 520 F2d 289 (8th Cir 1975); *PhilCo Corp v. RCA*, 186 F Supp 155, 161–62 (ED Pa 1960).

27 e.g., *American Pipe & Construction Co v. Utah*, 414 US 538, 559 (1974).

28 *Zenith Radio Corp v. Hazeltine Research, Inc*, 401 US 321, 338 (1971).

29 e.g., *City of Detroit v. Grinnell Corp*, 495 F2d 448, 460–61 (2d Cir 1974), abrogated on other grounds by *Goldberger v. Integrated Resources Inc*, 209 F3d 43 (2d Cir 2000).

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

domestic commerce.<sup>31</sup> Courts have construed this to require a ‘reasonably proximate causal nexus’ between the conduct and the effect on US commerce or import commerce, a standard similar to a proximate causation standard.<sup>32</sup> Additionally, 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>33</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>34</sup>

When a plaintiff alleges other antitrust claims, such as under the Clayton Act, the extraterritoriality test applies,<sup>35</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>36</sup> Additionally, the FTAIA extends the Sherman Act’s extraterritoriality test to apply to the FTC Act.<sup>37</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>38</sup> the Ninth Circuit held that the conduct of the same cartel was within the reach of the Sherman Act.<sup>39</sup> The US Supreme Court recently denied a petition for certiorari to resolve this issue, so lower courts will continue to develop the law to clarify how these decisions apply.

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- 31 15 USC Section 6a. Where conduct involves import trade or commerce, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) does not apply and courts instead apply the common law ‘intended effects’ test, requiring that the foreign anticompetitive conduct was intended to and actually affected US trade or commerce. *Hartford Fire Insurance Co v. California*, 509 US 764, 796 (1993); *United States v. Aluminum Co of America*, 148 F2d 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 F2d 597, 611–15 (9th Cir 1976).
- 32 *Lotes Co, Ltd v. Hon Hai Precision Industry Co*, 753 F3d 395, 398 (2d Cir 2014); *Motorola Mobility LLC v. AU Optronics Corp*, 683 F3d 845, 857 (7th Cir 2014) (en banc); *Minn-Chem, Inc v. Agrium, Inc*, 683 F3d 845, 857 (7th Cir 2012) (en banc); *In re Dynamic Random Access Memory (DRAM)*, 546 F3d 981 (9th Cir 2008); *In re Monosodium Glutamate Antitrust Litigation*, 477 F3d 535 (8th Cir 2007); *Empagran SA v. F Hoffmann-La Roche Ltd*, 417 F3d 1267, 1271 (DC Cir 2005).
- 33 *F Hoffmann-La Roche Ltd v. Empagran SA*, 542 US 155 (2004); *Empagran SA*, 417 F3d at 1271.
- 34 *Minn-Chem, Inc v. Agrium Inc*, 683 F3d 845 (7th Cir 2012); *Animal Science Products, Inc v. China Minmetals Corp*, 654 F3d 462 (3d Cir 2011), cert denied, 565 US 1260 (2012); *In re TFT-LCD Antitrust Litigation*, 781 F Supp 2d 955 (ND Cal 2011); contra *United Phosphorus, Ltd v. Angus Chemical Co*, 322 F3d 942 (7th Cir 2003) (en banc) (the FTAIA’s limitations are jurisdictional in nature).
- 35 e.g., *United Phosphorus Ltd v. Angus Chemical Co*, No. 94 C 2078, 1994 WL 577246, at \*5 (ND Ill 18 October 1994); *The In Porters SA v. Hanes Printables Inc*, 663 F Supp 494, 498 n4 (MDNC 11 June 1987).
- 36 15 USC Section 14.
- 37 id., Section 45(a)(3).
- 38 *Motorola Mobility v. AU Optronics Corp*, 775 F3d 816 (7th Cir 2014).
- 39 *United States v. Hui Hsiung*, 778 F3d 738 (9th Cir 2015).

## ii Comity considerations

A court may employ comity considerations to decline jurisdiction, even when the FTAIA's requirements have been satisfied.<sup>40</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>41</sup>

## iii Exemptions

Foreign sovereigns are presumptively immune from US courts' jurisdiction under the Foreign Sovereign Immunities Act (FSIA).<sup>42</sup> To rebut the presumption, a plaintiff must show that one of the FSIA's seven exceptions applies.<sup>43</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>44</sup> The scope of 'commercial' activity, 'foreign state' and the specific nexus required to meet this exception has been extensively litigated.<sup>45</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>46</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 under the assumption that the defendant's activity was effectively foreign sovereign state activity.<sup>47</sup> US federal courts must give 'respectful consideration' to a foreign government's official statement on the correct interpretation of its own laws, but are not bound to defer to the foreign government's interpretation.<sup>48</sup>

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40 HR Rep No. 97-686, at 13 (1982), reprinted in 1982 United States Code Congressional and Administrative News 2487, 2498.

41 *Hartford Fire Insurance Co v. California*, 509 US 764, 798–99 (1993).

42 28 USC Section 1604.

43 *id.*, Section 1605.

44 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'.

