

Working Session

“Damage claims in competition matters: The dawn of a new era?”

Antitrust Commission
Litigation Commission

Munich, 2016

National Report of United States

Jennifer M. Driscoll

Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Avenue, NW, Suite 100
Washington, DC 20006-6801
(202) 747-1900
jdriscoll@sheppardmullin.com

General Reporters:

Sebastian Janka, Noerr LLP, Munich, Germany
Simone Gambuto, Macchi di Cellere Gangemi, Rome, Italy
Anouk Rosielle, Boekel N.V., Amsterdam, the Netherlands
Dina El-Gazzar, Stewarts Law LLP, Leeds, United Kingdom

27 November 2015

GENERAL DISCLAIMER

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.

QUESTIONNAIRE

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. How would you summarize in few lines the status quo of private enforcement in your jurisdiction?

The United States, through various procedural and substantive mechanisms, has traditionally encouraged private antitrust enforcement, which currently continues to be very active. Indeed, private enforcement actions constitute the majority of antitrust cases brought in the United States, and have resulted in the award of billions of dollars in damages.

- a. *[For Non-EU Member States]* Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)

If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

Yes, individuals may file antitrust damages claims in federal courts under Section 4 of the Clayton Act, which establishes a private cause of action for “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages by him sustained.” 15 U.S.C. § 15(a).

The above language of Section 4 has been applied by courts to limit standing to those individuals who allege and can establish an injury to his business or property causally linked to an antitrust violation, and “antitrust injury,” i.e., “injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant’s acts unlawful.” *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). U.S. courts additionally limit standing to those individuals whose injuries are not too far removed from the alleged violation. Thus, where an individual’s injury is derivative of a more direct injury to some other person, and that person would have a strong incentive to pursue its own antitrust claim, courts are not likely to confer standing.

Individuals who meet these requirements may bring both stand alone and follow-on actions.

- b. *[For EU Member States]* Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?

If yes, are they able to submit both stand alone and follow-on actions?

Not applicable.

2. *[For EU Member States]* Has your country already implemented/started implementing the private enforcement Directive?

- If No: Do you believe that your country will meet the deadline?
- If Yes: Please give the status quo of the implementation by highlighting in few lines what you consider the most important aspects of the implementation of the private enforcement Directive into national law in your country.

Not applicable.

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

Federal courts have exclusive jurisdiction over claims arising under federal antitrust laws.

Individual states may have their own antitrust laws. Antitrust claims based on state law may be brought either in state court, or federal court if the requirements for federal jurisdiction are otherwise met.

- a) Is there a specialized court specifically for antitrust based claims?
If No: are there specific chambers for antitrust claims within the civil/commercial courts?
If Yes: is the court composed only by judges, also economic experts and/or other persons?

No, there is no specialized court specifically for antitrust claims. There is also no specific chambers for antitrust claims within the civil courts.

- b) May the court impose interim measures?

Under Section 16 of the Clayton Act, courts may order preliminary injunctions if the plaintiff has established that: (a) he is likely to succeed on the merits; (b) he is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in his favor; and (d) that a preliminary injunction is in the public interest.

- c) May the trial proceed in parallel and independently of a National Competition Authority investigation?

If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

Private antitrust actions may proceed in parallel to government investigations and proceedings. However, trials in criminal proceedings generally take place before trials in related civil actions.

Parties to private antitrust actions may request stays of discovery pending resolution of parallel criminal investigations or proceedings. Government investigators pursuing criminal investigations or proceedings may also request stays of discovery in related civil actions in order to safeguard the secrecy and integrity of grand jury proceedings, and have in recent years been more likely to seek such stays in related private antitrust actions. Courts have likewise been more inclined to grant government motions to stay discovery, likely because the government is the more appropriate party to lead the investigation than private plaintiffs.

- d) Is the decision subject to appeal?
If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

Yes, the losing party in federal antitrust actions has the right to appeal a final decision of the district court to the applicable federal court of appeals. Further appeal to the United States Supreme Court is possible, but not a matter of right.

Standards of review applicable on appeal depend on the particular issue being reviewed. Generally speaking, questions of law are reviewed *de novo*, without deference to the district court. Questions of fact are reviewed under the “clearly erroneous” standard, which pays special deference to the district court’s findings, even if the reviewing court may have reached a different outcome. Matters left to the district court’s discretion are reviewed under the deferential “abuse of discretion” standard.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an “anchor defendant” sufficient (*cf* ECJ, C-352/13))?

