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Dear Colleagues,

For lawyers, economists, and other professionals, antitrust litigation—the focus of this Fall issue of the Magazine—can be rewarding intellectually, professionally, and financially. It is not quite as much fun for our clients. In the long term, we will run into trouble unless we can find a way to make the process less time-consuming and less costly.¹

Antitrust cases can take forever and cost a fortune. One of the first cases I worked on when starting out in 1976 was a private action follow-on to United States v. Greater Buffalo Press.² The events leading to that case started in 1954.³ A grand jury was convened in 1958. No bill was voted out, but Justice commenced a civil suit in 1960. A bench trial took place in 1967, with judgment for the defense. On direct appeal to the Supreme Court (ironically under the “Expediting Act”), the judgment was reversed 9-0 and the case sent back for divestiture of one of the printing plants involved. So much time had passed, however, that by 1973 the case terminated for lack of an interested buyer. The plant could not be sold.

The follow-on case was filed in 1974, taking advantage of the government case tolling of the statute of limitations under 15 U.S.C. § 16(i). The case was litigated for eight more years, after which it settled—long before expert reports, summary judgment, or trial. This was 28 years after the relevant events. By the time of settlement, all the principals involved were long gone. And, by then, case law developments in the late 1970s and early 1980s had made the plaintiff’s task more challenging.

This is clearly an extreme set of circumstances, but we all have our war stories of similar Jarndyce-like events. And we have a true obligation as professionals to do what we can to minimize the time and expense involved. It is no mistake that, while 130 or so nations have followed the U.S. lead to create competition protection regimes, not one has sought to replicate our litigation methodology. And yet none of the newer regimes offers anything like the procedural fairness in outcomes that the U.S. system affords. Is there a way to achieve these same benefits with substantially reduced costs?

The high costs stem from a few different components of U.S. antitrust litigation, most notably from discovery, the use of experts, and motions practice. As antitrust continues to be a fact-intensive area of law, discovery is, of course, key. Likewise, expert analysis of the data, though expensive, is necessary if decisions are to be based on actual facts and economic analysis. The overwhelming time and expense associated with antitrust litigation, however, warrant some critical thinking as to how we can obtain and present the needed facts without miring our clients, agencies, and courts in years-long cases costing millions of dollars. For instance, there must be diminishing returns to the materials obtained during discovery. And perhaps better methods for resolving procedural issues can be implemented, as opposed to, say, convening a room full of lawyers to address more mundane issues such as schedules for briefing of protective orders.

Some strides have been taken already:

- Antitrust was essentially a trial practice until the 1980s, with Poller and other cases frowning on summary dispositions.
- Matsushita in 1986 made clear that summary judgment is not “disfavored” in antitrust cases, and since then summary judgment has ended a large percentage of the antitrust cases filed.
- Most recently, in 2007, Twombly launched a new day for motions to dismiss in antitrust cases. And, although relatively few cases today are resolved on that basis, Rule 12(b) now provides a credible means for ending a baseless case with relatively minor expense.³

These steps have helped mitigate the problems, but there is much more that can be done. Consider:

- Abolishing interrogatories for anything other than numeric or equivalent data.
- Imposing a 10 custodian limit on document production, absent good cause shown for more, if sufficiently detailed organization charts are provided at the start.
- Imposing a 10 witness limit on percipient witness depositions, absent good cause.
- Limiting expert reports to 10,000 words.
- Greater use of court-appointed experts.
- Requiring discovery to end within 12 months of when it begins.

There are of course other measures too, including (through legislation) the imposition on the courts of timing requirements for the scheduling of hearings and trial, as well as the time to decide Daubert and dispositive motions. We may also want to consider how creative options like judicial education can contribute to lowering the time and cost associated with antitrust litigation. It is widely recognized that the economic issues underlying antitrust cases can be quite complex and difficult for the typical judge to understand.⁴ An ABA Antitrust Section Task Force Report from 2006, for instance, found that only 24 percent of antitrust economists responding to the survey believe judges “usually” understand the economic issues in a case.⁵ Some studies suggest that

¹ There are of course other measures too, including (through legislation) the imposition on the courts of timing requirements for the scheduling of hearings and trial, as well as the time to decide Daubert and dispositive motions. We may also want to consider how creative options like judicial education can contribute to lowering the time and cost associated with antitrust litigation. It is widely recognized that the economic issues underlying antitrust cases can be quite complex and difficult for the typical judge to understand. An ABA Antitrust Section Task Force Report from 2006, for instance, found that only 24 percent of antitrust economists responding to the survey believe judges “usually” understand the economic issues in a case. Some studies suggest that
judicial economic education programs contribute meaningfully to judicial decisions in antitrust cases—and that even additional exposure to antitrust cases is not necessarily a good substitute for such training. Accordingly, continuing our economic education efforts could bolster not only outcomes but processes, as more educated judges likely have both a more accurate understanding of the facts and a better framework for understanding the materials and, accordingly, what does (and does not) need to be done in a given case.

Neither is the issue limited to the judicial branch. Complying with a Second Request or CID can likewise be incredibly expensive for companies. A 2014 survey found the median cost of second request compliance was $4.3 million, with a range of about $2 million to $9 million. Custodian document collection, processing, review, and production is a significant contributor to this expense. While the Agencies typically rely upon the documents from just a handful of custodians in rendering their decisions, they nonetheless routinely require parties to provide materials from upwards of 20–30 custodians. The same 2014 survey found an average of 26 custodians, with a maximum of 171 custodians. There is no reason why most second requests (or CIDs) cannot be handled with 10 or fewer custodians. Approval for more than that should have to come from a DAAG or a Bureau Director.

Antitrust litigation is important, indeed essential. Absent the unusual (and often ineffective) intervention by the Congress, antitrust remains a common law doctrine in the United States, and so litigation provides the main vehicle to establish, maintain, or change the law. But at some point, if things do not change, the companies that pay for all this will say “stop” and Congress will weigh in with solutions none of us will like. Let’s make the process more manageable and avoid that outcome.

All the very best,

Jonathan M. Jacobson
Chair, ABA Section of Antitrust Law
2017–2018

1 Many thanks to Elyse Dorsey for her assistance in preparing this letter.
4 See Richard A. Posner, The Law and Economics of the Economic Expert Witness, 13 J. Econ. Persp., Spring 1999, at 91, 96 (“Econometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be able to understand all the criticisms of an econometric study, no matter how skillful the econometrician is in explaining a study to a lay audience”); Michael R. Baye & Joshua D. Wright, Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals, 54 J.L. & Econ. 1, 6 (2011) (finding “a large fraction of judges had little or no prior antitrust experience at the time the decision was made”).
6 Baye & Wright, supra note 2, at 10 (“Our second finding is that the decisions of judges who attended programs to learn basic economic skills are appealed at the same rate as those of their untrained counterparts in complex cases but about 10 percent less often in cases that do not involve the evaluation of sophisticated economic or econometric evidence. . . . Our results also suggest that repeated exposure to complex antitrust issues is not a close substitute for economic training.”).
8 Id. at 30.
THE COVER THEME FOR THIS ISSUE focuses on litigating civil antitrust and competition law claims. Articles in the theme discuss a range of topics, including standards for dismissal, ethical considerations facing class counsel, commentary by district court judges who have presided over complex antitrust cases, the decision on judge or jury as the trier of fact, civil non-merger enforcement by the U.S. Department of Justice and Federal Trade Commission, and the growth of private competition law litigation in EU Member States.

