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# Private enforcement of Antitrust Law in the United States of America

*Summary*: **I.** Sources of Antitrust Law – **II.** Enforcement – **III.** Types of Private Enforcement Actions – **IV.** Arbitration – **V.** Jurisdiction – **VI.** Statute of Limitations – **VII.** Pleading Requirements – **VIII.** Evidence – **IX.** Standing and Antitrust Injury – **X.** Class Actions – **XI.** Legal Fees – **XII.** Remedies – **XIII.** Relationship between Public and Private Enforcement.

Antitrust law plays a critical role in the U.S. economy. The success of the law is dependent upon a combination of public and private enforcement. As recognized by the U.S. Supreme Court: "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to recover three times their actual damages every time they were injured in their business or property by an antitrust violation"[1]. Litigation asserted by private plaintiffs based on alleged violations of the United States antitrust laws is an essential part of the effective enforcement of U.S. antitrust law. Private antitrust litigation serves the purposes of ensuring that anti-competitive conduct uncovered, the individuals harmed are adequately compensated, and deterring future anti-competitive conduct[2]. According to one leading scholar, "private litigation probably does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the [Department of Justice]"[3]. As recognized even by some Federal Trade Commission (FTC) Commissioners, however, private enforcement of the antitrust laws can lead to abuse. FTC Commissioner Thomas Roche and former FTC Chairman William Kovacic have characterized private enforcement as "scandalous"[4] and "poison"[5].

## I. Sources of Antitrust Law

Antitrust law in the United States has two sources: federal and state statutes. Each of these statutory sources are accompanied by case law and regulations adopted by the federal and state authorities. The federal antitrust law is codified in the Sherman Act[6], the Clayton Act[7], the Robinson-Patman Act[8] and the Wilson Tariff Act[9].

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[1] Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

[2] Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis for Forty Cases*, 42 *U.S.F. L. Rev.* 879 (2007-2008). For a discussion of the considerations involved in determining whether to initiate a private enforcement action see Michael D. Hausfeld, Initiation of a Private Claim, in The International Handbook on Private Enforcement of Competition Law (Albert A. Foer & Jonathan W. Cuneo eds. 2010) 111.

[3] Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis for Forty Cases*, 42 *U.S.F. L. Rev.* 879, 880 (2007-2008). See also Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 *B.Y.U L. Rev.* 315 (2011).

[4] J. Thomas Rosch, *Remarks to the Antitrust Modernization Commission 9 (June 8, 2006)* available at *www.ftc.gov/speeches/rosch/Rosch-AMC%20Remarks.June8.final.pdf*.

[5] Comments of William Kovacic reported in FTC: Watch No. 708 (Nov. 19, 2007) at 4.

[6] The Sherman Antitrust Act of 1890, 26 Stat. 209, codified at 15 U.S.C. §§ 1-7 (hereinafter the Sherman Act).

[7] The Clayton Antitrust Act of 1914, 38 Stat. 730, codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (hereinafter the Clayton Act).

[8] The Robinson-Patman Act of 1936, 49 Stat. 1526 codified at 15 U.S.C. § 13.

[9] 15 U.S.C. § 8 For a discussion of the historical development of U.S. antitrust law, see An Intellectual History of American Antitrust Law (Dan Crane & Herbert Hovenkamp eds. 2012).

In addition to these federal statutes, each of the individual U.S. states has laws regulating competition. The State of New York, for example, adopted the Donnelly Act in 1899[10]. Similar to the Sherman Act, the Donnelly Act prohibits price fixing, bid rigging, territorial and customer allocations, monopolization, boycotts, and tying arrangements. It also provides for private rights of action and tremble damages. Although state antitrust law is often overlooked in the international context, it is an important source of antitrust law in the United States[11].

According to the U.S. Supreme Court, federal antitrust law does not automatically preempt the application of state antitrust law to the same conduct[12]. Each of the states may also apply their respective state antitrust laws to the same conduct. This can result in conduct permissible under the federal antitrust laws being prohibited under the state antitrust laws. In Leegin Creative Leather Products, Inc. v. PSKS, Inc. the U.S. Supreme Court held that vertical minimum price maintenance is not automatically prohibited under the federal antitrust laws[13]. According to the Court, "Minimum resale price maintenance can stimulate interbrand competition-the competition among manufacturers selling different brands of the same type of product-by reducing intrabrand competition-the competition among retailers selling the same brand. The promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers". Many individual states, however, still prohibit resale price maintenance under their respective state antitrust laws even though the same conduct is permissible under federal antitrust law. Although a discussion of the state laws and procedures is beyond the scope of this contribution, state antitrust law should not be overlooked as an influential element in private enforcement in the United States.

## II. Enforcement

United States antitrust law relies on a combination of public and private enforcement. At the federal level, the public enforcement of antitrust law is entrusted to the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC). The Antitrust Division of the DOJ was established in 1933. The mission of the Antitrust Division is "the promotion and maintenance of competition in the American economy"[14]. Both the DOJ and the FTC have the authority to enforce Sections 2, 3, 7 and 8 of the Clayton Act. The DOJ and FTC have attempted to mitigate the inefficiencies associated with overlapping jurisdiction by entering into a series of agreements allocating cases between them[15].

