The Private Competition Enforcement Review: USA

Philip J Iovieno, Kristen J McAhren and Daniel Lumer
Cadwalader Wickersham & Taft LLP
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Overview of recent private antitrust litigation activity

Private litigants are key in the enforcement of US antitrust laws. The trend of political and media attention being directed towards US antitrust laws and their enforcement, including private enforcement, continued in 2022. However, this attention has yet to result in legislative enactment or major changes in decisional law at the level of the US Appeals Courts or the US Supreme Court.

The US Supreme Court has issued a series of decisions during the past decade, establishing a heightened 'plausibility' pleading standard that governs whether a complaint survives a motion to dismiss,[2] a requirement that district courts scrutinise the merits of petitions to certify private actions as class actions as well as the use of experts for that purpose,[3] and the enforceability of arbitration agreements to private antitrust litigation and class actions.[4] The lower federal courts apply these Supreme Court cases in deciding issues concerning antitrust injury, standing requirements, the statute of limitations, class actions, discovery and pleading standards.

The US Supreme Court most recently addressed antitrust litigation in the technology and labour sectors and clarified that:

a. the Supreme Court's ruling in *Illinois Brick Co v. Illinois*, which bars antitrust suits by indirect purchasers, did not apply to consumers who purchased apps from Apple's App Store, even though Apple only collected a commission on the apps and did not set their prices;[5] and
b. the National Collegiate Athletic Association (NCAA) rules limiting education-related compensation to student-athletes violated Section 1 of the Sherman Act, which prohibits agreements in restraint of trade.[6]

Private antitrust enforcement in the lower federal courts continues to be active, not only within the technology and labour sectors but across all sectors of the US economy.

General introduction to the legislative framework for private antitrust enforcement

The legal bases for commencing a private federal antitrust action are found in the Clayton Act of 1914. Section 4 allows private plaintiffs to sue under the federal antitrust laws for money damages, plus reasonable attorneys' fees. Prejudgment interest on actual damages may also be awarded at a court's discretion if such an award is 'just' in the circumstances.[7] Section 16 allows private plaintiffs to sue for injunctive relief.[8]

i Statute of limitations limits period of potential recovery

A four-year statute of limitations applies to Section 4 monetary claims.[9] The limitations period commences when the cause of action accrues, which generally occurs when the plaintiff suffers injury and damages become ascertainable.[10] Although there are several instances in which courts have subjected Section 16 claims to a four-year statute of limitations, the injunctive requirement of ongoing or imminent irreparable harm typically addresses any timeliness issues presented by a Section 16 claim.[11] Additionally, the statute of limitations for both Section 4 and Section 16 claims can be extended (but not revived) by the fact of overt acts in furtherance of the violation under the 'continuing violation' doctrine.[12] The statute of limitations may be tolled by government antitrust actions,[13] the filing of a class action,[14] fraudulent concealment,[15] duress[16] or equitable estoppel.[17] Courts have generally permitted the tacking of tolling periods when the government has filed successive enforcement actions, or where the plaintiffs are able to establish fraudulent concealment that overlaps with the start of a class action or government enforcement action.[18]

In a non-antitrust case, the US Supreme Court recently reiterated that where a statute of limitations is not jurisdictional, equitable tolling doctrines are fully applicable.[19] This decision would apply to the antitrust law statute of limitations that are not jurisdictional.

ii State antitrust claims

Most US states and territories have adopted antitrust statutes. They generally mirror the federal scheme and prohibit monopolies and unreasonable agreements (like the Sherman and Clayton Acts) and unfair and deceptive trade practices (like the Federal Trade Commission (FTC) Act). The vast majority provide for private rights of action. Statute of limitations periods vary by state.

The statutes and courts' interpretations of them differ on various points, such as the availability of treble damages,[20] restitution, class actions and availability of recovery for indirect purchasers.

Extraterritoriality

i General jurisdictional rule

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits the extraterritorial reach of the Sherman Act to foreign anticompetitive conduct that either involves US import commerce or has a 'direct, substantial, and reasonably foreseeable effect' on US import or domestic commerce.[21] Courts have construed the FTAIA to require a 'reasonably proximate causal nexus' between the conduct and the effect on US commerce or import commerce, a standard similar to a proximate causation standard.[22] Additionally, a plaintiff's injury must occur in the United States rather than a foreign market to 'give rise to' a claim under the Sherman Act.[23] The interpretation and application of the FTAIA law has been extensively litigated, with varied results.

Although the US effects requirement has traditionally been characterised as a jurisdictional issue, it is increasingly being treated as a substantive element of the Sherman Act.[24]

ii Comity considerations

A court may employ comity considerations to decline jurisdiction, even when the FTAIA's requirements have been satisfied.[25] Comity considerations generally come into play when domestic and foreign law are in conflict, such as where one law requires a defendant to engage in acts prohibited by other laws.[26]

iii Exemptions

Foreign sovereigns are presumptively immune from US courts' jurisdiction under the Foreign Sovereign Immunities Act (FSIA).[27] To rebut the presumption, a plaintiff must show that one of the FSIA's seven exceptions applies.[28] The most common exemption in antitrust cases is the commercial activity exception, which precludes FSIA immunity where a foreign sovereign state's commercial activity has a nexus with the United States.[29]

The act-of-state doctrine requires US courts to recognise the validity of public acts performed by authorised agents of foreign sovereign states within their jurisdictions.[30] Thus, where a plaintiff's claim depends on the invalidity of a foreign sovereign state's domestic act, the act-of-state doctrine may absolve the defendant of liability. Various exceptions apply, such as where an extant treaty provides applicable legal standards, where the act involves a commercial function or where US foreign policy interests would not be advanced by application of the doctrine.

A private party whose conduct was compelled (and not merely sanctioned or assisted) by a foreign sovereign state will generally be immune from antitrust liability under the assumption that the defendant's activity was effectively foreign sovereign state activity.[31] US federal courts must give 'respectful consideration' to a foreign government's official statement on the correct interpretation of its own laws, but are not bound to defer to the foreign government's interpretation.[32]

Standing

i Standing under Section 4, Clayton Act

To maintain a lawsuit for money damages under Section 4 of the Clayton Act, an antitrust plaintiff must allege:

a. that the plaintiff is a 'person' under Section 1 of the Clayton Act;[33]
b. that the defendant violated the 'antitrust laws';[34]
c. antitrust injury (impact or fact of damage);[35] that is, harm to competition[36] and to a plaintiff's 'business or property' proven by direct or circumstantial evidence or inference[37] with a reasonable degree of certainty;[38] and
d. that the antitrust violation was a material and substantial cause of the injury.[39]

Finally, the plaintiff must satisfy the remoteness doctrine, which requires that a plaintiff's injury is not too remote from the defendant's conduct, by addressing five factors:[40]

a. the causal connection between the violation and the harm to the plaintiff, and whether the defendants intended to cause the harm;
b. the nature of the injury, including whether the plaintiff is a consumer or a competitor;
c. the directness of the injury, and how speculative or tenuous the damages are;
d. the potential for duplication of recovery or complex apportionment of damages; and
e. whether more direct victims exist.