A private plaintiff generally has the choice of filing a claim in any forum that has jurisdiction over the antitrust claim and the defendant(s). Private antitrust actions may be filed in any federal district court where: (a) the defendant resides; (b) substantial parts of the events at issue took place; or (c) the defendant can be served.

One potential limitation to a private plaintiff’s choice of forum arises when there are multiple antitrust actions pending in different districts alleging common questions of fact. In such instances, all cases may be transferred to a single district court selected by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pre-trial proceedings.

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

The length of private antitrust actions varies greatly such that it is difficult to give an overall estimate applicable to all private enforcement actions. Generally speaking, however, private actions may take a minimum of two to five years. Cases involving class actions, multidistrict litigation, particularly complex issues, or that proceed all the way to trial can take significantly longer, particularly given crowded judicial dockets and limited judicial resources.

6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?

During the pendency of the action, the American Rule (*i.e.*, each party responsible for paying its own attorneys' fees) applies. Under Sections 4 and 16 of the Clayton Act, prevailing plaintiffs in private antitrust damages actions or actions for injunctive relief may recover reasonable attorneys' fees and costs. Prevailing defendants may also recover costs, but are generally not entitled to recover attorneys' fees.

7. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?

Plaintiffs may proceed in the United States on a contingency fee basis, which are generally negotiated privately between the plaintiff and his attorney, and is a certain agreed-upon percentage of plaintiff's ultimate recovery.

Third-party litigation funding has also been on the rise in recent years, where an outside party agrees to fund all or part of a plaintiff's litigation costs in exchange for an agreed share of any recovered proceeds.

Assignment of private antitrust claims to third parties is generally permissible in the United States.

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?
 - If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?
 - Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?
 - How is it coordinated with the individual actions' framework?

Private antitrust actions may be brought as class actions under Rule 23 of the Federal Rules of Civil Procedure. For an action to proceed as a class action, the putative class representative must meet the requirements of Rule 23(a), as well as one of the requirements under Rule 23(b).

A putative class representative must meet all the following requirements of Rule 23(a):

- the class must be “so numerous that joinder of all members is impracticable”;
- there must be questions of law or fact common to the class;
- the putative class representative’s claims must be “typical” of the claims of the class; and
- the putative class representative will “fairly and adequately protect the interests of the class.”

A putative class representative must also meet one of the four alternative requirements of Rule 23(b):

- where separate, individual actions presents a risk of inconsistent or varying adjudications establishing incompatible standards of conduct;
- where separate, individual actions would dispose of the interests of the other members not parties to the individual actions or substantially impair their ability to protect their interests;
- the party opposing the class has acted on grounds generally applicable to the class, making injunctive or declaratory relief with respect to the entire class appropriate; or
- where questions of law or fact common to the class predominate over questions affecting only individual members.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular
 - as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)
 - in terms of the *quantum* of the compensation?
 - for the limitation period?
 - else?

Under Section 5 of the Clayton Act, final judgments or decrees rendered in any government action (both civil or criminal) brought under federal antitrust laws shall be “prima facie evidence against such defendant...as to all matters respecting which said judgment or decree would be an estoppel as between the parties” in the government action. In addition, judgments in actions brought by the United States Department of Justice may be given conclusive effect under the common law doctrine of collateral estoppel. However, collateral estoppel does not apply to any findings made by the Federal Trade Commission in a proceeding under either the antitrust laws or Section 5 of the Federal Trade Commission Act.

In addition, antitrust investigations conducted by the Department of Justice may affect the *quantum* of the compensation in follow-on private antitrust actions. Specifically, leniency applicants in government investigations are not subject to joint and several liability or to treble damages (*i.e.*, just limited to actual damages) if the applicant satisfies its cooperation obligations under the Antitrust Criminal Penalty Enforcement and Reform Act (ACPERA).

Finally, the running of the statute of limitations in private antitrust actions is tolled or suspended under Section 5(i) of the Clayton Act during the pendency of a government antitrust action and for one year thereafter if the following conditions are met: (a) the government action must be a civil or criminal proceeding to prevent or punish violations of the antitrust laws; (b) the private action must be based in whole or in part on the matter at issue in the government action; and (c) the private action must be filed within one year of the termination of the government action.

10. What are the relevant limitation periods (taking into account question 9 above)?

Under Section 4B of the Clayton Act, a four-year statute of limitations applies for private antitrust actions. The limitations period generally begins to run when the cause of action accrues, *i.e.*, when the plaintiff suffers injury resulting from the alleged antitrust violation.

As indicated above in question 9, the statute of limitations will be suspended under Section 5(i) of the Clayton Act by certain government antitrust actions.

