COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

United States

COMPETITION LITIGATION

Contributor

Clifford Chance

William Lavery

Partner | william.lavery@cliffordchance.com

Joe Ostoyich

Partner | joseph.ostoyich@cliffordchance.com

Weisiyu Jiang

Associate | weisiyu.jiang@cliffordchance.com

Kimberly Shi

Associate | kimberly.shi@cliffordchance.com

This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in United States.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

UNITED STATES
COMPETITION LITIGATION

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

For federal antitrust laws, the Sherman Act and the Clayton Act provide the basis of nearly all competition damages claims. In addition, most states have their own antitrust laws that mirror federal laws.

Section 1 of the Sherman Act prohibits competitors from entering into contracts, combinations, and conspiracies that unreasonably restrain trade. To establish a violation of Section 1, a plaintiff must prove that the defendant (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market. *See Reazin v. Blue Cross & Blue Shield of Kan., Inc*., 899 F.2d 951, 959 (10th Cir.1990).

To establish the existence of an agreement, a plaintiff must show concerted action by at least two separate entities. *See e.g*., *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010). The test for "concerted action" is set out in *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 764 (1984), namely, whether there is a "conscious commitment to a common scheme designed to achieve an unlawful objective." The test for whether parties are separate entities capable of conspiring is stipulated in *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984), namely, whether the entities are "separate economic actors pursuing separate economic interests," and whether their agreement "deprives the marketplace of the independent centers of decision- making that competition assumes and demands." *Copperweld* established the broad principle that an "intra-enterprise" agreement, between a parent company and one of its subsidiaries or affiliates, does not generally implicate Section 1. Instead, Section 1 is focused on prohibiting certain agreements between two or more separate and independent entities.

After establishing the existence of an agreement, the plaintiff must then prove that the agreement unreasonably restrains trade under either the "per se" or "rule of reason" standard. The U.S. Supreme Court believes that "certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in particular circumstances." *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). Therefore, practices such as price fixing, bid rigging, or market allocation are usually found to be "per se illegal" and require no examination of competitive effects. In other words, the agreement, by itself, is effectively illegal. On the other hand, there are many agreements (and virtually all "vertical" agreements between, for example, a supplier and its distributor or another customer) that often promote competition and are only problematic in certain circumstances when they have an adverse impact on competition. In those situations, the agreement is not inherently problematic and, instead, is judged under a more relaxed standard that requires an assessment of its market impact. Under this "rule of reason" analysis, the court would employ a burden-shifting test to weigh all the circumstances to determine if the challenged agreement unreasonably impairs competition. *See Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018). Under this test, the court will weigh the purported anti-competitive effects of an agreement against the proffered pro-competitive justifications.

Section 2 of the Sherman Act, at a high level, prohibits individuals and entities from monopolization, attempts to monopolize, and conspiracies to monopolize. The core of Section 2 is a prohibition against unilateral conduct that allows a firm to unlawfully achieve or maintain monopoly power in a relevant market. It is important to note that simply possessing monopoly power does not violate Section 2; a company may obtain monopoly power by innovating and "building a better mousetrap," by more clever use of "business acumen," by simply competing more vigorously on price, or simply by historic accident. Simply charging a monopoly price is, likewise, not a violation of Section 2. Indeed, in a famous formulation by former Justice Scalia, the Supreme Court held that the "mere possession of monopoly power, and the concomitant charging of

monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Instead, the key component of monopolization is conduct that allows a company to acquire or maintain monopoly power; for example, conduct, such as predatory pricing, exclusive dealing, or a refusal to deal, that excludes rivals from the market or severely hampers their ability to compete.

Section 2 also prohibits attempts and conspiracies to monopolize. An attempt does not require proof of monopoly power. Rather, it requires proof of exclusionary or predatory conduct that was undertaken with the "specific intent" to monopolize a relevant market and that also creates a "dangerous probability" of success. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Finally, Section 2 prohibits conspiracies to monopolize. A conspiracy to monopolize requires combined or coordinated exclusionary conduct engaged to bestow monopoly power on a single entity. Courts generally do not recognize a claim that two or more companies conspired to "share" a monopoly; rather, the group must agree to engage in conduct that will result in one entity possessing monopoly power. *See, e.g., Flash Elecs. v. Universal Music & Video Distrib. Corp*., 312 F. Supp. 2d 379, 396 (E.D.N.Y. 2004) ("The idea of a 'shared monopoly' giving rise to Section 2 liability repeatedly has been received with skepticism by courts who have squarely addressed the issue"). Thus, to prove a Section 2 claim for conspiracy to monopolize, the plaintiff must show: (1) the existence of a combination or conspiracy (e.g., an industry agreement to restrict output of certain products that are proven to exacerbate global warming); (2) an overt act in furtherance of the conspiracy (e.g., participating in group boycotts to discriminate against certain "non-green" product manufacturers in the market); and (3) the specific intent for one member of the group to monopolize the market (e.g., this can be proven through direct evidence or inferred from anticompetitive behaviour). *See Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