To introduce the issue, ABA Section of Antitrust Law Chair Jon Jacobson offers a personal anecdote and cautionary tale about the over-long road that some U.S. antitrust cases travel. In this note, I extend that thought process a bit with comments and questions (but not answers) on interlocutory appeals and summary judgment, which can impact the path and outcome of the litigation process for antitrust claims in important ways.

Interlocutory Appeals. Decisions to grant or deny interlocutory appeals in civil antitrust cases are subject to the same standards as for other types of civil claims. This includes rulings on arbitration and class certification issues, which are subject to separate provisions in the Federal Arbitration Act and Rule 23(f) of the Federal Rules of Civil Procedure, respectively. Even if there is merit in adopting different standards for antitrust cases (or complex/high-stakes civil cases of all types, including large class actions), we are likely for the foreseeable future to be left with the current framework that applies to all civil cases in federal courts.

Opportunities for interlocutory appeals in antitrust cases arise through a wide range of district court rulings, including rulings on motions to dismiss, on application of immunity principles (Noerr doctrine, state action immunity, filed rate doctrine), and occasionally on summary judgment. As a practical matter, rulings that keep some or all of an antitrust case active in the district court are not likely to be reviewed on interlocutory appeal, in particular if the district court does not certify the ruling under Fed. R. Civ. P. 54(b). This includes rulings denying defense motions to dismiss or for summary judgment.

The U.S. Supreme Court has now accepted Hall v. Hall for review, a non-antitrust case that presents the question whether a plaintiff may appeal from an adverse judgment after trial in a case that has been consolidated by a single district court with another case that is not yet ripe for appeal. Most opportunities for interlocutory appeals in antitrust cases do not arise in this procedural posture, so the Court’s ruling may not work a fundamental change in the prospects for interlocutory review in antitrust cases. Nevertheless, the Court’s 2015 ruling in Gelboim may suggest that the Court is prepared to broaden the scope of cases in which appellate review can (and should) occur before an entire group of consolidated cases reach finality in the district court.

The Court also has under review a petition for certiorari in the Vitamin C litigation, now awaiting input from the U.S. Solicitor General. The procedural path of the case may animate the discussion about use of interlocutory appeals in antitrust cases:

- Complaint filed in 2005 alleging price fixing dating back to late 2001 by Chinese manufacturers of Vitamin C.
- District court denied motion to dismiss in 2008. Defendants did not contest the conduct allegations but sought dismissal under various legal grounds based on actions by the government in China.
- District court denied defendants’ motion to certify this ruling for interlocutory appeal in 2008.
- District court denied motion for summary judgement in 2011. Defendants did not contest conduct allegations but sought summary judgment under various legal grounds based on actions by the government in China.
- Case proceeded to jury trial in 2013, resulting in damage award to plaintiffs for $147 million.
- Second Circuit issued decision in September 2016, on appeal from the entry of judgment on the jury verdict, ruling based on considerations of international comity that the district court erred in not dismissing the complaint in 2008.
- Plaintiffs’ petition for certiorari, filed April 2017, challenges, inter alia, whether the court of appeals erred in exercising jurisdiction over the interlocutory pretrial order denying the motion to dismiss (given that a jury trial had occurred), and whether defendants properly preserved the international comity defense in their pre-verdict Rule 50(a) motion.

The record in the case is too complex to discern here whether factual and legal grounds for the court of appeals’ 2016 ruling were sufficiently developed to have permitted...
appellate review in 2008, but the procedural path sketched above suggests the potential at least for a shorter path to final judgment if interlocutory appeal had occurred at that time.

**Summary Judgment.** The U.S. Supreme Court most recently addressed summary judgment standards for antitrust claims in *Kodak* and *Matsushita*, over 25 and 30 years ago, respectively. In the October 2017 term, the Court has already declined to review two cases in which summary judgment was granted in favor of antitrust defendants. Lower courts face summary judgment motions in most or virtually all antitrust cases and continue to issue important rulings on the evidence needed to advance these claims to trial. Antitrust practitioners and commentators will also continue to debate whether standards for summary judgment on antitrust claims are too demanding (mostly on plaintiffs), or not demanding enough.

One asymmetry that may transcend this debate is the practical inability of antitrust defendants to obtain interlocutory review when their summary judgment motion is denied. Appellate review of a post-trial ruling under Fed. R. Civ. P. 50 may be subject to the same standard as a motion for summary judgment, but may occur in the face of a large treble damages judgment with joint and several liability for non-settling defendants. Given the high stakes in many or most antitrust cases, in particular large class actions, these practical realities may drive settlements even when there may be strong grounds to challenge a district court ruling denying the defendant’s motion for summary judgment.

**Road Work Ahead?**

These brief comments do not attempt to deconstruct or evaluate the details of legal standards now used to determine the path of civil antitrust cases through interlocutory appeals and summary judgment but they may serve as a backdrop for questions we should consider:

- What impact would more permissive standards have on the dockets of courts of appeals, given that the same standards for interlocutory appeal will likely continue to apply to antitrust claims and other types of civil claims?

In future issues of *Antitrust*, we will look for opportunities to address these topics in greater depth, and offer guidance on how parties and courts may use the current standards for interlocutory appeals and summary judgment in federal civil cases to improve their journey to prompt and just final resolution of antitrust claims.

Discussion of these and other issues addressed by articles in the theme may also help with the road building now underway in the EU, as Member States and their courts grapple increasingly with the myriad challenges that private enforcement of competition laws present.

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1. See, e.g., *SolarCity Corp. v. Salt River Project Agric. Improvement and Power Dist.*, 859 F. 3d 720 (9th Cir. 2017) (dismissing, for lack of jurisdiction under collateral order doctrine, appeal from denial of motion to dismiss antitrust claims based on state action doctrine); *Woodman’s Food Mkt., Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016 (granting interlocutory appeal and reversing denial of motion to dismiss claims under Robinson Patman Act); *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (granting interlocutory appeal and affirming order granting partial summary judgment and thereby extinguishing most but not all of plaintiff’s case (i.e., 99 percent of price-fixed products), on the basis that the claims are barred by the Foreign Trade Antitrust Improvements Act); *DPWN Holdings (USA) Inc. v. United Air Lines, Inc.*, 747 F.3d 145 (2d Cir. 2014) (granting interlocutory appeal on denial of motion to dismiss, ruling that district court applied incorrect standard on plaintiff’s knowledge of alleged price-fixing conspiracy, and remanding for factual determinations by district court under proper standard); *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F. 3d 1106 (9th Cir. 2013) (granting interlocutory appeal and reversing partial grant of motion to dismiss state law antitrust claims based on jurisdictional grounds, and remanding for individual factual determinations on same); *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845 (7th Cir. 2012) (granting interlocutory appeal on ruling denying motion to dismiss based on FTAIA, ruling that FTAIA sets elements of an antitrust claim rather than jurisdictional requirements, and affirming denial of motion to dismiss based on sufficient allegations of direct effect in the United States).