At the state level, the public enforcement responsibilities generally reside with the respective states attorney generals. As many of these state attorney generals are directly elected partisan positions, the decision to bring enforcement actions under state antitrust law is often said to be influenced by political considerations. In addition to the ability to apply their state antitrust laws to the allegedly anticompetitive conduct, the states may assert claims under federal antitrust law. According to Section 4C of the Clayton Act, the states may bring actions in federal court on behalf of the citizens of their state for alleged violations of the federal antitrust laws[16]. These parens patriae actions are similar to private class actions in that the members of the class have the right to opt out of the parens patriae liti-

[10] The Donnelly Act is codified at NY CLS Gen Bus § 340 *et seq*.

[11] For a discussion of state antitrust law see American Bar Association, State Antitrust Practice and Statutes (4th ed. 2009).

[12] Rice v. Norman Williams Co., 458 U.S. 654 (1982).

[13] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[14] Antitrust Division Manual (4th ed.) I-2.

[15] Antitrust Division Manual (4th ed.) VII-4-VII-10.

[16] 15 U.S.C. § 15c.

gation and pursue claims on their own. Failure to opt out means that the members of the class are bound by the result of the litigation[17]. As parens patriae actions must meet the standing requirements imposed on private plaintiffs, such actions have encountered mixed success[18]. As discussed below, in order to meet the standing requirements to bring an antitrust claim, the plaintiff must be directly injured by the alleged anti-competitive conduct[19]. Indirect purchasers generally lack standing to bring a claim under the federal antitrust statutes[20]. As the states are often bringing claims on behalf of consumers, and consumers are typically indirect purchasers, the states attorney generals have a difficult time meeting the standing requirement.

The Clayton Act was adopted in 1914 in response to the general perception that the Supreme Court had been too lenient in the application of the Sherman Act. The principal provisions of the Clayton Act, which is far more detailed than the Sherman Act, include (1) a prohibition on anticompetitive price discrimination; (2) a prohibition against certain tying and exclusive dealing practices; (3) an expanded power of private parties to sue and obtain treble (triple) damages; (4) a labor exemption that permitted union organizing; and (5) a prohibition against anticompetitive business practices.

## III. Types of Private Enforcement Actions

There are generally two types of private claims depending on the type of relief sought. A private party may bring a claim for damages (Section 4 Clayton Act) or injunctive relief (Section 16 Clayton Act). According to Section 4 of the Clayton Act: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States… and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee". In order to bring a claim for damages under Section 4 of the Clayton Act, the plaintiff must allege (1) a violation of the antitrust laws, (2) antitrust injury (3) causation[21]. In addition, Section 16 of the Clayton Act allows a private plaintiff to make a claim for injunctive relief. Although there are subtle differences in the requirements for a claim for damages under Section 4 and a claim for injunctive relief under Section 16 of the Clayton Act, these three core requirements are the same[22]. Although claims under Section 16 are more common in merger cases (because the merger is frequently challenged prior to its consummation), private plaintiffs often bring claims for both damages and injunctive relief in the same case unless the alleged anti-competitive has been discovered by the antitrust agencies and discontinued[23].

## IV. Arbitration

United States courts will generally recognize arbitration clauses in contracts even if the claim is based on alleged antitrust violations[24]. The basic justification

[17] 15 U.S.C. § 15c(b)(2) and (3).

[18] Parens patriae actions are not generally considered class actions. LG Display Co., Ltd. V. Madigan, 665 F.3d 768 (7th Cir. 2011); Washington v. Chimei Innolux Corp., 659 F.3d 842 (9th Cir. 2011).

[19] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[20] Delaware Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116 (9th Cir. 2008); Kloth v. Microsoft Corp., 444 F.3d 312 (4th Cir. 2006).

[21] Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 114 (1969); Messner v. Northshore University Healthsystem, 669 F.3d 802, 815 (7th Cir. 2012); Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007); Blessing v. Sirius XM Radio Inc., 2001 WL 1194707 (S.D.N.Y Mar. 29, 2011).

[22] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111 (1986).

[23] The fact that a merger does not qualify as a reportable transaction under the Hart Scott Rodino Antitrust Improvement Act or has been cleared by the DOJ and FTC does not preclude a private claim. For a more detailed discussion of the requirements and procedure for challenging mergers, see M. Sean Royall & Adam J. di Vincenzo, When Mergers Become A Private Matter: An Updated Antitrust Primer, 26 Antitrust 41 (2012).

[24] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). This general rule applies even thought the agreed arbi-

for this position relates to the deference given to arbitration clauses in agreements and the confidence in the ability of arbitration panels to achieve the same public purpose of the antitrust laws as the courts would achieve. According to the U.S. Supreme Court:

"[W]hen first enacted in 1890 as Section 7 of the Sherman Act, the treble-damages provision was conceived of primarily as a remedy for the people of the United States as individuals; when reenacted in 1914 as Section 4 of the Clayton Act, it was still conceived primarily as opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giving the injured party ample damages for the wrong suffered. And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, and the private antitrust plaintiff needs no executive or judicial approval before settling one. It follows that, at least where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies"[25].

The basic requirement imposed by the Supreme Court for the arbitrability of antitrust claims is that the prospective litigant must be in the position to effectively "vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function"[26]. As most arbitration rules give the arbitrator the right to award the relief that is available under the applicable substantive laws[27], most courts will recognize the arbitrability of antitrust disputes.