45 e.g., *Kato v. Ishihara*, 360 F3d 106, 108 (2d Cir 2004); *General Electric Capital Corp v. Grossman*, 991 F2d 1376, 1380–82 (8th Cir 1993); *Tubular Inspectors Inc v. Petroleos Mexicanos*, 977 F2d 180, 183–86 (5th Cir 1992).

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

47 e.g., *Mannington Mills v. Congoleum Corporation*, 595 F2d 1287, 1293 (3d Cir 1979).

48 *Animal Science Products v. Hebei Welcome Pharmaceuticals Co*, 138 S Ct 1865, 1869–70 (2018).

## 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 that the plaintiff is a ‘person’ under Section 1 of the Clayton Act;<sup>49</sup>
- b that the defendant violated the ‘antitrust laws’;<sup>50</sup>
- c antitrust injury (‘impact’ or ‘fact of damage’);<sup>51</sup> that is, harm to competition<sup>52</sup> to a plaintiff’s ‘business or property’ proven by direct or circumstantial evidence or inference<sup>53</sup> with a reasonable degree of certainty;<sup>54</sup> and
- d that the antitrust violation was a material and substantial cause of the injury.<sup>55</sup>

Finally, the plaintiff must satisfy the remoteness doctrine, which requires that a plaintiff’s injury is not too remote from the defendant’s conduct, by addressing five factors:<sup>56</sup>

- 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;
- 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

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49 15 USC 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 US 330, 340–42 (1979)), partnerships (e.g., *Coast v. Hunt Oil Co.*, 195 F2d 870, 871 (5th Cir 1952)), states (e.g., *Standard Oil Co v. Arizona*, 738 F2d 1021, 1023 (9th Cir 1984)) and foreign governments (*Pfizer v. Government of India*, 434 US 308, 318–20 (1978)). Section 4 of the Clayton Act (15 USC 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 USC Sections 15a, 15c).

50 e.g., 15 USC Sections 12(a) and 15.

51 *Story Parchment Co v. Paterson Parchment Paper Co*, 282 US 555, 563 (1931).

52 e.g., *Brunswick Corp v. Pueblo Bowl-O-Mat Inc*, 429 US 477, 488 (1977); see, e.g., *Southeast Missouri Hospital v. CR Bard, Inc*, 616 F3d 888 (3d Cir 2010); *Race Tires America v. Hoosier Racing Tire Corp*, 614 F3d 57 (3d Cir 2010); but see *Palmyra Park Hospital v. Phoebe Putney Memorial Hospital*, 604 F3d 1291 (11th Cir 2010).

53 *Zenith Radio Corp v. Hazeltine Research*, 395 US 100, 126 (1969).

54 *Duty Free Americas, Inc v. Estee Lauder Companies*, 797 F3d 1248, 1272–73 (11th Cir 2015); *Mostly Media v. US W Communications*, 186 F3d 864, 865–66 (8th Cir 1999); *OK Sand & Gravel v. Martin Marietta Technologies*, 36 F3d 565, 573 (7th Cir 1994).

55 e.g., *Tal v. Hogan*, 453 F3d 1244, 1258 (10th Cir 2006).

56 *Associated General Contractors v. California State Council of Carpenters*, 459 US 519, 537–44 (1983).

In 2018, the Third Circuit Court of Appeals addressed a novel standing issue and found that purchasers of products that include inputs made more expensive by the defendants’ conspiracy – but not produced by the conspirators – had standing under the Clayton Act. *In re Processed Egg Prods. Antitrust Litigation*, 881 F3d 262 (3d Cir 2018).

remoteness doctrine may bar an indirect purchaser<sup>57</sup> from bringing a Section 4 claim unless it is a competitor.<sup>58</sup> Some courts require that the plaintiff is an ‘efficient enforcer’ or a potential competitor sufficiently prepared to enter the market.<sup>59</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>60</sup>

- a the plaintiff is a ‘person, firm, corporation, or association’;<sup>61</sup>
- b the defendant violated the ‘antitrust laws’;<sup>62</sup>
- c the threatened loss or damage proximately results from the alleged antitrust violation;<sup>63</sup> and
- d the ‘antitrust injury’, that is threatened loss or injury, is due to harm to competition.<sup>64</sup>

However, there are differences. Section 16 requires ‘threatened loss or damage’<sup>65</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>66</sup> rather than actual loss.<sup>67</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>68</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>69</sup>

## iii Indirect purchaser standing

Generally, indirect purchasers who purchase from a defendant indirectly through a downstream distributor cannot recover under federal antitrust laws unless<sup>70</sup> the direct purchaser had a pre-existing ‘cost-plus’ contract, shifting the entire overcharge to the indirect purchaser;<sup>71</sup> there is also an ownership-control exception, where the direct purchaser is owned or controlled by the defendant or the indirect purchaser;<sup>72</sup> indirect purchasers may also sue

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57 *Campos v. Ticketmaster Corp.*, 140 F3d 1166, 1169 (8th Cir 1998).

58 *Illinois Brick Co v. Illinois*, 431 US 720, 735 (1977).

59 *Sanger Insurance Agency v. Hub International Ltd*, 802 F3d 732 (9th Cir 2015); *Sunbeam Television Corp v. Nielson Media Research, Inc.*, 711 F3d 1264 (11th Cir 2013).