In re Refrigerant Compressor Antitrust Litig., 731 F.3d 580 (6th Cir. 2013) (dismissing, for lack of jurisdiction, appeal from order dismissing claims of some but not all plaintiffs in a consolidated complaint filed after separate cases were transferred to the district court by the Judicial Panel on Multidistrict Litigation).


7 See, e.g., Valspar Corp. v. E.I. du Pont de Nemours & Co., No. 16-1345, 2017 U.S. App. LEXIS 19015 (3d Cir. Sept. 14, 2017) (affirming summary judgment for defendant due to lack of evidence on conspiracy element of Section 1 claim); Suture Express, Inc. v. Owen & Minor Distribution, Inc., 851 F.3d 1029 (10th Cir. 2017) (affirming grant of summary judgment for defendants on Section 1 rule of reason tying claim due to lack of evidence of market power and antitrust injury); In re Text Messaging Antitrust Litig., 782 F.3d 867 (7th Cir. 2015) (affirming summary judgment of defendants due to lack of evidence on conspiracy element of Section 1 claim).


9 See, e.g., In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig., No. 15-6218 2017 U.S. App. LEXIS 18089 (10th Cir. Sept. 19, 2017) (affirming grant of defendant’s Fed. R. Civ. P. 50(b) motion following jury verdict in favor of plaintiff due to lack of evidence on foreclosure element of Section 1 per se tying claim, noting that standard for Rule 50 motions mirrors standard for summary judgment under Fed. R. Civ. P. 56(c)).

10 See, e.g., In re Vitamin C Antitrust Litig., 837 F.3d 175 (2d Cir. 2017) (vacating $147 million judgment entered in 2013 on jury verdict in favor of plaintiff, reversing 2008 ruling denying motion to dismiss, and remanding with instructions to dismiss complaint on the basis of international comity); Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC, 843 F.3d 1225 (10th Cir. 2016) (vacating $10 million judgment on jury verdict in favor of plaintiff due to failure to allege and prove relevant market for Section 2 claim of conspiracy to monopolize, and remanding to provide plaintiff an opportunity to do so).

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This second edition also covers significant consumer protection developments since the last hardbound publication, including the addition of a separate chapter on the Consumer Financial Protection Bureau (CFPB), as well as significant discussions about the impact of new technologies on consumer protection law, the expansion in state consumer protection law enforcement, and ever growing importance of international legal precedent. Consumer Protection Law Developments is a comprehensive and up-to-date analysis of this important and complex subject and the perfect companion treatise to Antitrust Law Developments.

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Interview with Judge Jon Tigar, U.S. District Court, Northern District of California

*Editor’s Note:* The Honorable Judge Jon S. Tigar sits on the U.S. District Court for the Northern District of California. He graduated from Williams College in 1984, and the University of California, Berkeley, Boalt Hall School of Law in 1989. He began his legal career as a clerk for Judge Robert S. Vance of the Eleventh Circuit, and then practiced complex commercial litigation at two different firms, with a break between them to serve as a public defender. He became a judge of the Superior Court of California in 2002 and federal trial court judge in 2013. Judge Tigar also serves as the Judicial Representative on the ABA Section of Antitrust Law Council.

Lisa Wood and Amanda Reeves interviewed Judge Tigar for *Antitrust* on September 25, 2017. We are grateful for Judge Tigar’s generosity in sharing his views about how to be effective as an advocate in an antitrust court case.

*Antitrust:* Could you give us a sense of your experience with antitrust matters, either on the bench or before coming on to the bench?

**Judge Jon Tigar:** After I graduated from law school in 1989, I clerked for a federal appellate judge in Birmingham, Alabama. After that, I went to work at Morrison & Foerster in San Francisco. I worked on a very big antitrust case as a young associate, but my recollection is that with the exception of a couple of research projects, my work on that antitrust case was similar to the work on any very large commercial litigation, and the rest of my cases were not antitrust cases. After three years at Morrison, I left to join the Public Defender’s Officer in San Francisco so I could try some cases, because I didn’t think I’d get that experience at a big law firm. After a year and a half there, I went to Keker & Van Nest in San Francisco where I eventually made partner. I did a small amount of antitrust work there, but it wasn’t something I specialized in.

In 2002, I became a trial judge on the California state court trial court, and I stayed there for 11 years. I did no antitrust at all on the state court. It wasn’t until I went on the federal bench in January 2013 that I started really doing antitrust work. Now that I’m doing antitrust work, I really like the cases.

I haven’t tried an antitrust case yet, but I’ve had a large amount of pretrial antitrust practice, including an antitrust MDL case which I inherited. At the time I got the case, there were 100 motions under submission, including 29 motions for summary judgment, so I sort of got a crash course in antitrust law.

I like antitrust cases for two reasons. First, I like the intellectual concepts. I studied economics in college, and I continue to read economics books and articles. Antitrust and economics go hand-in-hand; it’s impossible to be involved in antitrust without thinking about economics. That’s very satisfying.

The other reason I like antitrust cases is that the bar is so talented. I would say almost uniformly, both in the cases that I’ve had in my court and in my interaction with the lawyers in the ABA Antitrust Section, there is a quality of rigor and intellectual curiosity that I really enjoy.

The Northern District of California, where I sit, has always been a destination docket for antitrust cases. It’s always in the top five districts in the country in terms of the number of antitrust filings. And so, even after just a few years on the federal bench, I have a fair amount of antitrust experience, and I’m confident that will just continue to grow.

*Antitrust:* In your view, do antitrust cases take up more time than they should? As counsel, we’re all aware of the time pressures that the court is under, and of course parties are also tremendously concerned about the cost and time associated with litigating antitrust cases. Are there practices that you’ve adopted over the years to effectively manage antitrust litigation to have it take the appropriate amount of time?

**Judge Tigar:** First of all, I’m somebody who defers a lot to the judgment of counsel regarding the order of which issues ought to be decided and how they ought to be scheduled and that sort of thing. Lawyers inherently know more about their cases than the judge does. But there are places where the judge sometimes needs to have a firmer hand.

One is discovery. We know that while discovery works very well in the vast majority of cases—and often doesn’t need much management from the bench—in very large cases discovery requires more management. I’m not usually involved in that directly because we have a fantastic magistrate judge bench in the Northern District and they normally manage...
discovery in my cases. But I do keep discovery in some of my cases, and I stay informed about what’s happening when a magistrate is running discovery.

In my MDL case, my predecessor appointed a private special master to run discovery. So he decided most questions in the first instance, and that was often the end of it because very few things were appealed.

