Private anti-trust remedies under US law

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Private plaintiffs play a central role in US competition law. While the Anti-trust Division of the Department of Justice (Anti-trust Division) and the Federal Trade Commission (FTC) are the principal public enforcers of US anti-trust laws, the rights of private parties to seek monetary damages and injunctive relief significantly complicate the process of advising both US and foreign clients. In the US, federal and state laws often overlap in terms of jurisdiction and penalties and, therefore, several claims (both criminal and civil) can arise from the same transaction or conduct.

This chapter provides an overview of private remedies available under US anti-trust laws and in particular looks at:

- The relevant federal and state statutory framework.
- Important procedural issues that arise in private anti-trust litigation, such as whether the plaintiff has "anti-trust standing", whether the court has jurisdiction over "foreign" conduct and parties, and the statute of limitations.
- The potential for overlapping remedies and cumulative penalties created by state-law indirect purchaser suits and the civil litigation that often follows criminal investigations.

STATUTORY FRAMEWORK

Federal anti-trust laws

US federal law provides a cause of action to "any person injured in his business or property by reason of anything forbidden in the anti-trust laws" (*section 4, Clayton Act*). A person who prevails in a private anti-trust action is entitled to recover "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." The threat of treble damages distinguishes private anti-trust litigation from most other US litigation and significantly increases the stakes for the litigants.

The reference to anti-trust laws in section 4 is to the federal anti-trust laws generally, most importantly the Sherman Act (*sections 1 to 7, 15 USC*) and the Clayton Act (*sections 12 to 27, 15 USC*), but also parts of the Robinson-Patman Act (*section 13(a), 15 USC*). The "persons" authorised to bring a suit under federal anti-trust laws include individuals, corporations and partnerships. No statutory distinction is made between foreign persons and domestic persons. A person can also sue on behalf of a class of persons with similar claims, potentially exposing defendants to treble damage claims by groups of plaintiffs.

A private plaintiff can also seek an injunction "against threatened loss or damage by a violation of the anti-trust laws" (*section 16, Clayton Act*). Unlike section 4, actual injury is not required in a section 16 proceeding; the threat of injury is sufficient. To obtain a preliminary injunction, a plaintiff typically must show all of the following:

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

Courts consider the last three factors in determining whether to issue a permanent injunction.

State anti-trust laws

Each US state also has its own anti-trust statute. These state statutes generally have provisions that are similar to federal anti-trust statutes, including the Sherman Act, the Clayton Act, and, in some cases, the Robinson-Patman Act. There are, of course, certain limitations on a state's ability to assert jurisdiction over anti-competitive conduct. For example, under the Due Process clause of the 14th Amendment of the US Constitution, a state cannot punish conduct that takes place wholly outside the state and therefore has no significant connection with that state.

State anti-trust statutes vary in important ways from their federal counterparts. For example:

- Many states permit indirect purchasers to recover damages. This is generally not possible under federal anti-trust law (*see below, Indirect purchaser suits*).
- A few states do not authorise treble damages, but instead limit recovery to actual or double damages. Some states only authorise damages for violations that are "wilful and flagrant."
- Defendants also must be aware of general consumer welfare statutes that plaintiffs may invoke to challenge allegedly anti-competitive conduct. These state statutes (for example, California's Unfair Competition Law) may permit a private plaintiff to attack conduct without even showing an injury to competition.

Cross-border

ANTI-TRUST STANDING

While the text of section 4 of the Clayton Act is quite broad, courts have developed, on a case-by-case basis, standing requirements that limit the potential plaintiffs who can pursue a private right of action. In order to possess standing under section 4, a plaintiff must show all of the following:

- An injury to his business or property.
- An injury of the type the anti-trust laws were intended to prevent.
- A lack of remoteness.

