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Overview of the U.S. Antitrust Laws

The U.S. antitrust laws are enforced by both government agencies and private parties. Not surprisingly, while there are broad similarities between the elements, rights, procedures, and remedies applicable to these two very different kinds of plaintiffs, there are also important differences, including the kinds of matters each may pursue and the relevant procedures, remedies, and burdens of proof.

This chapter deals with both of these sources of antitrust risk, reviewing first the federal (and state) agencies responsible for enforcing the antitrust laws, and discussing how their enforcement efforts differ in the criminal, civil conduct, and merger contexts. In particular, this chapter looks at:

(1) how and when government agencies begin investigations and bring enforcement actions;

(2) how to distinguish between criminal and civil violations of the antitrust laws; and

(3) what penalties government enforcers may (and do) seek for violations of the antitrust laws.

The discussion then turns to the other main source of antitrust risk: litigation by private parties (including states in their non-enforcement capacity) alleging violations of federal or state antitrust laws. Here, the focus is on the standing requirements in private antitrust litigation and the defenses and remedies that are available in those actions.

The discussion of how government agencies investigate proposed mergers and acquisitions is covered in chapter 6, Mergers and Acquisitions.

Enforcement of the Antitrust Laws

Q 1.1 What federal and state agencies are responsible for enforcing the antitrust laws?

The Antitrust Division of the Department of Justice and the Federal Trade Commission are the two federal agencies responsible for enforcing the U.S. antitrust laws. The DOJ and FTC share jurisdiction over civil antitrust enforcement, including merger enforcement. Criminal enforcement is exclusively within the jurisdiction of the DOJ.

Several other federal agencies also have some oversight of competition issues as part of their broader statutory authority in certain regulated industries. These include:

- Federal Communications Commission (broadcasting and telecommunications);
- Department of Transportation (air transport);
- Surface Transportation Board (rail transport);
- Federal Energy Regulatory Commission (energy); and
- Various regulatory bodies involving financial institutions.

The scope of authority over competition issues for each agency varies depending on the relevant statutory framework. In addition, when it investigates criminal violations of the antitrust laws, the DOJ often obtains assistance from the FBI and the various U.S. attorneys' offices.

State attorneys general are responsible for enforcing state antitrust laws. But they also can bring what are essentially private actions under the federal antitrust laws, acting on behalf of the state's citizens. These cases can seek either injunctive relief or, in some cases, money damages.

Department of Justice's Antitrust Division

Q 1.1.1 How is the DOJ's Antitrust Division organized?

The DOJ is a cabinet-level department in the executive branch.[1] The Antitrust Division is headed by an assistant attorney general for antitrust, who reports to the U.S. attorney general, who in turn reports to the president of the United States. The internal structure within the division has varied over the years. The assistant attorney general is supported by a number of deputy assistant attorney generals responsible for:

- criminal enforcement,
- civil enforcement,
- regulatory matters,
- international enforcement, and
- economic analysis.

Current division leadership has made several adjustments to the roles of the DAAGs and to the division's Office of Operations. First, the directors of Civil and Criminal Enforcement now report to the DAAG for Civil and Criminal Operations, who oversees the management of the division. Second, one of the Civil DAAG slots is filled with a senior litigator who oversees litigation by the division and even serves as first-chair in certain major cases. There continues to be a Civil DAAG, Criminal DAAG, and DAAG for Economics. Second, some of the responsibilities of the former international enforcement DAAG are now overseen by a new Special Advisor, International. Third, for civil matters, each matter is assigned a "supervisory" DAAG, and at times two DAAGs (depending on whether litigation is foreseen) can be assigned to supervise specific matters. Finally, a new General Counsel position has been created, which will oversee (among other things) compliance with consent decrees.

Civil conduct and merger investigations typically are conducted by one of six Washington, D.C. sections:

(1) Litigation I,
(2) Litigation II,
(3) Litigation III,
(4) Networks and Technology,

(5) Telecom and Media, and,
(6) Transportation, Energy and Agriculture.

While any of the Antitrust Division's three regional field offices could investigate civil conduct and merger matters, the division historically has assigned these matters to only the San Francisco and Chicago offices. In general, the division assigns civil investigations (both merger and conduct) by industry, with each section responsible for multiple industrial segments.

Criminal antitrust investigations are conducted by the division's Washington Criminal I and Washington Criminal II sections in Washington, D.C., and each of the regional field offices in Chicago, New York, and San Francisco. The division typically assigns localized criminal matters to the field office generally located closest to the likely witnesses in the investigation, while it assigns matters of more national or international scope to the Washington Criminal sections.

The Antitrust Division organizes its economists into three sections (Economic Litigation, Economic Regulatory, and Competition Policy), each of which reports to the DAAG for Economic Analysis. Typically, the agency assigns one or more economists to work alongside attorneys in each investigation. The section chief in charge of the section conducting the investigation supervises the staff attorneys on the matter, as does the DAAG or DAAGs responsible for the matter. The Antitrust Division also has a number of sections that support the agency's mission, including Legal Policy, Foreign Commerce, and Appellate.

Federal Trade Commission

Q 1.1.2 How is the FTC organized?

The FTC is an independent agency created by Congress in 1914, whose two missions are competition and consumer protection.[2] It has five commissioners (one of whom serves as chairman) appointed by the president, but once in office, they are not subject to executive-branch oversight. No more than three of the commissioners can be from any single political party. Formal decisions are taken on the basis of a majority of votes cast. The chairman controls appointments of senior management at the FTC and, therefore, usually directs policy, at least to the extent he or she can attract two supporting votes for those actions requiring formal commission action. The two bureaus with the greatest involvement in antitrust matters are the Bureau of Competition and the Bureau of Economics. Each is headed by a director and two or more deputy directors. The Bureau of Consumer Protection deals with a wide range of privacy, data protection, labeling, consumer fraud and similar issues, but typically is not involved in antitrust enforcement.

The FTC's Bureau of Competition investigates potential civil antitrust violations. Typically, attorneys in one of six litigation divisions (Mergers I, Mergers II, Mergers III, Mergers IV, Healthcare, and Anticompetitive Practices) or in one of three regional offices (located in New York, San Francisco, and Seattle) conduct the investigations. As with the Antitrust Division, the FTC generally assigns investigations based on the industry, with each division responsible for multiple sectors of the economy. At the FTC, however, the agency also makes assignments based on whether the matter involves a merger or conduct, with the Healthcare and Anticompetitive Practices divisions usually handling conduct matters, and the other divisions generally handling only mergers. An assistant director heads each litigation division, along with two or more deputy assistant directors. A regional director and an assistant director supervise investigations out of the FTC's regional offices. These investigation units report directly to the bureau's deputy directors. The Bureau of Competition contains a number of other divisions that support investigations, including the Pre-Merger Notification, Operations, Policy and Coordination, and Compliance divisions.

The FTC's Bureau of Economics usually assigns one or more economists to investigate a matter alongside the Bureau of Competition. The Bureau of Economics is organized with two separate divisions (Antitrust I and Antitrust II) that report to the Deputy Director for Antitrust. At the conclusion of an investigation, the Bureau of Economics typically issues a separate recommendation to the FTC, along with the Bureau of Competition. Other divisions that sometimes are involved in antitrust investigations include the Office of the General Counsel, the Office of International Affairs, and the Office of Policy Planning.

State Attorneys General

Q 1.1.3 How are state attorneys general offices organized?

The organization of the offices of state attorneys general varies from state to state. Staff attorneys in a state AG's office typically conduct antitrust investigations. Some, but not all, state AG offices have one or more staff attorneys who focus on antitrust and have significant experience with application of the antitrust laws.

Frequently, states conduct antitrust enforcement in cooperation with a federal enforcement agency, other state AG offices, or both. In the 1980s, the Multistate Antitrust Task Force of the National Association of Attorneys General was created in order to facilitate communication and cooperation among state AGs in connection with state antitrust investigations and to monitor legislative and regulatory developments in antitrust. This coordination usually leads to one state being responsible for leading a multistate investigation, while sharing information obtained during the investigation with other interested AGs.

Agency Jurisdiction

Q 1.2 How is it determined which federal antitrust agencies will investigate a matter?

Since the creation of the FTC by Congress in 1914, both the FTC and the Antitrust Division have had concurrent jurisdiction over enforcement of the federal antitrust laws in many areas. Only the DOJ has authority to investigate and prosecute criminal antitrust matters, but in virtually all civil matters, the DOJ and FTC have overlapping jurisdiction. In addition to its authority under other antitrust statutes, the FTC also has exclusive authority to enforce section 5 of the Federal Trade Commission Act of 1914,[3] which prohibits "unfair methods of competition." Section 5 is generally viewed as covering not only the same civil antitrust violations prosecuted by the FTC and DOJ under the Sherman Act[4] and the Clayton Act,[5] but also other conduct that may not be reached by the Sherman and Clayton Acts, such as invitations to collude. Section 5 is discussed in chapter 9.

Both agencies understand that simultaneous investigations by two federal antitrust agencies of the same conduct would be neither efficient nor tolerable, so they have entered into a number of "clearance" agreements over the years as a way to allocate, or "clear," matters to one agency or the other, generally based on which agency has more experience in the relevant product area. For many matters, this allocation is resolved in a few days with little or no dispute because the locus of expertise is clear. For example, the DOJ traditionally has handled matters involving airlines, telecommunications, electricity, steel, and waste disposal. The FTC traditionally has taken the lead in investigating matters involving pharmaceuticals, oil and gas, chemicals, and consumer goods, among others.

But there are areas, especially with emerging technologies, where neither agency has clearly superior expertise, and conflicts can arise when both agencies request clearance. After all, both agencies have essentially the same broad legal jurisdiction, and both understandably want to be involved in interesting or visible matters. Moreover, ceding a transaction to the other agency provides it with expertise it can cite in the next clearance fight. When clearance disputes happen, they can delay efficient resolutions of a matter. Unfortunately these disputes are not uncommon, particularly in industries such as computer hardware and software, Internet-based services, media, defense products, construction materials, and agriculture. Clearance disputes have the biggest impact on mergers reported under the Hart-Scott-Rodino Act;[6] because HSR has statutory deadlines for decisions to investigate, disputes between the agencies can have a significant impact on the speed at which a transaction can be reviewed. This periodic competition between the two federal agencies may be understandable, but it is neither productive nor attractive.

Given this less-than-precise allocation system, it is not always possible to predict which federal agency will handle a matter. Experienced antitrust lawyers can make educated judgments, but there are occasionally surprising results. While many lawyers have tried over the years to guide a particular matter to one agency or the other, as a general matter such efforts are not successful. As a result, one of the uncertainties at the beginning of many antitrust matters is which federal agency will be involved. Because there are significant procedural differences between the agencies, and even some substantive differences in how they apply the antitrust laws, this uncertainty could conceivably affect the final outcome and is thus frustrating to those who are subject to it. It is small consolation that many others have faced the same frustration.

Q 1.2.1 Do U.S. antitrust agencies ever coordinate investigations with foreign competition agencies?

In today's global economy, it is not uncommon for matters investigated by the U.S. antitrust authorities to also be the subject of investigations by one or more foreign jurisdictions. In fact, more than 100 countries have some form of merger review, and a non-trivial number of these jurisdictions require pre-merger notification and undertake merger analysis to a similar degree as do the U.S. agencies. The U.S. authorities and their counterparts in other countries communicate regularly to the extent permitted by the rules of confidentiality, both about basic facts and about how they are approaching the investigation, including potential theories of harm. If the investigation reaches this stage, the U.S. agencies may also discuss possible remedies with the relevant foreign authorities to ensure that any remedies adopted by the United States and foreign authorities are consistent. The U.S. antitrust agencies are prohibited from providing confidential documents or information to foreign authorities absent the parties' consent; as a result, more detailed coordination between U.S. and foreign antitrust agencies can be difficult unless the company or companies concerned execute a waiver permitting the authorities to exchange confidential information. It is common to agree to this sharing, if only because not doing so is likely to impair the relationship with the requesting jurisdiction, and may not prevent the jurisdictions from working closely together in any event.

On rare occasions, a foreign competition authority may be willing to exercise "positive comity" pursuant to which it suspends any investigation of conduct relating primarily to the United States pending a U.S. agency's completion of its investigation. This allows the foreign authority to see whether any remedy adopted by the U.S. agency would be sufficient to resolve any anticompetitive concerns in the foreign jurisdiction.

Q 1.3 How are different types of U.S. antitrust investigations initiated?

The manner in which the government initiates antitrust investigations usually depends on the type of conduct being investigated. Mergers and acquisitions above certain size thresholds must be reported to the government under Hart-Scott-Rodino, as discussed in chapter 6. The government typically decides whether to investigate a merger based on the contents of the HSR notification forms, background knowledge of the industry in question, and information collected pursuant to any preliminary inquiries, including input from customers and competitors in the market.

In most other areas—such as horizontal or vertical agreements to restrain trade, monopolization, unfair methods of competition, or mergers that were not subject to HSR notification—the decision to start an investigation is frequently prompted by complaints from concerned or interested parties, such as competitors, consumers, or whistleblowers. In fact, the Antitrust Division has established the Citizen Complaint Center to field reports of possible antitrust violations. The government also sometimes initiates investigations of more serious antitrust violations, such as price fixing or bid rigging, after one of the participants seeks immunity from prosecution under the DOJ's amnesty program. Foreign antitrust authorities might spur investigations of international antitrust violations with an impact on U.S. consumers by providing leads to the U.S. authorities. Finally, an agency will periodically conduct a self-initiated inquiry into a particular industry or practice based on information it obtains in another matter, or on a concern about specific practices that have somehow come to its attention.

Q 1.3.1 Under what circumstances will state enforcers initiate an investigation?

Because a state AG typically has wide discretion to initiate an investigation into a possible antitrust violation, the impetus for such an investigation may range from a concern over possible harm to local competitors or consumers to simply the visibility of a particular transaction or a desire to appear active in an industry of significant state interest. In addition, the existence (or not) of a federal antitrust investigation may affect the state decision. In very visible mergers and other investigations, for example, it is common for NAAG's Multistate Task Force to coordinate investigations by a number of states in conjunction (and frequently in cooperation) with a federal investigation. State AGs are frequently constrained by limited resources, however, which may impact their decision to initiate or take an active role on a matter.