The doctrine generally limits the plaintiffs to consumers and competitors, and denies standing to creditors, employees, officers, shareholders and suppliers of antitrust victims. Some courts require that the plaintiff be the most 'efficient enforcer' or a potential competitor sufficiently prepared to enter the market.[41]

ii Standing under Section 16, Clayton Act

A plaintiff who has standing to bring an antitrust action under Section 4 will also have standing under the more lenient requirements regarding injunctions in Section 16. However, there are differences. Section 16 requires 'threatened loss or damage'[42] that is a 'significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur'[43] rather than actual loss. Unlike Section 4 claims, the threatened loss or injury in a Section 16 claim is not limited to injury to business or property.[44] Finally, courts do not impose the remoteness doctrine on Section 16 claims, so indirect purchasers may sue for injunctive relief, even though they may not sue for monetary damages.[45]

iii General prohibition on indirect purchaser standing

Indirect purchasers who purchase from an intermediary rather than directly from the defendant cannot recover under federal antitrust laws unless the direct purchaser had a pre-existing 'cost-plus' contract, shifting the entire overcharge to the indirect purchaser; where the direct purchaser is owned or controlled by the defendant or the indirect purchaser; or where the intermediary was a co-conspirator to the defendant.[46] The Supreme Court clarified the scope of the bar on indirect purchaser suits in 2019, ruling that plaintiffs who purchase directly from an alleged antitrust violator have standing to sue even if the defendant only collects a commission and does not set the price of the product sold.[47]

Indirect purchasers may nonetheless recover under the statutes of 26 states as well as state consumer protection statutes.[48]

The process of discovery

The scope of discovery in antitrust cases is broad. Rule 26 of the Federal Rules of Civil Procedure (FRCP 26) allows discovery of a reasonable amount of time, geographical scope and subject matter if the requested information is relevant to any claim or defence, proportional to the needs of the case, and the burden of the proposed discovery on the responding party does not outweigh its benefit. What is relevant for discovery is broader than what is admissible as evidence at trial.

Courts may restrict 'unduly burdensome' discovery requests where the burden and expense outweigh the prospective benefit of the requests.[49] FRCP 26(c) allows courts to restrict discovery of confidential business information or trade secrets and privileged attorney–client communications or attorney work-product. Criminal grand jury or investigation materials are only discoverable if the party has strongly demonstrated a 'particularized need' for the materials.[50]

In deciding whether to allow discovery from non-party market participants, courts consider the relevance of and need for the information, whether the information is protected as trade secret or confidential commercial information, and whether the request will cause the non-party undue hardship.[51] A party or non-party that refuses to comply with a court order for discovery may face sanctions.[52]

Courts generally grant requests to compel discovery from domestic or foreign affiliates or subsidiaries of corporations that are parties to the antitrust case.[53] Generally, a foreign party subject to personal jurisdiction in the United States is subject to discovery.[54] Parties may also seek discovery from abroad pursuant to the Hague Convention or by letters rogatory.[55] Foreign blocking statutes do not allow a corporation present in the United States to resist producing documents located abroad.[56]

Use of experts

Plaintiffs may use expert testimony to establish various elements of a private antitrust claim. Expert testimony is often key in certifying a class[57] on substantive antitrust issues such as market or monopoly power, anticompetitive harm, antitrust injury and damages.

The courts must rigorously examine expert testimony and only admit it based on a finding that the expert has sufficient specialist knowledge and expertise with respect to the field in question; the methodology and data used to reach the expert's conclusions are sufficiently reliable; and the expert's testimony is sufficiently relevant to assist the trier of fact.[58]

Reliability is the most common basis on which expert testimony is excluded. Several factors are considered to determine whether the proffered testimony is reliable, such as whether the expert's methodology has been tested, is subject to peer review or is widely accepted by the relevant scientific community.[59]

Class actions

i Requirements

FRCP 23 governs class actions, where one representative sues on behalf of all other similarly situated plaintiffs. To proceed, a class must be certified under FRCP 23(a) and 23(b).

FRCP 23(a) requires that the plaintiff establish that:

a. the class is so numerous that joinder of all members would be impracticable;
b. common questions of law and fact apply to the class;
c. the claims or defences of the representative parties are typical of the claims or defences of the class; and
d. the representative parties will fairly and adequately protect the interests of the class.

Additionally, FRCP 23(b) requires that the plaintiff establish one of the following:

a. separate actions 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';
b. separate actions would create a risk of adjudications that 'would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests';
c. 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole'; or
d. 'questions of law or fact common to class members predominate over any questions affecting only individual members', and 'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy'.

Most antitrust class action suits are certified under the fourth provision (point (d), above). Only 'common' questions under FRCP 23(b)(2) are relevant to the FRCP 23(b)(3) predominance analysis.[60]

Plaintiffs must establish that damages can be proven with class-wide evidence; that is, the case is susceptible to resolution by common proof, to satisfy FRCP 23(b)(3)'s requirement that common issues predominate.[61] Plaintiffs also must prove class-wide impact – that all class members suffered injury to their business or their property – using common proof.[62] Courts have recently required more rigorous qualitative and quantitative assessments of plaintiffs' proposed common methodology for analysing class-wide impact and merits-related issues regarding class certification.[63] Although the depth and breadth of expert testimony and the scope of pre-certification discovery necessary are decided case by case,[64] a 'rigorous analysis' of expert opinions is required.[65]

Plaintiffs' ability to meet, rather than an intention to meet, the FRCP 23 requirements must be demonstrated by a preponderance of the evidence at the class certification stage. A plaintiff may meet FRCP 23 requirements even if the putative class includes a *de minimis* number of potentially uninjured parties.[66] Thus, courts generally resolve all factual and legal disputes, including expert disputes, relevant to their certification decision at the time of class certification.