## V. Jurisdiction

The U.S. legal system distinguishes between subject matter jurisdiction and personal jurisdiction. In private antitrust cases, the court must have both subject matter jurisdiction as well as personal jurisdiction over the parties. Subject matter jurisdiction refers to the ability of the court to address the subject matter which is at the basis of the dispute. According to Section 4 of the Clayton Act, the federal courts have exclusive subject matter jurisdiction over private antitrust cases brought under the federal antitrust laws. As this jurisdiction is exclusive, a private antitrust action based on federal antitrust law may not be brought in front of a state court. Nonetheless, private claims based on violations of state antitrust law may be brought before a state court.

In practice, personal jurisdiction tends to be more of an issue than subject matter jurisdiction in private antitrust cases in the United States. Personal jurisdiction means refers to the court's authority to decide a dispute, as against a particular person. A court has jurisdiction over individuals based on citizenship, residence or domicile or for legal entities based on state of incorporation or principal place of business. In addition, a court may have personal jurisdiction over a natural or legal person outside the state where the court is located if the defendant has min-

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tration might be before a foreign arbitration tribunal. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972). According to the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985), «concerns of international comity, respect for the capacities of foreign and international tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context».

[25] Charles H. Brower, *Arbitration and Antitrust: Navigating the Contours of Mandatory Law*, 59 *Buff. L. Rev.* 1127 (2011); Peter E. Greene, Peter S. Julian & Julie Bedard, *Arbitrability of Antitrust Claims in the United States of America*, 19 *Eur. Bus. L. Rev.* 43 (2008); Georgios I. Zekos, *Antitrust/Competition Arbitration in EU versus U.S. Law*, 25 *J. Int'l Arb.* 1 (2008).

[26] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985).

[27] According to Rule R-43(a) of the Commercial Rules of Arbitration of the American Arbitration Association, for example, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement.

imum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice[28].

## VI. Statute of Limitations

A claim brought by a private plaintiff based on an alleged violation of the federal antitrust laws must be commenced within four years after the cause of action accrued[29]. A claim begins to accrue when the defendant first commits the anti-competitive act[30]. There are four notable exceptions to the strict application of the statute of limitations. The running of the statute of limitations may be tolled if the defendant fraudulently concealed the violation[31]. The doctrine of fraudulent concealment in the context of an antitrust case has been formulated as a three-part test: the party pleading fraudulent concealment must have fraudulently concealed facts which are the basis of the claim, the plaintiff failed to discover those facts and the plaintiff exercised due diligence[32]. If, however, the plaintiff knew or with reasonable diligence should have known of the violation, the court will not toll the statute of limitations based on fraudulent concealment[33]. Second, the tolling of the statute of limitations is suspended when any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws[34]. The suspension lasts during the pendency of the public enforcement action and for one year thereafter. This exception applies even to challenges by the FTC to mergers under the Clayton Act[35]. Third, a court may exercise its discretion and toll the statute based on equitable considerations (equitable estoppel)[36]. There is no catalog of legitimate considerations for equitable estoppel. The doctrine of equitable estoppel suspends the running of the statute of limitations during the period in which the defendant took active steps to prevent the plaintiff from suing[37]. For example, if the parties are engaged in settlement discussions and the defendant agrees not to plead the statute of limitations, the court may apply equitable estoppel to prevent the defendant from relying on this defense[38]. Finally, the statute of limitations is tolled once a class action is filed[39]. The tolling is valid for all putative class members and lasts until the decision is made on class certification.

## VII. Pleading Requirements

The liberal requirements imposed on a plaintiff in the United States when bringing its complaint serve as one characteristic of the U.S. legal system which distinguishes it from all others. In order to bring an antitrust claim, a private plaintiff merely needs to file a short and plain statement of the claim showing that the plaintiff is entitled to relief[40]. The plaintiff is not required to substantiate its claim by providing evidence. "[T]he factual allegations must [merely] be enough to raise a right to relief above the speculative

[28] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). For a discussion of personal jurisdiction in the international context, see Spencer Waller, Antitrust and American Business Abroad § 5.4 (2011 Supp.).

[29] Clayton Act Section 4b.

[30] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971).

[31] Klehr v. A.O. Smith Corp., 521 U.S. 179, 194 (1997).

[32] GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170, 178 (4th Cir. 2007).

[33] GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170, 178 (4th Cir. 2007); Information Exchange Systems, Inc. v. First Bank Nat. Ass'n, 994 F.2d 478 (8th Cir. 1993).

[34] Section 5(*i*) of the Clayton Act.

[35] Minnesota Mining & Manufacturing v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965).

[36] American Pipe and Constr. Co. v. Utah, 414 U.S. 538 (1974).

[37] In re Copper Antitrust Litigation, 436 F.3d 782, 790 (7th Cir. 2006).

[38] Singletary v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 9 F.3d 1236, 1241 (7th Cir. 1993).

[39] Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983). The filing of a claim under state antitrust law will not effect a tolling of the federal antitrust claim because this would amount to a state law amending a federal statute. Eichman v. Fotomat Corp., 880 F.2d 149 (9th Cir. 1989); Drumm v. Sizeler Realty Company, Inc., 817 F.2d 1195 (5th Cir. 1987).

[40] Fed. R. Civ. P. Rule 8(a)(2).

level"[41]. This has come to be known as the plausibility test[42]: For a complaint to be sufficient, the claim asserted must be one that, in light of the factual allegations, its success is at least plausible. As formulated by the Second Circuit: "To present a plausible claim, the pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action. It must allege facts that would be sufficient to permit a reasonable inference that the defendant has engaged in culpable conduct: A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"[43].

