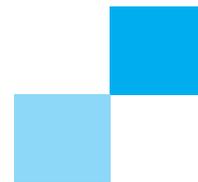


Private anti-trust remedies under US law



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One of the most important features of anti-trust enforcement in the US is the large and complicated role played by private remedies. Unlike most jurisdictions around the world, in which only governmental enforcement must be considered, the US grants private parties (and all state governments, acting on behalf of their citizens) a wholly independent right to seek:

- Monetary damages.
- Court injunctions to order potentially far-reaching changes in anti-trust defendants' conduct.

In addition, special rules, such as the automatic trebling of damages, award of attorneys' fees and costs, and aggregation of hundreds to thousands or more claims within a single action on behalf of a class of similarly placed claimants, dramatically increase both the attractiveness of bringing private claims and the stakes for defendants.

This chapter discusses the central elements of private anti-trust actions and the important practices and procedures commonly associated with litigating them, including:

- The federal and state statutory framework.
- The key procedural issues arising in private anti-trust litigation in federal courts, including:
 - whether the claimant has standing to bring a claim;
 - whether the court has jurisdiction over foreign conduct and parties; and
 - the statute of limitations.
- The possibility of overlapping remedies and cumulative penalties created by state-law indirect purchaser actions.
- The interaction between criminal enforcement and private civil remedies.

STATUTORY FRAMEWORK

Federal framework

Damages. Section 4 of the Clayton Act 1914 allows the recovery of damages by "any person injured in his business or property by reason of anything forbidden in the antitrust laws" (*section 4, Clayton Act*). The Act entitles a successful private claimant to an award of triple damages and costs (including a reasonable attorney's fee) (*section 4, Clayton Act*).

"Antitrust laws" includes:

- The Sherman Act 1890, which prohibits conspiracies and monopolisation.
- The Clayton Act which, among other things, prohibits certain mergers or acquisitions of stock or assets (*section 7, Clayton Act*).
- Sections of the Robinson-Patman Act 1936, which prohibits discriminatory pricing (*amending sections 13, 13a, 13b and 21, Clayton Act*).
- Sections of the Wilson Tariff Act 1894, which prohibits price-fixing of US imports (*sections 73 to 76, Wilson Tariff Act*).

It should be noted that section 3 of the Robinson-Patman Act, which creates criminal penalties for certain discriminatory pricing, and section 5 of the Federal Trade Commission Act, which authorised the Federal Trade Commission to act against "unfair methods of competition" are not considered "antitrust laws" for the purpose of civil enforcement under the Clayton Act.

"Any person" includes:

- Individuals.
- Partnerships.
- Corporations and associations existing under or authorised by federal, state, territorial, or foreign law.

State governments are considered to be "persons" when they bring anti-trust claims on behalf of themselves as injured parties. A state can also bring an action *parens patriae*, on behalf of its citizens who are natural persons (that is, that are not corporations or partnerships) (*section 4A, Clayton Act*). States have steadily increased the number of *parens patriae* actions that they bring, often combining with other states to investigate and bring a joint action.

Section 4A also allows the US government to recover treble damages for injuries it has suffered. Although there is no explicit statutory distinction between foreign and domestic persons, in many circumstances, recovery by a foreign government is limited to actual damages (*section 4, Clayton Act*).

Injunctions. Any person that is threatened with loss or damage by a "violation of the antitrust laws" can also obtain a court injunction (*section 16, Clayton Act*). In contrast to damages under

section 4, an injunction can be obtained without showing that actual injury has occurred (the threat of injury is sufficient). The usual standards for preliminary injunctive relief apply. A claimant must demonstrate:

- A likelihood of success on the merits.
- A threat of irreparable harm with no adequate legal remedy at law.
- A threatened injury that outweighs the harm that the injunction may create for the defendant.
- That the granting of the injunction is in the public interest.