Class representatives may have to establish other threshold requirements, including that the class is in existence, ascertainable and definable with reasonable specificity;[67] and that at least one class plaintiff is able to demonstrate standing.[68]

ii Limitations on class action settlements

Pre-certification settlements

FRCP 23 also allows a settlement class to be certified prior to a ruling on class certification for trial purposes. To certify a settlement class, plaintiffs must satisfy the requirements of FRCP 23(a) and meet one requirement of FRCP 23(b). However, a district court need not enquire whether the case, if tried, would present intractable management problems, allowing settlement classes to be certified where potential conflicts would defeat class certification for trial.[69]

Court approval of class settlements required

To prevent abuse by class representatives, FRCP 23(e) requires court approval of class action settlements and voluntary dismissals. Proposed class action settlements, voluntary dismissals or compromise proposals are generally approved if the class meets the FRCP 23(a) and 23(b) requirements, and the settlement is 'fair, reasonable, and adequate'. Under the latter enquiry, relief under the settlement will be evaluated against the class's expected relief at trial and its likelihood of success.[70] The settlement may be rejected if the court has concerns that the damages are inadequate or regarding the class standing of the plaintiffs.[71]

iii Notice

Upon certification, FRCP 23 requires notice to be provided[72] 'in a reasonable manner' to all class members who would be bound by a settlement or proceedings.[73] Typically, plaintiffs bear the cost of notice. Class members have the right to notify the court of their individual intention to opt out of the class for further proceedings.[74] A class member who fails to opt out of the class in a timely manner may not subsequently bring their own private litigation as to the same defendants and conduct, unless 'a violation of due process or excusable neglect' has occurred.[75]

Calculating damages

Antitrust damages are compensatory and are limited to those that can be attributed to the antitrust violation.[76] A fact finder may assess damages where the plaintiff can provide 'probable and inferential' proof of a 'just and reasonable estimate' of damages.[77] Damages do not have to be proven with precision but cannot be proven through 'speculation or guesswork'.[78] The court will award the plaintiff triple the amount of damages claimed (treble damages) if a violation is proven. Courts do not allow punitive damages awards because antitrust plaintiffs already receive treble damages.[79]

i Calculation of damages

The appropriate measure of damages depends on the type of antitrust violation alleged and the injury suffered. Common approaches to damages are as follows.

The difference between the plaintiff's purchase price and the price the purchaser would have paid on the open competitive market, if not for the violation, is a common approach where the alleged effect of the violation is an overcharge, such as cartel claims (e.g., price-fixing, bid rigging, market allocations or output limitation agreements) or monopolisation[80] or in tying and related monopoly offences.[81]

The plaintiff's lost profits is a common measure of damages if the plaintiff is a competitor excluded from the market or is a disfavoured purchaser in a price discrimination case.[82] Damages are usually limited to lost net profits, although some courts may award lost gross profits if lost net profits are negligible[83] or anticipated future profits for a nascent competitor. When the plaintiff's business has been almost or completely destroyed, courts may measure damages by lost goodwill or going concern value (i.e., the current value of lost future profits).[84]

ii Mitigation

"Basic-Paragraph">A defendant may raise a plaintiff's failure to mitigate damages as an affirmative defence and thereby limit the recovery of losses that could have been avoided.[85]

iii Other costs

Section 4 also awards successful plaintiffs' court costs, reasonable attorneys' fees, prejudgment interest on actual damages (awarded at the court's discretion if the court finds it 'just in the circumstances') and mandatory post-judgment interest.[86]

iv Enforcement of monetary judgments

Monetary judgments issued by US courts generally become enforceable promptly after entry, and taking an appeal from the judgment does not ordinarily stay enforcement.[87] To stay enforcement pending appeal, the losing defendant (or judgment debtor) must ordinarily post a bond for the full amount of the monetary judgments.[88] Enforcement of monetary judgments in US federal courts is governed by FRCP 69.[89] FRCP 69 authorises proceedings in aid of enforcement, including post-judgment discovery as to the judgment debtor's assets.[90] The US Supreme Court has held that such discovery may extend to assets held abroad because the judgment creditor may be able to secure execution in the countries where the assets are held.[91]

Pass-on defences

Antitrust defendants are barred from asserting pass-on defences against direct purchasers. Therefore, defendants may not introduce evidence that direct purchasers lacked damage or mitigated their damages by passing on any monetary harm to downstream purchasers.[92] This bar against pass-on defences is analogous to the above-noted bar against claims by indirect purchasers, preventing the defensive and offensive use of the pass-on theory to prevent duplicate recovery by multiple purchasers in a distribution chain against defendants.[93] Similarly, the pass-on defence will be allowed in the same circumstances as for indirect purchaser standing, namely (1) the existence of pre-existing, fixed-quantity, cost-plus contracts; (2) ownership or control of the direct purchaser by the plaintiff or defendant; and (3) participation in a conspiracy by the intermediary.[94]

Follow-on litigation

i Prima facie evidence

A government judgment or decree may be prima facie evidence in a private antitrust suit if the government judgment or decree is:

a. final;
b. rendered in a civil or criminal proceeding brought by or on behalf of the United States;
c. under the antitrust laws to the effect that a defendant has violated said laws; and
d. not a consent judgment or decree entered before any testimony has been taken.[95]

Additionally, the private plaintiff must be injured in fact by the antitrust violation proven in the government action.[96] Guilty pleas to a US Department of Justice (DOJ) indictment generally are admissible as evidence in subsequent private litigation.[97] Because DOJ and FTC consent decrees are typically for settlement purposes, they do not constitute an admission by the defendant that the law has been violated.[98]

The prima facie effect is given to all matters 'distinctly put in issue and directly determined' and 'necessarily decided' against the defendant in the government proceeding,[99] but is limited to the period, products and geographical scope adjudicated in the prior government action.[100]

ii Collateral estoppel

The collateral estoppel doctrine applies in private antitrust suits.[101] Generally, the doctrine bars the retrying of issues that have already been determined by a court, and gives them conclusive effect in subsequent suits that involve a party to the prior litigation.[102] A defendant can use the collateral estoppel doctrine defensively to prevent a plaintiff from relitigating issues

previously decided and lost by the government,[103] while a plaintiff can use collateral estoppel offensively to bar a defendant from relitigating issues lost in prior government actions. Collateral estoppel applies to prior DOJ actions, but not to findings made by the FTC.[104]

iii Antitrust Criminal Penalty Enhancement and Reform Act

Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 offers criminal defendants who participate in the DOJ's corporate leniency programme the opportunity to limit civil liability to single rather than treble damages if they provide 'satisfactory cooperation' to civil claimants.[105] To qualify, defendants must provide a full account of relevant facts, furnish all relevant documents, and participate in interviews and depositions reasonably requested by the plaintiff. The Act does not affect the plaintiff's right to recover costs, attorneys' fees and prejudgment interest provided under the Clayton Act.