60 *Palmyra Park Hospital v. Phoebe Putney Memorial Hospital*, 604 F3d 1291 (11th Cir 2010).

61 15 USC Section 26.

62 *id.*

63 *Zenith Radio Corp v. Hazeltine Research*, 395 US 100, 130 (1969).

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

65 1675 USC Section 26.

66 *Zenith*, 395 US at 130; but see *Freedom Holdings v. Cuomo*, 624 F3d 38 (2d Cir 2010), cert denied sub nom *Freedom Holdings v. Schneider*, 31 S Ct 1810 (2011).

67 15 USC Section 15.

68 *Cargill*, 479 US at 111.

69 e.g., *In re Relafen Antitrust Litigation*, 221 FR D 260, 273–74 (D Mass 12 May 2004).

70 *Illinois Brick*, 431 US at 735.

71 *Hanover Shoe, Inc v. United Shoe Machine Corp.*, 392 US 481, 494 (1968); *Illinois Brick*, 431 US at 736.

72 *Illinois Brick*, 431 US at 736 n16.

where the direct purchaser was a co-conspirator.<sup>73</sup> The Seventh Circuit recently expanded the scope of the co-conspirator exception, holding that it applied to all anticompetitive conduct, not just vertical price-fixing.<sup>74</sup> The Supreme Court clarified the scope of the bar on indirect purchaser suits in 2019, ruling that plaintiffs who purchase directly from an alleged antitrust violator have standing to sue even if the defendant only collects a commission and does not set the price of the product sold.<sup>75</sup> A federal appellate court also ruled in 2020 that the anti-assignment provision between a manufacturer and a wholesale distributor did not prevent assignment of the wholesale distributor's antitrust claims to a retailer, although the retailer, as an indirect purchaser, would normally lack standing to pursue antitrust claims under federal law.<sup>76</sup>

Indirect purchasers may recover under the *Illinois Brick* repealer statutes of 26 states as well as state consumer protection statutes.<sup>77</sup>

## V THE PROCESS OF DISCOVERY

The scope of discovery in antitrust cases is broad. FRCP 26 allows discovery of a reasonable time period, geographical scope and subject matter if the requested information is relevant to any claim or defence, proportional to the needs of the case, and the burden of the proposed discovery on the responding party does not outweigh its benefit. 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>78</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 'particularized need' for the materials.<sup>79</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 secret or confidential commercial information, and whether the request will cause the non-party undue hardship.<sup>80</sup> A party that refuses to comply with a court order may face sanctions.<sup>81</sup>

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73 e.g., *Insulate SB, Inc v. Advanced Finishing Systems*, 797 F3d 538, 542 (11th Cir 2015); *Paper Systems v. Nippon Paper Industries Co*, 281 F3d 629, 631 (7th Cir 2002); *Campos v. Ticketmaster Corp*, 140 F3d 1166, 1171, n4 (8th Cir 1998); *Arizona v. Shamrock Foods*, 729 F3d 1208, 1212–14 (9th Cir 1984).

74 *Marion Healthcare, LLC v. Becton Dickinson & Co*, 952 F3d 832 (7th Cir 2020).

75 *Apple v. Pepper*, 139 S Ct 1514, 1525 (2019).

76 *Walgreen Co v. Johnson & Johnson*, No. 19-1730, 2020 U.S. App. LEXIS 5336 (3d Cir 21 February 2020).

77 e.g., *Ciardi v. F Hoffmann-La Roche*, 436 Mass 53 (Mass 2002).

78 FRCP 26(b)(1); e.g., *In re ATM Fee Antitrust Litigation*, No. C 04-02676 CRB, 2007-1 Trade Cas (CCH) ¶ 75,760 (ND Cal 25 June 2007).

79 e.g., *United States v. Sells Engineering*, 463 US 418, 443 (1983).

80 e.g., *ACT Inc v. Sylvan Learning Sys*, No. CIV A 99-63, 1999-1 Trade Cas (CCH) ¶ 72,527 (ED Pa 14 May 1999).

81 FRCP 37.



Courts generally grant requests to compel discovery from domestic or foreign affiliates or subsidiaries of corporations that are parties to the antitrust case.<sup>82</sup> Generally, a foreign party subject to personal jurisdiction in the US is subject to discovery.<sup>83</sup> Foreign blocking statutes do not allow a corporation present in the US to resist producing documents located abroad.<sup>84</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>85</sup> on substantive antitrust issues like market or monopoly power, anticompetitive harm, antitrust injury and damages.

Expert testimony is only admissible if<sup>86</sup> the expert has sufficient specialised knowledge and expertise with respect to the field in question; the methodology and data used to reach the expert's conclusions are sufficiently reliable; and the expert's testimony is sufficiently relevant to assist the trier of fact.

Reliability is the most common basis on which expert testimony is 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>87</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).

Rule 23(a) requires that the plaintiff establish that:<sup>88</sup>

- a* the class is so numerous that joinder of all members would be impracticable;
- b* common questions of law and fact apply 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.

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82 e.g., *In re ATM Fee Antitrust Litigation*, 233 FR D 542, 544–45 (ND Cal 5 December 2005).