Equitable principles of fraudulent concealment, duress, and equitable estoppel may also toll or suspend the applicable limitations period or preclude a defendant from asserting a limitations defence.

Finally, the filing of a class action based on the same allegations may also toll the limitations period.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

Under United States law, parents are generally not liable for the infringements of their subsidiaries or affiliates. A narrow exception exists to this general bar against

parental liability if the plaintiff can “pierce the corporate veil” by showing that the subsidiary is merely a sham or alter ego of the parent.

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

It is settled law in the United States that co-conspirators participating in the same alleged conspiracy are jointly and severally liable for the entirety of the injury caused by their concerted action. It is also settled law that an antitrust defendant has no right of contribution from co-defendants.

One exception to joint and several liability exists under the Antitrust Criminal Penalty Enforcement and Reform Act (ACPERA, discussed above in response to question 9). Antitrust violators who are accepted into ACPERA’s leniency program and satisfy the cooperation obligations therein are not subject to joint and several liability, but limited to actual damages directly attributable to it.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals’ actions for antitrust infringements?

- Is there any pre-trial discovery procedure available?
- Is there any evidence protected by legal privilege?

All types of relevant evidence are generally admissible in individuals’ actions for antitrust infringements, including witness (both lay and expert) testimony, documents, depositions, and other discovery. The Federal Rules of Civil Procedure govern pre-trial discovery procedures in federal courts, and generally allow broad discovery reasonably calculated to lead to the identification of admissible evidence.

Confidential attorney-client communications are protected from discovery if the elements of the attorney-client privilege are met. In addition, materials prepared by attorneys in anticipation of litigation are protected from discovery under the attorney work product doctrine.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

Yes, courts may order defendants or third parties to submit to discovery. Generally speaking, while the scope of discovery that defendants are subject to is fairly broad and viewed as a matter of right by plaintiffs, discovery from third parties is usually permitted by the courts only in limited circumstances upon a showing of good cause.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

Private claimants and courts do not have an automatic right of access to files of criminal antitrust proceedings because of the general requirement of secrecy for grand jury proceedings under Federal Rules of Criminal Procedure 6(e). However, courts may order limited disclosure of such files to be used in another proceeding if the claimant makes a strong showing that a "particularized need for disclosure outweighs the interest in continued grand jury secrecy."

The U.S. Supreme Court has held that grand jury testimony may only be disclosed if claimants seeking its disclosure establish that: (a) the testimony sought is needed to avoid a possible injustice in another judicial proceeding; (b) the need for disclosure is greater than the need for continued secrecy; and (c) their request is limited to cover only material so needed. District courts have substantial discretion in determining whether to disclose grand jury testimony. Finally, the need for continued secrecy of grand jury proceedings is relatively greater for pending (as opposed to completed) investigations.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

Under federal law, indirect purchasers of products or services are not allowed to bring antitrust claims for damages. But many state laws allow indirect purchasers to bring antitrust damages actions, and the rules and limits of these actions vary by state.

17. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

Umbrella damages, *i.e.* damages to injured parties other than the direct or indirect purchasers of the infringing undertakings, have never been considered by the U.S. Supreme Court. The consensus view is that umbrella damages are not available under federal law because even such basic elements as the victims and the measure of damages are highly speculative.

18. Is the passing-on defence allowed?

Some states recognize the passing-on defence, but it is not available at the federal level. The defence allows evasion of antitrust liability if the defendant can show plaintiff passed on any injury to a third party or parties.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations?

In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

Courts may award a variety of compensation for antitrust violations. Monetary damages caused by the violation itself are the primary form of compensation, and these damages are trebled for purposes of deterrence. Claimants may also seek costs of the suit, reasonable attorneys' fees and post-judgment interest. In some circumstances, pre-judgment interest from the date the complaint was served may be available if the court determines the defendant acted unreasonably to delay or derail the litigation.

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

The plaintiff in the action has the burden to show it is entitled to damages. The plaintiff must provide relevant data giving a "just and reasonable" estimate of its damages. While the evidentiary burden is not as high as what is required to show the harm occurred, mere "speculation or guesswork" will not support an award of damages.

21. Is there a difference between stand alone and follow-on actions?

There is no difference procedurally in how a plaintiff must bring an antitrust claim that is either a stand alone or a follow-on action. The plaintiff must file a complaint that sufficiently alleges all harmful conduct and comply with all relevant procedural rules. However, there is often a difference in the focus of the litigation once it is underway. A plaintiff bringing a stand alone action must prove all elements of the antitrust violation as well as damages to prevail on the merits. But, as described in more detail in response to question 9 above, in a follow-on action, the government has already proven the violation occurred and the focus of the follow-on private action is on proof of damage to the antitrust plaintiff(s).

