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Contents

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Private antitrust litigation in the US is a robust and well-developed discipline, featuring a mature and evolving body of case law pursuant to which litigants and courts regularly explore the outer boundaries of private recovery. The US Congress intended this: the federal antitrust laws deliberately contain economic incentives designed to encourage private parties to pursue costly and time-consuming litigation, acting – in the words of the US Supreme Court – as "private attorneys general" to complement the efforts of resource-constrained antitrust enforcement agencies in punishing cartel conduct. [Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).] Thus, in addition to the US Department of Justice, Antitrust Division (the Division) and the US Federal Trade Commission (FTC), which share principal responsibility for public enforcement of the federal antitrust laws, private litigation is a "chief tool in the antitrust enforcement scheme." [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 615 (1985).] A similar dynamic plays out under the laws of the individual states, which generally authorise the respective state attorneys general to pursue public enforcement of the states' antitrust laws, while authorising private parties to pursue damages claims. This dynamic can complicate a defendant's response to antitrust allegations and demands a well-planned strategy for responding to these parallel public and private threats.

1.2 Other Developments

This year has seen a number of significant developments in antitrust litigation in the US. Two of the most noteworthy trends are summarised here.

'No-Poach' Litigation

While the Division supports private litigation as a tool for antitrust enforcement, it is sensitive to the potential consequences to its own enforcement regime that may arise from the circumstance wherein private plaintiffs – economically incentivised to sue – are doing so under the same Sherman Act provisions that apply to the Division's enforcement efforts. The Division closely monitors private antitrust cases and will seek to intervene to advocate for its own pro-enforcement posture if the private case – perhaps because of unusual facts or aggressive argument by the parties – threatens to create bad precedent or otherwise impacts one of the Division's enforcement priorities. This has happened in a number of cases in a wave of private litigation challenging agreements between employers not to poach each other's employees (known as 'no-poach' agreements).

These actions were inspired by a set of DOJ consent agreements on these arrangements, followed by joint guidance the Division and FTC issued in October 2016, announcing the agencies' intent to pursue no-poach arrangements as criminal per se violations of § 1 of the Sherman Act. The per se rule applies to a narrow class of concerted actions between competitors – including price-fixing and market division – that courts recognise as "irredeemably" restraining competition, without any assessment of the potential pro-competitive effects of that conduct. As a matter of policy, the Division pursues criminal charges only for per se antitrust violations. Categorisation of a restraint as 'per se' is of crucial importance to antitrust defendants in both criminal prosecutions and private litigation because defendants lose the opportunity to argue that the challenged restraint has pro-competitive benefits that justify its implementation (the 'Rule of Reason' test). As a result, litigants fiercely contest whether a restraint is a per se violation, particularly when the conduct at issue is at the outer boundary of what the case law recognises as a per se restraint.

After the Division and FTC issued their no-poach guidance in 2016, private plaintiffs, exercising the complementary antitrust enforcement role envisioned by Congress, promptly pursued class actions alleging anticompetitive no-poach arrangements in a variety of settings, ranging from medical school hiring to franchisee-franchisor agreements. Among other things, many of these matters have featured disputes over whether the challenged arrangement falls within the category of no-poach restraints the agencies intend to pursue on a per se basis. The Division, citing its "strong interest in the [] correct application" of the antitrust laws, has filed Statements of Interest in a number of these cases, setting out its views on how the law should be applied. [28 U.S.C. § 517.] The private plaintiffs' bar will no doubt continue to contribute to the evolution of the no-poach theory of antitrust liability, even as the antitrust enforcement agencies seek to safeguard the bright-line contours of the per se rule.

Federal Judge Scrutinises the Division's Resolution of CVS-Aetna Merger Challenge

The Division has also clashed recently with the federal courts over a perceived threat to the agency's power to investigate and resolve potential threats to competition resulting from contemplated business combinations. Section 7 of the Clayton Act authorises the Division and FTC to scrutinise – and, if necessary, seek to enjoin – mergers and acquisitions if their completion could "substantially... lessen competition or tend to create a monopoly." When the agencies' pre-merger review suggests to them that the transaction could violate Section 7, they may sue in an effort to block the deal's completion (as the Division tried – and failed – to do in challenging the AT&T-Time Warner deal). The agencies can resolve threatened suits to stop the deal by seeking concessions from the merging parties – including divestitures of some business assets or units – to mitigate the threat of harm caused by the combination. As we note in **2.3 Decisions of National Competition Authorities**, such proposed resolutions are subject to review by the federal courts to ensure that a proposed resolution is in the 'public interest', a standard that courts have long applied deferentially. [15 U.S.C. § 16.] But

this year, Judge Leon of the D.C. District Court has sought to clarify the "permissible scope" of this judicial review, in his scrutiny of the Division's proposed settlement to approve a planned USD69 billion merger between pharmacy retailer CVS and health-care company Aetna. Over the objections of the Division and the merging parties, Judge Leon recently held what was considered an unprecedented evidentiary hearing to test whether the parties' proposal for Aetna to divest a segment of its business was sufficient to protect the public interest from the potential anticompetitive effects of the merger. Stating that the statute mandates that courts do not simply "rubberstamp" a consent decree proposed by the government, Judge Leon heard evidence from interested parties concerning potential effects of the merger beyond those identified in their applications for court approval of the deal. On September 4, 2019, the court issued a decision that ultimately approved the resolution but that reaffirmed the courts' authority to review these consent decrees. It remains to be seen whether or how this decision, from an influential district court, will impact the ways in which parties and the government resolve potential antitrust scrutiny of planned business combinations.