83 e.g., *Société Nationale Industrielle Aerospatiale v. US Dist Court for Southern Dist of Iowa*, 482 US 522 (1987); *Strauss v. Credit Lyonnais*, 242 FR D 199 (EDNY 25 May 2007).

84 e.g., *Arthur Andersen & Co v. Finesilver*, 546 F2d 338, 342 (10th Cir 1976).

85 See Section VII.

86 FRCP 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579, 593–94 (1993).

87 *Daubert*, 509 US at 593–94.

88 FRCP 23(a).

Additionally, Rule 23(b) requires that the plaintiff establish one of the following:<sup>89</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>90</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>91</sup> In some cases, plaintiffs may have recourse to representative samples to establish class-wide liability.<sup>92</sup> Plaintiffs also must prove class-wide impact – that all class members suffered injury to their business or their property – using common proof.<sup>93</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.<sup>94</sup> 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>95</sup> a ‘rigorous analysis’ of expert opinions is required.<sup>96</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. A plaintiff may meet FRCP 23 requirements even if the putative class includes a *de minimis*

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89 FRCP 23(b).

90 *Wal-Mart Stores, Inc. v. Dukes*, 564 US 338 (2011).

91 *Comcast Corporation v. Behrend*, 569 US 27 (2013).

92 *Tyson Foods, Inc v. Bouaphakeo*, 136 S Ct 1036 (2016).

93 2A, P Areeda and H Hovenkamp, *Antitrust Law*, 398a, at 438–39 (3d ed 2007).

94 See *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F3d 619, 625 (DC Cir 2019) (upholding a lower court’s denial of class certification where plaintiffs’ proposed damages model indicated that 12.7 per cent of the class suffered negative overcharges (i.e., no injury at all), and finding that under the circumstances, plaintiffs had failed to provide the common proof of impact required by Rule 23); *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F3d 184, 192–94 (3d Cir 2020) (reversing class certification because the district court did not conduct a rigorous analysis of whether the average prices used to calculate class-wide damages could sufficiently demonstrate each class member’s harm); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litigation*, 967 F3d 264, 272 (3d Cir 2020) (holding that antitrust plaintiffs may satisfy the predominance requirement by using a model that estimates the damages attributable to the antitrust injury, even if more individualised determinations are needed later to allocate damages among class members).

95 *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305, 310 (3d Cir 2009).

96 *Comcast*, 569 US at 33–38; *Wal-Mart*, 564 US at 352–55.

number of potentially uninjured parties.<sup>97</sup> Thus, courts generally resolve all factual and legal disputes, including expert disputes, relevant to their certification decision at the time of class certification.

Class representatives may have to establish other threshold requirements, including that the class is in existence, ascertainable and definable with reasonable specificity;<sup>98</sup> and that at least one class plaintiff is able to demonstrate standing.<sup>99</sup>

When a district court issues an order ruling on class certification, the parties have 15 days to request permission to appeal the decision from a court of appeals, or 45 days if the United States government is one of the parties.<sup>100</sup> Courts are not permitted to grant discretionary extensions of the deadline to request permission to appeal a class certification decision.<sup>101</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>102</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>103</sup>

### *Court approval of class settlements required*

To prevent abuse by class representatives, Rule 23(e) requires court approval of class action settlements and voluntary dismissals. Proposed class-action settlements, voluntary dismissals or compromise proposals are generally approved if the class meets the 23(a) and 23(b) requirements, and the settlement is 'fair, reasonable, and adequate'.<sup>104</sup> Under the latter

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97 *In re Nexium Antitrust Litigation*, 777 F3d 3, 25 (1st Cir 2015). But see *In re Asacol Antitrust Litigation*, 907 F3d 42 (1st Cir 2018) (overturning a lower court's grant of class certification where roughly 10 per cent of the class consisted of uninjured plaintiffs, and the plaintiffs proposed that uninjured class members could be removed after class certification); see also *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F3d, footnote 94.

98 Some courts have held that a class is ascertainable when defined by objective criteria that are administratively feasible for the court to identify. *Brecher v. Republic of Argentina*, 802 F3d 303 (2d Cir 2015); *Marcus v. BMW of North America*, 687 F3d 583 (3d Cir 2012).

99 See, e.g., *Prado-Steinman v. Bush*, 221 F3d 1266, 1279 (11th Cir 2000).

100 FRCP 23(f).

101 *Nutraceutical Corp. v. Lambert*, 139 S Ct 710, 713 (2019).

102 FRCP 23(g).

103 FRCP 23(b)(3)(d); *Amchem Products, Inc v. Windsor*, 521 US 591, 620 (1997); e.g., *Sullivan v. DB Investments, Inc*, 667 F3d 273, 301 (3d Cir 2011).

104 FRCP 23(e)(2); *Amchem*, 521 US at 621.

inquiry, relief under the settlement will be evaluated against the class's expected relief at trial and its likelihood of success.<sup>105</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>106</sup>

### **Notice**

Upon certification, 23(b)(3) requires notice to be provided<sup>107</sup> 'in a reasonable manner' to all class members who would be bound by the proposal.<sup>108</sup> Typically, plaintiffs bear the cost of notice.