Q 1.3.2 Can state investigations overlap with federal investigations?

In many instances, yes. State AGs frequently launch parallel investigations once a federal antitrust investigation is publicly disclosed. If federal and state antitrust investigations concerning the same conduct are ongoing, state AGs are usually content to proceed more slowly and allow the federal authorities to take the lead. In situations where a statute of limitations may be relevant, state AGs frequently seek "tolling agreements" with possible offenders, which toll the running of applicable statutes.

Q 1.3.3 May a company cause the government to initiate an investigation of another company?

Sometimes. Anyone is free to complain to a state or federal antitrust agency that a company or a person has engaged in anticompetitive conduct, and the government agencies will consider any complaint that is brought to their attention. But the government agencies always retain the discretion to decide whether a particular complaint is worth the expenditure of resources to open an investigation. The DOJ and the FTC, in particular, will attempt to confirm that the practice complained of is likely to harm competition generally, and ultimately consumers broadly, rather than just the complainant, before opening an investigation.

Q 1.3.4 To what extent might members of Congress influence an antitrust investigation?

Congressional legislation has occasionally required an agency to conduct an antitrust investigation, most commonly in the oil and gas and agriculture industries. Individual members or committees of Congress also can contact one or both federal antitrust agencies, either on behalf of constituents or on their own initiative, requesting that the agencies investigate a particular company or companies or a particular course of conduct. The federal antitrust agencies take such requests seriously and typically look into whether an antitrust investigation is warranted. But as with other complaints, the antitrust agencies exercise independent judgment in determining whether a full-fledged investigation is appropriate, and it is rare that a formal investigation is begun unless the agency thinks there is a sound basis for it.

Once an investigation is initiated, the relevant antitrust agency will conduct its investigation independently. There is no legitimate mechanism available for members of Congress to influence individual investigations, although from time to time efforts to do so are reported. House members or Senators have been known to call the FTC or DOJ to inquire about an investigation. Because the FTC is an independent agency created by Congress, there is also a mechanism by which members of Congress and their staffers can receive nonpublic briefings on FTC investigations. These briefings are relatively rare, however, and are usually reserved for high-profile matters or ones of particular interest to a high-ranking member of Congress.

Criminal/Civil Determination

Q 1.4 How does the government differentiate between potential criminal and civil violations?

Although it surprises many, the principal federal antitrust statute, the Sherman Act, is a criminal statute, so theoretically any antitrust violation could be prosecuted criminally. Over the more than a century of the Sherman Act's existence, however, criminal prosecutions have gradually been limited to a small number of violations, such as bid rigging and price fixing, that everyone should know are illegal, as explained in more detail directly below. The DOJ, because it is an executive-branch agency, is the only federal agency with the constitutional power to enforce the antitrust laws through criminal prosecutions, and it does so against both corporate and individual offenders. Indeed, antitrust enforcers, in numerous speeches and publications, have long maintained that the most effective way to deter and punish antitrust violations is to put individuals in jail for significant periods of time. Nearly all state antitrust statutes also carry criminal penalties, but state criminal antitrust prosecutions are rare.

While the DOJ could theoretically prosecute any Sherman Act violation as a criminal offense, in fact criminal enforcement is reserved for "hard-core" antitrust violations—things that every person should know are illegal. All potentially anticompetitive conduct other than hard-core violations is typically investigated and prosecuted by the DOJ as civil violations.

"Hard-core" antitrust violations include price fixing, bid rigging, and market or customer allocation among horizontal competitors—conduct that usually involves some form of secretive or clandestine agreement. The DOJ assumes that participation in such conduct is consistent with a criminal intent to violate the antitrust laws and thus is appropriate for criminal prosecution. Conversely, visible public actions or agreements are usually deemed inconsistent with the criminal intent necessary for a criminal violation, even if the agreement is later shown to have clear anticompetitive effects. Even an agreement between competitors that may arguably involve setting prices or allocating markets is typically investigated as a civil matter, for example, if the conduct in question is part of a legitimate joint venture or other economic or business integration.

Q 1.4.1 Can a civil investigation be converted into a criminal investigation?

The DOJ may convert a civil investigation into a criminal investigation if, during the investigation, it unearths evidence of naked collusion, and under similar circumstances the FTC can refer such matters that it discovers to the DOJ for criminal investigation. If the DOJ does not find evidence of a hard-core violation, it typically will close a criminal investigation, but could under some circumstances seek to prosecute the conduct as a civil violation.

Q 1.4.2 Are criminal and civil violations of the antitrust laws mutually exclusive?

No, but if the DOJ is pursuing an investigation as a criminal matter, it is highly unlikely that the DOJ or FTC would pursue a parallel civil investigation. State AGs could initiate a parallel civil investigation based on the same conduct criminally charged by the DOJ, and this has occurred in the past. In addition, private civil actions are frequently filed following the public disclosure of a criminal investigation, regardless of whether that investigation is completed or whether any charges have been brought. Although not required as a matter of criminal procedure or constitutional law, the presiding civil-court judge may stay this follow-on civil litigation (or at least the discovery that comes along with it) while the criminal investigation is pending, at the request of either the defendant or the DOJ, if the judge finds that the criminal investigation might be adversely impacted by the civil litigation.

ANTITRUST LAW FACT

The possible consequences of less-than-effective counseling and representation in criminal antitrust matters could well involve serious jail time for individuals and very serious financial and other consequences for companies. The questions and answers that follow are a general description of the criminal antitrust process and provide an overview of this area of antitrust law. *If there is any question about whether specific conduct raises criminal antitrust issues, consult a lawyer who is experienced in antitrust criminal matters*.

Criminal Enforcement

Statute of Limitations

Q 1.5 What is the statute of limitations for a criminal violation of the antitrust laws?

The statute of limitations applicable to criminal antitrust violations is "five years . . . after such offense shall have been committed."[7] But the statute of limitations for a criminal violation of the Sherman Act does not begin to run until the purpose of the violation has been accomplished or abandoned.[8] In the case of a conspiracy, this applies not just to an individual defendant, but to the conspiracy as a whole.

Thus, a key issue often is whether any of the alleged co-conspirators committed an overt act in furtherance of the antitrust conspiracy during the five years preceding the criminal indictment. If they did, the statute would not have run on the matter.

The five-year statute of limitations can also be extended under the doctrine of fraudulent concealment. This applies if the defendant took steps to conceal the wrongdoing and as a result the plaintiff did not discover it despite using reasonable diligence. The government has argued that this concept applies to almost any conduct taken to conceal the illegal activity and, therefore, to almost every conspiracy by its very nature. Under this doctrine, the statute of limitations will be extended (or "tolled") until the plaintiff knew or should have known of the wrongdoing, at which time it would then start to run. (The statute of limitations and the doctrine of fraudulent concealment in private antitrust litigation are discussed at Q 1.33 *et seq.*)

The Criminal Investigation

Q 1.6 How is a criminal investigation conducted?

In a typical matter, once DOJ staff has evidence of a possible criminal violation—in the form of information obtained from a cooperating witness, an amnesty applicant, or informal inquiries—Antitrust Division attorneys will conduct a grand jury investigation. Once a grand jury has been seated to review the suspected conduct, DOJ staff can utilize a number of different investigative techniques. The DOJ frequently uses compulsory process, such as grand jury subpoenas calling for the production of documents or grand jury testimony, to aid in its investigation.

In appropriate cases, the DOJ also has authority, usually in cooperation with the FBI, to use other information-gathering tools, such as wiretaps, electronic surveillance, and the execution of search warrants. DOJ staff is more likely to use such methods if extreme conduct is suspected, high-profile industries or companies are believed to be involved, or there is a heightened risk that evidence may be destroyed or witnesses will flee the United States. In addition, the DOJ frequently obtains information during the course of its investigations through the voluntary cooperation of witnesses, informants, victims, and even potential defendants (usually because such a defendant hopes to better its position with the DOJ by cooperating with the investigation).

DOJ attorneys may at various points in the investigation inform potentially culpable corporations and individuals that they are targets or subjects of the investigation. A "target" is loosely defined as someone for whom the government already has substantial evidence has committed a crime (that is, a putative defendant). A "subject" is someone under investigation who may later become a target if evidence warrants. During the investigation, counsel usually will be given a general sense of the types of evidence implicating its client; they will also be given the opportunity to provide the DOJ with any exculpatory or mitigating evidence.

Q 1.7 Do corporations and their employees need separate counsel during the course of a criminal investigation?

Perhaps. In connection with a criminal investigation, potential conflicts of interest can arise if an attorney represents multiple targets in that investigation. The most common situation involves an attorney who represents both a corporation and its employees, some of whom may be individual targets of the investigation. In general, the Antitrust Division takes the view that a potential conflict of interest may exist if counsel is representing multiple targets of the investigation who have the ability to implicate one another in unlawful conduct. The implication is that counsel may share information or evidence with more than one of the targets, or discourage one target from cooperating in order to avoid implication of another target. In such a case, Antitrust Division staff may demand that the targets obtain separate counsel or, at least, may insist that the targets knowingly waive the potential conflict of interest. If a matter proceeds to trial, representation of multiple defendants with conflicting interests could raise issues about a defendant's right to effective counsel and, in some circumstances, may necessitate separate representations. In some cases, the DOJ will not object to a single attorney representing both a corporation and the corporation's employees who are merely "subjects" or "witnesses."

Q 1.8 How long does a criminal investigation typically last?

The length of criminal investigations varies, usually depending on the number of corporations and individuals being investigated, the conduct at issue, and whether parties are cooperating with the investigation. That being said, most criminal investigations last anywhere from one to two years, from the time subpoenas are served (which usually marks the official beginning of the investigation) to the entrance of a plea agreement, the issuance of an indictment, or closure of the investigation.

Q 1.9 How does the government decide whether to prosecute a company or an individual?

If DOJ staff believes that it has evidence sufficient to prove at trial, beyond a reasonable doubt, that the company or individual in question engaged in a criminal violation of the antitrust laws, it is likely to seek an indictment. The DOJ's criminal-enforcement policy is rooted in the belief that the most effective way to deter and punish antitrust violations is to criminally prosecute individual violators, regardless of whether they were acting for corporate or personal gain. For this reason, the DOJ makes a point of prosecuting the most high-ranking individuals it can identify, and seeking significant jail time. On some occasions, the Antitrust Division may refrain from prosecuting lower-level employees who merely had knowledge of, rather than an active role in, unlawful conduct. In addition, the DOJ virtually always seeks to prosecute corporate entities for the crimes of their employees, even if senior officers of the corporation were unaware of the illegal conduct.

Criminal Indictment

Q 1.10 What are the procedures for issuing a criminal indictment against a company or individual?

In the final stages of an investigation, the DOJ will generally issue a "target letter" to those individuals or corporations the DOJ intends to seek to indict before the grand jury. The target letter informs the target that it has an opportunity to appear before the grand jury, but also advises the target that, in order to testify, it must waive its Fifth Amendment rights against self-incrimination, it must submit to cross-examination by the Antitrust Division, and it cannot have counsel present during questioning. Given these restrictions, and because grand jury testimony can be used at trial, most targets do not accept this invitation to appear before the grand jury. After the issuance of a target letter, counsel for the target may get another opportunity to meet with Antitrust Division attorneys in an effort to dissuade them from proceeding with prosecution.

If the DOJ decides to pursue criminal charges against a company or an individual, DOJ attorneys present evidence of unlawful conduct to the grand jury and request an indictment. If the grand jury votes to indict, as is almost always the case when the DOJ requests it to do so, the indictment is presented to a judge, who issues the indictment and compels the attendance of the defendant at an arraignment. Absent a plea agreement or dismissal, the matter then proceeds to trial.

Q 1.11 Is there an opportunity to negotiate a plea before an indictment is returned?

Yes. Once it becomes clear that the DOJ will pursue the indictment of a target, DOJ attorneys usually are willing to enter into plea negotiations. This provides counsel with an opportunity to lobby for more-favorable treatment or a departure from proposed fines or penalties. But if the DOJ is seeking penalties unacceptable to the target, or if the target believes the DOJ does not have evidence sufficient to convict, the target can refuse to negotiate, waiting to see if an indictment actually results. Moreover, even if the grand jury returns an indictment, the DOJ must then obtain a conviction at trial in federal court. Because proving a violation beyond a reasonable doubt is a high hurdle and the DOJ loses its fair share of criminal trials, agency staff often is willing to discuss a plea agreement even after the grand jury returns an indictment, and defendants often accept plea agreements before a trial or verdict to avoid the stiffer penalties a conviction likely would bring.

Penalties

Q 1.12 What types of penalties do companies and individuals face in connection with a criminal enforcement action?

Criminal penalties under the Sherman Act are substantial. The current maximum Sherman Act corporate fine is $100 million per violation; the maximum individual fine per violation is $1 million. The maximum Sherman Act jail term is ten years per violation.

To deter criminal antitrust behavior, the DOJ enforcers seek stiff penalties for violators, and jail sentences of a year or more are not uncommon.

In addition, criminal antitrust actions frequently include other charges, such as wire fraud and mail fraud, that may expose the defendants to additional penalties. For example, the statutory penalty for wire or mail fraud is $250,000 and twenty years in prison per violation, and it is not uncommon to see multiple counts of wire or mail fraud based on individual incidents involving telephone or mail communications. This type of pleading, which is relatively new to the antitrust arena, has long been used by federal prosecutors to increase potential penalties for defendants and thus, presumably, to increase the chances of defendants being willing to seek some form of plea bargain to minimize their exposure.

Q 1.12.1 Is there any way for corporations or individuals involved in unlawful activities to obtain favorable treatment?

A corporation or an individual can potentially avoid prosecution under the antitrust laws through participation in the DOJ's leniency program. The Antitrust Division's Corporate Leniency Policy and its Leniency Policy for Individuals are also known as the amnesty program. The vast majority of antitrust investigations and convictions over the last few years have been the result of the amnesty program.