Injury to his business or property

A plaintiff must show that the alleged anti-trust violation by the defendant was a material or substantial cause of injury to the plaintiff's "business or property." Courts define business and property broadly and therefore a plaintiff must simply allege some economic loss for which recovery is sought. So long as a plaintiff can show that it had sufficient intent and capabilities to enter a market, many courts find that potential profits from an anticipated business are recoverable.

Injury of the type the anti-trust laws were intended to prevent

Courts have limited the standing of plaintiffs under the anti-trust laws to those plaintiffs who can show "anti-trust injury." Anti-trust injury is "injury of the type the anti-trust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (*Brunswick Corp v Pueblo Bowl-O-Mat, Inc, 429 US 477, 489 (1977)*). Plaintiffs seeking monetary or injunctive relief must go beyond simply proving that their injury was caused by the defendants' anti-competitive act. They must show that their injury was caused by conduct that the anti-trust laws were intended to remedy. Simply put, not every anti-competitive act merits an award of damages under federal anti-trust laws.

For example, the Supreme Court has refused to find anti-trust injury where the injury claimed was lost profits resulting from a merger that delivered a more vigorous competitor and lower prices in the market (*Cargill, Inc v Monfort of Colorado, Inc, 479 US 104 (1986)*). Similarly, a plaintiff has no anti-trust standing to sue its competitors that fix prices where the plaintiff actually economically benefits from the fixing of prices above competitive levels (*Matsushita Elec Indus Co, Ltd v Zenith Radio Corp, 475 US 574 (1986)*). There are, of course, no formal criteria for determining whether a plaintiff has sustained anti-trust injury; courts make this important threshold determination on a case-by-case basis.

Remoteness restrictions

To bring a private anti-trust action under federal law, a plaintiff must demonstrate that there is a significant connection between the alleged anti-trust violation and the alleged harm to the plaintiff. Courts deny claims where the plaintiff is not a participant in the relevant market, the alleged damages are highly speculative, or the plaintiff is an indirect victim of the anti-trust violation.

The most commonly invoked remoteness challenge to standing is the indirect purchaser doctrine. This doctrine bars indirect purchasers (for example, consumers who purchased from a retailer rather than the manufacturer) from asserting anti-trust claims against remote defendants. In a recent example, in the wake of the government's case against Microsoft, claims by certain consumers have failed because they purchased Microsoft's products from intermediaries such as computer manufacturers rather than from Microsoft directly.

In the case which first pronounced the doctrine, *Illinois Brick* (*Illinois Brick Co v Illinois, 431 US 720 (1977)*), the Supreme Court observed that:

- Without the indirect purchaser doctrine, defendants would be at risk for treble damage claims by both direct and indirect purchasers for a single alleged anti-trust violation.
- Apportioning a defendant's liability among a series of indirect purchasers would impose a significant and complex burden on the courts.

There are exceptions to the rule that indirect purchasers do not have standing under federal anti-trust laws. If the direct purchaser is "owned and controlled" by the defendant (for example, the defendant is the parent corporation of the direct purchaser), then the first "indirect" purchaser has standing to sue under federal anti-trust laws. Another exception to the indirect purchaser doctrine is where the plaintiff alleges that there was a conspiracy between the defendant and the direct purchaser and, therefore, the indirect purchaser is effectively buying "directly" from the conspiring parties. Even where a plaintiff's federal anti-trust claim is barred by *Illinois Brick*, a defendant may be liable under certain state anti-trust laws that permit indirect purchaser claims, often in the context of a class action (*see below, Indirect purchaser suits*).

JURISDICTION OVER FOREIGN CONDUCT AND PARTIES

In 1982, the US Congress adopted the Foreign Trade Anti-trust Improvement Act of 1982 (FTAIA) (*section 6(a), 15 USC*), which sets out when a US court has subject matter jurisdiction over conduct that occurs outside the US. The FTAIA provides that US courts have subject matter jurisdiction over conduct involving trade or commerce where:

- The conduct has a direct, substantial and reasonably foreseeable effect on:
  - US domestic or import commerce; or
  - export trade or commerce of a person engaged in this type of trade or commerce in the US; and
- This effect gives rise to a Sherman Act claim.