Privileges

i Attorney–client privilege

The attorney–client privilege protects confidential communications between an attorney and client made for the purpose of rendering or receiving legal advice and applies in the antitrust context to the same extent as in other contexts. The privilege extends to confidential communications between corporate employees and the corporation's lawyer when those communications are necessary to facilitate the provision of legal advice to the corporation,[106] and covers communications with current and former employees,[107] subsidiaries and affiliates.[108] It does not extend to communications with a lawyer acting in a business capacity.[109]

Privilege is waived if a communication is voluntarily disclosed to a third party,[110] unless disclosure is necessary to provide legal advice (e.g., a secretary or an interpreter) or is part of the community-of-interest (or joint defence) privilege.[111] Privilege may be waived if the corporation voluntarily discloses communications to third-party government agencies.[112] Communications made between clients and their attorneys for the purpose of furthering a current or future crime or fraud, such as an antitrust law violation, are not privileged.[113]

ii Foreign communications and documents

Attorney–client communications that occur in a foreign country or involve foreign attorneys or proceedings and attorney work for foreign proceedings is governed by common law principles.[114] Principles of international comity dictate that the law of the country with the most 'predominant' or 'direct and compelling' interest in whether those communications should remain confidential applies, unless it would be contrary to public policy.[115] The 'predominant' jurisdiction is usually the jurisdiction in which the attorney–client relationship was formed or where the relationship was centred at the time the privileged communication was sent.[116]

The Hague Evidence Convention allows discovery of foreign evidence; however, Article 11 safeguards privileged and protected evidence under the law of the 'state of execution' or 'state of origin'.

iii Attorney work-product doctrine

The work-product doctrine protects all documents and tangible materials prepared by or for an attorney in anticipation of litigation.[117] Ordinary fact work-product includes materials in which the attorney merely records or summarises information, while opinion work-product includes materials that reflect the attorney's mental impressions, opinions, judgements or legal conclusions.[118] Although opinion work-product is virtually immune from discovery,[119] a discovering party may obtain fact work-product if it shows substantial need for the work-product and undue hardship in obtaining the information from another source.[120]

Settlement procedures

Federal policy generally favours settlement over continued litigation. FRCP 16 allows federal judges to mandate pretrial conferences among the parties to, inter alia, facilitate settlement, and allows them to impose sanctions on parties for failing to appear or for failing to participate in good faith at such conferences.[121] With the exception of class action settlements, courts typically accept a party's stipulation to settle without review. However, FRCP 23 requires that proposed class action settlements be reviewed and approved by the court only if they are 'fair, reasonable, and adequate' as class-section settlements affect the rights of all class members.[122] A defendant's unaccepted offer of settlement to a class representative

does not moot the plaintiff's claim.[123] Due process requirements – giving notice to the absent class members and holding a hearing in which any such absent class member who wishes to may object to the proposed settlement – must be met prior to settlement approval.[124]

Arbitration

Federal policy favours arbitration, and federal antitrust claims arising out of both international and domestic transactions generally may be arbitrated.[125] Arbitration clauses are construed broadly[126] and courts refuse to recognise attempts by parties to limit the statutory remedies and procedures available to arbitrators, invalidating, for example, portions of arbitration agreements where the parties attempted to waive rights to treble damages or class or consolidated actions.[127] Courts may not decline to enforce arbitration agreements that delegate to an arbitrator the question of whether a dispute should be arbitrated.[128] In the context of class actions, however, the defendant's arbitration rights may be deemed waived if it seeks to compel arbitration only after the class is certified and extensive discovery has occurred.[129] Arbitration provisions may not be enforceable by franchisors against employees when the franchisor is not explicitly a signatory to the agreement.[130] In addition, arbitrators may not impose class arbitration on parties unless it is contractually permissible.[131] The US Supreme Court has held that express arbitration clauses trump class action rights, even in antitrust cases.[132]

Indemnification and contribution

Under the doctrine of joint and several liability, each guilty defendant is liable for all the damages caused by the conduct of the entire conspiracy, not just those attributable to its own conduct.[133] Antitrust co-conspirators can be held jointly and severally liable for damage predicated on sales by members of the conspiracy and damage caused by entities outside the conspiracy caused by the conspiracy. An antitrust defendant may not seek contribution from other participants in the anticompetitive scheme.[134] However, indemnification may be available to 'an innocent actor whose liability stems from some legal relationship with the truly culpable party'.[135]

Future developments and outlook

Private antitrust litigation tends to follow the trends of government enforcement and both are expected to remain active in 2023. These trends are largely aligned with President Biden's emphasis on technology companies, healthcare, agriculture and labour, as articulated in a July 2021 executive order.[136] In recent years, various legislative antitrust reforms have also been introduced in both Congress and statehouses, and have primarily taken aim at the technology and pharmaceutical sectors. However, to date, Congress has failed to adopt proposed legislation that would have made substantive changes to antitrust law and only one state legislative proposal has been adopted in the past year.[137] Substantive reforms face greater headwinds following the 2022 midterm elections, which changed the composition of the House of Representatives and made it unlikely that federal substantive antitrust reforms will be enacted in the next two years.

In the absence of further legislative action, contested issues of federal antitrust law will continue to be resolved primarily by the courts. Private enforcement will be characterised by increased uncertainty and potential jurisprudential circuit splits.

In an effort to align the development of the law in the courts, the DOJ has been increasingly involved in private litigation through its amicus programme, which involves filing third-party briefs in cases to offer the agency's insight, expertise and recommendations to courts dealing with important questions in antitrust law.[138] This practice has continued over the change of government and agency leadership in 2021 and is expected to continue.

In the short term, among the most closely watched private litigation for 2023 is *Epic Games v. Apple*, a litigation brought by an electronic game provider challenging restrictions to the payment and distribution options for apps on Apple's iPhone. In 2020, a district court in California became the first to apply the US Supreme Court's 2018 landmark decision in *Ohio v. American Express Co* on two-sided transaction platform economics[139] at a trial, holding that both sides of Apple's in-app payments platform were components of a single product market, rather than two distinct markets serving different classes of consumers.[140] On appeal to the Ninth Circuit Court of Appeals, both Epic and Apple have garnered major supporters, who have appeared before the court in amicus briefings, including the DOJ and numerous state attorneys general in support of Epic.[141] A ruling on the appeal is expected to affect future government and private enforcement matters regarding digital platforms.

Private litigation regarding labour and 'no poach' litigation against franchise-based industries that restrict hiring between franchises, once novel, seem here to stay. Following a 2022 decision by the Eleventh Circuit in *Arrington v. Burger King*,[142] the courts that have been presented with no poach litigation are largely aligned in finding that franchises are independent entities capable of legal collusion with each other and not single economic enterprises, although there is more division and less certainty as to whether the claims should be allowed to proceed under a per se theory of conspiracy or whether scrutiny of pro-competitive benefits under a rule of reason theory should be undertaken.[143]

The proliferation of individual lawsuits filed by companies affected by antitrust violations that chose to opt out of class actions and pursue individual claims is likely to continue. A rising trend for years now, the amount of opt-out activity has increased substantially in the past few years. Recent consolidated multi-district litigation proceedings involving class action and opt-out plaintiffs together are notable not only for their scale but also for the number of early and high-profile opt-outs who have

decided to enforce their claims individually. For example, opt-out plaintiffs to the *Broiler Chicken Antitrust Litigation* in the Northern District of Illinois currently number more than 180 and include numerous large and well-known companies, such as McDonald's, Costco, Burger King, QSCC (a Wendy's cooperative), Chick-Fil-A and others.[144] Companies with large claims who have been the victims of antitrust violations are increasingly aware of the potential to achieve greater recoveries by opting out and the trend is likely to escalate in the coming years.