ANTITRUST LAW FACT

The record prison sentence for a single antitrust violation is forty-eight months, which shipping executive Peter Baci received in January 2009 for his participation in a conspiracy to suppress and eliminate competition in the coastal water freight transportation services between the continental United States and Puerto Rico, and which ready-mix concrete executive Steven Keith VandeBrake received in February 2011 for his participation in a conspiracy to fix prices on sales of ready-mix concrete.[9] The largest corporate fine imposed to date in the United States is $500 million, which F. Hoffmann-La Roche Ltd. agreed in 1999 to pay for leading a worldwide conspiracy to raise and fix prices and allocate market shares for certain vitamins sold in the United States and elsewhere.[10]

Leniency Policies and Amnesty

Q 1.13 How does a corporation or individual obtain amnesty?

Under the amnesty program, a corporation or an individual can potentially avoid prosecution under the antitrust laws by voluntarily reporting to the DOJ its or their involvement in unlawful activities, as long as DOJ staff is unaware of the illegal conduct at that time. There are a number of additional cooperation terms an applicant must fulfill in order to officially be awarded amnesty, including full cooperation with the DOJ throughout the investigation and any subsequent litigation. By being the first in the DOJ's door to report involvement in criminal conduct, a corporation or an individual can obtain an "amnesty marker" and preserve its spot at the front of the line.[11]

Q 1.13.1 May a company or individual qualify for amnesty if it is not the first informant?

Typically, no; the DOJ awards amnesty to the first informant only. But all is not lost; a company or individual implicated in an antitrust cartel can still obtain more favorable treatment from the DOJ enforcers even if it is not the first in the door, if it provides useful information and pledges cooperation with the investigation. This more favorable treatment can include reduced penalties and perhaps prosecution of fewer company employees.

Civil Enforcement

Statute of Limitations

Q 1.14 Is there a statute of limitations for government enforcement of a civil violation of the antitrust laws?

In general, no. The only limitation on civil actions by the government is with respect to those seeking money damages suffered by the United States. As is true for all damage plaintiffs, a four-year statute of limitations applies to such damages actions.[12] But even here it is common for government and private plaintiffs to assert that the statute was tolled or extended by the deliberate efforts of the defendants to conceal their conduct (the so-called fraudulent concealment doctrine). This doctrine applies if the defendant took steps to conceal the wrongdoing and the plaintiff did not discover it despite having exercised reasonable diligence. In such cases, the statute of limitations will be extended back to when the plaintiff knew or should have known of the wrongdoing.

Surprisingly, the law is not absolutely clear as to whether a government enforcement action for injunctive or equitable relief is subject to any limitations period. As a practical matter, a formal limitations period often has little relevance if the government seeks to enjoin either an ongoing violation or the possibility of recurrence of particular past conduct. Equitable doctrines such as mootness, however, may limit the ability of the government to enjoin repetition of past conduct that is unlikely to recur.

Civil Enforcement Investigation

Q 1.15 How is a civil enforcement investigation conducted?

Once the investigating staff has determined the scope and focus of its investigation and defined its theory of the case, it sets about obtaining useful documentary and testimonial evidence. The FTC and DOJ often initiate investigations with a voluntary request for information. The government agencies also rely on compulsory process (subpoenas and civil investigative demands) to obtain the evidence they need to investigate matters. Depending upon the nature of the conduct at issue, investigators will collect business data about the company, the industry, and the alleged violation. This often includes sales and pricing databases relating to the products or services under investigation. Government economists typically analyze this data in order to determine whether the investigated conduct led to higher prices or other harmful effects to consumers in the market. In the case of pending mergers, the economists use this data to predict whether the transaction is likely to result in these effects in the future.

The process of requesting and collecting this information in a civil investigation is discussed in detail in the next chapter.

Q 1.15.1 Does a company under investigation have access to information collected by the government?

During an FTC or DOJ investigation, the company under investigation has very limited access to the evidence collected by the agency. This is the result of both the statutory confidentiality protections afforded information submitted by third parties, like customers and competitors, and the agencies' desire to protect their investigative processes by keeping secret the identity of witnesses and what information they provide. Thus, while the FTC or DOJ staff typically will discuss the conduct and potential theories of harm it is investigating, it usually will not identify third-party sources or the evidence provided by them. The agencies' reluctance to discuss key evidence can even carry over to that information submitted by the companies under investigation. For example, the agencies typically will not explain during an investigation how they are using the data or documents collected by the companies.

Once an investigation is completed and the staff is prepared to make a recommendation to its managers within the agency, however, the staff usually will provide the parties under investigation with a general sense of the type of evidence upon which its recommendation rests. For example, the company usually will be able to infer whether there are customers complaining, competitors who have weighed in, documents supporting the staff's theory, or data analyses that support a challenge. Only after the FTC or DOJ files suit will the company have access to the third-party evidence collected by the agency. Because much of this evidence typically contains competitively sensitive information, the court often enters a protective order limiting access to the defendant's lawyers.

Although there are some limited exceptions, investigatory materials are generally not subject to disclosure under the Freedom of Information Act or similar statutes.

Resolution/Remedies

Q 1.16 What remedies may the government pursue in a civil enforcement action?

The FTC and DOJ can seek a number of remedies in the enforcement of civil antitrust violations. In general, these remedies are designed to do one or more of the following: halt the unlawful conduct; prevent reoccurrence of the conduct; restore competition in the market; force the violator to pay back any ill-gotten gains; and deter future violations. For civil conduct matters, the primary remedy sought by the agencies is an injunction or a cease-and-desist order that halts the offending conduct and prevents the defendant from continuing it in the future. Both agencies may also seek other relief in civil conduct cases, such as restitution or disgorgement of unlawful gains. The DOJ may also seek to recover treble damages suffered by the United States as a consumer.[13] For merger challenges, both agencies typically will seek an injunction to block a pending deal and divestiture or rescission for mergers already completed. Finally, both agencies may seek fines or other penalties for violations of existing consent decrees or orders.

Q 1.16.1 If an investigation is closed without action, is that a final resolution of the matter?

Technically, the fact that the FTC or DOJ closes a matter does not preclude the agency from reopening the matter at some point in the future. As a practical matter, however, it is very rare for the agencies to reopen a closed investigation. In the few instances where this has occurred, it was based on new evidence showing that the conduct had actually resulted in higher prices or other harmful effects on consumers.

Q 1.17 How and when is an investigation converted into an enforcement action?

Although there are several notable differences between the FTC and DOJ, both agencies follow similar procedures when staff recommends taking an enforcement action. After the legal and economic staffs complete their investigation, they typically will each prepare a detailed written recommendation for staff management—the Assistant Director at the FTC and the Section Chief at DOJ. Staff management will then provide its views on the recommendation and forward it to the agency's front-office personnel. On antitrust matters, the FTC front office includes the heads of the Bureau of Competition and Bureau of Economics—the directors and deputy directors. In the DOJ front office, the DAAGs initially review staff recommendations. These front-office personnel then forward their recommendations to the ultimate decision maker for the agency—the five commissioners at the FTC and the AAG at the DOJ. (This is the biggest difference between the FTC and DOJ: While the DOJ has one decision maker in the AAG, the FTC has five, with each commissioner getting one vote. A simple majority vote of the participating commissioners decides what action the agency will take. As a result, there are typically more meetings at the decisional level at the FTC than at the DOJ.)

The parties subject to the potential enforcement action usually will have an opportunity to present their evidence and arguments at each level of the recommendation process. Oftentimes the parties will prepare a memorandum summarizing their arguments and will have separate meetings with staff management, the front office, and the agency's decision maker.

Q 1.17.1 When a formal complaint is issued against a company, who hears the case?

Both the FTC and DOJ can file antitrust enforcement actions in federal court. One major difference between the two agencies, however, is that, while the DOJ must file all of its actions in federal court, the FTC has an alternative forum—its own administrative adjudication process where it can also file complaints. DOJ actions are heard by a federal district court judge, with any decision appealable to the appropriate court of appeals.

Depending on the relief sought and the FTC's preferred venue, the FTC can either file an action in federal district court, before an administrative law judge in administrative litigation, or both. In conduct cases where the FTC is seeking an order to stop the unlawful behavior, prevent its recurrence, and restore competition to the market, it can proceed in either federal court or administrative litigation. Historically, the FTC has initiated most conduct (non-merger) cases in administrative litigation before an ALJ. The function of the ALJ is to conduct adjudicative hearings and issue preliminary decisions with respect to the administrative complaints filed by the FTC. Although the FTC Rules of Practice[14] provide for somewhat relaxed procedures, recent ALJs have tended to apply the Federal Rules of Evidence and to conduct adjudicative hearings in a manner similar to trials in federal court. The ALJ renders an initial decision, which can then be appealed to the full commission.

The administrative litigation process can produce findings of a violation of law and can support an order preventing further violations, but it cannot produce equitable relief, such as a preliminary injunction, restitution, or disgorgement. When the FTC seeks such relief, it must bring actions in federal district court. For example, when challenging unconsummated mergers, the FTC typically files two complaints: one in federal district court seeking a temporary restraining order (if necessary) and a preliminary injunction to prevent consummation of the transaction, and one in administrative litigation seeking a permanent injunction. Although in these situations both the federal injunction action and the administrative trial can move forward on parallel paths, the preliminary injunction decision will almost always come first and frequently is determinative as a practical matter. This is because most mergers do not survive as a business matter if the federal court significantly delays the closing by entering a preliminary injunction and because the FTC typically will not pursue the administrative trial if it loses the preliminary injunction and the parties then consummate the deal (although it has done so in several recent cases). Thus, most unconsummated-merger challenges are heard only by a federal district court judge, subject to court of appeals review.

Q 1.17.2 In the case of an FTC trial before an administrative law judge, what is the avenue of appeal?

Following the initial decision by an ALJ, there is an opportunity to appeal to the full commission. At that point, the commission conceptually is no longer a prosecutor, but rather now a judge. Once the commission approves issuance of a complaint against a company, the commissioners, their attorney advisors, attorneys in the general counsel's office, and any other personnel who might be involved in reviewing the matter on appeal are recused from any further involvement in prosecuting the matter. Any ex parte communications regarding the matter between staff members prosecuting the case (referred to as complaint counsel) and any commissioners or their advisors are strictly prohibited, so as to preserve the "independence" of the commission from the ALJ proceedings. Of course, there has historically been considerable cynicism about whether the same body that initiated the prosecution is likely to be a completely objective reviewer of the evidence in its role as a judge.

On appeal, the commission is supposed to conduct a de novo review of the facts and the law, meaning no particular deference is given to the ALJ's findings. The review is conducted on the paper record developed before the ALJ, the parties' briefing on appeal, and one or more oral arguments before the full commission.

A company may appeal an adverse decision issued by the commission to any federal court of appeals covering a geographic area in which the company resides or carries on business. If the company conducts business in multiple circuits, it may choose the circuit in which to appeal. On appeal, the commission's factual findings, if supported by substantial evidence, are treated as conclusive. The commission's legal conclusions are reviewed de novo.

Settlements

Q 1.18 How does a company settle a civil matter with the government?

While there are some differences, both agencies follow similar basic procedures for settling a civil matter. At any point in the investigation, the company can approach the agency staff with a proposed settlement. Staff then evaluate whether the settlement sufficiently remedies the competitive concerns it has identified. If it is early in the investigation, it may take more time for the staff to evaluate the settlement. Later in the investigation, staff likely will be in a better position to promptly convey its views. If the staff concludes that a settlement is within reach, it typically will negotiate the details of the remedy with the parties after input from its management and then send the settlement proposal to the agency decision maker for approval. If the staff concludes that the proposed settlement is deficient, it will either continue its investigation or make its recommendation to the agency decision maker to challenge the conduct in court.

The fact that the FTC has five decision makers (each of the commissioners), while the DOJ has one (the AAG), can have a significant impact on the settlement process at the agencies. Not surprisingly, having one decision maker generally makes it easier for DOJ staff to seek guidance throughout the investigation and settlement negotiation and determine what settlement the AAG likely would accept. This can make the process more transparent and predictable for the merging parties. Conversely, having five commissioners, each with an equal vote and often different views on a matter, can significantly reduce the ability to predict what settlement a majority of the commissioners ultimately will accept.

The most common method for resolving a matter with the DOJ is through the issuance of a consent decree. Settlements at the FTC are called consent orders.

Q 1.18.1 How are DOJ antitrust consent decrees issued?

Once the details of the decree are negotiated, the investigating staff will forward its recommendation, with input from the front office, for approval by the AAG. In addition, the Tunney Act[15] (adopted during the Nixon Administration as a reaction to what were believed to be unduly favorable settlements of antitrust matters) requires that a federal court review and approve every DOJ antitrust consent decree (but not FTC consent orders) before becoming final. The DOJ files a complaint, the proposed consent decree, and a competitive impact statement describing the settlement in district court and also publishes these documents in the *Federal Register*. The consent decree is subject to a sixty-day public comment period (which may be lengthened or shortened by the court), at the end of which the DOJ will publish all comments received together with its responses. Thereafter, the court will decide under a broad public-interest standard whether to accept and enter as final the consent decree. As a practical matter, a district court has little discretion to reject a decree under the Tunney Act, and it is extremely rare for that to happen.

Q 1.18.2 How are FTC antitrust consent orders issued?

Similar to the DOJ process, the investigating staff forwards its recommendation, with input from the Bureau of Competition front office, to the ultimate decision maker, here the commission. One difference between the DOJ and FTC, however, is that the FTC has a Compliance Division with specific responsibility for ensuring that a proposed consent agreement is likely to present a viable remedy and can be enforced by the agency. The Compliance Division will also provide its recommendation on the proposed order. If the commission accepts the proposed consent order by majority vote, it then publishes it, along with an analysis of the settlement, for a public comment period of at least thirty days. The commission then considers all public comments received and staff's response to those comments, and votes on whether to accept the consent order. If the commission votes to accept the order, which happens in virtually all cases, the accompanying decision and order becomes final. If the commission decides not to accept the consent agreement, it is no longer binding on the company, and the investigation or litigation resumes.

Q 1.19 Do settlements operate as a finding of liability in lawsuits brought by third parties?