State framework

Virtually all states and territories in the US have enacted their own anti-trust statutes that are based on or resemble the federal anti-trust statutes. Some states have also enacted general consumer protection or unfair trade practices laws that permit actions for conduct that might be characterised as anti-trust violations, but which do not require injury to be shown to competition. The language and specific coverage of anti-trust statutes vary significantly from state to state, but most states under statutory provision or by court decision follow federal anti-trust precedents. Despite this similarity to federal anti-trust law, courts have made it clear that state laws have not been pre-empted by federal law, although states may not punish conduct wholly outside of and unconnected to that state.

Nearly all states permit private civil damage actions, most for treble damages, although a few limit recovery to actual or double damages. A few states authorise recovery of damages only for “flagrant” or “wilful and flagrant” violations. Most importantly, many states authorise civil damages claims on behalf of persons that did not purchase a product directly from defendants (indirect purchasers), in contrast to federal courts (*see below, Procedural issues - anti-trust standing: Remoteness*). In recent years, lawyers that regularly represent claimants have become quite adept at supplementing federal anti-trust claims on behalf of direct purchasers with state-law claims on behalf of indirect purchasers (*see below, Indirect purchasers in state courts*).

The key procedural issues are now discussed in relation to federal courts. With the exception of the issue of indirect purchasers, most states follow similar principles, often relying on federal court precedent as guidance for interpreting the state anti-trust law.

PROCEDURAL ISSUES - ANTI-TRUST STANDING

To bring an action in a federal court under the Clayton Act, a claimant must demonstrate that he has standing for the relief sought.

Standing to bring a claim for damages under section 4 of the Clayton Act requires a claimant to show:

- Injury of the type the anti-trust laws were intended to prevent (anti-trust injury).
- That he has suffered actual injury to his business or property.

- That the claimant's injury is not too remote from the violation. Importantly, indirect purchasers are generally considered too remote to claim damages.

Standing to bring a claim for injunctive relief under section 16 is not as strict. The second requirement is relaxed to permit threatened loss or damage, and the third requirement is relaxed to permit indirect purchasers to seek injunctive relief.

The three main standing requirements are discussed in turn.

Anti-trust injury

Courts require that all private anti-trust claimants demonstrate “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful” (*Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 US 477, 489 (1977)).

No simple test determines anti-trust injury. Each case must be considered on its particular facts. Although some situations are fairly easy to assess, such as direct purchasers' claims based on overcharges caused by price-fixing, others can be harder to assess, particularly those involving claims by a defendant's competitor.

Examples of claims that were rejected under this test include:

- The Supreme Court rejected one competitor's claims of lost profits due to lower market prices resulting from the challenged merger's creation of a stronger competitor (*Cargill, Inc. v. Monfort of Colorado, Inc.*, 279 US 104 (1986)). The merger may have caused injury, but the lower prices would not have been anti-competitive.
- The Supreme Court found no standing to challenge a competitor's alleged price-fixing (*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 US 574 (1986)). Although anti-competitive, the price-fixing would not have injured the claimant, which stood to gain from the higher market prices.

Injury to business or property

For a damages claim, the claimant must show that the violation was a material or substantial cause of injury to the claimant's business or property.

“Business or property” has been interpreted broadly by the courts. As a result, the claimant must only show some economic loss for which recovery is sought. Commonly acceptable forms of injury include:

- A business' lost sales.
- Overcharges to purchasers of affected products.

The damages standard is flexible enough, however, to allow even a claim for potential profits by a company prevented by anti-competitive conduct from entering a market.

Claims for injunctive relief have an even less stringent standard, under which threatened losses or damages (not limited to “business or property”) may be sufficient.

Remoteness

There must be a significant connection between the alleged violation and the alleged harm to the claimant. Courts refuse claims in which:

- The alleged damages are highly speculative.
- The claimant is an indirect victim of the alleged violation.
- The claimant is not a purchaser or seller in the relevant market.