The significance of these liberal pleading standards in the dynamics of private antitrust litigation in the United States should not be overlooked. Together with class certification (discussed below, *infra* § XI), fulfillment of the pleading requirements is a critical stage in the litigation. This is because it occurs at an early stage – often prior to the expensive stage of the litigation. If the defendant can dispose of the plaintiff's claim by convincing the court that the plaintiff has failed to meet the pleading requirements, the defendant will be able to save a significant amount of costs. Conversely, if the plaintiff can survive a motion to dismiss for failure to meet the pleading requirements, it can move into the discovery stage of the litigation – which is often costly for the defendant. Consequently, the outcome of the dispute over the proper pleading may determine whether the parties settle the dispute.

## VIII. Evidence

Although the pleading rules do not require the plaintiff to submit evidence for its claim beyond the plausibility test, the plaintiff must present sufficient evidence prior to trial to survive a motion for summary judgment. A court will grant a motion for summary judgment – typically after the parties have conducted their discovery – if there are no triable issues as to material facts and the matter may be resolved as a matter of law[44]. In making this decision, the court views the evidence in a light most favorable to the non-moving party[45]. The significance for the parties is that the summary judgment avoids the time, costs and uncertainty of a trial.

The standard of proof in a private enforcement action is a preponderance of the evidence. This is a lesser standard than the standard of beyond a reasonable doubt which is applied in criminal antitrust cases. Plaintiffs in private antitrust cases in the United States gain access to the evidence by relying on the discovery rules codified in the Federal Rules of Civil Procedure[46]. Discovery typically includes written interrogatories, depositions and production and inspection of documents. Due to the broad scope of the plaintiff's discovery rights and the often one-sided nature of the burdens of discovery, this procedural aspect of private enforcement plays an important role in the process. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of

[41] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).

[42] Anderson News, L.L.C. v. American Media, 2012 WL 1085948 (2d Cir. April 3, 2012). For further discussion see Richard A. Epstein, Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust, 2011 *U. Ill. L. Rev.* 187 (2011); Richard Raleigh, & Marcus A. Huff, Bell Atlantic Corp. v. Twombly: A Review of the Plausibility Pleading Standard, 55 Fed. Law. 32 (2008).

[43] Anderson News, L.L.C. v. American Media, Inc., 2012 WL 1085948 at *16 (2d Cir. April 3, 2012).

[44] Fed. R. Civ. P. Rule 56(a).

[45] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[46] For an overview of how private plaintiffs gain access to the requisite evidence, see Joseph Goldberg and Dan Gustafson, Obtaining Evidence, in The International Handbook on Private Enforcement of Competition Law (Albert A. Foer & Jonathan W. Cuneo eds. 2010) 170.

persons having knowledge of any discoverable matter[47]. For "good cause", the court may order discovery of any matter relevant to the subject matter involved in the action[48]. It is not necessary that the information requested be admissible at trial. The requirement is only that the discovery appears reasonably calculated to lead to the discovery of admissible evidence. The party resisting discovery has the burden to establish the lack of relevance.

Although the discovery rights of the parties are quire broad, the judge in the case has the authority to impose limits on the frequency and extent of the use of discovery. The judge may limit discovery in any of the following circumstances[49]:

– the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

– the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

– the burden or expense of the proposed discovery outweighs its likely benefit.

One important limitation on the broad discovery rights of private litigants is the attorney-client privilege. A party may not secure discovery from another party which is privileged[50]. There are various privileges in U.S. law including the attorney-client privilege, the work product privilege and the privilege against self-incrimination. The attorney-client privilege generally applies to oral and written communications between an attorney and his or her client[51]. There are, however, important limitations to the attorney-client privilege. For example, if the communication is made to a third party, the privilege is lost.

The doctrine of attorney work product is slightly different from the attorney-client privilege although there may be some overlap. The work product doctrine protects documents and other material developed or obtained by a lawyer in the course of preparing for litigation[52]. In contrast to the attorney-client privilege, the work product does not necessarily have to be part of a communication between the lawyer and the client. Another distinction is that the court may order disclosure of the attorney work product if the party seeking access to such work product can show that it has a substantial need of the materials in the preparation of its case and it is not otherwise possible to obtain the substantial equivalent of the otherwise privileged materials without undue hardship[53].

Although discovery is carried out under the supervision of the court, the judge does not typically get involved in the process. The parties are required to confer as soon as practical after the lawsuit is filed to arrange for discovery[54]. Although the judge takes a passive role in the process, the judge has the authority to impose sanctions if a party fails to comply with its discovery obligations[55]. Not only may the judge hold the non-complying party in contempt of court, the judge may require the non-complying party to bear the costs of the other party, adopt an inference adverse to the non-complying party or even dismiss the case[56].

## IX. Standing and Antitrust Injury

The Clayton Act allows private enforcement actions for damages as well as for injunctive relief for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws". If read literally, the

[47] Fed. R. Civ. P. Rule 26(b)(1).

[48] Fed. R. Civ. P. Rule 26(b)(1). It is widely held that this broad discovery, together with the relatively lenient pleading standards, has the potential to be abused. Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 *N.Y.U. L. Rev.* 1887 (2003); Frank Easterbrook, Discovery as Abuse, 69 *B.U. L. Rev.* 635 (1989).

[49] Fed. R. Civ. P. Rule 26(b)(2).

[50] Fed. R. Civ. P. Rule 26(b)(1).