The specific factual scenarios underlying the resolution of the government action and the subsequent private litigation drive the answer to this question. In contrast to litigated judgments in government enforcement actions, which may be given conclusive effect under the doctrine of collateral estoppel or may be used as prima facie evidence of an antitrust violation, government settlements generally cannot be used to establish liability in subsequent litigation by third parties. Under certain very limited circumstances, a consent decree can be used as prima facie evidence of an antitrust violation—if it is a final resolution of an antitrust action brought by the government, and if the settlement was entered into after testimony was taken.

Q 1.20 What is the typical duration of a case from the time a complaint is issued until a final decision?

The timing of litigation commenced by the FTC and DOJ varies depending on the nature of relief sought and the venue. Experience in recent years is that a case tried before an FTC ALJ typically takes twelve to eighteen months to reach the point of an ALJ decision (depending on the size and complexity of the matter), eighteen to twenty-four more months after that to reach a commission decision on appeal, and another year for resolution on appeal to a federal circuit court. Thus, matters generally took a total of between three and one-half and four and one-half years to reach final resolution. In 2009, new FTC Rules of Practice were adopted in an attempt to significantly shorten how long decisions take. Under those new rules, a case tried before an ALJ would be expected to lead to an ALJ decision in nine to thirteen months, and the commission decision would be expected to be issued within three to six months after that. If rigorously implemented, these measures would reduce the average time from complaint to final resolution to around two and one-half years. These deadlines have yet to be fully tested in practice.

A conduct case tried in district court by the FTC or DOJ is, of course, subject to the schedule set by the court. Recent experience indicates that a typical case takes anywhere from one to three years to reach judgment, followed by another year or so on appeal.

Preliminary injunction actions filed by the FTC or DOJ in merger cases are also subject to the schedule of the court. Because courts usually are sympathetic to the merging parties' request to rule quickly, however, injunction cases typically take between three and six months from initiation to ruling. Permanent-injunction cases in federal court take usually six to nine months.

Q 1.21 Can a company obtain an advance ruling from the government about the legality of a particular course of conduct?

In what are known as "business review letters" or "advisory opinions," the Antitrust Division and the FTC may, upon request, review proposed conduct and state their enforcement intention regarding that conduct. The requesting parties cannot initiate the proposed conduct while the review is pending, and the government is not required to complete its review in any specified time, which introduces uncertainty and potential delay. A request for a business review letter must be made in writing and must provide all relevant information. On occasion, the government may ask for additional information from the requesting entity or others. After relevant materials have been submitted, the government may either state its present enforcement intention, refuse to take a position, or take other "appropriate" action. The government's response to a request for a business review letter is not judicially reviewable and does not affect the rights of third parties. The request for a business review letter and the government's response are generally made publicly available.

As a practical matter, these statements of enforcement intentions are only useful in limited circumstances. Understandably, the criteria the agency will apply in these public statements are different from, and likely more conservative than, those it would apply if it were making a decision to challenge the conduct as a violation of the antitrust laws. In many (perhaps most) circumstances, a company can get practical guidance from experienced antitrust lawyers that is as good as, or better than, what it would receive from a statement of enforcement intentions, and without the public disclosures that are inherent in the business review or advisory opinion process. But if delay and disclosure are not issues, and if some formal level of comfort is necessary for some or all of the participants, these processes can be useful.

Private Enforcement

Standing

Q 1.22 Who can bring private lawsuits for violations of the federal antitrust laws?

Any person who is injured in his or her "business or property" as a result of conduct forbidden by the federal antitrust laws may file a private lawsuit under section 4 of the Clayton Act. "Person" includes not only individuals, but also corporations, partnerships, associations and other entities. Sometimes a representative may sue on behalf of a person entitled to bring a lawsuit, such as a shareholder bringing a suit on behalf of a corporation allegedly injured, or a state attorney general bringing a *parens patriae* action on behalf of citizens of a state. As discussed below (see Q 1.27), any person entitled to bring a lawsuit under section 4 may sue on behalf of a class of persons under Rule 23 of the FRCP, just as in any other federal litigation.

Q 1.22.1 Can a foreign plaintiff sue in U.S. district courts for violations of U.S. antitrust laws concerning trade or commerce outside the United States?

Yes, in certain circumstances. Under the Foreign Trade Antitrust Improvements Act (FTAIA),[16] a foreign plaintiff can sue in U.S. district courts for violations of U.S. antitrust laws with respect to conduct involving trade or commerce with foreign nations, but only if:

- such conduct has a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce; and
- such effect gives rise to a claim under the Sherman Act—and, even then, only when their foreign injuries are independent of any adverse domestic effect.

This means that a foreign plaintiff seeking redress under the U.S. antitrust laws must assert a claim arising from the effects of the alleged anticompetitive conduct on U.S. commerce, and not simply from the alleged effects in some jurisdiction outside the United States. Thus, a foreign plaintiff can sue for damages suffered in the United States, or potentially for damages suffered outside the United States, but only if those damages arise from the "direct" effects on commerce in the United States. What it takes to show "direct effects" has been the subject of considerable debate. Two schools of thought have developed. One school of thought construes an effect as "direct" only if it "follows as an immediate consequence of the defendant's . . . activity."[17] By contrast, the Second and Seventh Circuits have construed the term "direct" to mean only "a reasonably proximate causal nexus."[18] However, even under the more liberal "direct effects" standard, the Seventh Circuit has made clear that the FTAIA bars claims based upon the alleged price fixing of component parts sold and integrated abroad into final products that are eventually exported to, and sold within, the United States because such price fixing fails the FTAIA's "direct effects" test.[19] Furthermore, a foreign plaintiff cannot sue for damages suffered outside the United States, even from the same alleged conduct, if those damages are merely cumulative of any damages suffered in the United States.

A plaintiff seeking to challenge conduct involving trade or commerce outside the United States will face different pleading burdens depending on the circuit within which it sues. For example, in the Seventh and Third Circuits, a plaintiff need only *plead* (consistent with Rule 12(b)(6)) that foreign conduct has the requisite effects sufficient to meet the FTAIA exception.[20] In those jurisdictions, the requirements set out in the FTAIA exception are simply additional elements that a plaintiff must prove to establish an antitrust claim based on foreign conduct. By contrast, other circuits, such as the D.C. and Ninth Circuits,[21] view these elements of the FTAIA as pertinent to the court's subject matter jurisdiction. Thus, defendants can challenge the jurisdiction of the court to hear the case at the pleading stage under Rule 12(b)(1), which allows defendants to challenge the evidentiary basis of the claim. It remains to be seen whether the Supreme Court will ultimately resolve this split in authority.

Q 1.22.2 Can private plaintiffs sue in the United States for violations of foreign antitrust laws, or in foreign jurisdictions for violations of U.S. antitrust laws?

No. Both U.S. and foreign courts generally have held that the courts of one nation will not enforce the antitrust laws of another. U.S. courts have done so out of a concern that, in the antitrust context, the legally and economically technical nature of examining foreign law, compared with U.S. law, would mean lengthier proceedings, appeals, and more proceedings—to the point that procedural costs and delays could themselves threaten to interfere with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system. In addition, the treble-damages provision of the Clayton Act, while designed primarily as a remedy, is intended at least in part to penalize wrongdoers and deter wrongdoing. Because it is a well-established principle of international law that the courts of one country should not execute the penal laws of another, U.S. courts have expressed little doubt that foreign courts would quite properly refuse to entertain Sherman Act claims, and, in turn, have refused to exercise even supplemental jurisdiction over claims brought under foreign antitrust laws.

While U.S. courts will not apply foreign antitrust law, the United States has entered into a number of agreements to facilitate the reciprocal enforcement of antitrust laws, including the International Antitrust Enforcement Assistance Act[22] and cooperation agreements with the European Union (1991 and 1998),[23] Canada (1995 and 2004),[24] and Australia (1982 and 1999),[25] as well as other jurisdictions.[26] The U.S. antitrust enforcement agencies also frequently collaborate with competition agencies in other jurisdictions on investigations with international dimensions including merger reviews, criminal matters and civil non-merger matters.

Q 1.23 Generally, what must a plaintiff demonstrate to bring a private action for a violation of state antitrust laws?

All fifty states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have some type of antitrust statute. Although these laws are not entirely uniform, many track federal antitrust law, including sections 1 and 2 of the Sherman Act, and a number track the Clayton Act, and the Robinson-Patman Act as well.[27] Thus, to maintain a private cause of action under state antitrust law, a plaintiff in a private action must generally plead and prove the same elements as a plaintiff in a federal action.

However, state standing law differs significantly from federal antitrust law in at least one major respect: approximately twenty-seven states, Puerto Rico, and the District of Columbia expressly permit indirect purchaser plaintiffs (who cannot recover money damages under federal law) to recover such damages for state antitrust violations. Indirect purchasers include parties who did not directly purchase the allegedly overpriced goods from the wrongdoers, but who can show that they were damaged by the alleged overcharge, even though they were further down the purchase chain.

Still, the mere fact that a state permits indirect purchasers to bring antitrust claims for monetary damages does not necessarily resolve the issue of standing. Indeed, there remains some controversy among the federal district courts regarding the extent to which federal law governs a state court's consideration of the alleged proximate or direct causal connection between the defendant's antitrust violation and the plaintiff's harm with respect to state claims. The majority of courts follow federal standing principles. That means that, in most states, to address antitrust standing, state courts tend to evaluate the plaintiff's harm, the alleged wrongdoing by the defendant(s), and the relationship between them. To do so, courts weigh the following five factors (generally known as the *Associated General Contractors* or "*AGC*" factors):

(1) the nature of the plaintiff's alleged injury, including whether the plaintiff was a participant in the relevant market;

(2) the directness of the alleged injury;

(3) the speculative nature of the alleged harm;

(4) the risk of duplicative recovery; and

(5) the complexity involved in apportioning damages.

In several recent cases, however, the district courts have concluded that the *AGC* test does not apply to claims under state antitrust laws. Thus, in an increasing number of states, standing may be conferred on a party that simply "meets the minimum constitutional requirements" for standing. Others, however, while rejecting the applicability of the *AGC* test, have nonetheless applied a similar remoteness analysis to determine antitrust standing under state antitrust law. For example, although North Carolina does not apply the *AGC* factors, North Carolina courts apply a standing test that considers:

(1) whether a plaintiff has adequately alleged causation,
(2) the speculative nature of plaintiff's claims, and
(3) the complexity of apportioning damages.[28]

In addition, many states also permit consumers to recover restitution or damages under state consumer protection laws, state deceptive and unfair trade practices statutes, and/or state unjust enrichment laws.

Q 1.24 What must a private antitrust plaintiff allege to establish standing to assert a claim for damages under section 4 of the Clayton Act?

Antitrust standing is best understood as a search for the proper plaintiff to enforce the antitrust laws. While section 4 of the Clayton Act broadly empowers any person to sue provided he is injured in his business or property by reason of anything forbidden in the antitrust laws, Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Instead, to determine who is and is not a proper plaintiff to enforce the antitrust laws, courts evaluate the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them.

Because there is a seemingly infinite variety of claims that may arise in the antitrust context, there is no black-letter antitrust standing rule that will dictate the result in every case. Thus, while a plaintiff's status as a consumer or competitor or supplier in the restrained market is relevant to the issue of standing, it is not determinative. While consumers and competitors are most likely to suffer antitrust injury, there are situations in which other market participants, such as potential entrants, licensors, landlords, and dealers, could suffer antitrust injury. It is not a plaintiff's status as a competitor or consumer that confers antitrust standing; the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff is what determines the result.

To bring a private cause of action for damages under the federal antitrust laws, a private plaintiff generally must show:

(1) it suffered injury-in-fact to its "business or property";

(2) the injury was "by reason of" an antitrust violation;

(3) a proximate or direct causal connection between the defendant's antitrust violation and plaintiff's harm (under federal law, this means a direct purchaser relationship);

(4) antitrust injury; and

(5) reasonably quantifiable damages.

If these elements are proven, the plaintiff may recover treble damages (that is, triple the actual damages caused by the defendant's unlawful conduct) and the cost of suit, including reasonable attorney fees.

Q 1.24.1 What qualifies as "injury to business or property"?

An injury to "business" is understood in the ordinary sense and generally refers to injury to one's commercial interests or enterprises, including one's employment or occupation. Not surprisingly, then, courts have found injury to a plaintiff's "business" where there is some kind of injury that can properly be characterized as economic. In addition, deprivation of future business prospects, including the loss by an individual of the opportunity to engage in employment, can also qualify as an injury to business. Courts generally have held that preventing a person from engaging in business and driving him out of business through anticompetitive means are equally unlawful. In order to demonstrate that it has suffered a loss of business opportunity, a private plaintiff must show a clear intention to enter the business and some level of preparation (a showing that generally involves evidence that the plaintiff has taken substantial demonstrable steps to enter an industry). By contrast, a plaintiff does not suffer injury to business or property and cannot recover damages for losses of inchoate expectations in property, or where it has taken only preliminary steps to engage in a business enterprise.

"Property" is construed even more broadly than "business" under section 4 of the Clayton Act and tends to encompass any interest the law protects. For example, a valid contract is property within the meaning of the antitrust laws. A person whose property is diminished by a payment of money wrongfully induced also is injured in his property. So, too, customers who pay a higher price for goods purchased for personal use are injured in their property under the antitrust laws. By contrast, because Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation, the property requirement is not met when a state or governmental agency claims injury to its general economy.

Q 1.24.2 How does a plaintiff show that the injury was "by reason of" an antitrust violation?

Showing that the defendant's conduct directly caused the antitrust plaintiff's injury is not sufficient to demonstrate that the injury was caused by an antitrust violation. The claimed injury also must be of a type that the antitrust laws were intended to prevent, as opposed to injury caused by increased competition in the market. For example, if a retail company lost business because one of its competitors simply opened new stores near that company's stores, those losses would not be the type of injury covered by the antitrust laws. As the Supreme Court has explained, the antitrust laws were enacted for the "protection of *competition*, not *competitors*." The antitrust injury requirement ensures that a plaintiff can recover only if its loss stems from a competition-*reducing* aspect or effect of the defendant's behavior and the plaintiff can establish the necessary link between that behavior and the plaintiff's claimed injury.