Relatedly, another U.S. antitrust statute, the Robinson-Patman Act ("**RPA**"), was enacted in 1936 to protect small businesses from advantageous prices large purchasers received due largely to their high-volume purchases. The RPA has not been regularly enforced by the federal regulators for the last 45 years, but at a high level, it seeks to prohibit price discrimination by: (1) prohibiting sellers from discriminating in price "between different purchasers of commodities of like grade and quality;" (2) prohibiting either buyer or seller from granting or accepting a commission, brokerage, or any other compensation, to/from the other party, except for services rendered in connection with the sale or purchase of goods; (3) prohibiting seller from offering a customer compensation for any services for advertising or promoting the resale of the seller's goods, unless such compensation is available to all other customers competing in the distribution of such products; (4) prohibiting seller from offering promotional or advertising services to a reseller, unless equivalent benefits are accorded to all resellers; and (5) prohibiting buyer form knowingly inducing or receiving a discriminatory price prohibited in the RPA. *See* 15 U.S.C. § 13(a)-(f). Both the Federal Trade Commission ("**FTC**") and the Department of Justice ("**DOJ**") have jurisdiction to enforce the RPA, but as noted above, neither agency has sought to enforce the RPA for quite some time. The RPA has historically been enforced mostly through private actions. However, public information indicates that the FTC recently opened preliminary investigations of several large companies for potential price discrimination, indicating the FTC's attempted revival of the RPA.

To establish price discrimination under the RPA, a plaintiff must show (1) a difference in price; (2) two or more contemporaneous sales in interstate commerce; (3) sales by the same seller to two or more different purchasers; (4) sales of goods of like grade and quality; and (5) a competitive injury resulted from the price discrimination. *See Volvo Trucks N. Am., Inc. v. Reeder–Simco GMC, Inc.*, 546 U.S. 164, 176 (2006). To establish "competitive injury," the most complex element of a price discrimination case, a plaintiff typically needs to show either (1) a "primary line injury (competition between another seller and the price discriminating seller was injured as the result of the latter's predatory price to customer); or (2) a "secondary line injury" (actual competition between the seller's "favoured" and "disfavoured" customers was injured due to the price discrimination). *See FTC v. Morton Salt Co*., 334 U.S. 37 (1948).

Sections 4 and 16 of the Clayton Act allow private claimants to bring civil injunctive and monetary damages suits to enforce the laws above (and to prevent parties from completing transactions that would substantially lessen competition or seek damages for consummated transactions). That requires, in addition to the elements above, proof of 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." *Brunswick Corp. v. Pueblo Bowl-O-Mat,*

Inc., 429 U.S. 477, 489 (1977). Injury that is caused by conduct that increases competition (for example, simply more aggressive pricing by a company even if it has a very high market share) is not cognizable. In addition to antitrust injury, a private plaintiff seeking monetary relief must prove at least some measure of non-speculative, quantifiable monetary damages caused by defendant's conduct, while a plaintiff seeking injunctive relief must prove a significant threat of injury from an impending antitrust violation or one that is likely to recur.

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

To bring any action in a federal court, a party must have both constitutional and antitrust "standing." To establish constitutional standing, claimants must have suffered a concrete harm that (1) has already occurred or will occur imminently (not conjectural or overly speculative); (2) is reasonably traceable to the alleged conduct; and (3) is redressable in a court of law. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). For antitrust standing, a private plaintiff must establish that it has (or will likely) suffer antitrust injury, *i.e.*, an injury that the antitrust laws were intended to prevent—an injury that harms competition itself – – and that flows from defendant's antitrust violation, and that it is the appropriate party to bring the lawsuit. In broad terms, this last requirement means it must establish that it was "directly" injured by the defendant's conduct and that its claims are not too remote. In its most well-known formulation, this requires proof by a company suing defendant cartelists for monetary damages for fixing prices that it directly purchased the affected goods from a cartel member. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). An indirect purchaser (someone who purchased the products from a non-conspiring distributor, for example) is not generally permitted to bring a claim for monetary damages under Clayton Act Section 4.