[51] Upjohn Co. v. U.S., 449 U.S. 383 (1981).

[52] Fed. R. Civ. P. Rule 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947).

[53] Fed. R. Civ. P. Rule 26(b)(3).

[54] Fed. R. Civ. P. Rule 26(f).

[55] Fed. R. Civ. P. Rule 37.

[56] Frame v. S-H, Inc., 967 F.2d 194, 203 (5th Cir. 1992); Sciambra v. Graham News, 892 F.2d 411 (5th Cir. 1990).

Clayton Act would allow a broad range of individuals and firms to assert claims based on alleged violations of the antitrust laws even if those individuals or firms were not directly injured by the anti-competitive conduct. In recognition of the potential for excessive enforcement, the courts have imposed standing requirements on plaintiffs in private antitrust cases. The most important standing requirement is that the plaintiff must have had suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive acts made possible by the violation"[57]. The antitrust injury requirement applies to private claims for damages under Section 4 of the Clayton Act as well as to claims for injunctive relief under Section 16 of the Clayton Act[58]. Standing is tested prior to class certification[59]. The purpose of the antitrust injury requirement relates to the rationale for allowing private enforcement of antitrust violations. It is to ensure that the plaintiff only recovers for conduct which the antitrust laws were designed to prevent[60].

The antitrust injury requirement has the effect of precluding a significant number of potential claimants. Indirect purchasers, for example, do not have standing under the Sherman Act to bring a private claim because it is assumed that they did not suffer antitrust injury if they purchased from vendors operating in a competitive market[61]. In addition, antitrust injury is a significant barrier in merger cases brought by a competitor. Courts tend to assume that a competitor is concerned with increased competition and not decreased competition[62]. Loss or damage due merely to increased competition does not constitute such injury[63]. Rather, the parties who typically suffer injury as a result of an anti-competitive merger are the customers of the merging parties.

### X. Class Actions

Private litigation in the U.S. is expensive. Moreover, the general rule is that each party must pay its own legal fees regardless of the outcome of the litigation. In this context, a system dependent upon private enforcement needs to address the dissuasive effect of this risk. The primary method by which plaintiffs in the U.S. fund antitrust litigation is by a class action under Rule 23 of the Federal Rules of Civil Procedure. A class action allows a group of similarly situated plaintiffs to pool their resources and risks to pursue their claims. Class certification – *i.e.*, the stage of the litigation where the court determines whether a class action is appropriate – is often determinative of the success of private litigation.

The basic idea behind class actions is to "enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture"[64]. The requirements for class certification for antitrust actions are the same as for other types of class actions under federal law. The requirements codified in Federal Rules of Civil Procedure 23(a) and 23 (b)(3) are often broken down into the following six elements: (1) numerosity, (2) commonality,

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[57] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[58] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986).

[59] In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 504 (S.D.N.Y. 1996)

[60] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990).

[61] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In response to the Illinois Brick doctrine, about half of the individual states have adopted "Illinois Brick repealer statutes" which specifically permit indirect purchasers to sue for violations of state antitrust law. The Supreme Court has recognized the validity of these state statutes. California v. ARC Am. Corp., 490 U.S. 93, 98 (1989).

[62] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 100 (5th Cir. 1988); Sprint Nextel Corp. v. AT&T, 2011 WL 5188081 (D.D.C. Nov. 2, 2011).

[63] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111 (1986)

[64] Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972). For a discussion of the advantages and disadvantages of class actions, see Newberg on Class Actions (4th ed. Supp. 2009) § 18.22.

(3) typicality, (4) adequacy of representation, (5) predominance and (6) superiority[65]. The purpose of these requirements, according to the Supreme Court, is to ensure "that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate"[66]. Plaintiffs bear the burden of establishing by a preponderance of the evidence that the requirements for class certification exist[67]. The relevant inquiry is not whether the plaintiffs will prevail on the merits, but rather whether the requirements of class certification required by statute are fulfilled[68]. The same standard for class certification apply regardless of whether class certification is sought prior to of after settlement. Prior to approving the pre-certification settlement, the court must determine whether the requirements for certification are met[69].

1. The numerocity component requires that the number of potential class members be so large that joinder of all members is impracticable[70]. In order to fulfill the numerosity requirement, the class must be so numerous that joinder of all members is impractical[71]. It is not necessary that the plaintiff identify a precise number of potential members of the class; an approximation will suffice[72]. Although the number 40 is often used as a rule of thumb for the requisite number of plaintiffs[73], there is no "magic number" needed to meet the numerosity requirement[74]. In antitrust cases, the number of affected class members is typically so high that the numerosity is easily fulfilled[75]. It would, however, likely preclude class certification of a claim by a sole distributor.

2. Commonality requires that there are questions of law or fact that are common to the class[76]. According to some courts, commonality is satisfied where common questions generate common answers apt to drive the resolution of the litigation[77]. Similar to the numerosity requirement, the commonality requirement is often not a significant issue in cartel cases because the effect of a cartel is widespread and

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[65] Fed. R. Civ. P. Rules 23(a) and 23(b)(3). Although class actions may be based on Federal Rule of Civil Procedure 23(b)(1) or (2), these alternatives are seldom relied upon in antitrust litigation. For a more detailed discussion, see Newberg on Class Actions (4th ed. Supp. 2009) § 18.24.