Q 1.24.3 How does a plaintiff prove a causal connection between the defendant's antitrust violation and the plaintiff's injury?

A plaintiff cannot establish standing to bring a private antitrust action simply by tracing any injury, no matter how remote, back to a defendant's antitrust violation. Federal courts have consistently held that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. The question of whether a plaintiff may recover for the injury it allegedly suffered by reason of the defendant's conduct, therefore, cannot be answered simply by reference to the broad language of section 4 of the Clayton Act. Instead, the question requires courts to evaluate the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them. In evaluating whether a plaintiff's injury is too remote, courts weigh the following five factors (generally known, as previously indicated, as the *Associated General Contractors* or "*AGC*" factors):

(1) the nature of the plaintiff's alleged injury, including whether the plaintiff was a participant in the relevant market;

(2) the directness of the alleged injury;

(3) the speculative nature of the alleged harm;

(4) the risk of duplicative recovery; and

(5) the complexity in apportioning damages.

No one factor is dispositive. In weighing these factors, most courts have found that injury to creditors, employees, officers, and shareholders of antitrust victims are too derivative in nature to confer antitrust standing. (See also the discussion of the indirect purchaser doctrine, below at Q 1.25.)

Q 1.24.4 How does a plaintiff show "antitrust injury"?

Generally, the antitrust injury doctrine was created to filter out complaints by competitors and others who may be hurt by production efficiencies, higher output and/or lower prices, or any other result that the antitrust laws were designed to encourage. A plaintiff, therefore, can prove antitrust injury only if the losses it suffered resulted from a competition-reducing aspect or effect of the defendant's conduct. To the extent a plaintiff's claimed injuries result from heightened or continued—rather than lessened—competition, no antitrust injury will be found. Likewise, where injury results only from a defendant's pro-competitive conduct, courts will not find antitrust injury.

However, not all reductions in competition cause antitrust injury. When a firm, or even a group of firms adhering to a vertical agreement (one between entities at different levels of the distribution chain), lowers prices but maintains them above predatory (essentially, below cost) levels, the business lost by rivals—even if those rivals go out of business—cannot be viewed as an anticompetitive consequence of the claimed violation. This is because a firm complaining about the harm it suffers from non-predatory price competition is really claiming that it is unable to raise prices or keep them at levels higher than its rival, and thus there is no consumer benefit to protect. In addition, no antitrust injury will be found where the defendant's conduct injures the plaintiff individually without having an adverse effect on competition as a whole. This is because indispensable to any Sherman Act antitrust claim is an allegation that *competition* has been injured, rather than merely one or more *competitors*. Thus, for example, unilaterally terminating one exclusive distributor (consistent with the terms of the agreement) in favor of contracting with a different exclusive distributor may injure the terminated party—indeed, it may put it out of business—but it will not, in and of itself, constitute antitrust injury. Courts also may refuse to find antitrust injury if the alleged injury resulting from a competitor's conduct would be better addressed through a breach-of-contract or business-tort cause of action.

An antitrust plaintiff seeking only injunctive relief must also allege and ultimately prove only "threatened" (versus "actual") antitrust injury—that is, threatened injury or loss of the type the antitrust laws were designed to prevent and that flows from an unlawful competition-reducing aspect or effect of the defendant's conduct.

Q 1.25 What is the indirect purchaser doctrine?

Even assuming that a plaintiff is able to show antitrust injury, the antitrust standing inquiry is not over. This is because a plaintiff's right to sue for money damages in federal court is subject to certain further limitations, based upon policies found by the courts to be inherent in the structure and purpose of the antitrust laws. For example, where a plaintiff's injury is derivative of a more direct injury to some other person and that person would have a strong motivation to pursue its own antitrust claim against the defendant, standing is likely to be denied. This is the rationale underlying the Supreme Court's decision in *Illinois Brick*,[29] which held that indirect purchasers (persons or entities that do not deal directly with or buy directly from a defendant) are too remote to suffer true "antitrust injury" and therefore do not have standing under federal antitrust law to pursue antitrust claims for money damages. This is known as the "indirect purchaser doctrine."

The *Illinois Brick* Court based its decision on several considerations. First, permitting indirect as well as direct purchasers to sue for the same illegal overcharge would expose defendants to a risk of multiple liability. Second, the Court deemed apportioning damages among different purchasers at different levels of the distribution chain to be exceedingly complex and uncertain, holding that it would impose too great a burden on the courts. Third, the Court noted that the antitrust laws would be better enforced if direct purchasers could seek the full overcharge rather than allowing every potential plaintiff to sue only for the amount it could show it absorbed.

Q 1.25.1 Can indirect purchasers obtain relief for antitrust violations after *Illinois Brick*?

Yes, in limited circumstances. While federal courts continue to invoke the *Illinois Brick* indirect purchaser doctrine in routinely dismissing antitrust claims for money damages brought by indirect purchaser plaintiffs, there are two narrowly defined exceptions: (1) if an indirect purchaser received goods from the direct purchaser according to a pre-existing "cost-plus contract"; or (2) if the direct purchaser is controlled or owned by another person or entity affiliated in some material way with the defendant-seller. The reasoning behind the first exception is that cost-plus contracts present a situation different from the typical indirect purchaser scenario because the direct purchaser is insulated from any overcharge by the fact that its customer has agreed to buy a fixed quantity at cost (whatever that may be) plus an agreed upon mark-up. The rationale of the second exception is that enforcement in those situations is very unlikely because the direct purchaser affiliated with the alleged wrongdoer would have little or no incentive to seek recovery.

As a variant of the second exception, courts have recognized a "co-conspirator" exception to the *Illinois Brick* indirect purchaser doctrine, where the controlled or owned middleman is a direct participant in the conspiracy. In such cases, the defendant(s) and the middlemen are viewed as a single entity—the conspiracy—from which the plaintiff is the direct purchaser. Because of the risk of multiple liability, however, most courts have declined to recognize the co-conspirator exception to *Illinois Brick* where alleged intermediary co-conspirators are not joined as co-defendants.

In addition, many courts have held that indirect purchaser plaintiffs seeking only injunctive relief are also excepted from the *Illinois Brick* prohibition. The rationale behind this exception is that problems of double recovery and speculative damages become irrelevant when only equitable relief is sought. The impact of *Illinois Brick* also has been somewhat softened by the large number of states that permit indirect purchasers to recover under their antitrust laws with what are known as *Illinois Brick* repealer statutes (see Q 1.25.2, immediately below; see also Q 1.23, above) or under state consumer protection or unfair and deceptive trade practices laws.

Q 1.25.2 What are *Illinois Brick* repealer statutes?

A number of state legislatures responded to *Illinois Brick* and the Supreme Court's prohibition on indirect purchaser suits under federal antitrust laws by enacting "*Illinois Brick* repealer statutes" (sometimes referred to as "indirect purchaser statutes"), which expressly allow indirect purchasers to sue for antitrust damages under that state's antitrust laws, even though they cannot do so under federal antitrust laws. The *Illinois Brick* repealer statutes have been upheld against claims of preemption under federal antitrust law and continue to provide relief to indirect purchaser plaintiffs under state law. In addition, a handful of states have repealed *Illinois Brick* through case law.

Q 1.26 What must a private antitrust plaintiff allege to establish standing to assert a claim for injunctive relief under section 16 of the Clayton Act?

Section 16 of the Clayton Act allows any person, firm, corporation, or association to sue for and obtain injunctive relief against threatened loss or damage caused by a violation of the antitrust laws. The plain language of the statute makes clear that a private plaintiff faces different requirements of proof when asserting a claim for injunctive relief than when asserting a claim for money damages. Specifically, a plaintiff seeking treble damages has to show actual injury, whereas a plaintiff seeking injunctive relief needs only to show "threatened" loss or damage. Similarly, while section 4 requires a plaintiff to show injury to "business or property," section 16 contains no such limitation. In view of these differences, courts uniformly recognize that the antitrust standing analysis is more flexible and less demanding for claims for injunctive relief than it is for those seeking money damages.

ANTITRUST LAW FACT

At present, twenty-seven states, the District of Columbia, and Puerto Rico have enacted *Illinois Brick* repealer statutes:

Alabama	Maine	New York
Alaska	Maryland	North Dakota
Arkansas	Michigan	Oregon
California	Minnesota	Puerto Rico
Colorado	Mississippi	Rhode Island
District of Columbia	Nebraska	South Dakota
Hawaii	Nevada	Utah
Idaho	New Hampshire	Vermont
Illinois	New Mexico	West Virginia
Kansas		Wisconsin

Additionally, four more states have repealed *Illinois Brick* through case law.[30]

Arizona
Iowa
North Carolina
Tennessee

The treble-damages remedy available for section 4 claims, if afforded to every person tangentially affected by an antitrust violation, would create a risk of duplicative recoveries and multiple lawsuits. In order to protect against such unintended consequences, courts have examined other factors in addition to antitrust injury, such as the potential for duplicative recoveries, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under section 4. Conversely, under section 16, the risk of duplicative recoveries or multiple lawsuits is absent, in part because one injunction is as effective as 100, and 100 injunctions are no more effective than one. Thus, because standing under section 16 raises no threat of multiple lawsuits or duplicative recoveries, certain factors—excluding antitrust injury—that are appropriate to a determination of damages standing are not relevant for injunctive relief standing.

Accordingly, to establish standing to assert a claim seeking injunctive relief, a private plaintiff must merely allege actual or threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from an unlawful competition-reducing aspect or effect of the defendant's conduct.

Antitrust Class Actions

Q 1.27 Can any federal antitrust claim be brought as a class action?

Yes; in theory, any federal antitrust claim may be brought as a class action if the putative class representative can satisfy its burden of establishing the prerequisites for class certification set forth in Rule 23 of the FRCP. As a practical matter, however, and as explained further in response to Q 1.27.1 below, price discrimination claims under the Robinson-Patman Act have proven virtually impossible to maintain as class actions brought pursuant to Rule 23(b)(3).

Q 1.27.1 What are the prerequisites for class certification in an antitrust case?

Rule 23 of the FRCP creates a two-pronged standard for class certification. Rule 23(a) sets forth four threshold requirements for all class actions:

- numerosity (the class is so numerous that joinder of all members is impracticable);
- commonality (there are questions of law or fact common to the class);
- typicality (the claims or defenses of the class representative are typical of the claims or defenses of the putative class); and
- adequacy of representation (the class representative is able to fairly and adequately protect the interests of the class).[31]

Rule 23(b) describes the three categories of maintainable class actions. In addition to satisfying all four elements of Rule 23(a), a class action must be one in which:

(1) the prosecution of separate actions would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class or would otherwise be dispositive of or substantially impair their interests; or

(2) the party opposing the class has acted toward the class in a manner generally applicable to the class, so that appropriate relief would consist of injunctive or declaratory relief with respect to the class as a whole; or

(3) common questions of law or fact predominate over any questions affecting only individual members, and class action treatment is superior to other available methods for fairly and efficiently adjudicating the controversy.

The third category of Rule 23(b) is the subsection most commonly invoked in antitrust cases. The Supreme Court recently affirmed that courts must conduct a "rigorous analysis" to determine whether antitrust class action plaintiffs meet the requirements for class certification, even when that requires inquiry into the merits of the underlying claims.[32]

While class actions theoretically are available to pursue any type of antitrust claim, courts in a virtually unbroken string of cases (with one now-discredited exception) have uniformly denied class certification in Robinson-Patman Act price discrimination damages cases brought under Rule 23(b)(3). In doing so, these courts have recognized that each putative class member's proof as to competitive injury and therefore liability (that the plaintiff competed with the favored buyer and that the supplier's lower price to the favored buyer caused the plaintiff to lose customers to that favored buyer) would be highly individualized and, thus, unsuitable for class certification under FRCP 23(a)(2). However, an Ohio district court recently certified a "business competitor subclass" (that is, a class of competitors of the favored businesses) in a Robinson-Patman Act price discrimination case seeking only injunctive and declaratory relief. The court noted that although Robinson-Patman Act claims are generally not susceptible to class treatment because of the individualized proof required to establish damages, the plaintiffs in that case were seeking only injunctive and declaratory relief under the Act, so competitive injury did not need to be demonstrated. Accordingly, the competitor subclass satisfied FRCP 23(a)(2)'s commonality requirement.[33]

Risk and Remedies

Q 1.28 What is the probability that a government investigation or enforcement action will lead to a private suit?

In recent years, federal agencies have increasingly turned their focus to non-merger antitrust enforcement. Even before an indictment or government lawsuit, public news of a governmental antitrust investigation often triggers private antitrust class actions in federal and state courts. And there are strong incentives for private parties who have been injured by antitrust violations to bring "follow-on" actions seeking damages from the wrongdoers in the wake of successful criminal proceedings. For instance, section 5 of the Clayton Act specifically provides that a litigated final judgment or decree against a defendant in a government civil or criminal proceeding brought under the antitrust laws may be used as "prima facie" evidence of liability against such a defendant in a follow-on lawsuit brought on the same theory by private plaintiffs. This provision does not apply, however, to consent judgments or decrees entered before any testimony is taken.

Q 1.28.1 How can a party mitigate the risk of a private suit?

Although participation in the Antitrust Division's leniency (or amnesty) program likely will not help to entirely forestall a private suit (see the discussion of the Antitrust Division's Corporate Leniency Policy and its Leniency Policy for Individuals at QQ 1.12.1–1.13.1), it theoretically could limit damages should private plaintiffs (often pursuing their claims as a class action) prove their allegations. Pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA),[34] a qualifying corporate leniency applicant can avoid treble damages and joint and several liability in a private civil action and instead limit a plaintiff's civil damages recovery to "actual damages sustained . . . attributable to the commerce done by [it] in the goods or services affected by the violation."[35] To qualify for this damage limitation, an applicant must provide satisfactory cooperation to the private plaintiff(s) in the civil action, including supplying a full account of the facts known to the applicant, as well as all relevant, non-privileged documents in its possession, custody, or control (no matter where located) and making itself (including current or former directors, officers, or employees of the applicant) available for interviews, depositions, and/or trial as reasonably required.

