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Antitrust Litigation 2023

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USA

Law and Practice

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1. Overview

1.1 Recent Developments in Antitrust Litigation

In recent years, US antitrust authorities and private plaintiffs have aggressively challenged proposed mergers in an array of industries ranging from tech to healthcare. They have also pursued major monopolisation cases against Big Tech companies in litigation that will shape competition in the US for years to come. For more detail, see USA Trends & Developments.

1.2 Other Developments

US authorities have signalled that certain emerging market trends may face increasing antitrust scrutiny in the near future, including co-ordination among competitors to achieve environmental, social, and governance (ESG) initiatives and the use of artificial intelligence (AI). Meanwhile, even as US authorities have become increasingly aggressive, the US Supreme Court has recognised new avenues for defendants to push back. For more detail, see USA Trends & Developments.

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 USC Sections 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 allows litigants to pursue damages claims that follow on from parallel scrutiny by federal law enforcement and standalone claims. Standalone claims – brought by private litigants in the absence of any governmental action against the defendants – are common in US practice. News that antitrust authorities are investigating potential anti-competitive conduct commonly prompts private litigants to quickly initiate parallel damages actions, usually while the underlying investigation remains pending.

2.2 Specialist Courts

Most federal competition matters are resolved in the US federal courts, which have exclusive jurisdiction over federal antitrust claims. An exception is the administrative adjudicatory process carried out by the Federal Trade Commission (FTC) (see **2.3 Decisions of National Competition Authorities**). 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 USC Sections 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" or to any district to which "all parties have consented" (28 USC Section 1404[a]). Different claimants may 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 co-ordinated pre-trial proceedings (28 USC Section 1407[a]).

Antitrust claims made under state law may also be heard in federal court if:

- they supplement a federal claim (28 USC Section 1367);
- the parties reside in different jurisdictions (28 USC Section 1332[a]); or
- 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 USC Section 1332[d]).

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 automatically reviewed by the FTC commissioners, and a losing defendant may appeal the commission's decision to the federal appeals courts.

Pursuing Enforcement Actions

By contrast, the US Department of Justice, Antitrust Division (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 seek judicial approval of the settlement's terms. However, the court's review is limited to ensuring the settlement is in the "public interest" (15 USC Section 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. By contrast, a criminal antitrust prosecution – which, as a matter of policy, the Division uses to target only "hardcore" per se competition offences – 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.

Consequences of Federal Antitrust Enforcement Actions

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 USC Section 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 (15 USC Section 15). 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 (ie, three times their actual 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 US 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 Associates, LLC, 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 (Associated General Contractors of California, Inc v Cal State Council of Carpenters, 459 US 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).

There are exceptions to this rule, including when the direct purchaser is a party to the conspiracy. Further, since the Supreme Court announced the bar on federal indirect purchaser claims, most 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 Inc 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 replead 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 Strike-Out/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 USA. 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.

3.2 Procedure

Any plaintiff suing under the federal antitrust laws may seek to pursue their claims on behalf of a putative class of parties whose injuries at the hands of defendants 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". (Comcast Corp v Behrend, 569 US 27, 34 [2013]). To begin with, a plaintiff must affirmatively demonstrate that:

- 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 law or fact 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" (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 process is to ensure that the resolution fairly and adequately protects the rights of all class-members (Fed R Civ P 23[e]). The rationales for these protections are that the lead plaintiff (and

its 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 normally – 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 (see **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 Strike-Out/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 in claims brought under the antitrust laws. Defendants can raise a number of pleading defects, including that:

- the claim is untimely;
- defendants are not subject to the court's jurisdiction;
- the pleading fails to plausibly allege a claim upon which relief can be granted; or
- 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 US 544 [2007]). 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 that the complaint survives dismissal and opens the door to discovery.

Summary Judgments

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. Summary judgment 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 Elec Indus Co v Zenith Radio Corp, 475 US 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 (eg, Anderson News, LLC 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 can only impose liability on defendants that have 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, 571 US 117 [2014]).

Specific jurisdiction, which is narrower, is appropriate only for claims that "arise out of or relate to" a foreign defendant's own purposeful contacts with the forum itself (and not just contacts with parties that reside in the forum) (Walden v Fiore, 571 US 277 [2014]). Plaintiffs must also have suffered an injury in the forum, although injury alone is not enough (Bristol-Myers Squibb v Superior Court of California, San Francisco County, 582 US 255 [2017]). The Supreme Court has recently reiterated that specific jurisdiction requires a "strong relationship among the defendant, the forum, and the litigation" (Ford Motor Company v Montana Eighth Judicial District Court, 141 S Ct 1017 [2021]).