2. The Basis for a Claim

2.1 Legal Basis for a Claim

Section 4 of the Clayton Act authorises damages suits in federal court by "any person" – which includes corporations and other legal entities – "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." [15 U.S.C. §§ 7; 15(a).] The federal "antitrust laws" underlying private damages claims include, perhaps most prominently, Section 1 of the Sherman Antitrust Act (prohibiting concerted action that unreasonably restrains trade), and Section 2 (prohibiting single-firm conduct that harms consumers by unreasonably excluding competitors from a market). State antitrust laws vary, but broadly confer private rights of action on a similar basis.

The Clayton Act does not constrain litigants to pursuing only those damages claims that follow on from parallel scrutiny by federal law enforcement. These standalone damages claims – brought by private litigants in the absence of any governmental action against the defendants – are common in US practice. That said, news that antitrust authorities are investigating potential anticompetitive conduct commonly prompts private litigants to quickly initiate parallel damages actions, usually while the underlying investigation remains pending.

2.2 Specialist Courts

With the exception of the FTC's administrative adjudicatory process (described in **2.3 Decisions of National Competition Authorities**), most federal competition matters are resolved in the US federal courts, which have exclusive jurisdiction over federal antitrust claims. The Clayton Act accords plaintiffs wide latitude in choosing a venue (that is, the US federal district court in which they file suit). Venue is proper under the Clayton Act in any federal district where the defendant "resides or is found or has an agent", or "transacts business." [15 U.S.C. §§ 15(a), 22.] The parties may request, or the court may on its own decide, "for the convenience of parties and witnesses" or "in the interest of justice", to transfer a federal antitrust litigation to a different federal district where the case "might have been brought." [28 U.S.C. § 1404(a).] It is not unusual for claimants to file parallel antitrust complaints in differing federal districts. When this occurs, the parties may request that the Judicial Panel on Multidistrict Litigation consolidate claims – involving "common questions of fact" – into a single federal district for coordinated pre-trial proceedings. [28 U.S.C. § 1407(a).]

Antitrust claims made under state law may also be heard in federal court if they supplement a federal claim [28 U.S.C. § 1332(a)] or if they meet the requirements of the Class Action Fairness Act of 2005, which significantly expanded the federal courts' authority to resolve large class actions even if pursued under state law. [28 U.S.C. § 1367(a).]

2.3 Decisions of National Competition Authorities

The federal antitrust enforcement agencies retain discretion over their enforcement decisions, but those decisions are generally subject to judicial review in some form. The FTC, as an independent administrative agency, possesses the statutory authority to adjudicate civil claims of 'unfair competition' before the agency's own administrative law judges in trial-type proceedings. Decisions by FTC administrative judges are reviewable by the FTC commissioners, and a losing defendant may appeal the commission's decision to the federal appeals courts.

By contrast, the Division, as a law enforcement agency, lacks the authority to adjudicate its own disputes, and instead must pursue enforcement actions exclusively in the federal courts. The courts likewise retain oversight of Division settlements of these cases before trial. When the Division concludes a civil antitrust investigation or litigation by settlement (known as a 'consent decree'), the Antitrust Procedures and Penalties Act obliges the Division to file a complaint and proposed settlement materials in federal court and submit to judicial approval of the settlement's terms. However, the court's review is limited to ensuring the settlement is in the "public interest." [15 U.S.C. § 16.] This has traditionally been interpreted as a highly deferential standard of review, but a recent decision has reaffirmed that the court's review is not simply a "rubberstamp" for the government's proposed resolution, see **1.2 Other Developments**. By contrast, a criminal antitrust prosecution – which as a matter of policy, the Division uses to target only 'hardcore' per se competition offenses – is overseen in its initial stages by a federal grand jury, which decides whether there is 'probable cause' to believe a

crime was committed, justifying the issuance of an indictment. In general, most criminal antitrust defendants plead guilty rather than stand trial. In that circumstance, the trial court has discretion to accept or reject the Division's recommended sentence.

A federal antitrust enforcement action can have important consequences on a parallel private litigation. For example, a final judgment or decree against a defendant in a federal antitrust enforcement action can serve as prima facie evidence against that defendant in related private litigation. [15 U.S.C. 16(a).] In addition, the Division periodically intervenes in civil antitrust litigation to request a stay of discovery where the Division believes the exchange of evidence between the parties could undermine the Division's ongoing criminal investigation of one or more defendants. Finally, the Division may intervene in private antitrust litigation as an amicus curiae to offer its views on the application of the antitrust laws to a given complaint.

2.4 Burden and Standard of Proof

Section 4 of the Clayton Act requires a plaintiff to prove that the defendant(s) violated the antitrust laws and that the plaintiff has been "injured in his business or property" – that is, suffered economic loss – "by reason of" that violation. Plaintiffs in federal antitrust cases must prove each element of their claim by a 'preponderance of the evidence', meaning they must establish through direct or circumstantial evidence that a fact is more likely than not true.