In addition to standing, claimants must also present enough evidence to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *See also*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (holding that plaintiffs must present a "plausible" cause of action to survive dismissal). Each antitrust cause of action is fact specific. For instance, in Sherman Act Section 1 cases, claimants must present facts that plausibly suggest an unlawful agreement or conspiracy between two or more parties. In Sherman Act Section 2 cases, however, claimants are less concerned with agreements (if at all) and are instead expected to define the relevant market and establish the defendant's share of that market.

3. What remedies are available to claimants in competition damages claims?

Damages: Treble damages and, typically, attorneys' fees are available for prevailing plaintiffs in competition claims (see Question 4 for more details).

Injunctions: Plaintiffs are also entitled to injunctive reliefs if they show "threatened loss or damage of the type that the antitrust laws were designed to prevent and that flows from that which makes defendants acts unlawful." *See Fair Isaac Corp. v. Experian Info. Sols., Inc.*, 650 F.3d 1139, 1146 (8th Cir. 2011).[1]

Footnotes

[1] Note that the government also has the full range of civil monetary and injunctive relief available and can, in cases of cartels and monopolization, bring criminal charges against companies and individuals involved.

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Successful antitrust plaintiffs recover treble damages, meaning "threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys' fee." But plaintiffs can only recover damages that are attributable to the defendant's antitrust violation and must be able to show that the defendant's alleged conduct caused the damages. Damages caused by other factors, such as increased competition, changes in supply and demand impacting the entire market, or the plaintiff's own decisions and capabilities, are not recoverable and must be "disaggregated" from any damages calculation.

Defendants in a Section 1 or 2 conspiracy case are jointly and severally liable for their conduct, thereby each defendant is responsible for the entire treble damages with no right to contribution from co-defendants. For instance, in an antitrust action involving 5 co-conspirators, if 4 of them settle, the last one may face the treble damages for all defendants combined without the right to seek contribution from the remaining participants if lost in trial, though a plaintiff must "offset," i.e., deduct, the value of settlements it has received from any joint and several treble damages

award. This is designed to encourage all participants to settle early.

The Antitrust Criminal Penalty Enhancement and Reform Act ("**ACPERA**") encourages antitrust law violators to self-report and cooperate pursuant to the DOJ Antitrust Division's Corporate Leniency Policy. Obviously, a leniency applicant, if accepted, obtains the benefit of a reduced criminal charge (and no charge at all if, for example, it is the first to report a violation and is fully forthcoming).[1] In addition, however, under ACPERA, a successful leniency applicant may be exempt from the trebling of damages and joint and several liability in a civil competition case brought by a private party to obtain damages for the same violations.

Footnotes

[1] The DOJ's leniency program provides applicants immunity from criminal prosecution if they meet certain program requirements, including, for instance, being the first to report the competition conspiracy; providing full co-operation with the Antitrust Division's investigation; making restitution to injured parties.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

A private antitrust plaintiff is ordinarily subject to a four-year statute of limitations, while a criminal competition violation prosecuted by the Department of Justice is subject to a five-year statute of limitations ("SOL") period. This SOL starts when an antitrust conspiracy is complete. A conspiracy will be deemed to have been completed at the time of completion of the last overt act. See U.S. v. Coia, 719 F.2d 1120, 1124 (11th Cir. 1983). This can be extended by each subsequent act in furtherance of a conspiracy or resulting injury. Certain circumstances can also "toll" (or pause) a SOL, such as when conspirators have actively concealed a violation, or if there are pending related government proceedings. The limitations periods under state competition laws vary among states.

6. Which local courts and/or tribunals deal with competition damages claims?

As discussed below in Question 7, competition damages claims arising under federal antitrust laws can be filed in any federal district court (if the district court also has personal jurisdiction over the defendants). Competition damages claims arising under state antitrust law alone may only be filed in state court, however, if diversity jurisdiction is available, a federal court can also obtain subject matter jurisdiction over a state claim. For a court to exercise diversity jurisdiction, the amount in controversy must exceed $75,000 and complete diversity of citizenship must exist, meaning the plaintiff and defendant cannot be domiciled in the same state. Additionally, if a state claim is closely related to a federal claim brought in the same action, federal district courts can exercise supplemental jurisdiction to adjudicate that state antitrust claim.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

Federal district courts are granted subject matter jurisdiction over competition damage claims arising under federal antitrust laws like the Sherman Act or Clayton Act (see Question 1).