[66] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

[67] Messner v. Northshore University Healthsystem, 669 F.3d 802, 811 (7th Cir. 2012); Ramos v. Simplexgrinnell LP, 796 F.Supp 2d 346, 353 (E.D.N.Y. 2011); In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 298 (N.D. Cal. 2010).

[68] Messner v. Northshore University Healthsystem, 669 F.3d 802, 811 (7th Cir. 2012); In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 299 (N.D. Cal. 2010).

[69] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997); Sullivan v. DB Investments, Inc., 667 F.3d 273, 319 (3rd Cir. 2011); Bicking v. Mitchell Rubenstein & Associates, 2011 WL 5325674 at *2 (E.D. Va. 2011).

[70] The right of joinder allows the plaintiff to include in the lawsuit as a defendant any persons against whom any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences, and any question of law or fact common to all defendants will arise in the action. Fed. R. Civ. P. Rule 20(a). However, the plaintiff still has to observe the jurisdictional requirements over each defendant. Fed. R. Civ. P. Rule 82. This makes joinder a cumbersome mechanism in antitrust cases where there are a large number of potential defendants. The impracticality standard does not require the lead plaintiff to show that joinder would be impossible. In re HealthSouth Corp. Sec. Litig., 257 F.R.D. 260, 273 (N.D. Ala. 2009); In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 504 (S.D.N.Y. 1996).

[71] Fed. R. Civ. P. Rule 23(a)(3).

[72] In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 509 (S.D.N.Y. 1996); Maywalt v. Parker & Parsley Petroleum Co., 147 F.R.D. 51, 55 (S.D.N.Y. 1993); In re Art Materials Antitrust Litig., 100 F.R.D. 367 (N.D. Ohio 1983).

[73] Ramos v. Simplexgrinnell LP, 796 F.Supp 2d 346, 353 (E.D.N.Y 2011). Newberg on Class Actions (4th ed. Supp. 2009) § 18.4: «[T]he plaintiff whose class exceeds 40 persons has a reasonable chance of satisfying the Rule 23(a) prerequisite on the basis of that fact alone». But the rule of thumb is not a threshold. In Meijer, Inc. v. Warner Chilcott Holdings Co., 246 F.R.D. 293, 306 (D.D.C. 2007), for example, a class of 30 putative plaintiffs satisfied the numerosity requirement.

[74] In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 509 (S.D.N.Y. 1996)

[75] In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 509 (S.D.N.Y. 1996)

[76] Fed. R. Civ. P. Rule 23(a)(1).

[77] Sullivan v. DB Investments, Inc., 2011 WL 6367740 (3rd Cir. Dec. 20, 2011).

uniform. It is not necessary to show that all issues are common. According to the Supreme Court, "even a single common question will do"[78]. Courts have not generally struggled with the commonality requirement in antitrust cases: "Where an antitrust conspiracy has been alleged, courts have consistently held that the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist"[79].

3. In order to fulfill the typicality requirement, the claims of the representative parties must be typical of the claims of the class[80]. The purpose of the typicality requirement is to make sure that the claims of the plaintiff are not "so different from the claims of the absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim"[81]. The respective claims of the class members do not have to be perfectly identical[82]. It is generally required that the class representatives are part of the class and possess the same interest and suffer the same injury as the class members[83]. Courts will inquire whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs and whether other class members have been injured by the same course of conduct[84]. In the context of price fixing, the class representative's claim is generally considered typical even if the class members purchased different quantities, at different prices or even a different mix of products[85].

4. Adequacy means that the representative parties will fairly and adequately protect the interests of the class[86]. As recognized by the Supreme Court, this requirement tends to overlap with the typicality requirement[87]. The basic difference is that the adequacy requirement includes a consideration of the competency and conflicts of the class counsel[88]. The purpose of the adequacy requirement is to "uncover conflicts of interest between named parties and the class they seek to represent"[89]. The courts generally apply a two prong test to determine whether the adequacy requirement is met: (1) the interests of the representatives must not conflict with the interests of the class members and the representatives and (2) their attorneys must be able to prosecute the action vigorously[90].

5. The questions common to the class must predominate over the questions affecting individual members. The proposed class must be sufficiently cohesive to warrant adjudication by representation and assesses whether a class action would achieve economies of time, effort and expense, and promote uniformity of decision vis-à-vis similarly situated persons[91].

[78] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

[79] In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 300 (N.D. Cal. 2010) quoting In re Dynamic Random Access Memory Antitrust Litigation, 2006 WL 1530166 at *3 (N.D. Cal. 2006).

[80] Fed. R. Civ. P. Rule 23(a)(3).

[81] Deiter v. Microsoft Corp., 436 F.3d 461, 467 (4th Cir. 2006).

[82] Wymer v. Huntington Bank Charleston, 2011 WL 5526314 at *3 (S.D.W.Va. 2011); In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 511 (S.D.N.Y. 1996).

[83] General Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982); In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 300 (N.D. Cal. 2010).

[84] Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992); In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 300 (N.D. Cal. 2010); In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 511 (S.D.N.Y. 1996).

[85] In re Dynamic Random Access Memory Antitrust Litigation, 2006 WL 1530166 at *4 No. (N.D. Cal. 2006); In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 300 (N.D. Cal. 2010).

[86] Fed. R. Civ. P. Rule 23(a)(4).

[87] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011); Amchem Prods. v. Windsor, 521 U.S. 591, 626 (1997).

[88] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011); Amchem Prods. v. Windsor, 521 U.S. 591, 626 (1997).

[89] Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 99 (2d Cir. 2007).