The US Supreme Court has articulated important 'limiting contours' on the right of private plaintiffs to recover treble damages under the Clayton Act, embodied in the requirement that plaintiffs establish the element of 'antitrust standing', which tests whether a particular plaintiff is the appropriate party to recover damages for an established antitrust violation. First, antitrust plaintiffs must demonstrate that they have suffered an 'antitrust injury', that is, an injury "of the type the antitrust laws were intended to prevent." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).] For example, a retailer that loses its distribution agreement with a manufacturer for refusing to conspire with other retailers to rig bids to sell the manufacturer's products has not suffered antitrust injury. This is because the retailer's harm (lost profits) does not "flow[] from that which makes bid-rigging unlawful" under the antitrust laws (ie, higher prices to consumers). [Gatt Communications, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68 (2d Cir. 2013).] Plaintiffs must also establish they are "efficient enforcers of the antitrust laws", an inquiry that assesses (among other things) the "directness" of the link between the asserted conduct and injury, and the existence of other "more direct" victims. [Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).] These elements are not part of the government's burden in proving an antitrust violation.

2.5 Direct and Indirect Purchasers

The US Supreme Court has ruled that 'indirect purchasers' – consumers who do not purchase directly from defendants, but to whom the direct purchaser has passed on the overcharge caused by the defendants' conspiracy – generally lack standing to pursue damages claims under the federal antitrust laws. [Illinois Brick Co. v. Illinois, 431 US 720 (1977).] This decision is rooted in concerns for judicial economy and the challenges in apportioning damages passed from direct to indirect purchasers (and the threat that those challenges could lead to duplicative recovery). That said, there are exceptions to this rule, such as when the direct purchaser is party to the conspiracy. Further, since the Supreme Court announced the bar on federal indirect purchaser claims, a majority of states have enacted what are known as 'Illinois Brick repealer' statutes sanctioning those claims under state law. As a result, antitrust defendants may be forced to litigate in a single federal court against both direct purchasers under federal law and indirect purchasers under various state laws. Though there have been calls for Congress to overturn the Illinois Brick rule, it has not done so. And the US Supreme Court affirmed Illinois Brick's bar on damages suits by indirect purchasers in 2019, the Court's first application of the rule to a digital market. [Apple v. Pepper, 139 S.Ct. 1514 (2019).]

2.6 Timetable

The duration of federal antitrust litigation varies dramatically. Most cases are dismissed or resolved before trial. Cases can be dismissed at the pleadings stage with reasonable speed, though claimants may be permitted to re-plead their allegations, and may appeal dismissal. Cases that survive the dismissal stage can go on for years, as the parties exchange evidence, retain experts, dispute class certification (see **3.2 Procedure**) and seek summary judgment before trial (see **4.1 Strikeout/Summary Judgment**). Private antitrust litigation is not automatically suspended (or 'stayed') during a parallel investigation by federal antitrust authorities. The litigants can seek stays of antitrust litigation for reasons common to most federal court litigation, including to raise 'interlocutory' appeals of issues that do not finally resolve the case (see **11.1 Basis of Appeal**).

3. Class/Collective Actions

3.1 Availability

Class actions are at the heart of private antitrust litigation in the US. Class litigation proceeds on an 'opt-out' basis: members of a 'certified' class are included in the resolution of the claim unless they affirmatively opt to be excluded from it.

3.2 Procedure

Any plaintiff suing under the federal antitrust laws may seek to pursue their claims on behalf of a putative class of similarly-situated parties whose injuries at the hands of defend-

ants involve the same set of concerns. To maintain a class, a plaintiff must move for 'class certification', establishing by a preponderance of the evidence that the class complies with the requirements of US Federal Rule of Civil Procedure 23. This class-certification review involves a "rigorous analysis" that "will frequently entail overlap with the merits of the plaintiff's underlying claim.":

- the class is so "numerous" that simple "joinder" of each class member's individual complaints into a single litigation would be "impracticable";
- the class members present questions of fact and law in "common" with one another (ie, that they have "suffered the same injury");
- the lead plaintiff's claims are "typical" of those of the class; and
- the lead plaintiff will "fairly and adequately protect the interests of the class." [Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013).] To begin with, a plaintiff must affirmatively demonstrate that [Fed R. Civ. P. 23(a).]

In addition to those "prerequisites", a plaintiff must also establish that the putative class meets one of several enumerated bases for certification. Most antitrust class actions seek to proceed on the showing that both common questions of law or fact "predominate" over questions affecting individual members and a class action is "superior" to alternative methods of "fairly and efficiently adjudicating the controversy." [Fed R. Civ. P. 23(b)(3).]