Corporate policies addressing environmental, social and governance (ESG) issues have also emerged as a possible target of antitrust enforcement. Although federal antitrust enforcers have not indicated that ESG activities are a priority, agency leaders have also expressly noted that ESG-related conduct is not exempt from antitrust liability.[145] State attorneys general have expressed a much greater appetite for enforcement in the ESG space, and a number of states have launched antitrust investigations into ESG coalitions and their participants.[146] Private claims, potentially brought by fossil fuel interests, are expected to follow state enforcement actions. Although the *Noerr-Pennington* doctrine firmly shields government petitioning activities from antitrust liability, challenges to ESG-related conduct are likely to test the applicability of a related exemption for boycotts with primarily non-economic objectives.[147]

Footnotes

[1] Philip J Iovieno is a partner, Kristen J McAhren is a counsel and Daniel Lumen is an associate at Cadwalader, Wickersham & Taft, LLP.

[2] *Bell Atlantic v. Twombly*, 550 US 544 (2007); *Ashcroft v. Iqbal*, 556 US 662 (2009); see also *Wood v. Moss*, 134 S Ct 2056 (2014).

[3] *Comcast Corporation v. Behrend*, 569 US 27 (2013); *Tyson Foods, Inc v. Bouaphakeo*, 136 S Ct 1036 (2016).

[4] *Stolt-Nielsen SA v. AnimalFeeds International Corp*, 559 US 662 (2010); *AT&T Mobility v. Concepcion*, 563 US 333 (2011); *American Express Co v. Italian Colors Restaurant*, 570 US 228 (2013).

[5] *Apple v. Pepper*, 139 S Ct 1514 (2019).

[6] *NCAA v. Alston*, 141 S Ct 2141 (2021).

[7] 15 United States Code (USC), § 15(a).

[8] ibid., § 26. In 2021, a federal circuit court ordered a divestiture in a private suit challenging a merger for the first time. *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 988 F3d 690, 719 (4th Cir 2021).

[9] ibid., § 15(b).

[10] e.g., *Zenith Radio Corp v. Hazeltine Research*, 401 US 321, 338–39 (1971).

[11] e.g., *Weinberger v. Retail Credit Co*, 498 F2d 552, 556 (4th Cir 1974) (finding § 16 case barred by four-year statute of limitations); see, generally, 15 USC § 26 – Injunctive Relief for Private Parties; Rule 65 of the Federal Rules of Civil Procedure (FRCP) (governing injunctions and restraining orders).

[12] *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)).

[13] 15 USC § 16(i). Specifically, the statute of limitations for private actions may be tolled during the pendency of a government action plus one year.

[14] *Crown, Cork & Seal Co v. Parker*, 462 US 345 (1983).

[15] e.g., *In re Scrap Metal Antitrust Litigation*, 527 F3d 517, 536–38 (6th Cir 2008); *In re Linerboard Antitrust Litigation*, 305 F3d 145, 160 (3d Cir 2002).

[16] e.g., *Willmar Poultry Co v. Morton-Norwich Products*, 1974-2 Trade Cas (CCH) "Smaller-pilcrow">¶ 75,292, at 97,896 (D Minn 1 October 1974), aff'd 520 F2d 289 (8th Cir 1975); *PhilCo Corp v. RCA*, 186 F Supp 155, 161–62 (ED Pa 1960).

[17] e.g., *American Pipe & Construction Co v. Utah*, 414 US 538, 559 (1974).

[18] See, e.g., *In re Air Cargo Shipping Services Antitrust Litigation*, 2010 WL 10947344, at *19-25 (EDNY, 22 September 2010).

[19] *Boechler, P.C. v. Comm'r of Internal Revenue*, 142 S Ct 1493, 1500 (2022) ('Because we do not understand Congress to alter that backdrop lightly, nonjurisdictional limitations periods are presumptively subject to equitable tolling.').

[20] Compare California Business and Professions Code, § 16750, § 16761, § 17070 and § 17082 with Consolidated Laws of New York, General Business Law, § 340(5) and § 349(h). A plaintiff that brings a state-law claim in federal court has access to the procedures available under Rule 23 of the Federal Rules of Civil Procedure (FRCP). *Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co*, 559 US 393 (2010).

[21] 15 USC § 6a. Where conduct involves import trade or commerce, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) does not apply and courts instead apply the common law 'intended effects' test, requiring that the foreign anticompetitive conduct was intended to and actually affected US trade or commerce. *Hartford Fire Insurance Co v. California*, 509 US 764, 796 (1993); *United States v. Aluminum Co of America*, 148 F2d 416, 443–44 (2d Cir 1945). Some courts supplement the effects test with considerations of comity. See *Timberlane Lumber Co v. Bank of America National Trust & Savings Association*, 549 F2d 597, 611–15 (9th Cir 1976).

[22] *Lotes Co, Ltd v. Hon Hai Precision Industry Co*, 753 F3d 395, 398 (2d Cir 2014); *Motorola Mobility LLC v. AU Optronics Corp*, 683 F3d 845, 857 (7th Cir 2014) (*en banc*); *Minn-Chem, Inc v. Agrium, Inc*, 683 F3d 845, 857 (7th Cir 2012) (*en banc*); *In re Dynamic Random Access Memory (DRAM)*, 546 F3d 981 (9th Cir 2008); *In re Monosodium Glutamate Antitrust Litigation*, 477 F3d 535 (8th Cir 2007); *Empagran SA v. F Hoffmann-La Roche Ltd*, 417 F3d (*Empagran SA*) 1267, 1271 (DC Cir 2005).

[23] *F Hoffmann-La Roche Ltd v. Empagran SA*, 542 US 155 (2004); *Empagran SA*, 417 F3d at 1271.

[24] See, e.g., *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 408 (2d Cir 2014) ('the requirements of the FTAIA are substantive and nonjurisdictional'); *United States v. Hui Hsiung*, 778 F.3d 738, 753 (9th Cir 2015) ('The FTAIA does not limit the power of the federal courts; rather, it provides substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations.'); *Minn-Chem, Inc v. Agrium Inc*, 683 F3d 845, 852 (7th Cir 2012) ('The FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.'); *Animal Science Products, Inc v. China Minmetals Corp.*, 654 F3d 462, 468-68 (3d Cir 2011), cert denied, 565 US 1260 (2012) ('the FTAIA's language must be interpreted as imposing a substantive merits limitation rather than a *469 jurisdictional bar'); *contra United Phosphorus, Ltd v. Angus Chemical Co.*, 322 F3d 942 (7th Cir 2003) (*en banc*) (the FTAIA's limitations are jurisdictional in nature).

[25] House of Representatives, Report No. 97-686, at 13 (1982), reprinted in 1982 *United States Code Congressional and Administrative News*, 2487, 2498.

[26] *Hartford Fire Insurance Co v. California*, 509 US 764, 798–99 (1993). See also *Animal Science Products v. Hebei Welcome Pharmaceutical Co.*, 8 F4th 136, 143–454 (2d Cir 2021) (reversing judgment in favour of US purchasers against Chinese sellers of vitamin C because Chinese law required sellers to engage in price-fixing, and remanding the case to the lower court for dismissal).