Additionally, the court must also have personal jurisdiction over the defendant. Personal jurisdiction can be established by finding either specific jurisdiction or general jurisdiction. Specific jurisdiction is the adjudicatory authority in which the suit arises out of or relates to the nexus between the defendant's alleged antitrust conduct, the plaintiff's harm, and the forum. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

To establish specific personal jurisdiction, the plaintiff, among other things, must show that its claim (1) "arises out of or relates to" one of the defendant's contacts in the forum, (2) the defendant must have "purposefully availed" itself of the privilege of conducting activities within the forum state, and (3) the exercise of personal jurisdiction is in accordance with traditional notions of "fair play and substantial justice. See Mario Del Valle, et al v. Trivago GMBH, et al, No. 20-12407 (11th Cir. 2022); See also, Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017).

General jurisdiction, on the other hand, is only exercisable when the defendant's continuous contacts within a state are so substantial and of such a nature as to justify a suit against it on causes of action arising from dealings entirely distinct from those activities. See International Shoe Co. v. Washington, 326 U.S. 310 (1945). To establish general jurisdiction, plaintiff needs to show that the defendant's contacts with the forum state is "so continuous and systematic as to render [the defendant] essentially at home." See Daimler AG v. Bauman, 571 U.S. 117, 127 (2014). The Supreme Court has seemingly tightened the requirements for corporations to subject themselves to "general jurisdiction" in recent years, and it now appears that a

corporation can be "fairly regarded as at home" primarily in its "place of incorporation" and its "principal place of business." Id.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

Determining which law will govern a claim for competition damages is a fact-specific inquiry (see Question 1).

For civil antitrust cases, the applicable standard of proof is a "preponderance of the evidence." However, criminal antitrust allegations, like all federal criminal charges, must be proved "beyond a reasonable doubt."

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

A finding of an antitrust violation in a country outside the U.S. is not generally sufficient, by itself, to prove a violation inside the U.S. But, of course, if facts unearthed in a government investigation outside the U.S. also suffice to show a violation inside the U.S., both government enforcers and private plaintiffs may seek to rely upon those to show a violation of U.S. law, as well.

A federal criminal conviction or civil judgment (or consent decree) may also be used in private cases challenging the same conduct as a means of short-cutting the proof required in the private suit. The circumstances are not applicable in all situations, but broadly Section 5 of the Clayton Act (15 U.S.C. § 16) provides that "a final judgment or [consent] decree… rendered in any civil or criminal proceeding brought by or on behalf of the U.S. federal government under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or consent decree would be an estoppel as between the parties…," provided that the consent judgments or decrees entered before any testimony has been taken would not be treated as prima facie evidence or estoppel. However, collateral estoppel effect would not be available for "any findings made by the FTC."

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

A private damages action may proceed simultaneously with a related government enforcement action. Sometimes, the government enforcement agency may seek a stay of the related private damages action for various reasons. When a complete stay is unjustified, government may attempt to stay certain aspects of the discovery in a related private case while the criminal case proceeds.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

Joinder: Federal Rules of Civil Procedure ("**Fed. R. Civ. P.**") Rules 18, 19, and 20 allow parties and/or claims to be joined into one suit if they meet certain requirements, including sharing a common question of law or fact, among others.

Class Action: When joinder of all members is impracticable due to the size of the class, Fed. R. Civ. P. 23 allows a representative party to sue on behalf of all members of a similarly situated class if certain requirements are met. For instance, to certify a class under Rule 23(b)(1)(A), claimants need to show that "prosecuting separate action by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class. To certify a class under Rule 23(b)(3), claimants need to show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Assignment of claims: Competition damages claims can be assigned and the assignee "may step into the shoes" of the assignor and "bring an antitrust suit in that capacity" if it receives a valid assignment of the assignor's antitrust claims. *Wallach v. Eaton Corp*, 837 F.3d 356 (3d Cir. 2016). Federal common law governs the validity of an assignment of a federal antitrust claim.

Consolidation: Fed. R. Civ. P. 42 provides that if actions

before the court involve a common question of law or fact, the court may join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay. In addition, when civil actions involving common questions of fact are filed in different courts, such actions may be transferred to a court for consolidated pretrial proceedings via a motion to transfer.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

A "passing-on defense" refers to a defendant's assertion that the plaintiff in a competition damage case suffered no legally cognizable injury because the plaintiff had passed on the claimed illegal overcharge to its customers or subsequent purchasers. In general, that defense is not applicable in the U.S. Pursuant to the Supreme Court's ruling in *Hanover Shoe, Inc. v. United Machinery Corp*., 392 U.S. 481 (1968), a defendant is generally not entitled to assert a "passing-on" defense, except in limited situations where the defendant can demonstrate that (i) the plaintiff "raised his price in response to, and in the amount of, the overcharge;" (ii) "[the plaintiff's] margin of profit and total sales had not thereafter declined;" and that (iii) "the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." Although the Court noted that the defendant's burden in establishing the applicability of the "passing-on" defense normally proves "insurmountable," there may exist situations where it is easy to prove that the buyer has not been damaged.