Do I think that antitrust cases take too long? That hasn’t been my experience. I think in general, economics acts as less of a brake on large-scale litigation than it might in other cases, but that’s true for most high-stakes litigation. Any piece of large commercial litigation can be over-litigated. Let’s say that the parties are fighting over a million dollars. At some point, it’s no longer worth spending attorneys’ fees to conduct the fight, and so pretrial activity is self-limiting. But let’s say the parties are fighting over a $600 million a year market with only two players, and a potential result of the litigation is that one of the two parties will be severely crippled. As a judge, you know going into that case that litigation cost is not going to act as a brake on litigation activity. Instead, the incentives will be there on both sides to file every motion that can be filed, take every deposition that can be taken, and so on.

Fortunately, the antitrust cases I’ve handled haven’t been particularly susceptible to this problem. In fact, I would actually say that the antitrust cases I’ve seen have been among the better managed. Maybe that’s the just luck of the draw.

I do think that antitrust cases present opportunities for the judge to decide discrete issues in a way that gets the case to the right size. For example, there may be a dispute over whether conduct in a particular market is appropriately part of the case, which can have an effect on damages. If you can identify that issue and decide it, you can make it easier for the parties to settle. So sometimes I’m looking to the lawyers to come to me and explain how the case can be broken down into component parts to be decided one at a time.

**ANTITRUST:** Is it your practice generally to use magistrate judges to resolve discovery disputes?

**JUDGE TIGAR:** Yes. Typically I refer a case to a magistrate judge for discovery purposes, meaning all discovery disputes will be resolved in the first instance by that magistrate judge. In a small percentage of the cases, I do keep my own discovery disputes, but that doesn’t happen very often.

**ANTITRUST:** Do you play any role in promoting mediation and settlement when presiding over an antitrust case or do you defer to counsel to bring that subject up?

**JUDGE TIGAR:** I’m fairly deferential in all my cases, antitrust and otherwise. I do very often ask lawyers to identify the disputes that are driving differences in case valuation, since resolving those is more likely to produce settlement. But that’s not because I want any particular case to settle or not settle; I don’t. Honestly, we don’t try enough cases. More than enough cases are going to settle, regardless of what I say or do.

But what I do want to do is to be a good case manager, and that means I want to make sure the parties are focused on doing the pretrial work that is either going to help them prepare for trial or is going to give them information about the value of the case in a way that resolves differences of opinion about value, or it does both of those things. If it’s not serving one or both of those objectives, then it’s a waste of everybody’s time, and that’s when I have a case management role to play.

**ANTITRUST:** What are the most important considerations to you when selecting class counsel under Rule 23(g), and how does diversity factor into your analysis?

**JUDGE TIGAR:** Demonstrated competence and experience, obviously. I also think it’s important for a district judge to consider diversity in every instance where it’s possible to make a difference. Most of the time, when I’m making a selection, it’s between white men. It is shocking to me how few women I see in these roles when I look around the big cases. We’ve had a very high percentage of women in law schools for a long, long time, so I’m surprised by how few women have leadership roles in large cases, and how much more needs to be done. And I would make the same observation regarding minorities.

**ANTITRUST:** In the District of Massachusetts, the judges have started to encourage younger lawyers to argue motions. Are there any tools that you’ve used to try to encourage a range of voices to present before you?

**JUDGE TIGAR:** I have an order that I issue when I vacate a motion hearing that says I’ll put the matter back on calendar if a young lawyer will argue the motion. I include that language most of the time. I have to vacate a certain percentage of hearings because of time constraints. This practice has been successful in providing younger lawyers with opportunities in court.

With regard to issues of diversity, lawyers of color and women in the courtroom, I have very often publicly spoken about how important diversity is to me, and I hope that has
an effect on the law firms and clients who are deciding whom to send to court. I have never told a law firm whom to send, and I don’t think I ever would, because I don’t think it’s consistent with my role as a judge. But I do have the power to gently encourage, and I hope sometimes it works. I also think it’s important for judges to mentor younger lawyers, women lawyer, and lawyers of color.

ANTITRUST: What can advocates do in an antitrust case to maximize their effectiveness in the courtroom?

JUDGE TIGAR: That’s a big question, and I don’t think there’s a one-size-fits-all answer. I think, like anything else, it depends on who your judge is. In a jury case, we are used to thinking about how to present a case to a particular jury pool and a particular jury. We probably wouldn’t present a case the same way to a jury in Manhattan as we would to a jury in Galveston. Once we’ve conducted voir dire, and we know something about a particular jury’s collective life experience and outlook, that should frame our presentation to that jury. I think practicing in front of a judge is no different: you have to frame your presentation based on the personality of the judge.

Turning to antitrust, most of the judges that I know like hard challenges and they like complexity, but they have differing amounts of experience with economics and differing amounts of experience with antitrust. So the first thing you have to do to be effective is make sure that your decision-maker understands all the concepts you need him or her to understand to see things your way. The same observation is true for any case with a complicated technical component, such as patent, environmental, and so on.

So, for a judge who doesn’t have a lot of experience, counsel might ask if a tutorial session would help the court. I’m a fan of tutorials, and I promote the idea of tutorials generally. We have a very, very large patent docket in the Northern District of California, and most of us have a practice of requiring a tutorial that takes place at least a couple of weeks before the claim construction hearing to make sure that we’ve given the parties an opportunity to educate us about the relevant science. It seems to me a similar technique might be very effective in antitrust cases, and even though I have some familiarity with economics, I could probably benefit from a tutorial in some of my cases.

There are a lot of benefits from tutorials beyond just the education of the court. For one thing, the tutorial setting is different from the more typical adversarial atmosphere when presented with a contentious motion. It gives you an opportunity to have something closer to a discussion with counsel about the cases. For another, a tutorial forces you to put aside a couple of hours to do nothing but think about this particular hard topic and not in the context of deciding a particular legal issue. A lot of districts, including mine, have very busy dockets. So a tutorial is a way of overcoming the challenge of divided attention.

ANTITRUST: That is a very interesting observation. I’m a big fan of tutorials, but in my experience, judges are not of one mind on the subject. Some are enthusiastic; but some are not. I’ve had some judges who have a busy docket say they don’t have time for a tutorial. These judges state that they need to focus on the pending matters that are before them and that a tutorial is a luxury they cannot indulge in—a morning or an afternoon of undivided attention on issues.

JUDGE TIGAR: That’s a fair point. The opportunity cost of time is highly subjective. For me, in the patent context, I learned that tutorials pay off to such an extent that I require tutorials even in cases with very simple mechanical patents. For example, I had a patent case involving a simple mechanical patent for a juicer. I could read the patent in one sitting at my kitchen table. But I had a tutorial anyway. Similarly, I had a patent case about a bicycle seat; I had a tutorial.

Now, in an antitrust case, for basic concepts of market definition or supply and demand or monopoly power, I don’t need a tutorial, so I probably wouldn’t have one. But I’m positive that the day will come in an antitrust case where the concepts at issue are new to me or ones that I haven’t used in a very long time or are particularly math-heavy, which has never been my strength. And in that case, there’s no question that I will want a tutorial.

ANTITRUST: Are there other issues suitable for a tutorial in an antitrust case? For example, health care is an unusual market with lots of different players and acronyms. It can be confusing if you haven’t been exposed to it.