Of these three requirements, the doctrine that bars claims by indirect purchasers is the most commonly invoked by defendants. This doctrine of federal anti-trust law bars claims by purchasers that did not buy directly from the defendant. As first set out by the Supreme Court, allowing direct and indirect purchasers to sue for damages would either (*Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)):

- Subject defendants to multiple recoveries.
- Overburden courts by imposing the obligation to disentangle multiple tiers of re-sale transactions to apportion damages fairly.

Courts have since carved out certain limited exceptions:

- The Supreme Court recognised that indirect purchasers may bring a claim against a remote seller if there are intervening links in the distribution chain bought from the defendant under pre-existing, fixed-quantity, cost-plus contracts that effectively insulate the intermediaries from lost sales (*Illinois Brick Co.*).
- Lower courts have sometimes allowed indirect purchasers to proceed if the direct purchaser is owned and controlled by the defendant.
- Remote purchasers have sometimes been allowed to proceed if they purchased from intermediaries that are part of the challenged anti-trust conspiracy.

In contrast to federal courts, many state courts allow indirect purchasers to claim under their anti-trust statutes. This means that federal anti-trust claims are very frequently supplemented by claims in state courts (*see below, Indirect purchasers in state courts*).

PROCEDURAL ISSUES - JURISDICTION OVER FOREIGN CONDUCT AND PARTIES

From the earliest days of the Sherman Act, US federal courts have recognised anti-trust jurisdiction over persons and conduct anywhere in the world if it sufficiently affects domestic US markets, US imports and US exports.

The following general jurisdictional issues are now considered in more detail:

- The types of anti-trust dispute that can be heard by US courts (subject-matter jurisdiction), including:
 - foreign conduct that affects the price of US imports;

- foreign conduct that affects foreign commerce other than imports.
- Which foreign parties have standing to bring claims in US courts.
- Which foreign defendants can face anti-trust claims in US courts (that is, which defendants the courts have personal jurisdiction over).
- Jurisdictional issues relating to state courts.

The types of anti-trust dispute that can be heard by US federal courts

Foreign conduct that affects the price of US imports. When foreign conduct is intended to and does have some substantial effect in the US, then it is subject to US federal anti-trust law (*for example, Hartford Fire Ins. v. California*, 509 U.S. 764 (1993)). The effect must be “substantial”, not merely a “spillover” of effects occurring outside the US (*United Phosphorus, Ltd v. Angus Chem Co.*, 131 F. Supp. 2d 1003 (ND Ill 2001)).

Foreign conduct that affects foreign commerce other than imports. In 1982 Congress passed the Foreign Trade Antitrust Improvement Act (FTAIA). This limits anti-trust subject matter jurisdiction over conduct that involves trade or commerce with foreign nations other than imports. For the anti-trust laws to apply to foreign conduct, both of the following must now apply:

- The conduct must have a direct, substantial and reasonably foreseeable effect on either:
 - US domestic or import commerce;
 - a US exporter.
- This effect must give rise to a claim under the Sherman Act.

The Supreme Court recently clarified that the FTAIA bars jurisdiction over claims that involve foreign injuries not “intertwined with” domestic injuries arising out of the same anti-competitive act (*F. Hoffman-LaRoche, Ltd. v. Empagran SA*, 542 U.S. 155 (2004)). Therefore, a foreign buyer of products from a foreign seller that participated in a global cartel cannot bring a claim against its supplier in US courts merely because the cartel included a US producer that sold to US customers at cartel-fixed prices. Only if the US and foreign injuries are connected does US anti-trust law apply.

Historically, if a US court finds subject-matter jurisdiction under the FTAIA based on the foreign entity’s conduct, the court is also likely to find personal jurisdiction over the foreign entity (*see below, Personal jurisdiction in federal court over foreign parties*).

Standing for foreign parties under federal anti-trust law

To have standing to bring a claim under US anti-trust laws, the claimant must be a participant or potential participant in the domestic market. Therefore, a foreign corporation that is prevented from selling a product on the US market may have standing, while a foreign subsidiary of a US corporation that operates exclusively in foreign markets is much less likely to have standing to bring a US anti-trust claim.