Unlike the generally barred "passing-on defense," the "indirect purchaser defense" under another Supreme Court precedent *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) is frequently invoked by defendants to prevent indirect purchasers from bringing suits in federal competition damage actions, as noted above. In *Illinois Brick*, the Court established a bright-line rule that authorized suits by direct purchasers but bars suits for monetary damages by indirect purchasers in federal court absent very narrow exceptions. *Id.*; *See also*, *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019).

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Yes, expert evidence is permitted and frequently required to successfully establish or defend against an antitrust case. For example, economists are commonly engaged to testify on issues of economic theory, addressing topics such as market definition, market structure, customer purchasing behavior, likelihood of collision, likelihood of harm to competition, among others.

A court may appoint an expert witness who consents to act, but courts rarely do that, and parties usually engage their own economists, statisticians, marketing experts, as well as other industry experts to provide testimony on the relevant issues.

Fed. R. Civ. P. 26 and the district courts' local rules govern expert witness discovery. Specifically, Rule 26(a)(2) sets out the required disclosure for expert testimony, including submitting an expert report that must contain a complete statement of all opinions the expert witness will express and the basis and reasons for them; the facts or data considered by the expert witness in forming them; and any exhibits that will be used to summarize or support them, among other things.

Federal Rules of Evidence ("**Fed. R. Evid.**") 702 provides the standard for admitting expert testimony in a federal trial, requiring that the testimony is based on sufficient facts or data, is a product of reliable principles and methods, and the expert has reliably applied the principles and methods to the facts of the case, among others. If the admissibility of an expert testimony is challenged, courts will conduct a *Daubert* hearing to determine whether the Rule 702 requirements have been met.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

Competition laws in the US are enforced by two dedicated federal government agencies, the Antitrust Division of the US Department of Justice and the US Federal Trade Commission, and can also be enforced by a state enforcer or a private party. However, the trial process differs depending on whether the case is criminal or civil litigation.

For criminal antitrust prosecutions at the federal level, while much of the process is identical to a civil case, the initial proceedings are typically before a grand jury who decides whether there is "probable cause'" to believe

that a crime has been committed. Upon an indictment, most criminal antitrust defendants plead guilty rather than stand trial. If a defendant in a criminal antitrust action accepts a plea, then the court has the discretion to accept or reject the charging agency's recommendation. If a plea is not accepted or never provided to the defendant in the first place, then the criminal antitrust case will be tried in federal district court before a jury unless the defendant "knowingly and voluntarily" waives their constitutional right.

In civil antitrust cases in federal district court, the right to a jury trial is also guaranteed in treble damage suits under the Seventh Amendment of the US Constitution. Parties seeking a jury trial must timely demand it in their initial pleadings. A party waives a jury trial unless its demand is properly filed and served. Alternatively, if a suit seeks only equitable relief, then there is no right to a jury trial and a judge will decide the issues.

In both criminal and civil antitrust proceedings, a trial is generally divided into three main components. First, both parties make opening statements where they outline to the decision-maker what they plan to prove during the trial. Second, the parties (beginning with the party that bears the burden of proof) present both the fact and expert testimony along with any documentary evidence that either goes towards their claims or seeks to diminish the opposing parties' claims. Third, both sides present their closing arguments, where they summarize the information presented during the trial and its relation to the applicable law at issue in the case.

Plaintiffs in civil federal antitrust cases must prove each element of their claims by "a preponderance of the evidence," meaning that based on both the direct and circumstantial evidence presented the fact is more likely than not to be true. Generally, evidence in antitrust cases involves both oral testimony and written documents; the introduction of which is governed by the Federal Rules of Evidence at the federal level, and by states' rules of evidence and common law rules at the state level.

Cross-examination is governed by Fed. R. Evid. 601. Judges must allow parties to have a fair and substantial opportunity to cross-examine witnesses called by the opposing party, but judges retain a significant amount of discretion as to the scope and duration of the questioning.