[90] General Tel. Co. v. Falcon, 457 U.S. 147, 157 (1982); Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 99 (2d Cir. 2007); In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 512 (S.D.N.Y. 1996).

[91] Kottaras v. Whole Foods Market, Inc., 2012 WL 259862 at * 6 (D.D.C. Jan. 30, 2012); Messner v. Northshore University Healthsystem, 669 F.3d

One common characteristic of class actions on which the courts have focused is whether the evidence of the anti-competitive behavior is generally the same for all of the plaintiffs: Evidence is common to the class if the same evidence could be used to prove an element of the cause of action for each member of the class[92]. The focus of the predominance inquiry is on the liability of the defendants and not of the damages[93]. The predominance requirement is not fulfilled if individual issues will overwhelm the common questions and render the class action valueless[94].

6. Finally, the class action must be superior to other available methods for the fair an efficient adjudication of the controversy. The obvious alternative is to require the plaintiffs to each pursue their own claims. Assuming that the other requirements for a class action are fulfilled, forcing the plaintiffs to pursue individual claims would often lead to considerable overlap and inefficient uses of limited judicial resources. In addition, it might dissuade the plaintiff from bringing their claims – which would be contrary to one of the fundamental purposes of class actions[95]. The superiority requirement is often fulfilled if there are a large number of class members[96] or their claims are individually so small that they would unlikely pursue them outside the class[97].

If the requirements are fulfilled, the court must certify the class – it is not within the court's discretion[98]. However, the court's certification decision is not final and the court can decertify a class at any time during the case. The requirements are not tested using a pleading standard[99]. Instead, the plaintiff "must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."[100]. When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses[101]. For example, in a price fixing case, the foreign purchasers may constitute a separate class from the domestic purchasers.

If class certification is granted, notice must be given to the putative class members. If the individual class members can be identified through reasonable effort, then they must be individually notified[102]. Otherwise, the standard is the best notice that is practicable under the circumstances[103]. The notice must clearly and concisely state in plain, easily understood language:

– the nature of the action;

– the definition of the class;

– the class claims, issues, or defenses;

– that a class member may enter an appearance through an attorney;

– that the court will exclude from the class any member who requests exclusion;

– the time and manner for requesting exclusion; and

802, 813 (7th Cir. 2012); Sullivan v. DB Investments, Inc., 667 F.3d 273, 297 (3rd Cir. 2011).

[92] Kottaras v. Whole Foods Market, Inc., 2012 WL 259862 at * 6 (D.D.C. Jan. 30, 2012); Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005).

[93] Ramos v. Simplexgrinnell LP, 796 F.Supp 2d 346, 359 (E.D.N.Y 2011); Bolanos v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 148 (S.D.N.Y. 2002).

[94] In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 517 (S.D.N.Y. 1996).

[95] Newberg on Class Actions (4th ed. Supp. 2009) § 18.39.

[96] Blessing v. Sirius XM Radio Inc., 2011 WL 1194707 at * 11 (S.D.N.Y Mar. 29, 2011); In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 527 (S.D.N.Y. 1996).

[97] In re TFT-LCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 291, 314 (N.D. Cal. 2010).

[98] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 599 U.S. ___ (2010).

[99] As discussed above, in order to bring a claim for a violation of the federal antitrust rules the pleading rules only require a private plaintiff to file a short and plain statement of the claim showing that the plaintiff is entitled to relief.

[100] Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011). The legal issues involving class certification are typically addressed without discovery. Newberg on Class Actions (4th ed. Supp. 2009) § 18.47.

[101] Fed. R. Civ. P. Rule 23(c)(4).

[102] Fed. R. Civ. P. Rule 23(c)(2)(B).

[103] See Katherine Kinsella and Shannon Wheatman, Class notice and claims administration, in The International Handbook on Private Enforcement of Competition Law (Albert A. Foer & Jonathan W. Cuneo eds. 2010) 264.

– the binding effect of a class judgment on members[104].

The general rule, which is based on the due process guarantees anchored in the U.S. Constitution[105], is that a potential class member can opt out of the class. Otherwise, the class member is bound by the results of the class action. One exception to the opt-out rule is where allowing the potential class members to opt out of the class would cause prejudice to the rights of the remaining class members[106]. An example of this might be where the defendants have limited funds to satisfy judgments in favor of the class and the individual plaintiffs who have opted out. In Ortiz v. Fibreboard Corp., the U.S. Supreme court held that this exception to the opt-out rule only applies if (1) the funds of the defendants are inadequate to satisfy all claims, (2) the entire fund is devoted to paying the injured victims and (3) the class description includes everyone with a claim[107].

If a class action has been filed, it is not necessary that the lead plaintiff pursue the case all the way through trial. The plaintiff can decide to settle with all or any of the individual defendants. However, the court must approve the settlement and notice must be given to the absent class members[108]. This approval and notice requirement applies even if the settlement is reached prior to certification of the class by the court[109]. The possibility for a settlement with less than all of the defendants creates a dynamic which is sometimes strategically leveraged by plaintiffs. Because the liability for antitrust violations is joint and several, the non-settling defendants remain potentially liable for the entire damages[110].

## XI. Legal Fees

The costs of pursuing litigation in the U.S. are high. The costs include not only the fees of the lawyers, but also of the economic experts – who are currently a necessity in most cases – as well as administrative costs such as the costs associated with discovery. Even if the plaintiff wins the case, the general rule in the United States is that each party pays its own legal fees.