JUDGE TIGAR: Yes. The health care market has many features that are unique to it that you don’t see in other markets. Economists now recognize that there are almost no perfectly competitive markets. But nonetheless there are degrees of difference. Also, there can be markets that are very, very unusual because they have characteristics unique to them. I think the health care and health care insurance markets are good examples. And a tutorial in a case involving those markets could be tremendously helpful.

ANTITRUST: You’ve made it clear that you’re very open to tutorials? How should counsel approach the topic with a judge who isn’t as enthusiastic?

JUDGE TIGAR: Probably the best approach is to take your lead from the court and say we have these concepts or we have these principles and in our experience, not every judge has seen these before. We’d like to suggest some possible ways that we could make these concepts more user-friendly, but we’re also curious to hear the court’s ideas. What is it that we can do for you? At its core, judging is making very important decisions, based on imperfect information, under time constraint. And as judges we are acutely aware of all three pieces of that: (1) that the decisions are important to you;
(2) that our information is imperfect; and (3) that we’re laboring under time constraints.

One of the things that follows from that is we, as judges, are always wondering, who’s going to give us information that’s reliable and useful? Who’s going to be honest about the flaws? In other words, whom can we trust? Because when we feel we’re in a position of partnership with counsel, our work product is going to be a lot better and everybody in the case is going to enjoy the experience a lot more. A good tutorial increases the judge’s stock of trusted information and does it in a way that promotes an atmosphere of trust.

When I was a lawyer, I always wanted to establish a sense of partnership with a court if I could. And I wanted the court to see me as a partner, because I wanted to be a trusted source.

Of course, not every judge can be persuaded to conduct a tutorial. But I think for the vast majority of judges, if you approach this issue that way, you will find yourself in a conversation with the judge. You’ll be able to figure out a technique that will let you educate the court. You might even wind up doing things that you didn’t expect the judge would want or allow in the beginning, because now you’ve created a sense of partnership.

ANTITRUST: Let’s talk a little bit about opening statements in complex cases. What has worked well and what hasn’t worked well?

JUDGE TIGAR: You have to have a compelling story. It should be a narrative that makes sense to a jury, that seems fair and that accommodates all of the facts, good or bad, that the jurors will hear in the trial. And it should also appeal to the values and themes that they have in their own lives. So, your opening should do all of that, optimally.

In your opening, you should tell the jury your compelling story. And you should use the same theme in your opening that you plan on using throughout the trial so that the jurors can start learning that story right away and also so that they can develop a relationship with you from the beginning.

We don’t want jurors to make up their minds before they’ve heard any evidence, but there’s no question that the opening is a very, very important framing device. And for the rest of the trial, if you’ve done your job, the jurors will be asking themselves, is this piece of evidence consistent with this frame that the lawyer gave me or not? And it should be consistent with your frame and inconsistent with your opponent’s frame.

So, the best opening is going to provide a theme from which everything else in your case springs naturally. And it’s going to provide that frame. That’s the first thing.

The second thing is you have to become the person that the jury likes and trusts. I don’t mean you want the jury to think of you as their best friend; some people make that mistake. Rather, you need to establish your credibility with a jury as somebody who is an honest broker of the information, who is defending an important principle, who is going to be a reliable source of the information they need to do their job.

You’re competing with the other lawyer: who will be on whose team? And the jurors already can see the tension between these two sides. They’re watching that unfold. You want to immediately develop a relationship with the jury; you want to be the person the jury likes and trusts. You want them to feel a sense of affinity with you.

So, if you’ve done those two things, now the jury’s going to be looking forward to hearing from you throughout the case. When your opponent has finished examining a witness, they think, “Oh, good, (Lisa’s) going to stand up now. This presentation we’ve been listening to has not been that clear, but now (Lisa’s) going to straighten it out for us.” That happens.

ANTITRUST: Have you ever allowed counsel to break up their opening, and provide it in stages during a trial?

JUDGE TIGAR: It’s not something I do often. Something that I have had some success with is “mini-openings.” Instead of the court reading a prepared statement of the case that both sides can agree on, each side gets not more than five minutes to stand up and address the entire jury pool, before jury selection, about the key facts of the case. It’s one of the few times when I’ll interpose my own objection because the other lawyer in that moment is too scared to object. But in the right case, that can be a very good tool for getting juror engagement right away. And it’s much more interesting than a prepared statement of the case read by the court.

ANTITRUST: Have you permitted counsel to provide interim summaries in a long trial or any other technique for guiding the jury?

JUDGE TIGAR: I’ve tried so many cases that I honestly can’t remember if I’ve done it, but I don’t think so. I would certainly be open to it if counsel jointly suggested it. I can imagine it making sense in a very long trial where there is a big shift in subject matter and a natural breaking point, such as between the liability and damages evidence.

ANTITRUST: Do you have observations about the use of presentation tools generally by counsel in the courtroom, whether it’s in the motion practice with you, a tutorial, or during trial?

JUDGE TIGAR: Let’s talk about juries first. I think it’s almost always a good idea to use PowerPoint or something similar because jurors now expect a visual component; that’s the reality of their daily lives.

I would say it’s usually a mistake now for somebody to think that they can just walk around and talk without any visual aids. Especially if there’s a lot of complexity in their case. I say usually, not always; there’s no one size fits all.
Some lawyers know that their most effective tool is their voice and that’s all they want to use. But I think for most lawyers, they will benefit from having a visual component.

On the other hand, the biggest mistake I see, and I see it often, is people putting too much information on the screen at once. It’s cognitively counterproductive. We know that human beings all learn in a variety of different ways. Some of us are taking in more information by listening; some are taking in more information by reading or watching, and many of us are benefiting when we can do both because they reinforce each other. But there are limits to anyone’s ability to absorb visual information. You can’t ask a juror to read a lot of dry text on a slide while simultaneously listening to what someone is talking about and then process and synthesize it all. It’s not realistic. It can actually move the ball backwards.

**ANTITRUST:** So, just to continue on that same topic, could you give some observations about best practices and pitfalls for counsel using document presentation technologies with a witness?

**JUDGE TIGAR:** Most lawyers that I’ve seen do this very well, so when we talk about pitfalls, we’re not talking about most lawyers. But the biggest pitfall that lawyers fall into with the presentation of information and trial generally is not thinking about it far enough in advance. Lawyers need to cull down the documents in big cases, and I can tell that is not happening enough in some of the cases tried before me. It’s a tedious task, but it’s necessary. No matter how many documents your legal team has coded as “important,” there will be at most 100 or 200 really important documents even in the biggest case. Sometimes there are really only ten. Someone has to go through the documents and think very carefully about whether each document is substantively necessary to connect the dots or has a lot of sizzle. Sometimes it doesn’t have much substance, but it adds an emotional, atmospheric element to the case. And doing that well takes a long time, so you have to start very far in advance.

Similarly, you have to be very fluid with the technology, or have someone who is, and you have to know the document very well, so you’re not fumbling around and emphasizing to the jury the third most interesting part of the document, and then realizing in the middle of the presentation you actually wanted to show them something else.