## **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>109</sup> Damages cannot be proven through 'speculation or guesswork'.<sup>110</sup> The court will award the plaintiff triple the amount of damages claimed (treble damages) if a violation is proven. Courts do not allow punitive damage awards because antitrust plaintiffs already receive treble damages.<sup>111</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>112</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>113</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>114</sup>

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105 e.g., *Wal-Mart Stores Inc v. Visa USA Inc*, 396 F3d 96, 118–19 (2d Cir 2005).

106 e.g., *In re Refrigerant Compressors Antitrust Litigation*, 795 F Supp 2d 647 (ED Mich 2011).

107 FRCP 23(c)(2).

108 FRCP 23(e)(1).

109 *Zenith Radio Corp v. Hazeltine Research*, 395 US 100, 123 (1969).

110 *Bigelow v. RKO Radio Pictures*, 327 US 251, 264 (1946); *Dopp v. Pritzker*, 38 F3d 1239, 1249 (1st Cir 1994).

111 *McDonald v. Johnson & Johnson Co*, 722 F2d 1370, 1381 (8th Cir 1983).

112 e.g., *Howard Hess Dental Labs Inc v. Dentsply International Inc*, 424 F3d 363, 374 (3d Cir 2005).

113 e.g., *Crossland v. Canteen Corp*, 711 F2d 714, 722 (5th Cir 1983).

114 e.g., *Will v. Comprehensive Accounting Corp*, 776 F2d 665, 672–73 (7th Cir 1985).

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>115</sup> Damages are usually limited to lost net profits, although some courts may award lost gross profits if lost net profits are negligible.<sup>116</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 current value of lost future profits).<sup>117</sup>

### iii Mitigation

A plaintiff must mitigate damages and cannot recover losses that could have been avoided.<sup>118</sup>

### 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>119</sup> If it does not, a damages award may be overturned on the grounds it is based on speculation and guesswork.<sup>120</sup>

### v 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>121</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>122</sup> were in fact harmed by the defendants' antitrust violations. This bar against pass-on defences is analogous to the above-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>123</sup>

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115 e.g., *Trabert & Hoefler, Inc v. Piaget Watch Corp*, 633 F2d 477, 484 (7th Cir 1980).

116 id.

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

118 e.g., *Pierce v. Ramsey Winch Co*, 753 F2d 416, 436 (5th Cir 1985); *Litton Sys Inc v. AT&T Corp*, 700 F2d 785, 820 n47 (2d Cir 1983).

119 e.g., *Blue Cross & Blue Shield United v. Marshfield Clinic*, 152 F3d 588, 592–93 (7th Cir 1998).

120 e.g., *US Football League v. NFL*, 842 F2d 1355, 1377–79 (2d Cir 1988).

121 15 USC Section 15(a); 28 USC Section 1961 (2000).

122 *Hanover Shoe Inc v. United Machinery Corp*, 392 US 481, 491–94 (1968).

123 See Section IV; *Illinois Brick*, 431 US at 730–31.

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 anticompetitive overcharge;<sup>124</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>125</sup> and
- 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>126</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:

- a* final;
- b* rendered in a civil or criminal proceeding brought by or on behalf of the United States;
- c* under the antitrust laws to the effect that a defendant has violated said laws; and
- d* is not a consent judgment or decree entered before any testimony has been taken.<sup>127</sup>

Additionally, the private plaintiff must be injured in fact by the antitrust violation proven in the government action.<sup>128</sup> Guilty pleas to a Department of Justice (DOJ) indictment generally are admissible as evidence in subsequent private litigation.<sup>129</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>130</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>131</sup> but is limited to the period, products and geographical scope adjudicated in the prior government action.<sup>132</sup>

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124 *Illinois Brick*, 431 US at 735–36; *Mid-West Paper Prods Co v. Continental Group Inc*, 596 F2d 573, 577 (3d Cir 1979).

125 *Jewish Hospital Association of Louisville v. Stewart Mechanical Enterprises Inc*, 628 F2d 971, 974–75 (6th Cir 1980).

126 e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F3d 599, 604 (7th Cir 1997).

127 15 USC Section 16(a); *Emich Motors Corp v. General Motors Corp*, 340 US 558, 569 (1951).

128 e.g., *Theatre Enterprises Inc v. Paramount Film Distribution Corp*, 346 US 537, 543 (1954).

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

130 *United States v. ITT Continental Baking Co*, 420 US 223, 236 n10 (1975).

131 15 USC Section 16(a).

132 e.g., *Dart Drug Corp v. Parke, Davis & Co*, 344 F2d 173, 184 (DC Cir 1965); *Michigan v. Morton Salt Co*, 259 F Supp 35, 68, 74 (D Minn 1966).