The principal issues are whether the "effect" on US commerce is "direct, substantial, and reasonably foreseeable" and whether there is a sufficient link between that effect and the alleged violation of US anti-trust law. In 1995, the Anti-trust Division and the FTC jointly released the *Anti-trust Enforcement*

Guidelines for International Operations. While the Guidelines, which are available on the websites of the Anti-trust Division (*www.usdoj.gov/atr*) and the FTC (*www.ftc.gov*), set out the enforcement agencies' position with respect to jurisdiction over foreign conduct, they are equally useful in determining the scope of private anti-trust remedies. Practitioners should pay particular attention to the hypothetical examples set out in the Guidelines and the enforcement agencies' view as to whether jurisdiction would exist in these circumstances.

Foreign conduct affecting the price of US imports

It is well settled that where foreign conduct affects the price of products imported into the US, this conduct has a direct and reasonably foreseeable effect on US commerce and, therefore, can be actionable under US anti-trust law. The effect, of course, must also be "substantial" rather than a "spillover" of effects that occur outside the US (*United Phosphorus, Ltd v Angus Chem Co, 131 F Supp 2d 1003 (ND Ill 2001)*).

Injuries sustained in foreign transactions

More difficult questions of subject matter jurisdiction arise where the plaintiff's injury occurred outside the US. Historically, courts have not found subject matter jurisdiction where the plaintiff's injury was sustained in foreign transactions that did not have an alleged anti-competitive domestic effect (*Den Norske Stats Oljeselskap As v HeereMac Vof, 241 F3d 420 (5th Cir 2001)*). The Supreme Court recently held that the FTAIA prohibits courts from exercising jurisdiction over claims involving foreign injuries that are not intertwined with domestic injuries arising out of the same anti-competitive act (*F Hoffman-LaRoche, Ltd v Empagran SA*, *524 US 1 (2004)*). (*See box, Recent case relating to jurisdiction over foreign conduct and parties*.)

Standing to sue

Separate from subject matter jurisdiction, US courts must also consider whether a plaintiff has "standing" to sue under US anti-trust laws. US courts generally require that the plaintiff was a participant or a potential participant in the domestic market. Thus, a foreign corporation that is prevented from selling a product on the US market may have standing, while a foreign subsidiary of a US corporation that operates exclusively in foreign markets is unlikely to have a valid US anti-trust claim.

Personal jurisdiction

There is no specific test to determine whether a foreign private entity (as opposed to a foreign sovereign) can be named as a defendant in a private anti-trust action. The question, as in most areas of US law, is whether the entity has "minimum contacts" with the US, making it fair and reasonable to require the entity to defend itself in a US anti-trust action. In practice, if a foreign entity's conduct is sufficient to give a US court subject matter jurisdiction under the FTAIA, then a US court is likely to find that the foreign entity is a proper defendant in the action.

STATUTE OF LIMITATIONS

A private cause of action under federal anti-trust law must be brought within four years of the date the cause of action accrued (*section 4B, Clayton Act*). The general rule is that the statute begins to run when the plaintiff suffers injury to its business or property. However, there are important exceptions to this general rule, for example:

- If the damage suffered by the plaintiff is too speculative to prove, then the cause of action does not accrue until the damage becomes provable (*Zenith Radio Corp v Hazeltine Research, Inc, 401 US 321 (1971)*).
- If the plaintiff's injury is the result of continuing anti-trust violations, each independent anti-competitive act may restart the limitation period (*Pace Industries, Inc v Three Phoenix Co, 813 F2d 234 (9th Cir 1987)*).
- The four-year deadline for bringing a private anti-trust action can also be tolled. If a plaintiff reasonably fails to uncover a cause of action that was fraudulently concealed by a defendant, then the statute runs from the date the plaintiff should have (or did) discover the alleged claim. The statute can also be tolled while another entity (such as the government) is investigating the alleged anti-competitive conduct. In private anti-trust litigation this issue often arises where a plaintiff brings a claim on behalf of a putative class, but the plaintiff is ultimately unsuccessful in certifying the class.