It’s not the end of the world if that happens, and even the best lawyers do that occasionally. But the jury can tell when you know the document well and when you don’t, and they can often tell when you’re giving them the information that’s really crucial to them and when you’re not. And sometimes even the witness will start to show a little exasperation, because of course the witness often knows the document very well. When your own witness starts to get a little exasperated with you, that isn’t good.

**ANTITRUST:** The technology can be great to zero in on a key part of a document, but I think the jury still likes to have a binder of the key documents so they can make their own assessment during deliberations of what’s important and how this all fits in. In your courtroom, do the jurors all still get a hard copy of the document to look at, even if it’s posted up on the screen? Or do you leave that to counsel?

**JUDGE TIGAR:** I would say my own practice varies. We now have an evidence presentation system in my court that is very easy for jurors to use when they’re deliberating. It consists of a computer that has no connection to the outside world, and the only software is what is needed to look at the evidence. That allows the jury to look at any document or image or video that’s in evidence in the case whenever they want to.

**ANTITRUST:** You still have an exhibit binder, in effect, but it’s electronic.

**JUDGE TIGAR:** Yes. And that’s on top of anything else they have. I would say more often than not the jury—the jury as a whole—also has binders with hard copies of every paper exhibited in the case. So, I’m trying to make it as easy as possible for the jury to look at the evidence they want in whatever format they want. And with regard to jurors having individual binders of the important documents in the case—that can be useful. But frankly, sometimes the disputes among counsel as to what constitutes an important document take up so much time, the fight isn’t worth it.

Something else that I think is useful in any lengthy trial is a binder of pictures of individual witnesses with their titles and a brief description of the witness. And that will help the jurors remember the various people as the trial goes along. And also in a case, like a patent case or an antitrust case, a glossary of the terms that they are likely to hear in the trial that we know they’re probably not familiar with.

**ANTITRUST:** What about timelines? Have you seen those used effectively?

**JUDGE TIGAR:** Yes. I think a timeline can be very powerful in the right case. I used timelines effectively as a lawyer, and I’ve seen them used effectively as a judge. A good timeline has been prepared, as we’ve been discussing, far in advance. It only has factual matters on it, and no argument. Any objections from the other side have been worked out in advance. And because all of those things have happened, you can use the timeline in opening statement. Because this is the core of your story, right? This is the part of the book that goes behind the flyleaf. This is what you want the reader to look at and to be able to refer back to when they’re in the midst of your novel. And so, I think you want to put something together that you can start using right away.

Lawyers also like to use timelines in closing argument, and there obviously you have more latitude. You can be argu-
mentative. But if your timeline is argumentative, it means it’s not the one you used in opening, and you will have given up something important. If you can bring out the same timeline in closing that you used in the opening, you can say to the jury, “See? I told you it was going to be like this.” That technique can be very powerful.

ANTITRUST: Are there techniques that you have seen used that make economic testimony more useful or accessible, either to you or to the jury? I mean, recognizing that you follow economics, it may be very accessible to you, no matter how it’s presented. But have you seen techniques that make it easier either for you or the jury to understand?

JUDGE TIGAR: Well, first of all, most of the economics testimony that I’ve seen has been in writing. Frankly, that’s actually how most of the economics testimony in the country is received, when you think about the percentage of the proceedings that occur in pretrial motion practice, actually.

So, why is that relevant to what we’re talking about now? Because I never have as much time to devote to a particular thing as I want to. So if your expert submits a 120-page report and the other side’s expert submits a 120-page report, will it be physically possible for the district judge assigned to the case to read every word of every report in every case? Let’s leave that question hanging for a moment.

At a minimum, I’m going to read every page of all of the briefs, and those portions of the record and those cases that I feel I must read in order to audit the arguments in the briefs, if that’s the right phrase, and make sure that I am clearly grasping the concepts in the way counsel want me to. My law clerk is going to read everything, and I’ll get some additional guidance there about what’s useful in the record.

So, it’s not so much how should the expert present her work, at least as far as my own reading is concerned. It’s how should the lawyers describe that work to me. And the answer is you should point me to the parts of the work you think I need to read. The lawyers should be clear in pointing me to the parts of the declaration that they think will support their arguments. Or pointing me to the parts of the other side’s declaration that they think undermine the other side’s arguments.

And you need to do it with a degree of specificity that acknowledges what’s happening in the judge’s chambers. A suggestion that I read an 85-page “excerpt” of an even longer, single-spaced declaration is less helpful than something focused. Counsel might say, “The heart of the dispute is laid out in this 10-page section, and in particular, on this one page, there are two paragraphs and if you read those paragraphs, you’ll see that the rest of this expert’s theory cannot hold water.” That’s useful. Because I want to be as prepared as possible every time I take the bench so I can do a good job for the parties.

Another thing that I want counsel to tell me is where is there really a clash between these experts. That’s useful. I’m very interested in what one recognized authority in the field thinks about something that another recognized authority in the field has done. And it’s also helpful to know when the experts agree on something.

I guess what I’m trying to say is that I hope counsel will figure out how to really use the expert testimony as a tool to educate the court, and not just stuff the information channel with information that hasn’t been tied to the core arguments in the case. An expert declaration is only great to the extent it drives the legal arguments in the case.

ANTITRUST: I recognize you’re saying that most of the expert economic testimony you’ve seen was presented in writing, through reports or declarations. When you have seen cross-examination of an expert on a complex subject, what have you found to be particularly effective by counsel and what traps are there for counsel when cross-examining an expert?

JUDGE TIGAR: What works is to break things down into bite-sized pieces, to proceed at a pace that acknowledges that the jury is intelligent—juries don’t like being talked down to—but also allows them to digest one bite-sized piece before counsel moves to the next one. Also, to use analogies that make sense to jurors and allow them to tether what you’re telling them to a context from their own personal experience.

And obviously there’s the danger of oversimplification. Sometimes you might feel that your opponent’s analogy is unfair because it fails to capture some relevant criteria. But when you have an economics expert or another expert in a complicated area, you’re trying to teach the jury a lot more substance in a shorter period of time than one would expect in a classroom setting. And you’re not generally giving them worksheets or doing the other things we associate with good pedagogy. You’re not letting them practice the concepts.

ANTITRUST: Right, no homework.

JUDGE TIGAR: Yes, we actually have a system that frowns on homework, giving the jurors homework. They’re not even supposed to talk about the case once they go home. So, you have to figure out how to make them familiar with the topic as quickly as possible. And I think for many experts, the way to do that effectively is by drawing analogies to things that the jurors already understand or already have in their own life experience.

ANTITRUST: Do you think that the increased use of social media has changed the way in which we should present things to jurors because they have a shorter attention span?

JUDGE TIGAR: There’s no question that not just social media, but Internet culture in general has shortened everybody’s attention span. So counsel’s presentation has to adjust accordingly, and the need to focus on juror engagement goes up. There are a variety of ways of getting that result, of get-
ting juror engagement. But one easy takeaway is that in the complicated areas, simply having a witness on a witness stand talking for long stretches of time about something dry without interruption or some kind of visual component is not going to be a successful strategy.

ANTITRUST: Have you approached jury selection in a unique way in complex cases over which you’ve presided at trial?

