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Competition & Antitrust Guide 2005

Follow-on private antitrust litigation

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Your corporate client faces a government antitrust challenge in the United States for price fixing or allocating markets. You have calculated the possible fines, weighed the matter of jail time for the conspirators, and assessed the impact of injunctive relief. Is there more to worry about? Yes. In fact, your worries have only just begun. The financial exposure in private antitrust litigation can far exceed the amount paid in government fines (even where the fines exceed $100 million, as they have in many recent cases). In this short piece we ask and – very briefly – answer five "frequently asked questions" about private antitrust litigation in the United States.

1. Who may sue?

Virtually anyone directly affected by the conduct may sue. The most common actions are filed by direct customers and suppliers of the alleged conspirators. They are typically filed by class action plaintiffs' counsel as nationwide class actions, although large customers often "opt out" of the class and pursue individual claims. Indirect purchasers (e.g., customers of direct customers) can also sue under state antitrust laws in more than 30 states.

Even state attorneys general may bring private antitrust actions seeking damages for state residents under parens patriae authority. So the arrows may be coming from all directions.

Competitors can sue as well, but only if they properly allege "antitrust injury" – loosely defined as suffering a harm that has also damaged customers and the marketplace. Competitors who merely face tougher competition have not suffered antitrust injury.

2. What are the statute of limitations periods?

The limitations period is four years under federal antitrust law (the Sherman and Clayton Acts) and most state antitrust laws. However, if the defendants "fraudulently concealed" the antitrust wrongs from the plaintiff, as is often alleged, then the clock does not start ticking until the plaintiff should have or did become aware of the activity. Plaintiffs have thus sued on conduct stretching back for decades. In addition, federal enforcement actions can toll the limitations period for private suits.

3. Can activities outside the US be caught?

Yes, but with some limits. The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") provides that the Sherman Act "shall not apply to conduct involving trade or commerce ... with foreign nations," except for conduct that significantly harms imports, domestic commerce, or American exporters. Because foreign conduct is often bound-up with domestic conduct, however, the FTAIA is difficult to apply and the door is open for clever plaintiffs. In 2004, the Supreme Court made it somewhat more difficult to sue on foreign conduct, ruling that foreign customers cannot recover for damages suffered outside of the United States where such damages were independent of U.S. effects.

4. What are the possible damages?

It would be difficult to overstate the magnitude of potential damages in U.S. antitrust actions. Damages for federal antitrust violations are automatically trebled – resulting in damage awards equal to three times the amount of actual damages. "Joint and several liability" also attaches, meaning each conspirator can be held responsible for the effects of an industry-wide conspiracy. Numbers get dizzying quickly. Multiplying the number of months or years the conspiracy is alleged to have run by the total effects of the alleged conspiracy (10% of total industry sales during the relevant period is an oft-used rule of thumb), and then multiplying this very large number yet again by three for trebling prompts many companies to explore settlements very quickly.

5. How can you best protect yourself?

The best defense is a good offense. It is always best to avoid the problem entirely by aggressively counseling companies up front on antitrust compliance and on how to write benign documents. If this fails, under a new law criminal amnesty recipients can limit their civil exposure to single damages, with no joint and several liability risk. If you are facing multiple class action suits in federal and state courts, the next best defense is usually an aggressive, fact-based analysis to disprove the allegations – there was no conspiracy, or in a rule of reason case that the anticompetitive effects were minimal and far outweighed by the pro-competitive benefits of the conduct. Be tough. You can win.

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