OVERLAPPING REMEDIES AND CUMULATIVE PENALTIES

Indirect purchaser suits

Illinois Brick generally bars indirect purchasers from seeking recovery under federal anti-trust laws (*see above, Remoteness restrictions*). If anything, *Illinois Brick* has been troublesome for defendants because the decision pushed indirect purchaser suits into a fragmented state court system.

Despite the federal prohibition, the Supreme Court has held that the federal law does not pre-empt state laws allowing indirect purchaser claims (*California v ARC America Corp, 490 US 93 (1989)*). Over 20 states now allow indirect purchaser suits under statutes that are commonly known as "*Illinois Brick* Repealers." These laws empower plaintiffs, denied access on the federal level, to instead bring suits in multiple state courts on behalf of indirect purchasers (usually consumers). Unlike the federal court system, there is no formal procedure for consolidating or co-ordinating actions in various state courts, even where those actions concern the same underlying facts. Defendants therefore face the problem of defending lawsuits in multiple jurisdictions on the same underlying alleged action, with the increased cost (for example separate counsel) and complexity (for example inconsistent judgments) that this type of system entails.

There is little doubt that *Illinois Brick* has not had the effect that the Supreme Court intended. As Donald Baker, who was the head of the Anti-trust Division from 1976 to 1977, recently wrote:

> "That is the great irony of *Illinois Brick* where a conservative decision led to a populist political reaction that has produced duplicative litigation and recoveries on a scale that the Supreme Court majority could scarcely have imagined in the first place" (*Hitting the Potholes on the Illinois Brick Road, Anti-trust (Fall 2002)*).

RECENT CASE RELATING TO JURISDICTION OVER FOREIGN CONDUCT AND PARTIES

F Hoffman-LaRoche Ltd v Empagran SA

In *F Hoffman-LaRoche, Ltd v Empagran SA* (*524 US 1 (2004)*), the Supreme Court rejected decisions by lower courts that had allowed foreign purchasers to sue in US courts for damages arising out of price-fixing conduct that had adversely affected both US and foreign purchasers, but where the adverse foreign effect was independent of any adverse domestic effect. The Supreme Court described the plaintiffs as vitamin distributors located in Ukraine, Australia, Ecuador and Panama, each of which purchased vitamins from the defendants for delivery outside the US. The alleged injuries derived from the inflated prices of vitamins in foreign markets, an injury completely independent of any injury suffered in the US. The Supreme Court held that the FTAIA prohibits courts from exercising jurisdiction over cases where the foreign injury is neither intertwined with, nor dependent on, a domestic injury arising out of the same anti-competitive act. Since the plaintiffs' injuries could not be linked to a domestic injury, the Supreme Court ruled that the courts lacked subject matter jurisdiction.

The Supreme Court's decision rejected the DC Circuit's argument that expanding the Sherman Act to include independent foreign injuries would deter anti-competitive behaviour. As the Supreme Court explained, Congress' deference to international comity and the historical application of the FTAIA both support the conclusion that the Sherman Act does not apply to independent foreign injuries.

The *Empagran* (*see main text above, Injuries sustained in foreign transactions*) decision also overturns a recent Second Circuit decision where a putative class of purchasers and sellers of goods in foreign auctions had brought suit against Christie's and Sotheby's claiming that the two defendants fixed prices, thereby affecting the price of foreign auctions (*Kruman v Christies Intl PLC, 284 F3d 384 (2d Cir 2002)*). The Second Circuit held that as long as there was an effect on domestic commerce that violated the substantive provisions of the Sherman Act, a plaintiff's injury can be foreign and does not need to arise from the domestic effect. By overruling both *Empagran* and *Kruman,* the Supreme Court significantly limited the application of the Sherman Act to foreign injuries and certain foreign plaintiffs.