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, substantial, and reasonably foreseeable

effect" on US commerce and that effect "gives rise to" a US antitrust claim (15 USC Section 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 (Compare United States v Hui Hsiung, 778 F.3d 738 [9th Cir 2015] ["immediate consequence"], with Lotes Co v Hon Hai Precision Industries Co, 753 F.3d 395 [2d Cir 2014] ["reasonably proximate causal nexus"]). 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 USC Section 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 US 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 USC Section 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 US 538 [1974]). In 2018, 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 years, with four years being the most common. 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 non-privileged 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" (Fed R Civ P 26[b][1]). 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 Strike-Out/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 US 544 [2007]). This decision has raised 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 US 383 [1981]). Importantly, in-house counsel communications may be protected by attorney-client privilege under US law. Furthermore, 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 (see Kellogg Brown & Root, Inc, 756 F.3d 754 [DC Cir 2014]).

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 where 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.

Limitations (and Exceptions to Those Limitations) to the Scope of Privilege

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 co-operative 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 US 554 [1989]).

The "common interest" protection – an exception to the rule that sharing legal advice with third parties results in a privilege waiver – 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 it applies to the "full range of communications otherwise protected by the attorney-client privilege" without regard to whether litigation is threatened (United States v BDO Seidman, LLP, 492 F.3d 806 [7th Cir 2007] [agreeing with at least five sister circuits that the threat of litigation is not required for the common interest protection to apply]; but see Santa Fe Int'l Corp, 272 F.3d 705 [5th Cir 2001] [finding that the protection only applies where there is the threat of litigation]). 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 Department of Justice, 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 co-operating 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 [DC Cir 2008]).

That said, a conditional leniency recipient will likely identify itself to plaintiffs in follow-on civil litigation, in an effort to fulfil its restitution obligation under the Leniency Policy by co-operating with plaintiffs and earning the resulting de-trebling 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.

On 4 April 2022, the Division updated its Leniency Policy. This update imposed a number of more stringent obligations on leniency applicants while giving the Department of Justice more discretion as to when to award leniency. These additional obligations include:

- "prompt" reporting upon internal discovery of the activity;
- best efforts to remediate (in addition to providing restitution); and
- best efforts to improve compliance programmes to mitigate future risks.

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, judges generally prefer live testimony so that the factfinder can evaluate the witness's credibility and so that the opposing party can cross-examine the witness. 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 fact-finder;
- 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 US 579 [1993]; Fed R Evid 702). 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 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 USC Section 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 ACPERA, leniency recipients who provide "satisfactory co-operation" 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 co-operation, 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 passed on to indirect purchasers some or all of an anti-competitive overcharge (Hanover Shoe v United Shoe Mach, 392 US 481 [1968]). But several 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 USC Section 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 USC Section 1961). Each state's antitrust laws provide 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 co-operation" 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 its 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 Industries Inc v Radcliffe Materials, Inc, 451 US 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 USC Section 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 US 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 (North American Soccer League, LLC v US Soccer Fed'n, 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 favours arbitration, as a matter of contract between parties. While courts cannot compel parties to arbitrate their disputes in the absence of an agreement between them to do so, courts will rigorously enforce arbitration agreements according to their terms. In recent years, the US Supreme Court has applied this 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 SA v AnimalFeeds Int'l Corp, 559 US 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, 563 US 333 [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 US 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) (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

Section 4 of the Clayton Act provides that plaintiffs "shall recover" the costs associated with successfully litigating their claim, including "a reasonable attorney's fee" (15 USC Section 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 (Fed R Civ P 11).

Sanctions – particularly significant monetary penalties – are exceedingly rare, and an unreliable source of recovery of defence costs. The unavailability 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 USC Section 1291). A decision is "final" if it "ends the litigation on the merits" (Catlin v United States, 324 US 229 [1945]). The policy of the "final judgment rule" is intended to promote efficiency and limit delay, by seeking to ensure that, where possible, all challenges to lower court decisions 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 USC Section 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. Supreme Court review is discretionary, and as a practical matter, is rarely granted.