In contrast to many civil law jurisdictions, contingency fees are common in the United States. Under a contingency fee arrangement, the private plaintiff agrees to share a portion of the judgment awarded to the plaintiff in the event of a successful verdict or settlement[111]. It is not atypical in contingency fee arrangements that the plaintiff bear all or a portion of the out of pocket costs incurred in pursuing the claim.

Attorney compensation in the context of a class action is somewhat different. It would be impractical to require the lead attorneys to negotiate and conclude engagements with all members of the class. Moreover, if an attorney representing the lead class member were limited to the portion of the judgment awarded to her client, they would have little incentive to invest the time and money into vigorously pursuing the case. The attorneys representing the lead plaintiff are required to submit their costs to the court for approval. The attorneys are then paid out of the judgment or settlement amount. The class then divides whatever remains.

## XII. Remedies

As discussed above, a private plaintiff or a class or plaintiffs may seek injunctive relief and/or damages for violations of the federal U.S. antitrust laws. In recognition of the importance of private enforcement actions, the Clayton Act allows the plaintiff in a private antitrust case to receive "threefold the damages by him sustained"[112]. The

[104] Fed. R. Civ. P. Rule 23(c).

[105] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

[106] Fed. R. Civ. P. Rule 23(b)(1)(B).

[107] Ortiz v. Fibreboard Corp., 527 U.S. 815, 839-842 (1999).

[108] Fed. R. Civ. P. Rule 23(e).

[109] See, e.g., Gupta v. Penn Jersey Corp., 582 F. Supp. 1058 (E.D. Pa. 1984).

[110] Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

[111] The reliance on a contingency fee to finance the litigation may have an effect on the settlement of that litigation. Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 *Harv. Negot. L. Rev.* 53 (1996).

[112] Section 4 of the Clayton Act.

possibility of having to pay treble damages is also a strong inducement to settle the case rather than take the risk of an adverse verdict. Antitrust class actions are typically settled for less than treble damages[113]. This dynamic has led some observers to criticize the system as creating a disproportionate incentive to file a frivolous lawsuit[114]. On the other hand, there are critics who point out that the system seldom results in the imposition of treble damages on guilty firms as contemplated by the Clayton Act because they settle rather than take the risk of treble damages[115].

The plaintiff in a private enforcement action also has the possibility to recover the costs of the lawsuit and a reasonable attorney's fees[116]. This applies even in cases where the plaintiff is suing for injunctive relief rather than damages[117]. The basic requirement is that the plaintiff prevails in its claims. Only the fees associated with the successful claims may be awarded[118]. The purpose of allowing the plaintiffs to recover reasonable attorney fees is to encourage the private enforcement of the antitrust laws as well as to deter conduct in violation of the antitrust laws[119].

## XIII. Relationship between Public and Private Enforcement

In the United States, many private antitrust claims are filed as follow-on claims to public enforcement actions. Public enforcement actions are frequently initiated following an amnesty application of a cartel participant. In the United States, a cartel participant who is the first to report the existence of the cartel to the Department of Justice may achieve immunity from public prosecution. The amnesty is enjoyed by not only the company but all current and former employees who agree to cooperate. Consequently, the applicant is only exposed to single civil damages related to its participation in the cartel. Although this amnesty does not preclude private claims, the amnesty rules have important implications for private cases. The amnesty applicant may avoid treble damages and joint and several liability in the private cases if the amnesty applicant cooperates with the plaintiffs in the private case[120]. This requires the applicant to provide the plaintiffs with a full account of all facts known to the cooperator that are potentially relevant to the civil action, providing all documents that are "potentially relevant" to the civil action that are within its custody or control in a timely manner and using its best efforts to secure and facilitate cooperation. In view of the liberal pleading rules – *i.e.*, the plaintiff does not have to provide concrete evidence of an antitrust violation in its initial claim – this cooperation requirement plays a significant role in the leniency process and ties the public and private cases together. The plaintiff must keep in mind that the DOJ may revoke its grant of amnesty during the process[121].

Although the public enforcement action based on federal antitrust law does not toll the statute of limitations for private enforcement actions, there may be advantages to a private plaintiff for waiting on the outcome of the private enforcement action. The primary advantage is that a guilty verdict in a public enforcement case (civil or criminal) can be used as *prima facie* evidence in private case of the underlying violation of the antitrust

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[113] Newberg on Class Actions (4th ed. Supp. 2009) § 18.57.

[114] Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 59 (2005).

[115] Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 *BYU L. Rev.* 315 (2011); Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 *Loy. Consumer L. Rev.* 329 (2004).

[116] Clayton Act Section 4.

[117] Clayton Act Section 26. Blue Cross Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 595 (7th Cir. 1998).

[118] Blue Cross Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588, 595 (7th Cir. 1998).

[119] Azizian v. Federated Dept. Stores, Inc., 499 F.3d 950, 959 (9th Cir. 2007).

[120] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

[121] Stolt Nielsen, S.A. v. United States, 442 F.3d 177 (3rd Cir. 2006).

laws[122]. This rule does not apply to consent judgments or decrees entered before any testimony has been taken. Conversely, a guilty verdict in the private case is not *prima facie* evidence of guilt in the public case because there is a higher burden of proof in public cases than in private cases. In a public case, the government must prove its case beyond a reasonable doubt. In a private case, the plaintiff need only prove its case by a preponderance of the evidence.

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[122] 15 U.S.C. § 16(a).