22. How is damage quantified?

To quantify the amount of damage, the court must assess the difference between (a) the actual financial position of the plaintiff in reality – as a consequence of the antitrust violation – and (b) what the plaintiff's financial position would have been "but for" the antitrust violation.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

While defences available in general commercial litigation are often available to antitrust defendants, in private antitrust actions, the *Noerr-Pennington* defence and state action immunity are often used to avoid private antitrust liability. Under the *Noerr-Pennington* defence, actions directed to influence the passage or enforcement of statutes, regulations, and judicial law are exempt from antitrust liability even if the action sought would have anticompetitive effects. But the petition must be related to actual or proposed law and not simply a “sham” petition. Similarly, state action immunity exempts agents of state and local authorities from federal antitrust laws. The defence encompasses non-state actors that are actively supervised by exempted state or municipal authorities through either supervision of the non-state actor’s activity specifically or through supervision of a clearly articulated policy to displace competition.

24. What is the role of economic experts, if any?

Economic experts are the most common type of expert used in antitrust litigation. Often, economic experts have two primary roles: (a) assisting the fact finder’s determination of the extent of antitrust injury, including the explanations of damages; and (b) explaining and defining the market in which the antitrust injury occurred. One expert may serve both roles, but in some cases, multiple experts are engaged to discuss various aspects of antitrust injury, markets, and competitive circumstances.

25. What other types of experts are typically engaged in your jurisdiction?

Outside of economic experts – who generally do most of the work demonstrating market conditions and damages – there are no “typical” experts engaged in private antitrust cases. While attorneys’ fee experts are sometimes used in cases where a class action settlement or award has been approved, cases must be evaluated on an individual basis to determine if additional experts would be helpful in proving elements of a specific claim or defence.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

Fines imposed by the Department of Justice, or any other enforcement agency, are not considered when quantifying damages in private follow-on actions. Plaintiffs in private antitrust actions are entitled to recover the damages they have suffered due to any antitrust violation – no matter the outcome of any fine imposed by the DOJ. This is in large part due to the fact that the DOJ protects the interests of all consumers at large whereas private enforcement seeks compensation for the specific victims, who are often not made whole through agency enforcement processes.

While fines are not considered when quantifying the damages in follow-on actions, private antitrust defendants that qualify for statutory leniency programs during DOJ enforcement proceedings may in some cases be able to mitigate their damages in private follow on actions, such as by eliminating the statutory trebling of damages, should the DOJ and the federal court supervising the private action agree that such action is warranted. And, if public and private antitrust actions are ongoing concurrently, the enforcement agency may, in its discretion, reduce the fine it would otherwise impose in light of the private action award. While these mechanisms may reduce the total exposure of antitrust defendants, it does not change the fact that private antitrust plaintiffs are entitled to receive full compensation for the harm caused by the anticompetitive conduct.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction? If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Yes. Arbitration clauses are generally enforceable, and the courts will compel arbitration where the parties have a valid arbitration clause. Alternatively, most federal courts also have ADR programs available to litigants, including mediation, arbitration, and sometimes even early neutral evaluation programs. Rules of each individual court determine whether a private antitrust action will be referred automatically to one of these ADR programs or whether litigants must certify or participate in these programs as part of a case management order or procedure.

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:
- settlements requiring court approval;
 - settlements outside of proceedings;
 - timing of settlement;
 - etc.

Class action settlements require court approval. The Federal Rules of Civil Procedure require the parties to first provide notice of any settlement to all who would be bound by such a settlement in clear and concise language, and to file with the court a statement containing any agreements regarding the proposal. The class members then have an opportunity to object to the proposed settlement, and the court must have a hearing on the proposal. If the court finds the proposal is fair, reasonable, and adequate, it approves the settlement, and the parties proceed to equitable distribution of the settlement.

There is no specific settlement procedure outside of the class action process, but sometimes parties are able to reach settlement through arbitration or some other ADR mechanism. To enforce the settlement, the parties must resort to the courts. The timing of these settlements will be established under the local court's rules for ADR procedures.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

Within the last 18 months, there have not been any high-level decisions changing the landscape of private antitrust actions. The elements of private antitrust actions, defences to those actions, and the potential damages stemming from enforcement have remained constant in recent years, and because there has been ample opportunity to flesh out these elements through legislation and antitrust case law, it does not appear that private antitrust actions in the U.S. are likely to undergo drastic change in the near future.