Trends and Developments

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Clifford Chance US is a global antitrust powerhouse that serves clients by handling the most complex matters in all the key hubs of Europe, Asia-Pacific, and the Americas. The practice consists of over 185 attorneys who provide seamless and integrated advice to domestic and multinational clients. The US practice is led by seasoned professionals whose extensive experience in private practice, in-house, and high-ranking government positions enables them to tackle cutting-edge issues. They advise clients across the full range of contentious and non-contentious matters, covering mergers, joint ventures, civil and criminal investigations, class action litigation, compliance, and broader antitrust and regulatory matters. The firm handles complex, multinational mergers and investigations that require an understanding of issues in multiple jurisdictions, and provides clients with a structured, co-ordinated, multi-jurisdictional response. It also represents clients in civil and criminal litigation and international arbitration, including in high-profile Second Request investigations and cartel and competition law violations.

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Current Antitrust Litigation Developments and Cases of Interest in the USA

Aggressive merger challenges

Both the Department of Justice, Antitrust Division (DOJ) and Federal Trade Commission (FTC) have been aggressive in challenging proposed mergers that they believe run afoul of the antitrust laws. While they have enjoyed some success, they have largely been on the wrong side of federal district court decisions.

Microsoft–Activision

In January 2022, Microsoft announced it would be acquiring Activision Blizzard, a game development company and creator of the Call of Duty series, for USD68.7 billion. The transaction would result in Microsoft becoming the third largest gaming company in the world behind Tencent and Sony. The FTC sought to enjoin the acquisition, alleging that Microsoft could harm competition in the gaming console market by making Call of Duty exclusive to Microsoft platforms. The FTC also alleged that the transaction would substantially lessen competition in the video game library subscription and cloud gaming markets. In July 2023, a federal district court in California denied the FTC's request for a preliminary injunction, relying in part on Microsoft's commitment to make Call of Duty available through ten-year agreements with rival gaming platforms, only some of which previously had access to the franchise. The deal has not yet closed, as the parties continue to negotiate with the UK's Competition and Markets Authority (CMA) on remedies. See below (**Private lawsuits against mergers**) for discussion of a challenge to the merger raised by private plaintiffs.

Meta–Within

In October 2021, Meta agreed to purchase Within Unlimited, a developer of a virtual reality (VR) fitness app. The FTC sought a preliminary injunction in federal court against the transaction, arguing that Meta's current and potential apps exerted a competitive constraint on the VR fitness app market. In January 2023, a federal court judge in California ruled in favour of the defendants, rejecting the agency's request for a preliminary injunction while holding that the FTC had failed to show that it was "reasonably probable" that Meta would have entered the market. Following the ruling, the parties closed their transaction, and the FTC dismissed its administrative case. See below (**Looking ahead**) for further discussion of this ruling's impact on future FTC challenges.

UnitedHealth–Change

In February 2022, the DOJ sued in the District Court for the District of Columbia to block the merger of UnitedHealth Group ("United") with Change Healthcare. United is America's largest health insurer, while Change is a leading technology provider. The DOJ argued that the transaction was anti-competitive because, among other reasons, it would allow United to access and misuse competitively sensitive information from other health insurance companies. United argued that it had a strong incentive to safeguard and not misuse data from rival insurers. Following a trial in August 2022, the court denied the government's request to enjoin the transaction, finding that the DOJ did not prove that United was likely to misuse rival payers' data.

Penguin Random House–Simon & Schuster

In November 2020, Penguin Random House announced it proposed to acquire one of its largest rivals, Simon & Schuster, for USD2.2 billion. The DOJ filed suit to block the merger, alleging harm to the market for the acquisition of publishing rights to anticipated top-selling books. Following a thirteen-day trial in August 2022, a federal judge blocked the deal, finding

that the DOJ had shown that the merger would likely harm authors under a monopsony-based theory of harm to competition.

Intercontinental Exchange–Black Knight

In May 2022, Intercontinental Exchange (ICE) announced a deal to acquire Black Knight for USD13.1 billion. The FTC filed suit to block the deal in March 2023, alleging that the deal would harm competition in the home mortgage loan origination systems market.

In the hopes of quelling antitrust concerns, ICE and Black Knight agreed to sell two business units of Black Knight in March and July 2023. As of August 2023, the FTC is analysing the implications of the proposed divestitures and whether to enter a consent decree with the parties.

Amgen–Horizon Therapeutics

In May 2023, the FTC sued to block Amgen, a leading biopharmaceutical company, from acquiring Horizon Therapeutics. Horizon manufactures Tepezza, the only FDA-approved treatment for thyroid eye disease, and Krystexxa, the only FDA-approved treatment for chronic refractory gout. The FTC has argued that the acquisition, if consummated, would allow Amgen to bundle its own "blockbuster" portfolio drugs with Tepezza and Krystexxa, thus entrenching Horizon's monopoly while hindering future entrants. While the defendants have offered to enter an agreement with the FTC not to bundle their products, the Commission has rejected this offer, arguing that behavioural remedies are disfavoured due to the high costs of monitoring and enforcement. A hearing on the FTC's motion for a preliminary injunction hearing is scheduled for September 2023.