Another benefit to participating in the amnesty program is that, because the amnesty participant does not typically enter into a plea agreement or pay a fine, the private civil suit against the participant will not include damaging averments that the participant has already pled guilty and paid millions (or hundreds of millions) of dollars in fines for the conduct under attack in the private action.

Q 1.29 What remedies are available to a private plaintiff for a defendant's violation of the antitrust laws?

Section 4 of the Clayton Act permits a successful plaintiff to recover treble damages and costs, including reasonable attorney fees. Because damages are automatically enhanced by the statutory award of treble damages, a private plaintiff may not recover punitive damages.

A private plaintiff may also sue for and seek injunctive relief against "threatened loss or damage" caused by violations of the federal antitrust laws pursuant to section 16 of the Clayton Act.

Q 1.30 With what level of specificity must damages be proven?

Although a plaintiff bears the burden of establishing the amount of damages caused by the alleged antitrust violation, the standard for proving the amount of damages in an antitrust case is generally less rigorous than in other contexts. That is, if a plaintiff is successful in proving the "fact of damage" and the requisite antitrust injury, courts will generally impose a lesser burden on a plaintiff to prove the actual measure of damages based on a belief that it would be inequitable to allow a defendant proven to have violated the antitrust laws to defeat recovery by insisting that the plaintiff provide rigorous proof of damages. Instead, recognizing the difficulty in proving the exact amount of damages, the court or jury is generally permitted to make a just and reasonable estimate of damages based on relevant data, including probable and inferential, as well as direct and positive, proof. However, a damage award may not be based on speculation or guesswork. Moreover, failure by a defendant to offer an alternative theory of damages has been held to support a plaintiff's theory of damages.

Q 1.30.1 What categories of damages are typically available in antitrust suits?

The appropriate measure of damages is generally dictated by the nature of the antitrust violation and injury. Damages for a private plaintiff may include increased costs, lost profits, or the reduction in the value of a plaintiff's business. For example, in price-fixing cases and cases involving monopolistic overcharges, the injured purchaser will ordinarily recover the increased cost (that is, the difference between the price it actually paid and the price it would have paid absent the antitrust violation), frequently referred to as an "overcharge." In tying cases, courts have used two different methods for calculating damages: the "tied product" method—which measures damages by calculating the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market—and the "package" method—which measures damages by calculating the difference between the price actually paid for the whole package of products (that is, both the tied and tying products combined) and the price at which the package could have been obtained on the open market. (Tying is an arrangement in which the purchase of one product is conditioned on the required purchase of another. Tying is discussed in chapter 5.) In refusal-to-deal and predatory pricing cases, the measure of damages is generally the plaintiff's lost profits, which is typically limited to a plaintiff's lost net profits. When a plaintiff's business has been totally or partially destroyed by the anticompetitive conduct, the plaintiff may recover the lost goodwill or "going concern" value of the business.

Q 1.30.2 How are damages calculated?

Numerous methodologies exist for calculating antitrust damages. It is common for a plaintiff to offer expert testimony in support of a particular theory for proving damages. Courts generally have accepted the "before-and-after" theory, which compares a plaintiff's profits or the price it paid during and after the anticompetitive conduct with profits earned or prices paid prior to the anticompetitive conduct, and the "yardstick" approach, which compares the profits earned or price paid by an injured plaintiff with that of a market participant in a comparable market unaffected by the anticompetitive conduct.

Lost profits are often calculated by estimating the market share and likely profit margin a plaintiff would have had "but for" the anticompetitive conduct. Courts may consider the plaintiff's market share and profit margin before the anticompetitive conduct to estimate the market share and profit margin in the but-for world. Courts may also reference other relevant markets unaffected by the anticompetitive conduct or consider general market conditions to estimate the plaintiff's market share and profit margin in the but-for world.

The lost goodwill or "going-concern" value of a business is often calculated by assessing the profit the business had made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner, and the prospect that this additional profit would continue in the future absent the antitrust violation. However, other methods for calculating the going-concern value of a business have also been utilized.

Q 1.30.3 Are antitrust defendants jointly and severally liable for plaintiff's injuries?

Yes. An injured antitrust plaintiff may seek the total amount of its damages from any or all of the defendants that caused the injury. Moreover, under the antitrust laws, there is no right of contribution (meaning those defendants who are ordered to pay damages have no legal right to seek compensation from other parties who may also have been liable (absent an agreement to the contrary entered into by defendants)). Nonetheless, several courts have upheld judgment-sharing agreements among defendants in antitrust cases through which antitrust defendants seek to contractually limit their exposure.

Q 1.30.4 Is an antitrust plaintiff entitled to prejudgment interest?

An antitrust plaintiff may recover prejudgment interest under limited circumstances. Pursuant to section 4(a) of the Clayton Act, prejudgment interest is the simple interest on actual damages (before trebling) for the period beginning on the date of service of the antitrust complaint and ending on the date of judgment, or for any shorter period therein. Courts have discretionary authority, under section 4, to award prejudgment interest if the court finds it "just in the circumstances" of the case. Courts shall consider only three factors in making their determination:

(1) whether either party or its representative "made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith";

(2) whether, in the course of the action involved, either party or its representative "violated any applicable rule, statute, or court order providing sanctions for dilatory behavior or otherwise providing expeditious proceedings"; and

(3) whether either party or its representative "engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof."[36]

It is unclear whether an antitrust plaintiff must prove all three factors, but courts have generally interpreted the factors to, at a minimum, require a plaintiff to establish that the defendant acted in bad faith causing a material delay in the adjudication of the dispute. Although the availability of prejudgment interest under limited circumstances was made clear by statutory amendment in 1980, there is no reported antitrust case in which a plaintiff has asserted facts sufficient to warrant an award of prejudgment interest.

Q 1.30.5 Is an antitrust plaintiff entitled to post-judgment interest?

Yes. Pursuant to 28 U.S.C. § 1961(a), the award of post-judgment interest is mandatory in antitrust cases, as it is in all civil actions in federal courts. Post-judgment interest applies to the entire money judgment (including trebled damages) and is calculated from the date of entry of the judgment, at a rate equal to the weekly average one-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. When a money judgment has been affirmed on appeal, interest is ordinarily calculated from the date of the original entry of judgment, notwithstanding the appeal.

Q 1.30.6 Is a successful antitrust plaintiff entitled to recover attorney fees?

Yes. In private antitrust litigation in the United States, plaintiffs who successfully assert antitrust claims may recover reasonable attorney fees and costs. Attorney fees and costs can include a lawyer's hourly rate times the number of hours reasonably spent on the case, court filing fees, and other administrative expenses incurred during litigation, such as printing and copying fees (note that expert witness fees are generally capped by statute at $40 per day). An award of attorney fees is mandatory when treble damages are awarded, regardless of the amount of damages. By contrast, defendants who successfully defeat antitrust claims are usually not entitled to attorney fees. The U.S. system differs from most other Western democracies, which employ a "loser pays" approach, sometimes referred to as the "English Rule."

The English Rule provides that the party who loses in court pays the other party's attorney fees.

Q 1.31 What kinds of injunctive relief are available to a private antitrust plaintiff?

Injunctive relief, under section 16 of the Clayton Act, can include preliminary and permanent injunctions, as well as an order of divestiture, or an order to prohibit the conduct that caused the harm. The remedy of divestiture, also commonly referred to as "dissolution" or "divorcement," involves a court order to dispose of, in whole or in part, any asset of a corporate entity. Although, in theory, divestiture exists as an equitable remedy, courts have construed it as a drastic one and it has rarely been granted in a private action. Courts also have been reluctant to provide retroactive equitable relief, such as disgorgement (recovery of profits illegally obtained by a defendant) or restitution (recovery of the amount paid by a plaintiff) under section 16, reasoning that such relief could result in duplicative recovery for a private plaintiff.

Q 1.31.1 Can a private plaintiff sue to enjoin a merger from being consummated?

Yes. Section 16 of the Clayton Act, as described above, authorizes a private plaintiff to enjoin a violation of the federal antitrust laws, including a violation of section 7 of the Clayton Act (which governs mergers). Section 7 renders mergers unlawful if the effect of the merger may be to substantially lessen competition or tend to create a monopoly. A private plaintiff with proper standing to challenge a merger (which generally would not include a competitor but might include a customer or possibly a supplier) could seek to enjoin a merger from being consummated by alleging that the proposed merger is in violation of section 7.

While possible, this is very rare, at least in part because a merger challenge is an expensive enterprise. Since even the government agencies (with very broad powers of discovery and less concern about costs) frequently lose in merger litigation, a private merger challenge is very risky.

Q 1.31.2 What must an antitrust plaintiff prove to demonstrate entitlement to injunctive relief?

As the moving party, the plaintiff bears the burden of proof to demonstrate the "threatened loss or injury" necessary to warrant injunctive relief against an alleged violation of the federal antitrust laws. To obtain such relief, a plaintiff must establish:

(1) a threatened loss or injury cognizable in equity;

(2) that is a direct or proximate result of the alleged antitrust violation; and

(3) that qualifies as an antitrust injury reflecting the anticompetitive effect of an alleged violation.

Significantly, a plaintiff seeking injunctive relief is not required to demonstrate *actual* injury, but instead need only demonstrate a *threat* of loss or injury from an impending violation of the antitrust laws.

In addition to establishing the threatened loss or injury required by section 16 of the Clayton Act, a plaintiff seeking a preliminary injunction must also establish the requisite elements of irreparable harm (if the conduct is not enjoined) and likelihood of success on the merits (of the plaintiff's antitrust claim). Some courts will apply a "sliding scale" that reduces the need to show a likelihood of success on the merits where the risk of irreparable harm is high (and vice versa). In deciding whether to grant a preliminary injunction, courts also typically compare the alleged irreparable harm to a plaintiff with any harm to a defendant that may flow from issuing the preliminary injunction, as well as assess whether the granting of the preliminary injunction is in the public interest.

Defenses

Q 1.32 What are some common defenses available to an antitrust defendant in a private antitrust suit?

Aside from negating the elements of a private antitrust claim, the statute of limitations is probably the most common statutory defense available to—and invoked by—defendants in private antitrust suits.

For this reason, the affirmative defense of the statute of limitations is discussed in further detail below.

Depending on the nature of the antitrust violation, defenses other than the statute of limitations may also be available. For instance, under the state action doctrine, the federal government and most divisions of state government are immune from antitrust liability for violations of the Sherman Act. If a private defendant can prove that it was acting pursuant to a clearly articulated and affirmatively expressed state policy and the state was actively supervising its conduct (even if that conduct was anticompetitive), a private defendant may be able to successfully claim immunity under the state action doctrine. (The state action doctrine is discussed further at Q 1.41.)

Similarly, an antitrust defendant may assert immunity under the *Noerr-Pennington* doctrine,[37] which immunizes attempts to influence government, even if the actions sought would have anticompetitive effects. The doctrine is partially grounded in the First Amendment, but also is based on the fact that the anticompetitive injury in such circumstances results not from the advocacy of the private party, but from the governmental action, and thus should not create liability for the private party. The parameters of this immunity are complicated and fact-specific, but can apply to the initiation of court proceedings, as well as advocacy of regulatory or legislative actions. (See Q 1.36 for further discussion of the *Noerr-Pennington* doctrine.)

Additionally, in the insurance context, the McCarran-Ferguson Act[38] exempts the business of insurance from the federal antitrust laws to the extent such business is regulated by state law.

By contrast to these recognized and frequently employed antitrust defenses, common-law defenses traditionally are not available as barriers to relief in private antitrust suits.

Q 1.32.1 Does the doctrine of unclean hands apply to antitrust claims?

Various courts have held that "unclean hands"—which bars a plaintiff from recovering damages because the plaintiff itself acted unethically or in bad faith with respect to the alleged wrongdoing—is not a defense in antitrust cases. In other words, an antitrust plaintiff's cause of action is not precluded simply because the plaintiff participated in the alleged antitrust violation or in another illegal act. However, other courts have disagreed and held that unclean hands can be asserted as a defense in lawsuits seeking injunctive relief under section 16 of the Clayton Act, reasoning that because injunctive relief is an equitable remedy, traditional principles of equity, including the unclean hands defense, apply.

Q 1.32.2 Does the doctrine of *in pari delicto* apply to antitrust claims?

Antitrust defendants typically are not permitted to assert the common-law defense of *in pari delicto*, which bars a plaintiff from recovering damages resulting from unlawful activities in which the plaintiff participated with the defendant(s). However, where the plaintiff equally and voluntarily participated in the alleged misconduct[39] or was a "co-initiator of the conspiracy and equally responsible therefor,"[40] the *in pari delicto* defense has been applied in private antitrust actions. But courts have rejected the defense where the plaintiff was "coerced into a program or pattern of conduct violative of the antitrust laws because of disproportionate bargaining power of the [defendant]."[41]

Statute of Limitations

Q 1.33 What is the statute of limitations for private actions under the Clayton Act?

Section 4B of the Clayton Act provides for a four-year statute of limitations for private antitrust actions. The limitation period begins to run from when the cause of action accrues, which is ordinarily defined by when a plaintiff has suffered an injury as a result of a violation of the federal antitrust laws. Significantly, a new cause of action may accrue with each overt act in furtherance of an antitrust conspiracy or from each injury resulting from a continuing antitrust violation. To restart the statute of limitations, however, the overt act must generally be a new and independent act that is not merely a reaffirmation of a previous act, and the overt act must inflict new and accumulating injury on the plaintiff. For example, in a price-fixing conspiracy that brings about a series of unlawfully high-priced sales over a period of years, each sale to the plaintiff may constitute an overt act that causes new and accumulating injury to the plaintiff, restarting the statute of limitations (regardless of the plaintiff's knowledge of the alleged illegality at much earlier times). In contrast, where the defendants entered an agreement to exclude the plaintiff from the market by refusing to purchase the plaintiff's product, the plaintiff's continued injury is unlikely to restart the statute of limitations. The agreement between the defendants would likely be construed as a final, single act and any injury resulting is attributable to that last overt act. Similarly, in the merger context, the two Courts of Appeals that have considered whether the continuing violations doctrine applies to price increases following a consummated merger (so as to extend the statute of limitations) have held that it does not apply. When a continuing violation occurs, the statute of limitations runs from the date that the defendant committed the last act that caused the plaintiff's damage. But even when the continuing violations doctrine applies, the defendant must commit an overt act to restart the statute of limitations. Both the Sixth and Eighth Circuits have held that the continuing violations doctrine does not apply to price increases following a consummated merger.[42] Those price increases are merely the "unabated inertial consequences" of the merger and, thus, cannot restart or extend the four-year statute of limitations.[43] Moreover, even assuming the continuing violations doctrine applied, a post-merger price increase is not likely to be treated as an overt act that can extend the statute of limitations because it is not "'a new and independent act that is not merely a reaffirmation of a previous act [that is, the merger].'"[44]

Q 1.33.1 Can the statute of limitations be tolled?