The FTC can and does often enter the federal court system as a civil litigant, similar to the DOJ. In addition to complaints filed in federal court, when the FTC determines that it has "reason to believe" an antitrust violation has occurred, it can vote to issue an administrative complaint, which is normally referred to an administrative law judge ("**ALJ**"). These cases can run concurrently with federal court actions (e.g., preliminary injunction actions to block a merger). Once an administrative complaint has been issued, it creates an internal firewall between the Commission and the FTC attorneys charged with prosecuting the dispute.

The administrative litigation is similar to a trial in federal district court "bench" trial, with the ALJ performing many of the same functions as a federal court judge; there is no jury, of course. Another key difference is that the Commission is not required to give deference to the ALJ's factual determinations. The Commission reviews both the legal and factual issues *de novo* and then issues a final decision either finding liability and issuing an order to cease and desist, or dismissing the complaint. Once the opinion is issued, it can be directly appealable by the defendant to any federal circuit court. Given that the Commission typically rejects its own ALJ's determinations when they are inconsistent with its complaint, and effectively sides with itself, many litigants have questioned the validity of this process. *See Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023).

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

Due to their complexity, antitrust cases can take years to go to trial. The duration of the lawsuit is dependent on the docket-load of the assigned federal judge (who may be carrying hundreds of criminal and civil cases, covering the full range of legal disputes, at any given time), the scope of discovery in the specific antitrust dispute, amendments to complaints and subsequent response time for the opposing party, the time the court needs to decide pre-trial motions, institutional limitations, expert identification, analysis, and, if necessary, class certification decisions. On average, most complex antitrust cases—that do not settle in advance—take more than six years to complete. Class actions may take longer.

Once a federal district court decision becomes final, a party has the right to appeal the decision to a U.S. Circuit Court of Appeals. Upon a decision by the U.S. Circuit Court of Appeals, a party to whom the decision was adverse has the option to appeal to the U.S. Supreme Court. To do so, the party must first seek permission to appeal by filing a petition for writ of certiorari to the Court. The appeal will only be able to proceed if the petition is accepted. However, the Supreme Court receives thousands of such petitions each year, across a wide range of legal disputes, and the

odds it will accept any particular certiorari petition are low.

16. Do leniency recipients receive any benefit in the damages litigation context?

Yes. ACPERA provides incentives to those who self-report criminal antitrust violations and cooperate fully with any subsequent investigation and litigation. More specifically, ACPERA provides leniency recipients with a legal avenue to limit civil exposure to their own single damages, avoiding joint and several liability as well as trebled damages. Additionally, in private civil antitrust cases, leniency recipients can satisfy their own restitution obligations through negotiated settlements under ACPERA. To qualify for ACPERA benefits, an applicant must prove to the court that they provided timely and "satisfactory cooperation," including a full account, of all known or potentially relevant facts and records, to the civil plaintiff. Though "satisfactory cooperation" is addressed in 15 U.S.C. §§ 7a-1(b)(1)-(3), there is still uncertainty as to what it looks like in practice. Despite the beneficial treatment under ACPERA, an applicant's criminal plea can be used as evidence of a violation in a future private action.

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

In antitrust cases, damages must "flow" from the anticompetitive conduct at issue versus lawful competition or unrelated factors. Courts must therefore determine whether "but for" the anticompetitive conduct, the economic environment would have been better with more competition. All other supply and demand factors that affect prices must stay the same as in the actual world. Further, a damage analysis must also consider individual harm and its duration. This is often a hotly disputed issue.

Courts diverge on whether they grant standing to umbrella plaintiffs. "Umbrella damages" cover the overcharges non-conspiring suppliers are required to pay because of inflated price arising from the conspiracy. The benefits of allowing umbrella plaintiffs and providing for umbrella damages, is that it allows the Court to promote competition, compensates a more expansive group of injured parties, and deters additional wrongdoing. Opponents argue the umbrella theory allows recovery for harm that is not directly caused by defendant's conduct, is too speculative and unduly expands monetary accountability.

Courts rely on several methodologies in calculating damages. These include but are not limited to: (1) the "before and after approach" method compares the profits earned during the anticompetitive behavior with the profits earned after and before the violation; (2) the "yardstick" approach compares the affected entity with a comparable one that was in a market unaffected by the anticompetitive conduct at issue. Antitrust damages do not need to be precise; they just need to be more than mere speculation.

18. How is interest calculated in competition damages cases?

Even though pre-judgment interest is not usually awarded in antitrust cases, post-judgement interest is available. Courts apply post-judgment interest to the entire award and is calculated "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."

19. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

The general consensus, with a few outlier cases, is that there is no right of contribution. Defendants face joint and several liability for damages caused by their anticompetitive behavior. As a result, plaintiffs can recover all their damages from a single defendant even if multiple defendants are involved in the antitrust suit. Courts have held that judgment sharing agreements can be entered into by defendants as they serve the purpose of controlling parties' exposure and prevent parties from settling early despite their individual culpability out of fear of overwhelming economic liability.

20. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

Most competition claims end in settlement between the parties before trial as they are costly, and risky, to litigate. For cases brought as a class action, as with other class action settlements, court approval is necessary before an antitrust class settlement can become final. Aggrieved members may object to the

settlement and attorney's fees. Under Rule 23(e)(4) of the Federal Rules of Civil Procedure, the Court can refuse to approve a settlement unless it provides an opportunity for individual class members to request exclusion from the terms.

Additionally, a competition damages claim can also be disposed of—in whole or in part—by a court order. The two main opportunities for dismissal are at the motion to dismiss stage and the summary judgment stage. Under Fed. R. Civ. P. 12(b), a defendant may be able to dispose of the complaint early into litigation by filing a motion. The most common motion to dismiss is for "failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), however, there may also be jurisdictional defects or other deficiencies that provide grounds for dismissal. In addition, of course, some conduct is immune from antitrust scrutiny, including conduct that is constitutionally protected (for example, lobbying Congress is protected by the First Amendment) and conduct by, or sanctioned or approved by, the U.S. or a foreign government. Because of the heightened pleading standard created in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), antitrust defendants are now more likely to be successful in disposing of unsupported "boilerplate" allegations of unspecified "conspiracies" or "monopolization" earlier in the case, which can save time and money for all parties.

Summary judgment also provides a defendant another opportunity to attempt to dispose of some or all the claims raised in the complaint. A defendant may file summary judgment at any point, but most defendants wait until the end of discovery to ensure "there are no genuine issue as to any material fact." Under Fed. R. Civ. P. 56, the Court must grant a motion for summary judgment if "the movant is entitled to judgement as a matter of law."

In antitrust class cases, defendants may, in effect, also be able to prevail in a case if the class representatives are unable to offer proof of a common injury or otherwise sustain the class allegations. In that circumstance, the named plaintiffs (the parties who filed the suit on their own behalf and on behalf of the putative class action) are left to pursue only their individual claims, which greatly reduces the defendant's exposure and their own incentive to litigate the suit.

21. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Prospective antitrust plaintiffs can use class action litigation to attain class-wide competition damages for a common harm. Fed. R. Civ. P. 23(e) provides that "claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or comprised" upon the court's approval. In determining the applicability of the proposed settlement, the court must determine the proposal to be "fair, reasonable, and adequate" and may also include a reconsideration of the class definition under Rule 23(b)(3). Courts generally also consider the nature of claims and defenses, whether parties are given the opportunity to be excluded from the terms, whether there have been "changes in the information available to class members," whether serious questions of law and fact exist, whether significant questions about damages and liability exist which would affect individual class members in different ways, and the defendant's financial viability. If the court chooses to preliminarily accept the proposed settlement, then notice must be given to all parties that will be bound by the settlement. Any class member may object to the court's approval of the settlement but must state to whom the objection applies and the specific grounds on which the objection rests. If the court does proceed to enter judgment for the entire class, then the class will be bound, and no individual members of the class will be able to bring individual claims post-settlement. Since a court cannot enter a binding class action settlement without personal jurisdiction, the settlement can only include parties within the court's jurisdiction. These settlements cannot bind parties outside of the court's jurisdiction.

22. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

Under Fed. R. Civ. P. 26(c), a party can move for a protective order to prevent the disclosure of confidential or proprietary information in either discovery or other requests for information. A motion seeking a protective order "must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Often parties agree collectively on the terms of the agreement, and then submit it to the court for its approval. The aim of a protective order is to

protect legitimate privacy interests, such as "a trade secret or other confidential research, development, or commercial information" and prevent the opposing party from accessing if good cause is shown. On rare occasions, there may be information protected—such as the identity of a client—that may affect the claim itself.

If a court approves the motion, then the protective order will govern inquiries and limit disclosure based on the terms. Generally, the terms are applied to information produced by the parties and any subpoenaed third parties. The designation of a protected order though does not mean it will remain confidential upon filing. To protect the information from public access, it must be filed under seal. Depending on the court, parties may be required to file another motion to have the confidential information sealed. There are typically two tiers of confidential information in federal court litigation. Where the information is placed dictates who is entitled to review it. If the material is determined to be "confidential," then the information can only be reviewed by the parties (and their employees), the court (and its staff), and attorneys (and their staff), and witnesses who have had access to the information presently or in the past. If the material is "highly confidential," on the other hand, then only the attorneys working on the lawsuit can access the information.