3.3 Settlement

The federal courts encourage parties to settle their disputes rather than litigate and, outside of the class-action setting, parties may stipulate to voluntary dismissal without disclosing the terms of settlement. [Fed R. Civ. P. 41(a)(1)(A)(ii).] But because the resolution of a class action has binding effect on absent class-members who have not opted out, the courts play a significant, multi-stage role in reviewing and approving settlement (or voluntary dismissal) of class claims. This is to ensure that the resolution fairly and adequately protects the rights of all class-members. [Fed. R. Civ. P. 23(e).] The animating concerns underlying these protections are that the lead plaintiff (and their counsel) may accept a settlement that is too small to appropriately compensate the class, and/or fail to take adequate steps to notify class members (hoping to keep whatever funds are not distributed to the class). The settling litigants – though adversaries under a plaintiff's complaint – must work together to jointly pursue and defend to the court the contours of the proposed settlement.

First, the parties must obtain the court's preliminary approval of the proposed settlement, by demonstrating both that it would likely be considered fair and adequate under a full review and that it would apply to a class that would satisfy the standards for class certification (described above in **3.2 Procedure**). Next, the parties must provide notice "in a reasonable manner" to "all class members who would be bound" by the proposed settlement. This notice must allow class members to object to the proposed settlement (on their own or on behalf of others). The court may also require that members of previously certified classes have another chance to opt out. Finally, the court must hold a "fairness hearing" to consider whether the settlement is "fair, reasonable, and adequate," assessing factors that include:

- the complexity, expense and likely duration of the litigation;
- the reaction of class members to the proposed settlement;
- the risks of establishing liability and damages; and
- a comparison of the settlement fund to the best possible recovery in light of the risks of litigation. [City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), abrogated on other grounds by Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000).]

4. Challenging a Claim at an Early Stage

4.1 Strikeout/Summary Judgment

Most private antitrust actions in federal court do not reach trial, but instead are either dismissed or settled at pre-trial breakpoints. Early in the case, defendants can seek to have a case dismissed on the grounds of a plaintiff's failure to plead sufficient factual allegations to support key elements of an antitrust claim. Defendants raise these challenges as a matter of course in most federal litigation, including under the antitrust laws. Defendants can raise a number of pleading defects, including that the claim is untimely, that defendants are not subject to the court's jurisdiction, that the pleading fails to plausibly allege a claim upon which relief can be granted or that the plaintiffs lack standing to sue in court. [Fed. R. Civ. P. 12.] Courts take these threshold challenges seriously, particularly in light of the significant costs and burdens of discovery in antitrust class actions. In 2007, the Supreme Court clarified that to survive dismissal and proceed to discovery, antitrust plaintiffs must plead a claim that is at least plausible on its face, as opposed to relying on conclusory statements suggesting an antitrust violation is merely possible. [Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).] Of course, because defendants generally cannot recover costs for successfully dismissing an antitrust claim, there is comparatively little disincentive for class plaintiffs to plead even a speculative claim on a contingency basis, in hopes the complaint survives dismissal and opens the door to discovery.

At the end of discovery and before trial, plaintiffs and defendants can ask the court to grant summary judgment on all or part of the claims, which requires the moving party to show that, with the evidence gathered, "there is no genuine dispute as to any material fact" relating to a claim or defence, obviating the need to put that question to the fact-finder at

trial. [Fed. R. Civ. P. 56(a).] Courts evaluate these motions by considering the evidence in the light most favourable to the opposing party and drawing all reasonable inferences in that party's favour. To overcome summary judgment in the antitrust conspiracy context, plaintiffs must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently." [Matsushita Elc. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).] For example, a court may grant summary judgment for defendants in a conspiracy case where there is no direct (or 'smoking gun') evidence of a conspiracy, and the evidence suggests the alleged conspiracy would have been economically irrational. See, eg, [Anderson News, L.L.C. v. American Media, Inc., 899 F.3d 87 (2d Cir. 2018).]

4.2 Jurisdiction/Applicable Law

In addition to the venue requirements of the Clayton Act (see **2.2 Specialist Courts**), plaintiffs must establish that both the defendant(s) and the conduct complained of are subject to the jurisdiction of the US courts. These requirements include both personal and subject matter jurisdiction.

Personal Jurisdiction

Personal jurisdiction assesses the court's power to hear cases against particular defendants. As a matter of constitutional due process, the federal courts have the ability to impose liability only as to defendants that maintain sufficient 'minimum contacts' with the forum state. Depending on the strength of a defendant's forum contacts, personal jurisdiction can be general (all-purpose) or specific (conduct-linked). For corporations, in all but the most "exceptional" cases, general jurisdiction will exist only if the defendant is headquartered or incorporated in the forum. [Daimler AG v. Bauman, 134 S. Ct. 746 (2014).] The narrower specific jurisdiction is appropriate only for claims that "arise out of or relate to" a foreign defendant's purposeful contacts with the forum itself (not simply with parties that reside in the forum). [Walden v. Fiore, 134 S. Ct. 1115 (2014).] In the antitrust context, this means plaintiffs must demonstrate their claim against a foreign defendant bears a causal connection to that defendant's forum contacts.