## ii Collateral estoppel

The collateral estoppel doctrine applies in private antitrust suits.<sup>133</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>134</sup> A defendant can use collateral estoppel doctrine defensively to prevent a plaintiff from relitigating issues previously decided and lost by the government,<sup>135</sup> while a plaintiff can use collateral estoppel offensively to bar a defendant from relitigating issues lost in prior government actions. Collateral estoppel applies to prior DOJ actions, but not to findings made by the FTC.<sup>136</sup>

Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)<sup>137</sup> offers criminal defendants who participate in the DOJ's corporate leniency programme 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. ACPERA 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

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>138</sup> and covers communications with current and former employees,<sup>139</sup> subsidiaries and affiliates.<sup>140</sup> It does not extend to communications with a lawyer acting in a business capacity.<sup>141</sup>

### ii Waiver of attorney–client privilege

Privilege is waived if a communication is voluntarily disclosed to a third party,<sup>142</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>143</sup> Privilege may be waived if the corporation voluntarily discloses communications to third-party government agencies.<sup>144</sup>

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133 15 USC Section 16(a) ('Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel').

134 e.g., *Montana v. United States*, 440 US 147, 153–54 (1979).

135 *In re Microsoft Corp Antitrust Litigation*, 355 F3d 322, 325–26 (4th Cir 2004).

136 15 USC Section 16(a).

137 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Section 213, 15 USC Section 1 note.

138 *Upjohn Co v. United States*, 449 US 383, 394–95 (1981).

139 e.g., *In re Allen*, 106 F3d 582, 605–06 (4th Cir 1997).

140 e.g., *United States v. AT&T Co*, 86 FR D 603, 616–18 (DDC 18 April 1979).

141 e.g., *In re Allen*, 106 F3d at 600–05.

142 e.g., *In re Qwest Communications International Inc*, 450 F3d 1179, 1185 (10th Cir 2006).

143 e.g., *In re Copper Market Antitrust Litigation*, 200 FR D 213, 217 (SDNY 30 April 2001).

144 *In re Qwest*, 450 F3d 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>145</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>146</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>147</sup> Principles of international comity 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>148</sup> The ‘predominant’ jurisdiction is usually the jurisdiction in which the attorney–client relationship was formed or where the relationship was centred at the time the privileged communication was sent.<sup>149</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 an attorney in anticipation of litigation.<sup>150</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>151</sup> While opinion work product is virtually immune from discovery,<sup>152</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>153</sup> The crime–fraud exception applies to ordinary attorney fact work 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>154</sup>

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145 e.g., *Clark v. United States*, 289 US 1, 15 (1933); *In re Antitrust Grand Jury*, 805 F2d 155, 164–68 (6th Cir 1986).

146 e.g., *Clark v. United States*, 289 US at 15.

147 Federal Rules of Evidence (FRE) 501.

148 e.g., *Wultz v. Bank of China*, 979 F Supp 2d 479, 486 (SDNY 2013) (quoting *Golden Trade SrL v. Lee Apparel Co*, 143 FR.D. 514, 522 (SDNY 17 August 1992)).

149 id.

150 FRCP 26(b)(2); *Hickman v. Taylor*, 329 US 495 (1947).

151 e.g., *In re Antitrust Grand Jury*, 805 F2d at 163.

152 e.g., *Hickman*, 329 US at 513.

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

154 e.g., *In re Antitrust Grand Jury*, 805 F2d at 163–64.



## 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>155</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>156</sup> A defendant's unaccepted offer of settlement to a class representative does not moot the plaintiff's claim.<sup>157</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>158</sup>

## XIII ARBITRATION

Federal policy favours arbitration, and federal antitrust claims arising out of both international and domestic transactions generally may be arbitrated.<sup>159</sup> Arbitration clauses are construed broadly,<sup>160</sup> and courts 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>161</sup> Courts may not decline to enforce arbitration agreements that delegate to an arbitrator the question of whether a dispute should be arbitrated.<sup>162</sup> In the context of class actions, however, the defendant's arbitration rights may be deemed waived if it seeks to compel arbitration only after the class is certified and extensive discovery has occurred.<sup>163</sup> Arbitration provisions may not be enforceable by franchisors against employees when the franchisor is not explicitly a signatory to the agreement.<sup>164</sup> In addition, arbitrators may not impose class arbitration on parties unless it is contractually permissible.<sup>165</sup> The Supreme Court has held that express arbitration clauses trump class-action rights, even in antitrust cases.<sup>166</sup>

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

156 FRCP 23(e).

157 *Campbell-Ewald Co v. Gomez*, 136 S Ct 663 (2016).

158 FRCP 23(e).

159 e.g., *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

160 e.g., *JLM Industries, Inc v. Stolt-Nielsen SA*, 387 F3d 163 (2d Cir 2004).

161 *Kristian v. Comcast Corp*, 446 F3d 25, 46–48, 55–62 (1st Cir 2006).

162 *Henry Schein Inc v. Archer & White Sales, Inc*, 139 S Ct 524 (2019). The parties returned to the Supreme Court in 2020 for a decision on the issue of whether an arbitration provision that exempts certain claims from arbitration negates an otherwise clear delegation of questions of arbitrability to an arbitrator. A decision on this issue is expected in 2021. *Henry Schein Inc v. Archer & White Sales, Inc*, No. 19-963 (S Ct, cert. granted 15 June 2020).

163 *Healy v. Cox Communications, Inc*, 790 F3d 1112, 1118–21 (10th Cir 2015).

164 *Harley Blanton, et al v. Domino's Pizza Franchising LLC, et al*, 962 F3d 842 (6th Cir 2020).