JUDGE TIGAR: I don’t think complexity has driven any changes. I think length of trial has driven some changes. I would say that compared to most, I have somewhat more liberal voir dire policies than many other judges. I’m a believer in voir dire. I do put time limits on counsel, but I have always allowed counsel to conduct voir dire. And I will sometimes permit longer voir dire in a longer trial. In a long case, I also think written questionnaires can be helpful.

And I can think of at least two instances where the trial was going to be so lengthy and the issues at stake were so important that I told counsel that I was not going to place any time limits in advance on voir dire; that we would see how it went. And in both of those cases, I thought counsel conducted themselves extremely well and I wound up allowing them to simply conduct all the voir dire they wanted, which was a very reasonable amount under the circumstances. And in both of those cases, I would say we had very, very solid juries.

Not every case needs that kind of voir dire. But even in the shortest case, I will allow counsel to have some time to talk to every potential juror who’s going to sit on their panel.

ANTITRUST: I would like to follow up on your observation about the importance of counsel developing a relationship of trust with the court. How does counsel demonstrate to you that she is an honest broker?

JUDGE TIGAR: By deciding that being the most trustworthy person in the room is more important than anything else. I will very often ask a question for the purpose of obtaining a concession from counsel. And the question will often take the form, “Well, isn’t it true that,” or, “If we were to adjust the facts just slightly,” and I’ll offer a hypothetical in which the facts are worse than the ones I have before me, “Isn’t the following true?” Or, “Isn’t there the following testimony in the record,” and the testimony I’m asking about is undermining a position the counsel is taking. These kinds of questions.

And sometimes, I would say maybe even much of the time when I ask these questions, I am not trying to get the concession because I’m going to use the concession. I’m trying to figure out can I believe this lawyer. And if somebody is unwilling to concede something that I know they have to concede, that makes it more difficult for me to believe them. We already know, because you and I talked about it earlier, we live in a world of imperfect information. So I’m constantly trying to figure out—and I think many judges are trying to figure out—whom can I trust? And that means at least some of the time, at the margin, the lawyer I trust will win a point.

I had a lawyer in a real estate fraud case in a post-trial motion say—in a footnote—that he had located authority that his opponent had not cited but that he felt his opponent should have cited because it was helpful to his opponent’s position. He did not believe that the case was controlling; he felt it was distinguishable. But nonetheless, because it was relevant to the issue in front of the court, he thought I should be aware of it.

This is exactly the thing that you’re told in ethics class you should do and no one ever does it. He did it. I still remember that hearing.

And that hearing occurred at least 10 years ago.

And at the hearing, the lawyer said, “I know Your Honor reads all of the briefs and I’m not meaning to suggest otherwise. But I did bury it in a footnote and I wanted to make sure that the court was aware of this case.”

I don’t think that lawyer had any idea what a positive event that was for his credibility. And I will look forward to that lawyer being in my courtroom for the rest of my career.

So, I think counsel should view opportunities to show the court how candid and credible you are exactly as that; not as tests with a lot of risk or downside, but as opportunities to demonstrate to the court that you’re exactly the kind of lawyer the court needs. And if you go into it with that attitude, you’re going to have a lot more fun and you’re going to win.

ANTITRUST: That’s a great note to end on. Thank you very much for your time.
Views from the Bench: Non-Merger Civil and Criminal Antitrust Cases

BY LISA C. WOOD

Trial Lawyers Value the Opportunity to hear from judges who preside over antitrust cases, and the ABA Section of Antitrust Law was fortunate to have 11 federal judges from around the country speak at programs presented at the 2017 Spring Meeting. In this column I share observations offered at one of these programs by three experienced trial judges—Denise Cote, Paul Friedman, and Michael Baylson—about non-merger civil and criminal antitrust cases.

Judge Denise Cote has been on the bench in the Southern District of New York for 23 years. She has handled numerous antitrust cases, including In re Wireless Telephone Antitrust Litigation, Siti-Sites.com, Inc. v. Verizon Communications Inc., and the United States v. Apple, Inc. e-books case. Before that, she was a federal prosecutor in the Southern District of New York, where she was the first woman to head the criminal division, and earlier was in private practice at Kaye Scholer.1

Judge Paul Friedman has also been on the bench for 23 years, in the District Court of the District of Columbia. Judge Friedman handled the Whole Foods/Wild Oats merger case, Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Company Antitrust Litigation, and In re Rail Freight Fuel Surcharge Antitrust Litigation. Before that, Judge Friedman had a varied practice in both the public and private sectors. In addition to serving as an assistant U.S. Attorney in the District of Columbia, he was an Assistant to the Solicitor General of the United States and worked on the Iran-Contra investigation. When he was in private practice, he was the managing partner of the D.C. office of White & Case.2

Judge Michael Baylson is from the Eastern District of Pennsylvania, and has been on the bench for 15 years. He has handled several antitrust cases, including Shionogi Parma Inc. v. Mylan Pharmaceuticals Inc. and the multidistrict In re Domestic Drywall Antitrust Litigation, among others. Before that, he served as a state and then federal prosecutor in Philadelphia, serving as the U.S. Attorney in the Eastern District of Pennsylvania from 1988 to 1993. He previously was a partner at Duane Morris and head of the trial department there.3

Antitrust Cases as Professional Challenges. The judges offered positive views of antitrust cases as both professional challenges and learning opportunities.

Judge Cote:

I am thrilled to get antitrust cases or complex cases of any kind. Most of us love this job because we love the idea of a lifetime of learning, and if we’re already familiar with the field, it’s nice to learn about the more esoteric aspects as opposed to understanding the general framework in which the litigation is being conducted. So I think it’s a benefit to the job that we get challenging, interesting cases, and I think most of us—I can’t speak for everyone—are very happy to have an antitrust case among their many cases on the docket.

Judge Friedman:

When I get an antitrust case I always say, “I’m glad it’s not a patent case.” But, seriously, antitrust cases are really fun and challenging and interesting. Some of what we do as judges is routine, and our job is to make sure we don’t treat it like it’s routine because it’s so important to the lawyers. A lot of the criminal cases are not intellectually challenging, but there’s nothing more important that we do as judges than to sentence people. So when we get a case from you guys with all these interesting, intellectual, hard questions and expert witnesses, I think we do relish the challenge but appreciate the help that you can give us in understanding these complex concepts.

Role of Generalist Judges. All three judges endorsed our system of generalist judges, though Judge Friedman explained that not all judges are in favor of the current system:

There’s a debate between a number of people, but in particular Judge Doug Ginsburg and Judge Diane Wood on this. They’ve both written and spoken on it. Doug, I think, at least in

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the patent area, is in favor of the specialized courts and the idea of the Federal Circuit. And Judge Diane Wood, like Judge Cote and like me, thinks the generalist courts are a good thing.

Judge Friedman explained that a generalist judge’s broad experience handling many of the procedural issues common to cases large and small is helpful in a complex case.

When you think about it, in most of the cases that we have, even patent cases, antitrust cases, other complex cases, there are also all sorts of other issues that emerge that you, I would hope, would prefer to have a generalist judge resolving. Statutory construction issues, class certification issues come up in a variety of contexts. They’re not antitrust specific. They come up in civil rights cases as well.