Subject Matter Jurisdiction

By contrast, subject matter jurisdiction is the power of the court to hear a given type of claim. In the antitrust context, as courts and litigants grapple with the practical realities of increasingly global supply chains and cross-border finance, this question is frequently considered in terms of the territorial limitations applied to the Sherman Act's bar on conspiracies that restrain trade. The US Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits the territorial reach of US antitrust law to domestic or import commerce, and places foreign or export conduct beyond the reach of US courts unless that conduct has a "direct, substantially, and reasonably foreseeable effect" on US commerce and that effect "gives rise to" a US antitrust claim. [15 U.S.C. § 6a.] Whether the causal nexus between foreign conduct and domestic effect is sufficiently direct will depend on the facts and circumstances, including the structure of the market and the relationships of the parties. Appeals courts presently disagree on whether the FTAIA's directness prong requires that the US effect follow as the 'immediate consequence' of the foreign antitrust conduct or whether the domestic effect must only bear a reasonably proximate causal nexus to that conduct. But however the test is expressed, the appeals courts generally appear to agree that the wholly-foreign price fixing and sale of components included in goods sold to US consumers can have a direct effect on US commerce.

4.3 Limitation Periods

A private litigant may pursue a claim for damages under the federal antitrust laws within four years after the cause of action has "accrued." [15 U.S.C. § 15b.] An antitrust claim accrues when the defendants' offending conduct causes the claimant to suffer a non-speculative injury. In the case of an ongoing conspiracy, the limitations period runs from each new "overt act" in furtherance of the conspiracy that inflicts new and accumulating injury on the plaintiff. [Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321 (1971).] In rare cases, the theory of 'fraudulent concealment' may equitably 'toll' (ie, pause) the limitations period where defendants have taken affirmative actions to prevent a plaintiff from learning of their cause of action. The limitations period can also be tolled for other statutory reasons, such as a pending government action for the same conduct. [15 U.S.C. 16(i).] In addition, the statute of limitations for a plaintiff who opts out of a purported class action remains tolled during pendency of the class claim. [American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).] Last year, the Supreme Court clarified that this rule applies only to opt-out plaintiffs who seek to pursue damages claims on their own behalf, and not to plaintiffs who seek to re-assert class claims after a prior class has failed to achieve certification for the same issues. [China Agritech v. Resh, 138 S. Ct. 1800 (2018).]

Limitations periods under state antitrust laws vary from as few as one year to as many as six. A small handful of states do not specify a limitations period for antitrust claims.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

The exchange of evidence between parties in federal antitrust litigation is governed by the general rules for discovery in federal court. Those rules contain a permissive standard for what evidence parties may request: "any nonprivileged matter that is relevant to any party's claim or defense," whether or not that information would ultimately be admissible at trial. [Fed. R. Civ. P. 26(b)(1).] Parties may request production of documents and electronically stored information, written responses to questions and requests for admissions, as well

as depositions of witnesses of fact or corporate representatives. Non-US litigants may, in some circumstances, need to provide disclosure that would not be permitted under their own country's laws. In addition, litigants may serve subpoenas seeking discovery from non-litigants.

Under these standards, discovery in US federal litigation is, in general, more burdensome, costly, and time-consuming than in many other jurisdictions. In the antitrust context, discovery can be particularly costly and time-consuming, as large putative classes of plaintiffs raise a variety of complex issues. That said, there are important constraints on the scope of discovery. Since 2015, the federal rules have limited permissible discovery to relevant information that is "proportional to the needs of the case." Parties may resist discovery requests on a variety of grounds, including that the requested materials fail the relevance standard or that compliance would be unduly burdensome under the circumstances.

In addition, the Supreme Court – recognising the practical risk that the burdens of antitrust discovery can push defendants to settle even 'anaemic' cases – has instructed lower courts to take seriously their gatekeeping function at the motion to dismiss stage (see **4.1 Strikeout/Summary Judgment**). In 2007, the Supreme Court clarified that to survive a motion to dismiss an antitrust claim on the pleadings, plaintiffs must set forth specific facts (accepted as true) "plausibly suggesting (not merely consistent with) agreement." [Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).] This decision has had the effect of raising the bar on what plaintiffs must allege, frequently before being permitted to request discovery from defendants.

5.2 Legal Professional Privilege

The attorney-client privilege protects from the discovery process confidential communications between an attorney and client made for the primary purpose of seeking or providing legal advice. In the corporate setting, the attorney-client privilege extends to communications between attorneys and those employees who "will possess the information needed by the corporation's lawyers" in order to provide sound legal advice, as well as to those employees who "will put into effect" that advice. [Upjohn Co. v. United States, 449 U.S. 383 (1981).] Importantly, in-house counsel communications may be protected by attorney-client privilege under US law. Further, the privilege protects attorney-client communications made with a business purpose, so long as at least "one of the significant purposes" of the communication was obtaining or providing legal advice. [In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).] And internal corporate communications that do not include attorneys may sometimes remain subject to the privilege, including where those communications reflect an attorney's legal advice or a non-attorney – such as in a compliance or internal audit role – is gathering facts at the direction of an attorney for the purpose of facilitating the attorney's provision of legal advice to the company.

That said, there are some important limitations on the scope of the privilege protection. For example, only the substance of legal advice (or of a request for advice) is protected. The fact of an attorney-client communication is not protected. Nor are underlying materials or information shared between attorney and client for the purpose of giving or receiving advice protected by the privilege. In addition, a party generally waives privilege protection by failing to maintain the confidentiality of legal advice, including by sharing that advice with third parties. There is no exception to this waiver for voluntary disclosure of privileged communications to the government (though importantly, the US antitrust authorities do not demand an investigative target hand over privileged materials to be seen as cooperative in a government investigation). And the privilege does not protect attorney-client communications made for the purpose of committing or furthering a crime or fraud. [United States v. Zolin, 491 U.S. 554 (1989).]