For example, under the current system, anti-trust manufacturers accused of price-fixing could be held liable in a federal court to distributors without any protection from suits by consumers in state courts. Because both the federal and state damage awards may be trebled, the anti-trust defendant could be held liable for six times the overcharge. Importantly, there is no obvious procedural mechanism by which a defendant can seek equitable apportionment of damages among the participants in the distribution chain. (Some states have even passed statutes that allow consumers to recover the entire cost of their purchase so long as they prove that the anti-trust violation had some effect on the retail price.)

Criminal pleas and criminal amnesty

American anti-trust law has both civil and criminal components and both can be (and often are) applied to the same conduct. In the US, criminal prosecution is generally reserved for "hardcore" anti-trust violations such as price-fixing and bid-rigging. Criminal fines for anti-trust violations can be significant. While the Sherman Act sets the maximum corporate fine at US$10 million (about EUR8.2 million), the government (in this case the Anti-trust Division) more often proceeds under alternative sentencing guidelines that permit it to recover up to twice the defendants' gross gain. The Anti-trust Division also actively pursues individual corporate executives implicated in price-fixing and bid-rigging schemes. These executives (including executives of foreign corporations) face the prospect of significant jail sentences if convicted.

In recent years, the Anti-trust Division has vigorously prosecuted alleged cartels in a variety of industries, including vitamins, lysine and auction services. The Anti-trust Division's investigations have been greatly aided by the Corporate Leniency Policy, also known as the Amnesty Program, which began in 1993. This programme grants amnesty to the cartel conspirator that is "first in the door" at the Anti-trust Division. That conspirator gains amnesty from criminal charges and criminal fines in exchange for being the first to report the illegal collusion and to offer its co-operation. In addition, its executives will be given amnesty from criminal fines and jail sentences. Every other conspirator will face charges, criminal fines, and possibly jail sentences, the severity of which depends on the order in which they came in and the degree of their participation in the illegal scheme.

Substantial incentives obviously exist for a cartel participant to seek amnesty or enter a plea. However, these incentives must be viewed in light of the almost inevitable private litigation that will ensue following a corporation's guilty plea. Settling with the US government does not extinguish the claims of private parties. Indeed, a criminal prosecution will likely aid private plaintiffs in several important ways:

- A criminal investigation informs potential plaintiffs of the possibility of anti-competitive behaviour. For example, in a price-fixing case, the government's investigation may be the first indication to potential plaintiffs that they have been overpaying for the product in question. A criminal plea can therefore alert private plaintiffs to causes of action that otherwise may have been barred by the statute of limitation through the passage of time.

- A private plaintiff can benefit from the defendant's previous criminal plea in a related action. Federal law grants prima facie or collateral estoppel effect to certain final judgments entered against a defendant in a criminal proceeding (*section 5(a), Clayton Act*). Private plaintiffs who successfully invoke a previous criminal plea or judgment have a significant advantage in private litigation. Even if the plaintiff does not get the benefit of section 5(a), private plaintiffs have a much better idea of where to look for relevant evidence to prove the cartel and their injuries as a result of the government prosecution. These factors can lead to significant settlements of private class actions that often follow criminal investigations.

- There is a significant risk that the civil litigation following a criminal plea or investigation will include fragmented and duplicative actions brought by both direct and indirect purchasers seeking treble damages in courts throughout the federal and state systems (*see above, Indirect purchaser suits*).
- Every amnesty arrangement entered into between the Antitrust Division and a cartel participant includes an agreement by the cartel participant to provide restitution to parties that were damaged by the operation of the price-fixing cartel. While the precise effect of these restitution provisions is somewhat uncertain, they almost certainly enhance the leverage of private plaintiffs in both civil litigation and any settlement negotiations between the parties to avoid litigation.

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