Other notable merger litigation

In March 2021, US Sugar Corporation announced it was acquiring Imperial Sugar Company. The DOJ sought to block the acquisition, alleging that the transaction would leave only two significant sugar producers in the area that stretches from Mississippi to Delaware. A federal court in Delaware ruled against the DOJ in September 2022, holding that the government had improperly excluded sugar distributors from its proposed product market. A federal appellate court affirmed the lower court in July 2023.

In September 2021, the DOJ and seven state attorneys general challenged a joint venture between American Airlines and JetBlue, the Northeast Alliance. A preliminary injunction was entered in May 2023 by a federal court in Massachusetts, finding the Alliance diminished competition in the domestic market for air travel. In July 2023, the Northeast Alliance was terminated.

In September 2022, ASSA ABLOY announced it would acquire Spectrum Brands' Hardware and Home Improvement Division. The DOJ sued to block the acquisition, arguing that the transaction would harm competition and that the parties' proposed divestiture package was insufficient to remedy those harms. Soon after trial began in April 2023, the parties reached a settlement, which required ASSA ABLOY to divest multiple assets related to its premium mechanical door hardware and smart lock businesses.

Private lawsuits against mergers

Private plaintiffs, rather than government enforcers, have brought several recent lawsuits seeking to block or unwind mergers. These types of private lawsuits are rarely successful. But in two ongoing cases, private challenges to mergers have overcome motions to dismiss by the merging parties.

The first suit is a challenge to the consummated merger of Charles Schwab and TD Ameritrade, which previously operated two competing retail brokerage services. The plaintiffs are seeking to represent a class of retail investors and obtain both damages and equitable relief, including a complete divestiture of TD Ameritrade from the merged entity. Although the merger was announced in 2019 and completed in 2020, plaintiffs did not bring suit until June 2022. The defendants originally moved to dismiss the complaint on several grounds, including that the suit was time-barred under the doctrine of laches and that divestiture would be inappropriate. The district court denied the motion to dismiss but cautioned the plaintiffs that "divestiture is an extraordinary remedy" that "courts have been reluctant to order... at the behest of a private plaintiff after consummation of the allegedly anti-competitive merger." As of August 2023, the litigation remains ongoing.

The second suit is a challenge to Microsoft's acquisition of Activision Blizzard. Plaintiffs brought a complaint in federal court in December 2022, alleging harm to competition in at least five different markets. The district court dismissed the original complaint and denied the plaintiffs' motion for a preliminary injunction, holding that the plaintiffs had not alleged a reasonable probability of anti-competitive effects arising from the acquisition in any relevant market. But the judge later allowed part of the plaintiffs' amended complaint to proceed, finding that the plaintiffs had sufficiently alleged harm to competition from the merger's vertical components (but not from its horizontal components). As of August 2023, the litigation remains ongoing.

Additional ongoing merger challenges by private plaintiffs include a challenge to Kroger's proposed merger with Albertsons and JetBlue's proposed merger with Spirit Airlines. The FTC is investigating the former transaction, while the DOJ has filed suit to block the latter. As of August 2023, the private challenges remain ongoing.

Big tech conduct cases

Cases challenging Big Tech conduct continue to march forward, with several new ones being added to the mix in the past year.

Google

In October 2020, the DOJ and 11 states sued Google for using restrictive contracts with Android phone manufacturers and Apple to monopolise the markets for general search services and search advertising. In December 2020, 38 states expanded on these theories, suing Google for unlawfully thwarting competitive threats from other search portals, such as voice-powered search and specialised search providers. Trial commenced on 12 September 2023.

Enforcers have also sued Google for anti-competitive practices in ad tech markets. In December 2020, ten states sued Google for inflating advertising costs and using various anti-competitive practices to suppress competition from rival exchanges. The case has since taken a detour, as the parties fight over proper venue: after first being consolidated with related cases in New York, the litigation was transferred back to Texas in response to the recently enacted State Antitrust Enforcement Venue Act. The case now sits in limbo as the parties contest whether the Act should apply retroactively. Meanwhile, in January 2023, the DOJ brought its own long-awaited case challenging Google's anti-competitive practices in ad tech markets, joined by 18 states.