165 *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp*, 559 US 662 (2010).

166 *AT&T Mobility v. Concepcion*, 563 US 333 (2011); *American Express Co v. Italian Colors Restaurant*, 570 US 228 (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>167</sup> Antitrust co-conspirators can be held jointly and severally liable for damage predicated on sales by members of the conspiracy and damage caused by entities outside the conspiracy caused by the conspiracy.

### ii No right to contribution

An antitrust defendant may not seek contribution from other participants in the anticompetitive scheme.<sup>168</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.

### iii Indemnification

Most courts prohibit a defendant from seeking indemnification from other participants of an anticompetitive conspiracy, treating contribution and indemnification analogously.<sup>169</sup> However, indemnification may be available to ‘an innocent actor whose liability stems from some legal relationship with the truly culpable party’.<sup>170</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>171</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>172</sup> Enforcement of monetary judgments in US federal courts is governed by FRCP 69.<sup>173</sup>

The principal device contemplated by that rule is the ‘writ of execution’ (i.e., an order authorising US marshals to seize and sell property of the judgment debtor within the territory of the district court).<sup>174</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

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167 e.g., *Texas Indus v. Radcliff Materials, Inc*, 451 US 630 (1981).

168 *id.*, at 639–46.

169 *Professional Beauty Supply, Inc v. National Beauty Supply, Inc*, 594 F2d 1179, 1186–87 (8th Cir 1979), abrogated on other grounds by *Texas Industries v. Radcliff Materials*, 451 US 630 (1981); *Mortgages, Inc v. US District Court for District of Nevada*, 934 F2d 209, 212 n3 (9th Cir 1991).

170 *Wills Trucking, Inc v. Baltimore & Ohio RR Co*, No. 97-4067, 1999 US App. LEXIS 9832, at 7–8 (6th Cir 1999).

171 FRCP 62(a); but see *Hewlett-Packard Co v. Quanta Storage, Inc*, 961 F3d 731, 744 (5th Cir 2020) (pushing back the deadline to satisfy a US\$438 million judgment because the deadline failed to take into account the intricacies of international law).

172 FRCP 62(d).

173 Judgments awarding injunctions are enforced by the issuing court through its power to hold a party that violates its orders in contempt. See 18 USC Section 401.

174 See *Aetna Cas & Sur Co v. Markarian*, 114 F3d 346, 349 (1st Cir 1997).

it had been issued from the court in which it has been registered.<sup>175</sup> Rule 69 authorises proceedings in aid of enforcement, including post-judgment discovery as to the judgment debtor's assets.<sup>176</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>177</sup>

US courts generally do not have authority to execute against assets outside the United States.<sup>178</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>179</sup> The constitutionality of this approach remains an open question.<sup>180</sup>

## XVI FUTURE DEVELOPMENTS AND OUTLOOK

Private antitrust litigation and government enforcement of antitrust law have remained active throughout 2020. Legislatures and antitrust authorities have focused on the application of competition policy to digital sectors, closely examining the conduct and business models of large online platforms and other digital businesses. Recent complaints filed by the DOJ, FTC and state attorneys general suggest that antitrust authorities are exploring relatively untested territory under US law, such as theories of self-preferencing as a monopolisation violation and requests to unwind long-consummated mergers as a remedy for alleged anticompetitive harm.<sup>181</sup> Government victories in these enforcement actions could lead to follow-on private litigation and establish precedent for new varieties of antitrust claims against firms in the digital space.<sup>182</sup> These platforms' expansive user bases could also yield large consumer classes in private class-action suits.

In 2021, US courts, in conjunction with antitrust enforcers and Congress, will play a central role in steering antitrust law and policy developments that will impact future private antitrust litigation. With the Democratic Party now in control of Congress and the White House, the coming years are likely to see increased antitrust enforcement as well as legislative proposals to expand the scope of antitrust liability, with the potential to expose firms to a broader variety of suits from competitors, customers, users and government enforcers.<sup>183</sup>

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175 See 28 USC Section 1963.

176 See FRCP 69(a)(2).

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

178 *id.*

179 *Koehler v. Bank of Bermuda*, 12 NY3d 533, 538–41 (2009); *Gryphon Dom VI, LLC v. APP Intl Fin Co*, BV, 41 AD3d 25, 31 (NY App Div 1st Dep't 2007).

180 *Koehler*, 12 NY3d at 544–45 (Smith, J, dissenting) (noting potential constitutional objections).

181 *FTC v. Facebook, Inc*, No. 1:20-cv-03590 (DDC, filed 9 December 2020); *State of New York v. Facebook, Inc*, No. 1:20-cv-03589 (DDC, filed 9 December 2020); *United States v. Google LLC*, No. 1:20-cv-03010 (DDC, filed 20 October 2020).

182 See, e.g., *Sherman et al v. Facebook, Inc*, No. 5:20-cv-08721 (ND Cal, filed 9 December 2020).

183 See, e.g., Cecilia Kang, 'Democratic Congress Prepares to Take On Big Tech', *New York Times*, 26 January 2021, available at [www.nytimes.com/2021/01/26/technology/congress-antitrust-tech.amp.html](http://www.nytimes.com/2021/01/26/technology/congress-antitrust-tech.amp.html).