Personal jurisdiction in federal court over foreign parties

As in other areas of US law, a foreign private entity can only be named as a defendant in a private anti-trust action if the entity has “minimum contacts” with the US, sufficient to make it “fair and reasonable” to subject that entity to an action in a US court.

Further information

For further information on the above issues, please consult the hypothetical scenarios considered by the federal anti-trust agencies in their Antitrust Enforcement Guidelines for International Operations, available at the websites of:

- The Department of Justice (www.usdoj.gov/atr).
- The Federal Trade Commission (www.ftc.gov).

State law jurisdictional issues

The personal and subject matter-jurisdiction of state anti-trust laws is a matter of state law, subject only to compliance with the US Constitution. Accordingly, the extent to which state anti-trust laws apply to foreign conduct or foreign parties varies from state to state. The Class Action Fairness Act of 2005, however, granted federal courts original jurisdiction over all claims valued at US\$5 million (about EUR3.9 million) (*see box, Aggregation of claims: class actions and multi-district litigation*).

PROCEDURAL ISSUES - STATUTE OF LIMITATIONS

Federal law requires that a private cause of action under anti-trust law must be brought within four years of the date the cause of action accrued (*section 4B, Clayton Act*). The cause of action generally accrues from the time the claimant suffers injury to his business or property.

There are, however, a few exceptions to this general rule:

- If the claimant's damages are too speculative to prove, then the cause of action does not accrue until the damages become provable (*Zenith Radio Corp. v. Hazeltine Research Inc., 401 US 321 (1971)*).
- If the claimant's injury is the result of continuing anti-trust violations, each independent anti-competitive act may restart the limitation period (*Pace Industries, Inc. v. Three Phoenix Co., 813 F2d 234 (9th Cir. 1987)*).

The four-year deadline for bringing a private anti-trust action may be suspended. For example, if a claimant reasonably fails to uncover a cause of action as a result of fraudulent concealment by the defendant, the limitation period runs from the date the claimant should have (or did) discover the alleged claim. In addition, the limitation period can be suspended during and up to one year after federal government entities investigate the alleged anti-competitive conduct. It may also be suspended in certain circumstances in which it would be unfair to the putative claimant, such as when the defendant has induced the claimant not to file until too late. The limitation period is also suspended for members of a putative class for the period between the original filing of the class action complaint and a decision by the court not to certify the alleged class (*see box, Aggregation of claims: class actions and multi-district litigation*).

Separate limitation periods apply to claims under state anti-trust laws.

INDIRECT PURCHASERS IN STATE COURTS

Many states (accounting for well over two-thirds of the US population) have passed statutes expressly rejecting the Supreme Court's decision in *Illinois Brick* and permitting indirect purchasers to sue under their anti-trust laws (*see above, Statutory framework: State framework*).

In 1989 the Supreme Court held that federal law does not preempt those state laws (*California v. ARC America Corp., 490 US 93 (1989)*). Since then, it has become quite common for anti-trust cases involving national or multi-state markets to be filed as:

- Direct purchaser actions under federal law in federal court.
- Indirect purchaser cases under state law in various state courts.

Some claimants' lawyers have attempted to circumvent the federal courts entirely by bringing both direct and indirect purchaser claims in state courts, with mixed success. Some state attorneys general have also brought claims on behalf of their indirect purchaser citizens. Unlike the federal courts, in which mechanisms exist to consolidate similar cases brought in multiple jurisdictions (*see box, Aggregation of claims: class actions and multi-district litigation*), state courts do not yet have any comparable mechanism.

The practical consequence of these laws is, therefore, that anti-trust defendants increasingly face:

- The complexities and added costs of litigating in several jurisdictions under slightly varying substantive laws.
- Potential multiple recovery.