Yes. The statute of limitations in private antitrust actions may be tolled (that is, suspended or temporarily stopped) under certain circumstances. For example, the equitable doctrine of fraudulent concealment may toll the limitations period or preclude a defendant from asserting a limitations defense. The equitable principles of estoppel and duress may also toll the limitations period.

Certain government proceedings or the filing of a class action may similarly toll the statutory period. Specifically, section 5(i) of the Clayton Act provides that the statute of limitations applicable to private antitrust suits will be suspended during the pendency of, and for one year after, any antitrust action commenced by the United States. For the statute of limitations to be tolled, the matters complained of in a private antitrust action must be based, in whole or in part, on any matter complained of by the United States. Likewise, the commencement of a class action may toll the running of the statute of limitations for all purported members of the class.

Q 1.34 What is the doctrine of fraudulent concealment?

Under the equitable doctrine of fraudulent concealment, the applicable statute of limitations is tolled if the plaintiff can plead and prove that the defendant fraudulently concealed the existence of the cause of action so that the plaintiff, acting as a reasonable person, did not or could not know of its existence—that is, despite due diligence, the plaintiff was unable to discover the factual basis of its cause of action. Where fraudulent concealment is established, the statute of limitations does not begin until the plaintiff knew, or in the exercise of reasonable diligence should have known, of the existence of the cause of action. From that point, the plaintiff is allowed the full four-year period provided by section 4B in which to assert an antitrust claim.

Q 1.34.1 Must fraudulent concealment be pled by an antitrust plaintiff that seeks to toll a statute of limitations and, if so, with what level of specificity?

An antitrust plaintiff alleging fraudulent concealment must plead with sufficient particularity the circumstances surrounding the concealment and state facts establishing:

(1) the defendant's wrongful concealment of his or her actions;

(2) that plaintiff did not discover the operative facts that are the basis of his or her cause of action within the limitations period; and

(3) that plaintiff exercised due diligence in attempting to discover those facts.

Bald allegations of conspiracy and concealment are not sufficient to make out a case of fraudulent concealment.

Most courts require a plaintiff to allege facts showing affirmative conduct to conceal by the defendant. Silence or passive conduct is typically not sufficient, unless a relationship between the parties imposes a duty upon the defendant to make disclosures. The affirmative act of denying wrongdoing will usually constitute fraudulent concealment, if the circumstances make the plaintiff's reliance upon the denial reasonable.

Additionally, an antitrust plaintiff must demonstrate that it had neither actual nor constructive notice of the facts constituting his or her claims for relief. Although there is some disagreement among the courts, to successfully invoke the doctrine of fraudulent concealment and toll the running of the statute of limitations, an antitrust plaintiff typically needs to establish the exercise of reasonable diligence to discover the facts supporting the claim.

Q 1.35 Are state statutes of limitations for private actions under state antitrust statutes different from the federal statute of limitations for private antitrust actions under the Clayton Act?

Consistent with section 4B of the Clayton Act, most states have adopted a four-year statute of limitations for private actions under state antitrust laws. Significantly, however, select states have adopted their own statutes of limitations and in some instances have limited their application to certain types of conduct. For example, Indiana adopted a five-year statute of limitations for collusion among contract bidders, but applies a general two-year statute of limitations to all other antitrust actions. By contrast, Kansas, Mississippi and Oklahoma apply a general three-year statutory period. Kentucky, Arkansas and Montana apply a general five-year statute of limitations. Maine and Vermont apply a six-year statute of limitations, and Louisiana applies a one-year statutory period.

Antitrust Exemptions/Immunity

Noerr-Pennington *Doctrine*

Q 1.36 Is it an antitrust violation to ask the government to take anticompetitive action?

Generally, no. Under a legal principle called the *Noerr-Pennington* doctrine, the antitrust laws cannot be used to challenge or prevent companies from genuinely seeking favorable federal, state, or local governmental action. The *Noerr-Pennington* doctrine is grounded in First Amendment principles and seeks to harmonize competition values with a citizen's right to petition the government for redress of grievances. The doctrine immunizes such petitioning from antitrust liability in order to preserve the right of the people to inform their government of their desires with respect to the passage or enforcement of the laws. Even if the petitioner is seeking to gain a competitive advantage over its rivals, such as by asking the government to grant it a monopoly, such actions are considered protected petitioning activity under *Noerr* and are immune from antitrust liability.

Q 1.37 What types of government petitioning typically have antitrust immunity?

Genuine attempts to request government action—even action that would hinder or supplant competition—are protected under *Noerr* and have antitrust immunity, provided the government decision maker is being asked to exercise its discretion and provided the petitioner does not make material misrepresentation or omissions to the government decision maker (outside of the political arena). *Noerr* originally provided immunity only to efforts to petition federal or state legislatures, but the Supreme Court has extended the doctrine to cover administrative and court proceedings as well.

Short of bribery or other illegal acts, attempts to influence legislatures and executive-branch officials should enjoy antitrust immunity. In the adjudicatory context, firms will enjoy antitrust immunity unless they misrepresent material facts central to the outcome or, alternatively, fail the two-prong test for "sham litigation" (see the discussion below).

Outside counsel will often be able to provide some probabilities on a party's likelihood of success on the merits before filing a lawsuit or a motion, and if that party has a non–de minimis chance of success under existing law or a reasonable, good-faith argument for changing the law, then its conduct should likely be immune from antitrust liability.

Q 1.37.1 Does petitioning immunity apply to lobbying the government for anticompetitive legislation or regulatory action?

Yes. Courts have not hesitated to apply *Noerr* immunity to a wide variety of conduct, including lobbying, so long as it involves elements of persuasion on the part of the alleged petitioner and a subsequent exercise of discretion on the part of the government official to whom the petitioning is directed.

Q 1.37.2 … to participation in litigation or administrative proceedings?

Yes, petitioning immunity typically does apply to participation in litigation or administrative proceedings. But under limited circumstances, discussed below, certain uses of litigation or the administrative process against competitors may be outside the protection of *Noerr* immunity.

Q 1.37.3 … to requests for unlawful government action?

Yes. As long as the regulatory process genuinely is being engaged, requests for action that might be unlawful for the government to take are immune from antitrust liability. Ultimately, if anticompetitive harm results from the requested government action, then the government itself becomes the "cause" of the restraint; the private petitioner's immunity is not affected.

Q 1.37.4 … when the government is acting in a commercial capacity?

The Supreme Court has acknowledged the difficulty in drawing precise lines between "anticompetitive political activity that is immunized despite its commercial impact from anti-competitive commercial activity that is unprotected despite its political impact."[45] The

Court has not ruled yet on whether *Noerr* immunity applies when the government acts in a commercial capacity, and appellate courts are split on this point.

Q 1.37.5 ... to compulsory filings with government bodies?

The FTC and several courts have made a distinction between petitioning that seeks only a ministerial act by the government and petitioning that calls for the government to exercise its discretion in some way. *Noerr* protection generally is extended only to the latter. Thus, a situation in which the government acts in a merely ministerial or nondiscretionary capacity (such as listing a patent in the FDA's "Orange Book")[46] or in which the petitioning occurs via a purely informational submission to the government (such as a tariff filing) generally will not have antitrust immunity. Such ministerial or compulsory filings do not require the government to perform an independent review of the validity of the petitioning activity, and any anticompetitive effect is not the result of government action.

Q 1.38 What types of government petitioning typically are excluded from antitrust immunity?

Courts have recognized that not all efforts to petition the government are genuine attempts to obtain government action. As a result, *Noerr* excludes certain activities from immunity under the antitrust laws, including petitioning immunity for "sham" litigation and petitioning that involves providing public officials with false or misleading information, bribery, or other corruption. In addition, *Noerr* protection generally does not extend to efforts to influence nongovernmental or private organizations.

Sham Litigation

Q 1.38.1 What is sham litigation?

Sham litigation is the filing of meritless lawsuits or administrative actions intended to impede a competitor's ability to compete rather than to prevail in those actions. It is an attempt to use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon. In such instances, the litigation is really "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[47]

An action does not automatically constitute a sham because a party's purpose is to harm a competitor or because it was unsuccessful. Rather, litigation is a sham if initiated solely to interfere with the business of a competitor through use of the judicial or administrative process itself, rather than out of any interest in the outcome of the case. Courts have noted that sham litigation is often evidenced by the filing of repetitive lawsuits containing insubstantial claims.

Q 1.38.2 What must be proved to show litigation was a sham?

Courts use a two-part inquiry to determine whether a lawsuit should be barred from *Noerr* immunity on the basis of sham litigation. First, the lawsuit must be objectively baseless, in the sense that "no reasonable litigant could realistically expect success on the merits." Second, the plaintiff must show that the defendant's subjective goal was to interfere directly with a competitor's business relationships through the use of the governmental process. If a firm sought to initiate a proceeding against a rival not out of a genuine effort to enforce the law, but instead for the purpose of harassing the rival or otherwise making it more difficult for the rival to compete, the *Noerr* doctrine would not apply. This is because the firm has no legitimate purpose to obtain government action. As a practical matter, a well-counseled company should never be found to have taken action that meets this test.

Q 1.38.3 Can immunity ever apply to petitioning that involves deliberate misrepresentations?

Immunity typically does not apply to petitioning that involves providing public officials with false or misleading information, bribery, or other corruption, except in the political context (seeking legislative action). Deliberate misrepresentations to the government generally are not entitled to *Noerr* immunity if the petitioning occurs outside of the political arena (political as opposed to legal or administrative efforts are held to a lower standard); if the misrepresentations are deliberate, factually verifiable, and central to the outcome of the proceeding; and if it is possible to remedy this effect of the misrepresentation without undermining the integrity of the deceived government decision maker. Courts reason that false petitioning subverts the government decision-making process and destroys the government's ability to make a decision on the merits because the petitioner has misrepresented the true merits.

In the particular situation of patent enforcement, the alleged infringer may allege that the patent was obtained by fraud and thereby assert that the enforcement litigation is a sham and an antitrust violation. So-called *Walker Process* fraud occurs when a patentee gains a monopoly based on purposeful misrepresentations to the U.S. Patent and Trademark Office and then attempts to enforce its patent against others.[48]

It may well be that this general rule does not apply at all to purely political petitioning—that is, seeking legislative action of some sort. The original *Noerr* and *Pennington* facts arguably included false representations of various sorts, and yet the Supreme Court held that conduct was constitutionally protected. At a minimum, however, demonstrably false representations are likely to increase the chances of a court denying immunity, so should be carefully considered before the fact.

Q 1.38.4 Why does immunity not apply to petitioning of nongovernmental organizations?

Because *Noerr* protection is based on the First Amendment, it generally does not extend to efforts to influence nongovernmental or private organizations, such as standards-setting organizations. But efforts to influence quasi-public organizations operating under a public mandate to resolve disputes, such as the World Intellectual Property Organization, are entitled to *Noerr* protection.

CASE STUDY: *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[49]

The U.S. Court of Appeals for the Fourth Circuit ruled that North Carolina's Board of Dental Examiners cannot ban non-dentists from offering teeth-whitening services, upholding the FTC's finding that the practice was anticompetitive. The dental board had claimed state action immunity by virtue of being a North Carolina state entity created by a state law giving it the right to regulate the practice of dentistry. The Fourth Circuit rejected this reasoning, asserting that the board was composed of a private consortium of individual competitors that had pushed for regulation—meaning that, without active state supervision of their conduct, the exemption is inapplicable.

Q 1.39 If the conduct in question is determined not to have antitrust immunity, what must be proved to show the conduct violated the antitrust laws?

Even if conduct is not protected by *Noerr*, then the plaintiff still must prove that the conduct violated the antitrust laws. Thus, if a defendant is unable to prove that it is entitled to *Noerr* immunity (for example, because its acts constituted sham litigation), the burden shifts to the plaintiff to prove the underlying substantive antitrust violation. As the Supreme Court has noted, "[p]roof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim."[50] Similarly, if a party claims that its patent is immune from challenge by virtue of its listing in the FDA's Orange Book, and if the challenger is able to remove *Noerr*'s protection on the grounds that the FDA filing is only a ministerial act not entitled to immunity, then the challenger still is required to prove the underlying elements of its patent suit.

Industry-Specific Exemptions

Q 1.40 Are any industries or business activities outside the reach of the antitrust laws?

Yes. In certain limited instances, Congress has passed statutes creating industry-specific exemptions from the antitrust laws. Federal courts also have developed a number of judicially created exemptions, such as the state action doctrine (see the discussion below at Q 1.41), which protects from federal antitrust liability actions taken pursuant to a state regulatory scheme that reflects an intent to replace competition with government-supervised regulation. Even when the antitrust laws are not entirely replaced by a regulatory scheme, courts may defer consideration of antitrust claims until the regulatory agencies with primary jurisdiction have the opportunity to review the dispute.

Q 1.40.1 What industries or business activities are expressly exempt from the antitrust laws?

The most notable industries that are exempt, in whole or part, from the federal antitrust laws include, among others:

- agricultural cooperatives;
- Major League Baseball;
- insurance;
- organized labor;
- railroads; and
- soft-drink bottlers.