Generally, parties are not required to disclose "privileged" information. Privileged information includes conversations made within the scope of the attorney-client relationship and documents created for and in anticipation of litigation (including memoranda and other materials prepared by those under the attorney's direction). Federal and state courts may also recognize additional privileges. Under the Federal Rules of Criminal Procedure ("**Fed. R. Crim. P.**") 16, internal government documents made by the government for purposes of "deliberating" on the strengths and weaknesses and strategies of a potential case are not subject to disclosure. The documents produced by the parties to the government, however, if applicable, can be discoverable.

23. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

In the United States, prevailing parties generally have the right to recover some types of reasonable out-of-pocket costs, but the parties—regardless of outcome—usually pay their own attorney's fees and have no right to recover from their opponents. Section 4 of the Clayton Act provides an exception to this rule. Under the statute, prevailing plaintiffs in private antitrust damages actions may recover reasonable attorney's fees and other litigation costs, such as court filing fees and printing expenses (expert witness fees are usually not recoverable). The same is true for prevailing plaintiffs suing for injunctive relief under Section 16 of the Clayton Act. In calculating the award, courts may scrutinize the plaintiff's attorneys' bills to determine whether they were reasonable, and may also compare the outcome achieved to the outcome sought, to assess how much the court concludes it should award the plaintiff. In class action cases, the court may also use the "lodestar method" to determine attorney's fees, which requires the number of "reasonable hours" incurred to be multiplied by a "reasonable" hourly rate and may also inquire into fee awards in similar cases to determine an appropriate award. The "reasonable" hourly rate may be the actual rate incurred or may be lower if the court determines that the amount actually incurred was excessive. Generally, prevailing defendants are unable to recover attorney's fees.

24. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

In the United States, litigation funding by third parties is generally allowed. Some states, however, may restrict third-party litigation under common law doctrines, and several states have now mandated that parties disclose when their cases are being funded by a third party. Attorneys must ensure that the litigation funding arrangements do not interfere with their ethical obligations under the Federal Rules of Professional Responsibility and other state-specific ethics codes. Third-party funders are typically not held liable for adverse party's costs in antitrust litigation, but this could change since litigation funding is occurring more often than it did in the past. Antitrust plaintiffs often retain their attorneys on a contingency-fee basis and these agreements are usually negotiated prior to filing. Experts, unlike attorneys, are generally paid for their work regardless of whether the plaintiffs are successful or not to avoid the implication that they are incentivized to support plaintiff's claims.

25. What, in your opinion, are the main

obstacles to litigating competition damages claims?

In the United States, most antitrust cases result in settlement rather than litigation through trial. The system itself provides strong incentives to settle the claims, rather than incur the massive expense and financial exposure of trying the case before a jury (or judge in some instances). Since damages are trebled and prevailing plaintiffs are entitled to attorney's fees (sometimes running in the tens of millions due to the complexity and length of antitrust cases, particularly class actions), settling can be both lower in risk and cost. Additionally, the expense of defending a case for more than five years can be extremely burdensome and require significant expense, including expert witnesses, travel, and court reporting, in addition to attorneys' fees. When there are multiple defendants named, a 'prisoner's dilemma' can also unfold where risk can be heightened if even one of the defendants settles for less than the damages attributable to its "portion" of alleged misconduct. All these considerations often pressure defendants into settling before trial.

26. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

Over the next five years, antitrust litigation will likely become more active following the heels of aggressive agency enforcement. The focus of the DOJ and FTC will likely continue to be on cartels, monopoly, merger enforcement and perhaps price discrimination, but with more emphasis on using newer theories of harm and the revival of legal theories (assumed to have been long ago set aside), such as "hub and spoke" conspiracy theories in the Section 1 context and refusals to deal in the Section 2 context. In terms of sectors, there will be a continued focus on industries that impact everyday consumer products, such as healthcare and technology and food, beverage, and household goods. Finally, we expect ongoing focus into companies' human resources decisions (who to hire or promote, what benefits to provide) particularly where industry bench-marking or other practices suggest no-poach or non-solicitation agreements or out-and-out agreements to depress wages or benefits.

Contributors

William Lavery
Partner
william.lavery@cliffordchance.com

Joe Ostoyich
Partner
joseph.ostoyich@cliffordchance.com

Weisiyu Jiang
Associate
weisiyu.jiang@cliffordchance.com

Kimberly Shi
Associate
kimberly.shi@cliffordchance.com