Private parties should also note the US agencies' recent focus on alleged 'nascent competitor' transactions.<sup>184</sup> Nascent competitor transactions involve the acquisition of a firm that does not yet compete in the buyer's market but that presents a potential competitive threat to the buyer.<sup>185</sup> Traditionally, US merger law has focused on mergers between two parties that compete in the same market or are expected to compete in the same market in the foreseeable future.<sup>186</sup> However, in a number of recent cases, the government has argued that potential harm extends to mergers in which the target company has the potential to enter and compete in the buyer's market.<sup>187</sup> While less common than government suits, private parties may sue to enjoin mergers under Section 16 of the Clayton Act.<sup>188</sup> Firms should carefully assess whether a planned merger could be viewed as an acquisition of a nascent competitor and create private litigation risk in addition to the risk of regulatory enforcement to enjoin the merger.

The DOJ has also been increasingly involved in private litigation through its amicus programme, which involves filing third-party briefs in cases, to offer the agency's insight, expertise and recommendations to courts dealing with important questions in antitrust law.<sup>189</sup> In currently pending circuit court cases, the DOJ has argued that: (1) a franchisor and franchisee are legally capable of conspiring over the terms of a franchise agreement;<sup>190</sup> (2) state dental boards are not immune from antitrust liability under the state action doctrine unless the boards can meet stringent requirements;<sup>191</sup> (3) immunity for insurance companies from antitrust scrutiny under the McCarran-Ferguson Act is a narrow exception;<sup>192</sup> and (4) lost tax revenue is not cognisable as an antitrust injury.<sup>193</sup> The US Supreme Court has also requested that the DOJ weigh in on *Viamedia, Inc v. Comcast Corporation*, a private monopolisation

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184 Prepared Statement of the Federal Trade Commission before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, 'Competition in Digital Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms' (24 September 2019), available at [www.ftc.gov/system/files/documents/public\\_statements/1545208/p180101\\_testimony\\_-\\_acquisitions\\_of\\_nascent\\_or\\_potential\\_competitors\\_by\\_digital\\_platforms.pdf](http://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf).

185 id.

186 id.

187 See *FTC v. Facebook, Inc*, No. 1:20-cv-03590 (DDC, filed 9 December 2020); *State of New York v. Facebook, Inc*, No. 1:20-cv-03589 (DDC, filed 9 December 2020); *United States v. Visa Inc*, No. 1:20-cv-07810 (DDC, filed 5 November 2020).

188 15 USC Section 15(a).

189 US Dep't of Justice, Division Update Spring 2018 (10 April 2018), available at [www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-expands-its-appellate-and-amicus-program](http://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-expands-its-appellate-and-amicus-program).

190 Brief for United States of America as amicus curiae in support of neither party, *Arrington v. Burger King Worldwide, Inc*, No. 20-13561 (11th Cir, filed 7 December 2020).

191 Brief for United States of America as amicus curiae in support of neither party, *Jeffrey Sulitzer, et al v. Joseph Tippins, et al*, No. 20-55735 (9th Cir, filed 2 December 2020); Brief for United States of America as amicus curiae supporting plaintiffs-appellees, *D Leeds, et al v. Adolphus Jackson, et al*, No. 19-11502 (11th Cir, filed 11 September 2019).

192 Brief for United States of America as amicus curiae supporting plaintiff-appellant and reversal, *Oscar Insurance Company of Fl. v. Blue Cross and Blue Shield, et al*, No. 19-14096 (11th Cir, filed 6 January 2020).

193 Brief for United States of America as amicus curiae in support of neither party, *City of Oakland v. Oakland Raiders, et al*, No. 20-16075 (9th Cir, filed 15 October 2020).

case between competitors in which the Supreme Court may issue a decision clarifying the appropriate standard for refusal to deal claims under US law.<sup>194</sup>

Several private antitrust litigation matters have been accepted by the Supreme Court for review or seem likely to make their way to the United States' top court in 2021. For example, the Supreme Court has accepted an appeal from the National Collegiate Athletic Association (NCAA) after the Ninth Circuit affirmed a ruling that the NCAA's restrictions on education-related benefits for college athletes are anticompetitive.<sup>195</sup> The Supreme Court has also been asked to consider the anticompetitive effects of no-poach agreements in a suit by a pizza chain's workers against the company.<sup>196</sup>

Ongoing developments in antitrust law and policy, as well as active enforcement by antitrust authorities testing novel legal theories and approaches to remedies, suggest that private antitrust litigation will remain a robust and developing area in the United States.

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194 Order, *Comcast Corporation, et al, Petitioners v. Viamedia, Inc*, No. 20-319 (S Ct, filed 7 December 2020) ('The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.'). The DOJ also weighed in on the standard for refusal to deal claims in *FTC v. Qualcomm, Inc*, 969 F3d 974 (9th Cir 2020).

195 Order, *NCAA v. Alston, et al*, No. 20-512 (S Ct, filed 16 December 2020).

196 Petition for a writ of certiorari, *Derek Piersing v. Domino's Pizza Franchising LLC, et al*, No. 20-695 (19 November 2020).