INTERACTION OF CRIMINAL PROSECUTION AND PRIVATE DAMAGES CLAIMS

The same conduct can give rise to liability under both the civil and criminal anti-trust law. Generally, criminal prosecution in the US is reserved for the most harmful anti-trust violations, such as:

- Price-fixing.
- Bid-rigging.
- Market or customer allocation.

Criminal fines under US anti-trust law can be quite considerable. Although the Sherman Act provides that the maximum corporate fine is US\$10 million (about EUR7.9 million), the Antitrust Division of the US Department of Justice often proceeds under alternate sentencing laws and guidelines permitting it to seek fines for as much as:

- Twice the defendant's gross gain.
- Twice the victim's gross losses.

AGGREGATION OF CLAIMS: CLASS ACTIONS AND MULTI-DISTRICT LITIGATION

The size, complexity, and cost of litigating anti-trust claims are often driven not just by the complicated substantive laws and facts of the case, but also by two procedural devices that may aggregate many claims into one huge case. These rules are intended to improve the efficiency and fairness of court procedures when many similar claims are filed that arise out of the same facts or involve the same legal issues. Although they are not supposed to change anyone's substantive rights, in practice, by aggregating many claims, these rules allow some claims to be brought that would not justify the expense if they were brought separately, and they further increase the stakes for all parties.

Rule 23 of the Federal Rules of Civil Procedure

Rule 23 permits an anti-trust claimant, like any other claimant in a federal court, to bring an action on behalf of an entire class of persons with similar claims. Most state courts have similar class aggregation rules. To represent a class, the claimant must demonstrate all of the following:

- The class is so numerous that joining all members in one action is impractical.
- There are some common questions of fact or law.
- The claimant's claims and defences are typical of the class.
- The claimant will fairly and adequately represent the class.

The claimant must also demonstrate that individual actions would be inappropriate for one of the following four reasons:

- They pose a risk of inconsistent outcomes.
- They would, as a practical matter, substantially impair the rights of class members not participating in the case.
- The party opposing class certification has acted on grounds generally applicable to the class.
- The common questions of law or fact predominate over those affecting only individual class members. This last reason is relied on in the vast majority of anti-trust class actions.

The court decides whether to certify the existence of the class and, if so, which lawyer(s) and claimant(s) will represent the class. As a practical matter, due to the mass nature of class actions, the lawyers chosen to represent the class often have a fairly free hand in conducting the case. Therefore, the court must approve any agreements that settle class claims, after ordering that notice be given to the class members and that there is an opportunity for them to challenge the settlement achieved by their representative or to opt out and bring their own claims. Victorious claimants' lawyers are granted fees and costs, at the court's direction.

There are similar state rules that permit class actions in state courts. In recent years, anti-trust class actions have often been filed in state courts to avoid the stricter decisions of some feder-

al courts (particularly the indirect purchaser doctrine). In 2005, Congress passed the Class Action Fairness Act, which gave federal courts jurisdiction over class actions in which (*section 4(a), Class Action Fairness Act*):

- The matter in controversy exceeds US\$5 million (about EUR3.9 million).
- Any of the members of the class of claimants is a citizen of a state different from any defendant (unless at least two-thirds or more of the members of the proposed class and the primary defendants are citizens of the state in which the action was originally filed).

It is expected that many anti-trust class actions that were formerly successfully brought in a state court will now be subject to removal from the state court to a federal court, even if brought under state statutes (*U.S.C. §§ 1441, 1446, and 1453*).

Transfer by a Judicial Panel on Multidistrict Litigation

Federal law (*28 U.S.C. § 1407*) provides a mechanism by which a Judicial Panel on Multidistrict Litigation can transfer similar cases filed in multiple federal courts to a single court for pre-trial proceedings, in order to:

- Avoid duplication.
- Conserve judicial and party resources.
- Avoid inconsistent rulings.

Once cases have been transferred to a single court, that court appoints lead counsel or a steering committee of counsel for claimants (and sometimes for defendants), a consolidated amended complaint is filed, and discovery and pre-trial motions are handled in a consolidated fashion for all the cases.