[27] 28 USC § 1604.

[28] 28 USC § 1605.

[29] The commercial activity exception, § 1605(a)(2), states that immunity does not apply when 'the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States'.

[30] *WS Kirkpatrick & Co v. Environmental Tectonics Corp*, 493 US 400, 409 (1990); see also *Alfred Dunhill of London Inc v. Republic of Cuba*, 425 US 682, 694 (1976).

[31] e.g., *Mannington Mills v. Congoleum Corporation*, 595 F2d 1287, 1293 (3d Cir 1979).

[32] *Animal Science Products v. Hebei Welcome Pharmaceuticals Co*, 138 S Ct 1865, 1869–70 (2018).

[33] 15 USC § 15. § 12(a) defines 'persons' as 'corporations and associations existing under or authorized by laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country'. Courts have also interpreted 'persons' to include individual consumers (e.g., *Reiter v. Sonotone Corporation*, 442 US 330, 340–42 (1979)), partnerships (e.g., *Coast v. Hunt Oil Co*, 195 F2d 870, 871 (5th Cir 1952)), states (e.g., *Standard Oil Co v. Arizona*, 738 F2d 1021, 1023 (9th Cir 1984)) and foreign governments (*Pfizer v. Government of India*, 434 US 308, 318–20 (1978)). § 4 of the Clayton Act (15 USC § 15(b)) generally limits recovery by foreign governments to actual, instead of treble, damages. Although the United States and state attorneys general are not considered 'persons' under the Clayton Act, they are nonetheless entitled to sue on their own behalf under § 4A and § 4C of the Clayton Act (15 USC §§ 15a, 15c).

[34] e.g., 15 USC § 12(a) and § 15.

[35] *Story Parchment Co v. Paterson Parchment Paper Co*, 282 US 555, 563 (1931).

[36] e.g., *Brunswick Corp v. Pueblo Bowl-O-Mat Inc*, 429 US 477, 488 (1977); see, e.g., *Southeast Missouri Hospital v. CR Bard, Inc*, 616 F3d 888 (3d Cir 2010); *Race Tires America v. Hoosier Racing Tire Corp*, 614 F3d 57 (3d Cir 2010); but see *Palmyra Park Hospital v. Phoebe Putney Memorial Hospital*, 604 F3d 1291 (11th Cir 2010).

[37] *Zenith Radio Corp v. Hazeltine Research*, 395 US 100, 126 (1969).

[38] *Duty Free Americas, Inc v. Estee Lauder Companies*, 797 F3d 1248, 1272–73 (11th Cir 2015); *Mostly Media v. US W Communications*, 186 F3d 864, 865–66 (8th Cir 1999); *OK Sand & Gravel v. Martin Marietta Technologies*, 36 F3d 565, 573 (7th Cir 1994).

[39] e.g., *Tal v. Hogan*, 453 F3d 1244, 1258 (10th Cir 2006).

[40] *Associated General Contractors v. California State Council of Carpenters*, 459 US 519, 537–44 (1983). In 2018, the Third Circuit Court of Appeals addressed a novel standing issue and found that purchasers of products that include inputs made more expensive by the defendants' conspiracy – but not produced by the conspirators – had standing under the Clayton Act. *In re Processed Egg Products Antitrust Litigation*, 881 F3d 262 (3d Cir 2018).

[41] *Sanger Insurance Agency v. Hub International Ltd*, 802 F3d 732 (9th Cir 2015); *Sunbeam Television Corp v. Nielson Media Research, Inc*, 711 F3d 1264 (11th Cir 2013).

[42] 15 USC § 26.

[43] *Cargill Inc v. Monfort of Colorado Inc*, 479 US (*Cargill*) 104, 111 (1986); *Zenith Radio Corp v. Hazeltine Research*, 395 US 100, 130 (1969).

[44] *Cargill*, 479 US at 111.

[45] e.g., *In re Relafen Antitrust Litigation*, 221 FR D 260, 273–74 (D Mass 12 May 2004).

[46] *Illinois Brick Co v. Illinois*, 431 US (*Illinois Brick*) 720, 735 (1977); *Hanover Shoe, Inc v. United Shoe Machine Corp*, 392 US 481, 494 (1968); *Illinois Brick*, 431 US at 736.

[47] *Apple v. Pepper*, 139 S Ct 1514, 1525 (2019).

[48] e.g., *Ciardi v. F Hoffmann-La Roche*, 436 Mass 53 (Mass 2002).

[49] FRCP 26(b)(1).

[50] e.g., *United States v. Sells Engineering*, 463 US 418, 443 (1983).

[51] e.g., *ACT Inc v. Sylvan Learning Sys*, No. CIV A 99-63, 1999-1 Trade Cas (CCH) "Smaller-pilcrow">¶ 72,527 (ED Pa 14 May 1999).

[52] FRCP 37.

[53] e.g., *In re ATM Fee Antitrust Litigation*, 233 FRD 542, 544–45 (ND Cal 5 December 2005).

[54] e.g., *Société Nationale Industrielle Aerospatiale v. US Dist Court for Southern Dist of Iowa*, 482 US 522 (1987); *Strauss v. Credit Lyonnais*, 242 FR D 199 (EDNY 25 May 2007).

[55] 28 USC § 1781-82; The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 18 March 1970, 23 U.S.T. 2555.

[56] e.g., *Arthur Andersen & Co v. Finesilver*, 546 F2d 338, 342 (10th Cir 1976).

[57] See Section VII.

[58] FRCP 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 US (*Daubert*) 579, 593–94 (1993).

[59] *Daubert*, 509 US at 593–94.

[60] *Wal-Mart Stores, Inc, v. Dukes*, 564 US (*Wal-Mart*) 338 (2011).

[61] *Comcast Corporation v. Behrend*, 569 US (*Comcast*) 27 (2013).

[62] *Tyson Foods, Inc v. Bouaphakeo*, 136 S Ct 1036 (2016).

[63] See *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F3d 619, 625 (DC Cir 2019) (upholding a lower court's denial of class certification where the plaintiffs' proposed damages model indicated that 12.7 per cent of the class suffered negative overcharges (i.e., no injury at all), and finding that, in the circumstances, the plaintiffs had failed to provide the common proof of impact required by FRCP 23); *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F3d 184, 192–94 (3d Cir 2020) (reversing class certification because the district court did not conduct a rigorous analysis of whether the average prices used to calculate class-wide damages could sufficiently demonstrate each class member's harm); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litigation*, 967 F3d 264, 272 (3d Cir 2020) (holding that antitrust plaintiffs may satisfy the predominance requirement by using a model that estimates the damages attributable to the antitrust injury, even if more individualised determinations are needed later to allocate damages among class members).

[64] *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305, 310 (3d Cir 2009).

[65] *Comcast*, 569 US at 33–38; *Wal-Mart*, 564 US at 352–55.