Determining precisely how these antitrust exemptions may apply to particular conduct often requires a detailed examination of industry-specific statutes and regulatory schemes. For example, the McCarran-Ferguson Act exempts from the federal antitrust laws "the business of insurance," but only to the extent the challenged practice is regulated by state law. Moreover, there is an exception that voids the exemption for acts of "boycott, coercion, or intimidation." Thus, the availability of the McCarran exemption to specific conduct of insurance companies is not always clear. In addition, there are continuing calls for new legislation to eliminate these exemptions (including recent efforts to repeal the insurance exemption as part of the healthcare reform legislation). You therefore should consult with an antitrust expert if you think any of these exemptions might apply.

*State Action (*Parker *Immunity) Doctrine*

Q 1.41 What is the state action doctrine?

The state action doctrine (or *Parker* immunity doctrine)[51] is a judicially created doctrine that allows parties to show that a state regulatory scheme precludes antitrust liability. It essentially defers to the state's decision to adopt a regulatory program that replaces competition with regulation, even if that regulation program produces antitrust competitive effects.

There are two requirements for antitrust immunity under the state action doctrine:

(1) The challenged conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation; and

(2) That policy must be one "actively supervised" by the state itself.[52]

In recent years, courts have applied the "active supervision" prong of the state action doctrine strictly and have refused to grant state action immunity where the plaintiffs could not make a satisfactory showing that the state had power to review the specific actions at issue and disapprove those that did not accord with state policy.

Q 1.41.1 How is the active-supervision requirement satisfied?

The factors that courts will consider in determining whether the active-supervision requirement is present include:

- whether and how a factual record was developed, particularly whether there was notice and an opportunity to be heard;
- whether there was a written decision on the merits;

- whether the agency specifically described how the private action comports with the state regulation;
- the extent to which data was collected or other fact-gathering took place;
- whether the agency conducted economic studies; and
- in rate-making cases, whether the agency disapproved rates that fail to meet the state's standards.

CASE STUDY: *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[53]

The Supreme Court applied the two-part state action doctrine test to determine whether a California statute requiring wine producers and wholesalers to set prices immunized otherwise unlawful resale price maintenance under the Sherman Act. While the Court concluded that the first prong was met—that the conduct was undertaken pursuant to a "clearly articulated and affirmatively expressed state policy"—it did not find "active supervision" under the second prong and, thus, rejected state action immunity. In particular, the Court found that, while the state authorized price setting and enforced the prices, the state did not establish the prices, review the reasonableness of the prices, otherwise regulate the relevant contracts, monitor the market, or reevaluate its pricing policy over time.

CASE STUDY: *FTC v. Phoebe Putney Health Sys., Inc., et al.*[54]

In *FTC v. Phoebe Putney Health Systems, Inc.*, the U.S. Supreme Court rejected the use of the state action doctrine to immunize from antitrust scrutiny a Georgia hospital authority's acquisition of the only other competing medical center in the county. The acquisition would have given Phoebe Putney an 86% market share for acute-care hospital services provided to commercial health plans in the area. The Supreme Court held that state legislation that created the hospital authority and authorized it to make acquisitions was insufficient to establish state action immunity because the state had not clearly articulated and affirmatively expressed a policy allowing the hospital to make acquisitions that substantially lessen competition. The unanimous decision emphasizes that antitrust exemptions are to be construed narrowly.

*Filed-Rate (*Keogh*) Doctrine*

Q 1.42 What is the filed-rate doctrine?

The filed-rate, or *Keogh*,[55] doctrine generally bars private antitrust damage claims based on conduct taken pursuant to a tariff filed with a federal or state regulatory agency. The doctrine does not create broad antitrust immunity, but simply prevents treble damage recovery. For example, under the filed-rate doctrine, a shipper on a natural gas pipeline cannot recover treble damages for rates that were filed with the state PUC.

Implied Immunity

Q 1.43 What is implied immunity?

Implied immunity is another judicially developed doctrine that refuses to apply the antitrust laws where they would disrupt or be inconsistent with a pervasive regulatory scheme. Although repeals of the antitrust laws by implication are strongly disfavored and are found only where there is "plain repugnancy" between the antitrust and regulatory mandates, implied immunity is applied when necessary to make the regulatory statute work, and even then, only to the minimum extent necessary.

Q 1.43.1 How does a court determine that there is a need for implied immunity?

The decision to find implied immunity rests on a number of factors, including:

- Congressional intent as reflected in legislative history and a statute's structure;
- the possibility for conflicting mandates between the antitrust laws and a regulatory system;
- the possibility that application of the antitrust laws would moot a regulatory provision;
- the history of agency regulation of anticompetitive conduct; and
- any other evidence indicating that the statute implies a repeal.

Even where no implied immunity is found, the existence of a regulatory remedy may have implications for the antitrust analysis. As the Supreme Court found in rejecting antitrust claims in *Trinko*, which involved a duty to deal by a telecommunications firm, "[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[56]

CASE STUDY: ***Credit Suisse Securities (USA) LLC v. Billing***[57]

The Supreme Court considered whether securities regulations administered by the Securities and Exchange Commission provided implied immunity from the antitrust laws. In *Credit Suisse*, private plaintiffs brought suit under the Sherman Act, alleging that a number of investment banks conspired to set extra fees in connection with initial public offerings. The Court analyzed four factors to determine whether there was a "clear incompatibility" between the securities and antitrust laws:

(1) whether the securities laws provided for SEC supervision of the specific activities;

(2) evidence that the SEC exercised those supervisory powers;

(3) the resulting risk that the application of the securities and antitrust laws could produce conflicting guidance, requirements or duties; and

(4) whether the specific conduct impacted by this potential conflict lies "squarely within an area of financial market activity that the securities laws seek to regulate."

Applying these four factors, the Court concluded there was a "serious conflict" between the securities and antitrust laws and thus immunized the banks' conduct under the antitrust laws.

Q 1.44 Are the antitrust laws relaxed during periods of national emergency?

Generally, no. Though there are specific historical examples of exceptions to antitrust enforcement during national crises, for the most part, antitrust enforcement continues unabated. For example, despite calls to relax merger enforcement for failing firms during the recession in the late 2000s, antitrust enforcers refused.

Contrary examples exist, however. For example, language in the Aviation and Transportation Security Act,[58] passed in the wake of September 11, 2001, allowed Hawaiian Airlines and Aloha Airlines to jointly agree to reduce passenger capacity in the wake of declining demand.[59]

Notes

1. An organizational chart of the U.S. Department of Justice is available at www.justice.gov/atr/about/org.pdf.

2. An organizational chart of the Federal Trade Commission is available at www.ftc.gov/ftc/ftc-org-chart.pdf.

3. 15 U.S.C. §§ 41–58 (as amended).

4. Act of July 2, 1890 (Sherman Antitrust Act), 15 U.S.C. §§ 1–7 [hereinafter Sherman Act].

5. Act of October 15, 1914 (Clayton Antitrust Act), 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 [hereinafter Clayton Act].

6. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (Sept. 20, 1976) [hereinafter Hart-Scott-Rodino or HSR].

7. 18 U.S.C. § 3282.

8. *See* Michael A. Doyle & Michael P. Kenny, *The Statute of Limitations Applicable to Criminal Enforcement of the Sherman Act: Restraint of Trade or Enjoyment of the Spoils?*, 1986 ARIZ. ST. L.J. 183 (1986).

9. *See* Press Release No. 09-075, U.S. Dep't of Justice, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy: Sentence is Longest Jail Term Ever Imposed for a Single Antitrust Violation (Jan. 30, 2009), *available at* www.justice.gov/atr/public/press_releases/2009/242030.htm; *see* Press Release No. 11-162, U.S. Dep't of Justice, Executives of Iowa-Ready [sic] Mix Concrete Companies Sentenced to Serve Prison Sentences for Price Fixing and Bid Rigging (Feb. 8, 2011), *available at* www.justice.gov/atr/public/press_releases/2011/266996.pdf.

10. *See* Press Release No. 899-196, U.S. Dep't of Justice, F. Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel (May 20, 1999), *available at* www.justice.gov/opa/pr/1999/May/196at.htm.

11. *See* U.S. Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), www.justice.gov/atr/public/guidelines/0091.pdf; U.S. Dep't of Justice, Leniency Policy for Individuals (Aug. 10, 1994), www.justice.gov/atr/public/guidelines/lenind.htm.

12. 15 U.S.C. § 15b.

13. 15 U.S.C. § 15a.

14. 16 C.F.R. pts. 0–5.

15. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1708 (Dec. 21, 1974) [hereinafter Tunney Act].

16. 15 U.S.C. § 6a.

17. United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004) (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992), and borrowing the definition of the word "direct" that the Supreme Court adopted for the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2)).

18. Minn-Chem., Inc. v. Agrium, Inc., 683 F.3d 845, 856–57 (7th Cir. 2012); Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Case No. 13-2280, slip op. at 5 (2d. Cir. June 4, 2014).

19. Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842, 845–46 (7th Cir. 2014).

20. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 852–53 (7th Cir. 2012); Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 468–70 (3d Cir. 2011).

21. Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 417 F.3d 1267, 1269 (D.C. Cir. 2005); United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).

22. 15 U.S.C. ch. 88 (§§ 6201–12).

23. *See, e.g.*, Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487 (1991), 1995 O.J. (L 95), 47–52, *available at* www.ftc.gov/bc/international/docs/agree_eurocomm.pdf; Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, 37 I.L.M. 1070 (1998), 1998 O.J. (L 173), 28–31, *available at* www.ftc.gov/bc/us-ec-pc.Shtm; *see also* US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, Oct. 2002, *available at* http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf.

24. *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 1995, 35 I.L.M. 309 (1996), *available at* www.ftc.gov/bc/international/docs/agree_canada.pdf; Agreement Between the Government of Canada and the Government of the United States of America on the Application of Positive Comity Principles to the Enforcement of Their Competition Laws, Oct. 5, 2004, *available at* www.ftc.gov/os/2004/10/0410comityagreeenglish.pdf.

25. *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, Apr. 27, 1999, *available at* www.ftc.gov/os/1997/04/lastaus.htm; Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters (June 29, 1982), *available at* www.justice.gov/atr/public/international/docs/austral.us.txt.

26. Links to international antitrust agreements with Brazil (1999), Chile (2011), China (2011), Germany (1976), India (2012), Israel (1999), Japan (1999), Mexico (2000), the Russian Federation (2009), and the OECD (1995) are available at www.ftc.gov/oia/agreements.shtm.

27. Act of June 19, 1936 (Robinson-Patman Anti-Price Discrimination Act), 15 U.S.C. §§ 13, 13a, 13b, 21a [hereinafter Robinson-Patman Act].

28. Teague v. Bayer AG, 671 S.E.2d 550, 557–58 (N.C. Ct. App. 2009).

29. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

30. *See* Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99 (Ariz. 2003); Comes v. Microsoft Corp., 646 N.W.2d 440, 449–50 (Iowa 2002); Hyde v. Abbott Labs., Inc., 473 S.E.2d 680 (N.C. Ct. App. 1996); Freeman Indus., LLC v. Eastman Chem. Co., 2005 WL 2036209, at *2 (Tenn. Aug. 25, 2005).

31. *See* FED. R. CIV. P. 23(a).

32. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013).

33. Williams v. Duke Energy Corp., No. 08-cv-00046-EAS-MRA (S.D. Ohio Mar. 13, 2014).

34. Pub. L. No. 108-237, tit. II, 118 Stat. 661 (June 22, 2004) (codified at 15 U.S.C. § 1) [hereinafter ACPERA]. In June 2010, ACPERA was amended to add provisions designed to enhance cooperation provided to civil claimants and the civil leniency provisions were extended to June 22, 2020. Pub. L. No. 111-190, 124 Stat. 1275 (2010). The extension applies to all applicants who "entered into an antitrust leniency agreement" or who received a "marker" on or before the termination date. *Id.* § 211(b).

35. *Id.* § 213(a) (codified at 15 U.S.C. § 1 note).

36. 15 U.S.C. § 15a.

37. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

38. 15 U.S.C. § 1012(b).

39. Perma Life Mufflers v. Int'l Parts Corp., 392 U.S. 134, 146–47, 149, 154 (1968).

40. South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 784 (6th Cir. 1970); *see also* Columbia Nitrogen Co. v. Royster Co., 451 F.2d 3, 15–16 (4th Cir. 1971).

41. Greene v. Gen. Foods Corp., 517 F.2d 635, 646 (5th Cir. 1975).

42. Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594 (6th Cir. May 23, 2014); Midwestern Mach. Co. v. Nw. Airlines, 392 F.3d 265 (8th Cir. 2004).

43. *See Z Technologies*, 753 F.3d at 599–600; *Midwestern Machinery*, 392 F.3d at 271.

44. *Z Technologies*, 753 F.3d at 600 (citation omitted).

45. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 507 n.10 (1988).

46. U.S. FOOD & DRUG ADMINISTRATION, APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS (31st ed. 2011) [hereinafter Orange Book], *available at* www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/UCM071436.pdf. The publication, commonly known as the "Orange Book," lists FDA-approved drug products as well as patent and exclusivity information for certain qualifying new drug applications.

47. *Noerr*, 365 U.S. at 144.

48. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 175–78 (1965) (holding that the enforcement of a patent procured by fraud on the Patent Office may violate section 2 of the Sherman Act, provided all other elements to establish a section 2 monopolization charge are proved, in which event the treble damage provisions of section 4 of the Clayton Act would be available to the injured party).

49. N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 717 F.3d 359 (4th Cir. 2013).

50. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 61 (1993).

51. The *Parker* immunity doctrine gets its name from Parker v. Brown, 317 U.S. 341 (1943) (concluding that a raisin marketing program adopted by California was a regulation of state industry of local concern that did not impair national control over commerce or violate the Sherman Act).

52. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

53. *Id.*

54. FTC v. Phoebe Putney Health Sys., Inc., et al., 133 S. Ct. 1003 (2013).

55. Keogh v. Chi. & Nw. Ry. Co., 260 U.S. 156 (1922).

56. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004).

57. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007).

58. Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001).

59. *See* Joint Application of Aloha Airlines, Inc., and Hawaiian Airlines, Inc., Under Section 116 of the Aviation and Transportation Security Act of 2001 for Approval of and Antitrust Exemption for Agreement, Order Approving Agreement and Granting Antitrust Immunity, Docket OST-2002-13002, 2002 WL 32341130 (Dep't of Transp. Sept. 30, 2002).