The 'common interest' protection – an exception to the rule that sharing legal advice with third parties results in a privilege wavier – safeguards against the compelled disclosure of communications between parties and their respective counsel when aligned in a common legal interest. There is some disagreement among the federal appeals courts as to whether the common interest protection is limited to communications between parties when threatened by litigation; a number of appeals courts recognise the protection shields the "full range of communications otherwise shielded by the attorney-client privilege" without regard to whether litigation is threatened. [Schaeffler v. United States, 806 F.3d 34, 40,42 (2d Cir. 2015).] In federal antitrust litigation, co-defendants regularly invoke the common interest protection to share materials and collaborate on defence strategy. Frequently, co-defendants will sign a joint defence agreement formalising that arrangement (but this step is not strictly required for the common interest protection to apply).

A related protection arises under the 'work-product' doctrine, which shields from disclosure materials "prepared in anticipation of litigation." [Fed. R. Civ. P. 26(b)(3).] It protects both "documents and tangible things" and the "mental impressions, conclusions, opinions, or legal theories of a party's attorney." The work product doctrine is not an absolute bar to compulsory disclosure of qualifying materials. Rather, an adversary may ask the court to compel disclosure of work product by showing that the requesting party has a "substantial need" for the materials in order to prepare its case and that the party cannot, without "undue hardship," obtain through "other means" the "substantial equivalent" of the requested materials. [Fed. R. Civ. P. 26(b)(3)(A)]. In practical terms, however, this is a very challenging standard to meet.

5.3 Leniency Materials/Settlement Agreements

As described in **2.3 Decisions of National Competition Authorities**, agreements to settle most forms of enforcement proceedings by the US federal antitrust authorities are typically made public in the course of a federal court's review of the proposed resolution. One exception to this general rule is for parties who qualify for leniency pursuant to the DOJ Antitrust Division's Corporate Leniency Policy. The Leniency Programme, a centrepiece of the Division's criminal cartel enforcement efforts for more than 25 years, accords immunity from criminal antitrust prosecution to corporations that report their role in a per se antitrust violation at an early stage and meet certain other conditions, including cooperating fully with the Division's prosecutions of co-conspirators and making restitution to injured parties. To encourage applicants to come forward, Division policy is to treat as confidential the identity of leniency applicants and the materials they provide. The Division acknowledges it will disclose the identity of a leniency applicant if ordered to do so by a court. But such an order would be unusual. While at least one appeals court has held that the Division must disclose leniency agreements pursuant to requests under the US Freedom for Information Act (FOIA), that court also recognised that details within those materials identifying a leniency recipient could be exempt from FOIA disclosure. [Stolt-Nielsen Transportation Group Ltd. v. United States, 534 F.3d 728 (D.C. Cir. 2008).]

That said, a conditional leniency recipient will likely identify itself to plaintiffs in follow-on civil litigation, in an effort to fulfil their restitution obligation under the Leniency Policy by cooperating with plaintiffs and earning the resulting detrebling of damages available under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA). In addition, public companies may face other legal obligations, such as under the securities laws, to disclose their status as the recipient of leniency.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Litigants in US federal court may rely on, and compel, testimony from witnesses of fact both before and during trial. Prior to trial, the principal tool for gathering the compulsory testimony of a witness is the deposition, in which the requesting litigant compels the witness to attend an in-person interview to provide sworn testimony in front of a judicial officer. Parties can also request that opposing parties respond to written questions, called 'interrogatories.' In either case, the court may compel the witness to respond under threat of sanction. During trial, there is a general preference for witnesses to provide live testimony so that the factfinder can evaluate the witness's credibility, and so the opposing party can cross-examine the witness. That said, deposition testimony may be admitted into evidence to contradict or impeach testimony given during trial, or in some cases, if a witness is unavailable to testify in court.

6.2 Expert Evidence

The rules governing federal court litigation, including antitrust claims, permit parties to rely on expert evidence both before and during trial. In the antitrust context, the parties nearly always rely on one or more experts to establish (or challenge) key issues, including:

- whether a purported class of plaintiffs satisfies the requirements for certification,
- the appropriate contours of the relevant product market,
- a party's market power (or lack thereof), and
- the proper measure of damages.

Expert evidence will generally take the form of a written report prepared and signed by the expert (which must be provided to the opposing party prior to trial) as well as in-person testimony. [Fed. R. Civ. P. 26(a)(2).]

An expert's testimony is admissible as evidence only if the court determines that

- the expert's specialised knowledge will assist the factfinder;
- the testimony is based on sufficient facts or data;
- the testimony is the product of reliable principles and methods; and
- the expert has reliably applied these principles and methods to the facts of the case.

This assessment requires the court to scrutinise the expert's particular methods and their degree of acceptance in the relevant field. [See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).] Before or during trial, parties can challenge the admissibility of opposing expert testimony or dispute the validity of that testimony. Parties may depose opposing experts, cross-examine them at trial, and seek to introduce evidence that purports to conflict with an expert's conclusions.