[66] *In re Nexium Antitrust Litigation*, 777 F3d 3, 25 (1st Cir 2015). But see *In re Asacol Antitrust Litigation*, 907 F3d 42 (1st Cir 2018) (overturning a lower court's grant of class certification where roughly 10 per cent of the class consisted of uninjured plaintiffs, and the plaintiffs proposed that uninjured class members could be removed after class certification); see also *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F3d 619 (DC Cir 2019) (affirming denial of class certification for failure to satisfy the FRCP 23 requirement of common impact where the plaintiffs' proposed damages model indicated that 12.7 per cent of the proposed suffered no injury).

[67] Some courts have held that a class is ascertainable when defined by objective criteria that are administratively feasible for the court to identify. *Brecher v. Republic of Argentina*, 802 F3d 303 (2d Cir 2015); *Marcus v. BMW of North America*, 687 F3d 583 (3d Cir 2012).

[68] See, e.g., *Prado-Steinman v. Bush*, 221 F3d 1266, 1279 (11th Cir 2000).

[69] FRCP 23(b)(3)(d); *Amchem Products, Inc v. Windsor*, 521 US 591, 620 (1997); e.g., *Sullivan v. DB Investments, Inc*, 667 F3d 273, 301 (3d Cir 2011).

[70] e.g., *Wal-Mart Stores Inc v. Visa USA Inc*, 396 F3d 96, 118–19 (2d Cir 2005).

[71] e.g., *In re Refrigerant Compressors Antitrust Litigation*, 795 F Supp 2d 647 (ED Mich 2011).

[72] FRCP 23(c)(2).

[73] FRCP 23(e)(1).

[74] FRCP 23(c); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

[75] FRCP 23(c); see, e.g., *In re American Express Financial Advisors Securities Litigation*, 672 F.3d 113, 129 (2d Cir 2011) (noting that 'absent a violation of due process or excusable neglect for failure to timely opt out, a class-action settlement agreement binds all class members who did not do so', the terms of which can be expected to preclude further relief to the bound members for the challenged conduct); *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (DC Cir 2003) (holding that 'the district court had discretion, pursuant to Fed.R.Civ.P. 6(b) and Fed.R.Civ.P. 60(b), to modify its order so that [the party seeking exclusion] would be able to opt-out of the settlement beyond the agreed opt-out date').

[76] e.g., *Blue Cross & Blue Shield United v. Marshfield Clinic*, 152 F3d 588, 592–93 (7th Cir 1998).

[77] *Zenith Radio Corp v. Hazeltine Research*, 395 US 100, 123 (1969).

[78] *Bigelow v. RKO Radio Pictures*, 327 US 251, 264 (1946).

[79] *McDonald v. Johnson & Johnson Co*, 722 F2d 1370, 1381 (8th Cir 1983).

[80] e.g., *Howard Hess Dental Labs Inc v. Dentsply International Inc*, 424 F3d 363, 374 (3d Cir 2005).

[81] e.g., *Crossland v. Canteen Corp*, 711 F2d 714, 722 (5th Cir 1983).

[82] e.g., *Trabert & Hoeffer, Inc v. Piaget Watch Corp*, 633 F2d 477, 484 (7th Cir 1980).

[83] id.

[84] e.g., *Faulkner's Auto Body Center Inc v. Covington Pike Toyota Inc*, 50 Fed Appx 664, 667–69 (6th Cir 2002).

[85] e.g., *Pierce v. Ramsey Winch Co*, 753 F2d 416, 436 (5th Cir 1985); *Litton Sys Inc v. AT&T Corp*, 700 F2d 785, 820 n47 (2d Cir 1983).

[86] 15 USC § 15(a); 28 USC § 1961 (2000).

[87] FRCP 62(a); but see *Hewlett-Packard Co v. Quanta Storage, Inc*, 961 F3d 731, 744 (5th Cir 2020) (pushing back the deadline to satisfy a US$438 million judgment because the deadline failed to take into account the intricacies of international law).

[88] FRCP 62(d).

[89] Judgments awarding injunctions are enforced by the issuing court through its power to hold a party that violates its orders in contempt. See 18 USC § 401.

[90] See FRCP 69(a)(2).

[91] *Republic of Argentina v. NML Capital, Ltd*, 134 S Ct 2250 (2014).

[92] *Hanover Shoe Inc v. United Machinery Corp*, 392 US 481, 491–94 (1968).

[93] See Section IV; *Illinois Brick*, 431 US at 730–31.

[94] id.

[95] 15 USC § 16(a); *Emich Motors Corp v. General Motors Corp*, 340 US 558, 569 (1951).

[96] e.g., *Theatre Enterprises Inc v. Paramount Film Distribution Corp*, 346 US 537, 543 (1954).

[97] Rule 410, Federal Rules of Evidence. A guilty plea is not admissible if a plea is later withdrawn or is a *nolo contendere* ('no contest') plea.

[98] *United States v. ITT Continental Baking Co*, 420 US 223, 236 n10 (1975).

[99] 15 USC § 16(a).

[100] e.g., *Dart Drug Corp v. Parke, Davis & Co*, 344 F2d 173, 184 (DC Cir 1965); *Michigan v. Morton Salt Co*, 259 F Supp 35, 68, 74 (D Minn 1966).

[101] 15 USC § 16(a) ('Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel').

[102] e.g., *Montana v. United States*, 440 US 147, 153–54 (1979).

[103] *In re Microsoft Corp Antitrust Litigation*, 355 F3d 322, 325–26 (4th Cir 2004).

[104] 15 USC § 16(a).

[105] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, § 213, 15 USC § 1 note.

[106] *Upjohn Co v. United States,* 449 US 383, 394–95 (1981).

[107] e.g., *In re Allen*, 106 F3d (*In re Allen*) 582, 605–06 (4th Cir 1997).

[108] e.g., *United States v. AT&T Co*, 86 FR D 603, 616–18 (DDC 18 April 1979).

[109] e.g., *In re Allen*, 106 F3d at 600–05.

[110] e.g., *In re Qwest Communications International Inc*, 450 F3d (*In re Qwest*) 1179, 1185 (10th Cir 2006).

[111] e.g., *In re Copper Market Antitrust Litigation*, 200 FR D 213, 217 (SDNY 30 April 2001).

[112] *In re Qwest*, 450 F3d at 1187–88.

[113] e.g., *Clark v. United States*, 289 US 1, 15 (1933); *In re Antitrust Grand Jury*, 805 F2d (*In re Antitrust Grand Jury*) 155, 164–68 (6th Cir 1986).

[114] Rule 501, Federal Rules of Evidence.

[115] e.g., *Wultz v. Bank of China*, 979 F Supp 2d 479, 486 (SDNY 2013) (quoting *Golden Trade SrL v. Lee Apparel Co*, 143 FR.D. 514, 522 (SDNY 17 August 1992)).

[116] id.

[117] FRCP 26(b)(2); *Hickman v. Taylor*, 329 US (*Hickman*) 495 (1947).