The statute provides that cases are to be transferred back to the federal courts in which they were originally filed for the actual trial. In practice, however, most multi-district anti-trust cases are resolved before trial by a settlement approved by the court to which they are transferred. When settlements do not occur, the parties sometimes consent to a trial before the court to which the cases are transferred, rather than return to their original jurisdictions.

Further complications

Many private anti-trust claims, particularly those that allege price-fixing of mass-produced products, end up involving both aggregation procedures. This results in them being filed in multiple federal courts as class actions by dozens or more individual claimants, sometimes seeking to represent overlapping or inconsistent classes.

Complicating matters further, some settlements generate significant numbers of "opt-out" claimants that bring their own, separate actions, which can lead to parallel settlements and even new classes.

In addition, the Antitrust Division actively pursues individual corporate executives implicated in price-fixing and bid-rigging schemes, including foreign executives living abroad. These executives face the prospect of large personal fines and significant jail time if convicted. The Antitrust Division's close co-operation with US immigration and border control authorities means that foreign executives who are indicted but refuse to stand trial in the US can effectively be barred from the US indefinitely.

In addition, nearly every significant criminal indictment, guilty plea or criminal conviction for an anti-trust violation is followed immediately by the filing of civil claims seeking damages on behalf of private parties. By statute, those claimants can rely on the conviction or guilty plea as prima facie evidence of the anti-trust violation found in the final criminal judgment. Therefore, a successful criminal prosecution not only gives potential civil claimants notice that they may have private claims, but also relieves them of the hard work of proving the violation.

Criminal prosecution helps civil plaintiffs in other, subtler ways. For many years the Antitrust Division's cartel investigations have been enhanced significantly by its Corporate Leniency Policy (or Amnesty Programme as it is commonly known), the current version of which was introduced in 1993. Under this policy, the first cartel conspirator to report previously unknown illegal collusion can be granted complete amnesty from:

- Criminal prosecution.
- Criminal fines.
- Criminal penalties.

The Antitrust Division's statement of policy spells out in detail what applicants must undertake to qualify for amnesty. In broad outline, however, the applicant must:

- Take prompt steps to terminate involvement in the conspiracy.
- Co-operate fully with the government's investigation.
- Make restitution to injured parties.

The *Antitrust Criminal Penalty Enhancement and Reform Act of 2004* further rewards conspirators that are granted amnesty by limiting private parties' monetary recovery from them to actual, single, damages rather than the usual treble damages, on condition that the amnesty applicant co-operate fully with private claimants. In practice, conspirators granted amnesty end up avoiding any criminal penalties and settle very early with private claimants on the basis of single damages, while agreeing to provide extensive interviews, documents, and other information to help the claimants continue their treble damages claims against other co-conspirators.

The other conspirators, in contrast, face not only a fully informed criminal prosecutor, but also civil claimants armed with:

- Everything the amnesty applicant made available to the Antitrust Division.
- A war chest provided by the early settlement, which can be used to fund the complex and costly litigation against the rest of the conspirators.

The other conspirators may choose to co-operate with the Antitrust Division in hopes of negotiating an acceptable plea agreement with a recommendation for reduced fines and other penalties, but the plea agreement will then be prima facie evidence against them in the civil cases, and they will continue to be liable for treble damages.

SUMMARY - THE IMPORTANCE OF PRIVATE ANTI-TRUST ENFORCEMENT

Private anti-trust enforcement is not just a limited adjunct to the government's enforcement powers, but a major force in its own right. Concurrent jurisdiction of federal and state laws, the ability of private actors and state governments to seek automatically trebled civil damages, the possibility of recovery by both direct and indirect purchasers, procedural mechanisms to aggregate even small claims into massive actions, and the interaction of criminal and civil enforcement combine to create complex and often costly litigation with very high stakes for all parties concerned.

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