7. Damages

7.1 Assessment of Damages

The Clayton Act does not provide for punitive damages. Instead, plaintiffs who suffer antitrust injury may recover three times their actual damages (known as 'treble damages'). For consumer plaintiffs injured by a price-fixing or a market-division cartel, common measures of damages include the amount of the overcharge caused by the conspiracy, measured by identifying the price they would have paid but for the restraint. For competitor plaintiffs injured by a monopolist's exclusionary conduct, a common measure of damages is the plaintiff's resulting lost profits. As with

the other elements of a civil antitrust action, plaintiffs must establish the value of their injury by a preponderance of the evidence standard. The Clayton Act permits damages assessments to be made "in the aggregate" according to "statistical or sampling methods" accepted by the court. [15 U.S.C. § 15d.] In practice, antitrust plaintiffs nearly always rely on an expert to quantify damages according to an accepted model. Plaintiffs must also prove that the damages were not caused by separate and independent factors – ie, they are required to disaggregate the losses caused by the alleged antitrust violation.

A statutory exception to the treble damages rule exists for defendants who successfully receive leniency from prosecution under the Division's Leniency Policy. Under the ACPERA leniency recipients who provide 'satisfactory cooperation' to plaintiffs in follow-on civil litigation may have their damages limited to actual damages, rather than treble damages. Courts have not assessed with any precision what constitutes a defendant's satisfactory cooperation, but defendants can expect that to receive what is known as 'ACPERA credit' they will need to provide evidence to plaintiffs in support of their antitrust claims.

7.2 'Passing-on' Defences

As set forth in **2.5 Direct and Indirect Purchasers**, indirect purchasers lack 'standing' to pursue damages claims under the federal antitrust laws. The corollary to this rule is the further limitation that defendants in federal antitrust litigation cannot escape liability by establishing that direct purchasers have passed on to indirect purchasers some or all of an anticompetitive overcharge. [Hanover Shoe v. United Shoe Machinery, 392 U.S. 481 (1968).] That said, a number of the state antitrust laws authorising antitrust claims by indirect purchasers provide that courts should take steps to avoid duplicative recovery, including by apportioning damages between direct and indirect purchasers.

7.3 Interest

Section 4 of the Clayton Act enables plaintiffs to recover interest on damages awards. Pre-judgment interest awards are discretionary: a federal district court may award interest on actual damages – but not for the full treble damages available under the antitrust laws – for any period from the date of service of the plaintiff's pleading to the date of judgment, when just in the circumstances. That standard considers whether defendants acted intentionally to delay resolution of the proceedings. [15 U.S.C. 15(a).] By contrast, post-judgment interest is mandatory: the court must award interest on a damages award until defendant(s) transfer the funds to the plaintiff(s). The interest – at a rate equal to the weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of the judgment – is calculated from the date of the entry of judgment and is compounded annually. [28 U.S.C. 1961.] Each state's antitrust laws provides for post-judgment interest; the law on pre-judgment interest varies from state to state.

8. Liability and Contribution

8.1 Joint and Several Liability

US antitrust law follows the common law tort principle of joint and several liability, which means each defendant can be responsible for paying the entire damage award for the conspiracy as a whole (not just for damages to purchasers with whom a given defendant transacted).

But as discussed in **5.3 Leniency Materials/Settlement Agreements** and **7.1 Assessment of Damages**, successful recipients of leniency from Division antitrust prosecution that provide "satisfactory cooperation" to follow-on litigants may have their civil damages claim limited to actual damages under ACPERA. Such a defendant will not be liable to plaintiffs on a joint-and-several basis for the harm from the entire conspiracy but will, instead, be held liable only for their own harm to the plaintiffs.

8.2 Contribution

The US Supreme Court has ruled that a defendant found jointly and severally liable under the federal antitrust laws for treble damages, costs, and attorneys' fees has no right to seek contribution from co-conspirators for their share of the damages award. [Texas Ind. Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981).] Rather, a single defendant may have to pay the entire damages award for three times the harm caused by the entire conspiracy. A court may subtract from the damages calculation any settlement other defendants have paid to resolve the litigation, but those settlement amounts are likely to reflect a discount to the settling defendants. This dynamic can create pressure on defendants to settle before trial, by exposing non-settling defendants to the risk of bearing a disproportionate share of liability for their role in a multi-party conspiracy. Courts do not permit co-defendants to agree to indemnify each other for liability but have generally upheld agreements between them to pay a proportionate share of any judgment based on – eg, each defendant's market share.

9. Other Remedies

9.1 Injunctions

The Clayton Act permits private plaintiffs to sue for injunctive relief against any "threatened loss or damage by a violation of the antitrust laws." [15 U.S.C. § 26.] To obtain injunctive relief, a plaintiff must show that:

- it has suffered irreparable injury that cannot be compensated for by other remedies, such as monetary damages;

- the balance of hardships between the plaintiff and defendant favour an injunction; and
- the injunction is in the public interest. [eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).]