[118] e.g., *In re Antitrust Grand Jury*, 805 F2d at 163.

[119] e.g., *Hickman*, 329 US at 513.

[120] FRCP 26(b)(3)(A).

[121] FRCP 16(a)(5), (f)(1); e.g., *In re Antitrust Grand Jury*, 805 F2d at 163–64.

[122] FRCP 23(e).

[123] *Campbell-Ewald Co v. Gomez*, 136 S Ct 663 (2016).

[124] FRCP 23(e).

[125] e.g., *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

[126] e.g., *JLM Industries, Inc v. Stolt-Nielsen SA*, 387 F3d 163 (2d Cir 2004).

[127] *Kristian v. Comcast Corp*, 446 F3d 25, 46–48, 55–62 (1st Cir 2006).

[128] *Henry Schein Inc v. Archer & White Sales, Inc*, 139 S Ct 524 (2019).

[129] *Healy v. Cox Communications, Inc*, 790 F3d 1112, 1118–21 (10th Cir 2015).

[130] *Harley Blanton, et al. v. Domino's Pizza Franchising LLC, et al.*, 962 F3d 842 (6th Cir 2020).

[131] *Stolt-Nielsen SA v. AnimalFeeds International Corp*, 559 US 662 (2010).

[132] *AT&T Mobility v. Concepcion*, 563 US 333 (2011); *American Express Co v. Italian Colors Restaurant*, 570 US 228 (2013).

[133] e.g., *Texas Indus v. Radcliff Materials, Inc*, 451 US 630 (1981).

[134] ibid., at 639–46.

[135] *Wills Trucking, Inc v. Baltimore & Ohio RR Co*, No. 97-4067, 1999 US App. LEXIS 9832, at 7–8 (6th Cir 1999).

[136] Executive Order on Promoting Competition in the American Economy, Executive Order No. 14036, 86 FR 36987 (14 July 2021). See, e.g., *In re Digital Advertising Antitrust Litigation*, MDL 3010 (ND Cal 2020); *Epic Games, Inc. v. Apple, Inc.*, No. 21-16506 (CA 9, 2021); *Sherman, et al. v. Facebook, Inc*, No. 5:20-cv-08721 (ND Cal, filed 9 December 2020).

[137] New Jersey was the only state to amend its antitrust laws in 2022, and did so by authorising indirect purchasers to sue for damages arising from violations of state antitrust law. Press Release, Office of the Governor, 'Governor Murphy Signs Package of Bills Targeting Predatory Financial Practices' (5 August 2022), **https://www.nj.gov/governor/news/news/562022/20220805b.shtml** (last accessed 20 January 2023). In so doing, New Jersey joined the majority of US states that allow for private antitrust actions brought by indirect purchasers.

[138] US Dep't of Justice, Division Update Spring 2018 (10 April 2018), available at **www.justice.gov/atr/** />division-operations/division-update-spring-2018/antitrust-division-expands-its-appellate-and />-amicus-program; See, e.g., Brief for the United States and Federal Trade Commission as Amicus Curiae, *Deslandes, et al. v. McDonald's USA, LLC*, Nos. 22-2333, 22-2334 (CA 7, Nov. 9, 2022).

[139] *Ohio v. American Express Co.*, 201 L. Ed. 2d 678, 138 S Ct 2274 (2018).

[140] *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1036 (ND Cal 2021) (quoting *Am. Express Co.* 138 S Ct at 2287) (noting that the plaintiffs 'demonstrate anticompetitive effects on the two-sided [mobile gaming] market as a whole' to establish liability and that in 'a two-sided transaction market, a court must consider procompetitive effects on both sides of the market').

[141] Brief for Utah and 34 Other States as Amicus Curiae Supporting Plaintiff-Counter-Defendant-Appellant, *Epic Games, Inc. v. Apple, Inc.*, No. 21-16506 (CA 9, Jan. 27, 2022); Brief for the United States as Amicus Curiae, *Epic Games, Inc. v. Apple, Inc.*, Nos. 21-16506, 21-16695 (CA 9, Jan. 27, 2022).

[142] *Arrington v. Burger King*, 47 F.4th 1247 (11th Cir 2022).

[143] The court in *In re Papa John's Employee and Franchisee Employ Antitrust Litigation*, No. 3:18-CV-00825 (WD Ky Oct. 21, 2019), for example, engaged in an extensive discussion of three approaches to review antitrust conduct, ultimately deciding that, at the early stage of the case, the issue was not required to be resolved.

[144] Direct Action Plaintiffs' Amended Consolidated Complaint and Jury Demand, *In re Broiler Chicken Antitrust Litigation*, 1:16-cv-08637 (N.D. Ill.).

[145] e.g., Lina Khan, 'ESG Won't Stop the FTC', *The Wall Street Journal* (21 December 2022), **https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic** />-promises-court-11671637135 (last accessed 26 January 2023); Andrew Goudsward, 'Compliance Hot Spots: GOP Eyes ESG as an Antitrust Issue + Another DOJ Crypto Seizure + Sidley Partner Jumps to Main Justice', **Law.com** (9 November 2022), **https://www.law.com/2022/11/09/compliance-hot-spots** />-gop-eyes-esg-as-an-antitrust-issue-another-doj-crypto-seizure-sidley-partner-jumps-to-main-justice/ (available to subscribers only).

[146] Press release, Commonwealth of Virginia, Office of the Attorney General, 'Attorney General Miyares Joins 19 State Coalition in Launching Investigation into Six Major Banks Over ESG Investing' (19 October 2022), **https://www.oag.state.va.us/media-center/news-releases/2479-october-19-2022** />-attorney-general-miyares-joins-19-state-coalition-in-launching-investigation-into-six-major-banks />-over-esg-investing (last accessed 31 January 2023); Saijel Kishan and Danielle Moran, 'Republicans Prepare to Ramp Up Their Anti-ESG Campaign in 2023', Bloomberg Law (29 December 2022), **https://news.bloomberglaw.com/environment-and-energy/republicans-prepare-to-ramp-up-their-anti** />-esg-campaign-in-2023 (last accessed 20 January 2023).

[147] Amelia Miazad, 'Prosocial' Antitrust, 73 *Hastings Law Journal* 1637, 1668–70 (2022), **https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3999&context=hastings_law_journal** (last accessed 20 January 2023).

Philip J Iovieno

Author

philip.iovieno@cwt.com

Kristen J McAhren

Author

kristen.mcahren@cwt.com

Daniel Lumer

Author

daniel.lumer@cwt.com

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Arnecke Sibeth Dabelstein

India

Charanya Lakshmikumaran and Neelambera Sandeepan
Lakshmikumaran & Sridharan

Israel

Eytan Epstein, Mazor Matzkevich and Inbal Rosenblum Brand
M Firon & Co

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Poland

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Linklaters LLP

Turkey

M Fevzi Toksoy, Bahadır Balkı, Ertuğrul Can Canbolat and Muhammed Safa Uygur
ACTECON

USA

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