A coalition of 36 states (and Washington, DC) has also challenged Google for its Android and Google Play practices, alleging that Google has used contractual and technical restrictions to monopolise Android app distribution and in-app payments. That case and related private claims continue to proceed in California court.

Meta

In December 2020, the FTC and 48 states and territories filed parallel complaints against Meta for monopolising the purported market for personal social networking services by acquiring Instagram and WhatsApp and adopting policies that hindered competitors' access to Facebook's platforms. After a judge initially threw out both cases, the FTC amended its complaint and survived a subsequent motion to dismiss. Trial is expected to commence in 2024. The states did not fare as well, ultimately failing to convince an appellate court to overturn the district court's dismissal of their case.

Apple

In August 2020, Epic Games sued Apple, alleging that Apple's restrictions on third-party app distribution and in-app payments constituted monopolistic behaviour in both markets. In September 2021, the trial court held that Apple's in-app payment anti-steering provisions were anti-competitive under state law but rejected Epic's other claims. The Ninth Circuit affirmed the lower court's decision in April 2023, prompting both parties to seek Supreme Court review.

In the meantime, private plaintiff class actions against Apple are still underway, including the long-running case In re Apple iPhone Antitrust Litigation, a matter that began in 2011 and has already had one appeal go all the way to the Supreme Court. As of publication, the trial court is considering whether to certify the class – a key decision that will have major ramifications on whether the case proceeds, with potential ripple effects on similar class action litigation.

Sports litigation

Several sets of plaintiffs are currently challenging the Supreme Court's antitrust exemption for professional baseball, first established in 1922. In Cangrejeros de Santurce Baseball Club, LLC v Liga de Beisbol Profesional de Puerto Rico, Inc, one of multiple cases in federal court in Puerto Rico, the court held that the antitrust exemption applied not only to Major League Baseball (MLB) but to all of professional baseball, including the defendants' league in Puerto Rico. Meanwhile, in Nostalgic Partners LLC v The Office of the Commissioner of Baseball, an appellate court rejected a challenge brought by minor league teams challenging MLB's 2020 decision to shrink its farm league system from 160 to 120 teams. The appellate court affirmed that the baseball exemption remained valid based on Supreme Court precedent and required dismissal of the suit. The Second Circuit did not address the district court's holding that the plaintiffs had otherwise stated a claim under the antitrust laws.

In the world of golf, all eyes are on how the DOJ will handle the PGA Tour and LIV Golf's recently announced combination. In August 2022, several LIV golfers filed suit against the PGA Tour, later joined by LIV Golf, alleging that the PGA deployed anti-competitive practices with the hope of driving LIV Golf out of business. In June 2023, the parties announced they would drop all pending litigation against one another and merge their commercial operations under common ownership. The PGA has indicated that it believes traditional antitrust merger review is not necessary because the deal is not a merger. Nonetheless, the deal seems poised to receive DOJ scrutiny.

Finally, several proceedings involving collegiate athletics are ongoing. Many of these proceedings follow in the wake of the Supreme Court's 2021 decision overturning National Collegiate Athletic Association (NCAA) restrictions on education-related benefits for student-athletes. In April 2023, a group of current and former college athletes sued the NCAA and its five major conferences, alleging they were denied education-related payments unanimously allowed by the Supreme Court. A case has been brought against the Ivy League and its colleges based on the League's policy against athletic scholarships. In a federal court in California, a group of Division I student-athletes are seeking class certification for past name, image, and likeness compensation. The NCAA, in conjunction with the Power 5 athletic conferences, have argued that the individuals comprising the putative class are not sufficiently similar to be certified as a single class. A separate set of plaintiffs in another district court in California have challenged NCAA policies limiting the number and compensation of college athletics coaches. In July, the court denied the NCAA's motion to dismiss. As of August 2023, these cases remain pending.

Labour market litigation

The DOJ has continued to face difficulties in its efforts to address alleged no-poach and wage-fixing agreements through criminal prosecutions.

In March and April 2023, the DOJ received its third and fourth consecutive losses attempting to criminally prosecute labour market antitrust cases before a jury. Both cases involved charges against competing employers who had allegedly agreed to fix wages or allocate employees. In indicting these individuals, the DOJ alleged that these agreements were per se illegal violations of Section 1 of the Sherman Act. In both cases, the DOJ succeeded in overcoming pre-trial challenges by the defendants to the indictment but failed to secure convictions at trial.