The Clayton Act also allows plaintiffs to seek interim relief – in the form of a preliminary injunction that can be obtained prior to trial – if the plaintiff is able to show a "likelihood of success on the merits" of its claim. [N. Am. Soccer League, LLC v. United States Soccer Federation, Inc., 883 F.3d 32 (2d Cir. 2018).] A preliminary injunction requires a hearing and notice to the opposing party (although in exceptional circumstances parties can seek a temporary restraining order without such notice or a hearing). [Fed. R. Civ. P. 65.] The party seeking a preliminary injunction must post a security bond to compensate the opposing party if the injunction is found to have been unwarranted. Notably, the bar on damages claims by indirect purchasers under the federal antitrust laws does not extend to claims for injunctive relief.

9.2 Alternative Dispute Resolution

Alternative dispute resolution is available in antitrust litigation on similar bases as it is in other federal court litigation. Federal judicial policy is to favour arbitration, as a matter of contract between parties. While the courts cannot compel parties to arbitrate their disputes in the absence of an agreement between them to do so, the courts will rigorously enforce arbitration agreements according to their terms. In recent years, the US Supreme Court has applied that principle to arbitration agreements in boilerplate consumer contracts, in ways that have important consequences to private antitrust litigants. The Court has held that parties may not be compelled to arbitrate on a class-wide basis, in the absence of an agreement to do so. [Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).] A year later, the Court invalidated state laws seeking to bar enforcement of class arbitration waivers in consumer agreements. [AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).] These rulings could make it more challenging for consumers to pursue class-wide recovery under the antitrust laws. Indeed, most recently, the Supreme Court affirmed – in the antitrust context – that contractual waiver of class arbitration is enforceable even if the cost of individually arbitrating exceeds a claimant's potential for recovery. [American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013).]

10. Funding and Costs

10.1 Litigation Funding

Litigation funding is a developing industry in the US and is perhaps less evolved here than in other jurisdictions. Litigation funding may be available to support civil litigation under the antitrust laws. But funding arrangements may be at risk of challenge under the laws of at least some states, barring 'champerty', the practice of acquiring an interest in pursuing a third party's cause of action, in exchange for a portion of the proceeds if litigation succeeds. [See –eg, Boling v. Prospect Funding Holdings LLC, 771 Fed Appx. 562 (6th Cir. 2019).] Regardless, counsel for plaintiffs pursuing antitrust litigation under federal or state laws on a class-wide basis will likely act for plaintiffs on a contingency basis, receiving compensation only from the proceeds of any recovery to the class.

10.2 Costs

The Clayton Act provides that plaintiffs "shall recover" the costs associated with successfully litigating their claim, including "a reasonable attorney's fee." [15 U.S.C. 15(a).] In the normal course, plaintiffs' lawyers acting for a purported class work on contingency and seek to recover a percentage of any court-approved class settlement before trial. By contrast, defendants have no general statutory right to recover their costs of successfully defending a federal antitrust litigation. The lone means of recovering defence costs is for the court to impose monetary sanctions on plaintiffs under the federal rules, for example, based on a finding that plaintiffs (or their attorneys) have asserted frivolous claims or arguments. Sanctions – particularly significant monetary penalties – are exceedingly rare, and an unreliable source of recovery of defence costs. The lack of defence costs to serve as a headwind on speculative antitrust claims is one reason the courts take seriously their gatekeeper role in assessing defendants' threshold challenges to the sufficiency of an antitrust complaint.

In the normal course, courts will not order a litigant to post security for its opponent's litigation costs. The exception is that parties seeking preliminary injunctive relief must provide a security in an amount sufficient to pay the costs and damages sustained if the party is found to have been wrongfully enjoined or restrained. [Fed. R. Civ. P. 65.]

11. Appeals

11.1 Basis of Appeal

A litigant adversely affected by a decision of a federal district court may seek to appeal that decision to an intermediate federal court of appeals. Parties may generally appeal a lower court's conclusions of law according to a de novo standard, under which the appeals court will analyse the legal question without deferring to the district court's analysis. While an appellant may also challenge a lower court's findings of fact, the appeals court will apply a far more deferential standard of review, generally leaving fact conclusions undisturbed unless clearly erroneous.

Whether, and when, a party may challenge a district court decision can take on great significance, particularly in complex litigation such as an antitrust class action. A party generally has the right to appeal "final decisions of the district

courts." [28 U.S.C. § 1291.] A decision is "final" if it "ends the litigation on the merits." [Caitlin v. United States, 324 U.S. 229 (1945).] The policy of the 'final judgment rule' is to promote efficiency and limit delay, by seeking to ensure that, where possible, all challenges to lower court decision are resolved in a single appeal. By contrast, only in limited circumstances will courts permit appeals of 'interlocutory' orders that do not finally resolve the dispute. In general, interlocutory appeals are reserved for "controlling questions of law" about which there is "substantial ground for difference of opinion" and resolution of which would "materially advance the ultimate termination of the litigation." [28 U.S.C. § 1292(b).] The federal rules authorise – but do not require – interlocutory appeal of a decision on class certification. [Fed. R. Civ. P. 23(f).] Parties who lose on appeal may petition the US Supreme Court for final review of the appellate decision, but as a practical matter, Supreme Court review is rarely granted.

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