In the former case, the DOJ charged four managers of home healthcare agencies with wage-fixing and allocating a labour market through no-hire agreements. At trial, the defendants argued that they had discussed making an agreement to set wages but never actually reached an agreement. After each side rested, the jury found for the defendants.

In the latter case, the DOJ charged a group of aerospace executives with an illegal agreement to restrict the hiring and recruiting of engineers and other skilled-labour employees. Immediately following the close of the government's case-in-chief, the defendants moved jointly for acquittal. The court granted the defendants' motion, holding that even assuming the defendants had made an agreement to restrict hiring that "constrain[ed]" job applicants "to some degree", the agreement did not "allocate the market for engineers or other skilled labourers from the supplier companies... to any meaningful extent", and thus was "not a market allocation agreement as a matter of law".

In a separate set of labour market prosecutions, the DOJ reached a set of non-trial dispositions with defendants. The DOJ had charged a healthcare staffing company and one of its employees with scheming to suppress the wages of school nurses. The company reached a plea agreement with the DOJ and was sentenced in October 2022 to a fine of USD62,000 and restitution of USD72,000. The employee entered into a pre-trial diversion agreement with the DOJ requiring him to perform community service in lieu of prosecution.

As of August 2023, the DOJ has one remaining labour-market prosecution, in which the DOJ has alleged that a healthcare staffing executive has conspired with others to fix nurses' wages. Trial is scheduled to take place in 2024.

Looking ahead

An even more aggressive FTC: targeting reduction of potential competition

Even though the FTC lost its bid for a preliminary injunction against Meta's acquisition of Within and ultimately withdrew its challenge (see discussion above), FTC officials have described the judge's decision as a victory for the FTC. The FTC's rationale for this characterisation is that the judge's opinion accepted the FTC's theory that reducing or eliminating actual or perceived potential competition is a valid theory of competitive harm under US antitrust laws. The FTC has long held this position (and included it in the 2010 Horizontal Merger Guidelines) but has had difficulty establishing precedent for it in court. Commission officials have said that the decision paves the way for future challenges of deals between companies that are not current competitors.

Antitrust enforcement focus: environmental, social, and governance (ESG)

US antitrust enforcers have also signaled that they will scrutinise – and, if appropriate, bring litigation against – anti-competitive conduct even where it furthers ESG initiatives. In recent hearings, US Senators expressed concern that collective action relating to ESG initiatives may constitute co-ordinated conduct that reduces competition. In response, leaders of both the FTC and the DOJ made clear that ESG commitments would not save conduct from antitrust scrutiny – whether in the form of co-ordination among competitors or merger activity. FTC Chair Lina Khan doubled down on this position in a December 2022 article published in the Wall Street Journal. State enforcers from conservative states have issued similar warnings, including a recent letter from 21 states to various asset managers warning that ESG investing initiatives are not immune from antitrust laws and that the states may pursue legal action against them.

Antitrust enforcement focus: artificial intelligence

As generative artificial intelligence (AI) technology has proliferated in recent months, the FTC has warned companies that it is closely scrutinising conduct that may harm competition in this critical emerging field. To provide transparency on areas of concern, the FTC issued guidance in June 2023 identifying key potential anti-competitive conduct that it is monitoring, including using control over key inputs and adjacent markets to establish and maintain monopoly power, implementing anti-competitive bundling and tying strategies, and maintaining an anti-competitive policy of self-preferencing. The FTC likely will continue its focus on technology companies and expand its investigations into generative AI.

A counterbalance: Supreme Court validates process for constitutional challenges to the FTC

In April 2023, the Supreme Court held in Axon Enterprise v FTC that defendants can bring constitutional challenges in federal district court to the structure of the FTC without first going through the FTC's administrative appeal process. This decision is important given the FTC's track record in its administrative courts – as the defendants argued before the Court, the Commission's administrative process has resulted in a near perfect success record for the FTC. Historically, defendants have had little recourse against this process in federal courts – they were only allowed to seek appellate review after a final

Commission decision (which can take years after the Commission first opens an investigation). As of August 2023, the case has been stayed while the parties consider a resolution of the matter.

Many defendants are now including constitutional challenges when answering FTC complaints. For example, Illumina is challenging the FTC's April 2023 decision to unwind the company's acquisition of Grail after finding that the transaction reduces competition for blood-based tests that provide for early screening of multiple types of cancer. As part of its appeal, Illumina plans to argue that the agency's administrative process violates constitutional due-process and equal-protection rights. As of August 2023, the appeal remains pending.

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