He also assured the audience that generalist judges learn how to handle a broad range of complex issues with the help of good lawyers.

And we’re pretty good, with the help of good lawyering and good lawyers, at getting on top of hard issues. Environmental cases are complicated; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Water Act and the Clean Air Act. We do that all the time.

Judge Baylson added that generalist judges are very important to preserving the unique American institution of a jury trial by ensuring that counsel present the case in a way that can be understood by jurors:

The only other thing that I want to add to this is the concept that every case that’s filed, at least theoretically, can lead to a jury trial. A jury trial is embedded in our Constitution, and as you probably know, we’re the only country in the world that still has jury trials in civil cases. Juries are, of course, lay people. One danger, I think, of getting specialized judges is that you would further erode the right to a jury trial. We know that jury trials have declined tremendously, which is one unfortunate thing about the way our current judicial system is operating. We have to deal with the fact that almost all cases are settled, but some could go to a jury. I think having a generalist judge means that the lawyers have to make sure they’re educating the judge, and they may at some point, if a case doesn’t settle, have to educate a jury. So I think having a generalist judge is better because if, as and when you go to a jury you’re going to have to deal with lay people who really probably know much less about the topic than the generalist judge did.

Role in Case Management. While acknowledging the important role lawyers play in helping judges handle complex cases, the judges also recognized the increasingly important role judges play in case management. As Judge Friedman explained:

I think there are ways that judges, particularly in big cases, can control and manage things. A huge part of our job as judges is being case managers and running things. Lawyers don’t run the courtroom. Experts don’t run the courtroom. Judges have to manage the courtroom, and each of us has our own techniques, and it depends on the nature of the case. But if we don’t run things and control things, then they can get out of hand.

In addition to case management orders for complex cases, Judge Friedman explained a novel approach he used for managing extensive expert opinions in a complex patent case that he thought could be employed in an antitrust case:

In a patent case . . . there were 14 experts proffered. And I thought, This is a little crazy. How are we going to deal with that?

So I asked each side to give me, I think it was about a ten-page summary of each expert’s report; who the expert was, background, what this expert is opining about, what the basis for the opinion was. I made it very clear this was not a substitute for the report itself. You were not going to be hoisted on your own petard if you left some things out of this summary. It was to give me a roadmap for the hearing I was going to have.

And then, in that case I said, “We’re going to have 3 days of testimony, 1 hour for each expert, 25 minutes for the proponent to examine, 25 minutes for the opponent, and 10 minutes for the judge, and if I took more time it wouldn’t count against any of you.”

Then I was able to go away and have a real sense of who these people were and what they were talking about and where they fit into the case, and I could write what turned out to be a fairly lengthy opinion, and admitted some opinions and excluded others.

Judge Baylson reflected on his positive experience with phased discovery in a Section 1 antitrust case:

In one case, I decided, and counsel went along with this, both plaintiffs and defendants, to first limit fact discovery to the issue of whether there was an agreement. . . . And there was some sparring over how the question would be phrased, but once we got through that, the discovery proceeded for about six months limited to that issue. And both sides wanted to have expert testimony, expert reports on that as well, which the Third Circuit has held is relevant on the issue of whether the parties formed an agreement.

Then there were summary judgment motions, and the briefing on that took another four to five months. I finally had a very lengthy oral argument and wrote a very long opinion in which I granted summary judgment to one of seven defendants because I found there was insufficient evidence that that defendant had participated in the agreement. And the defendants wanted me to certify the case for an interlocutory appeal, and I agreed to do that, but the Third Circuit refused to take it. So the case is now moving forward on the class action issue.

But it had several results that I thought were beneficial, and I’ll just be very brief about this.

Number one, it eliminated one defendant from defending the rest of the case. So for that company the case was over, and of course they are free of any kind of financial responsibility for the case and free of hiring lawyers, etc.

Of the other defendants, three of them have since settled. That leaves three defendants that are now in the case on the class action issue. Those defendants filed Daubert motions as
to the plaintiffs’ experts. So we’re now proceeding in briefing on the class action issue, and I have now agreed to have an evidentiary hearing for the experts to actually testify in an evidentiary hearing with their reports constituting their direct testimony, and then there will be cross-examination, redirect, and recross.

So we are moving toward a decision on Daubert and on class certification, and we’ve not yet touched anything about damages. But this has generally been done by agreement with counsel as the most efficient way to move this particular case forward.

Judge Cote explained the importance of the initial conference in a court’s management of a complex case because it will inform the court’s assessment of proportionality.

One of the questions that’s at the forefront of case management now is the issue of proportionality, and judges are encouraged to be active case managers. Now I think when Paul and I were in baby judges school together that theme was very present, you know, that we were encouraged to be active in managing our cases, both large and small. But I think it’s now more formally recognized even in the Federal Rules of Civil Procedure.

If I was to give this theme one practice tip to attorneys, it is to come to the initial conference after the motion to dismiss has been decided fully informed about what discovery you need, what’s important with respect to the sequencing of that, what limitations you want the judge to impose—to come in a way that you’ve thought both tactically and strategically about your case so that you can design, and help the judge design, a management structure for that case that is going to be helpful in that particular litigation.

I use the initial conference to learn about the case from that vantage point and also to make suggestions to counsel. I come usually with my own proposal about sequencing of discovery, trying to understand what the core discovery is, understanding most cases will settle, trying to figure out what the parties need early on to make that evaluation about settlement discussions, to understand whether, for instance, expert discovery can be conducted concurrently with fact discovery, what kinds of limitations on electronic discovery are important, how many fact depositions we actually need, all those kinds of issues.

I think that each case is its own unique animal, and I want attorneys to be thinking creatively, and I certainly try to think creatively about what will be helpful in this case to get the parties as quickly and efficiently as possible to the point where they can evaluate the case for settlement or get the core discovery they need to go all the way to trial.

**Role of Magistrate Judges.** The judges were not of one mind regarding the use of magistrate judges to assist with complex cases. Judge Cote explained that she rarely referred discovery disputes to magistrate judges:

I know practices vary in my own district and around the country, but I don’t use magistrate judges or special masters for discovery. I’ve always managed discovery myself. And I think there are enormous advantages for me. There are many good ways to be a great judge, but just for me, this works. I started this as a new judge because I realized there were so many fields of practice that I didn’t know anything about, and I just really wanted to get up to speed as fast as I could and understand sort of what was behind the screen in terms of what I would otherwise see as a judge.

Over time I’ve really enjoyed the case management aspect of being a judge. I feel that by being the one who makes the decisions on the discovery schedule, the scope of discovery, and rules on discovery disputes, I can save the parties an enormous amount of time. It’s very cost effective, and it helps me, I think, be a better judge on the case.

Discovery disputes don’t fester before me. If you have a discovery dispute, you have to meet and confer with your adversary. We have a local rule in the Southern District of New York that forbids motions and requires that meet-and-confer process. But if you have a dispute after that process, you write me a letter no longer than two pages, and I read it on it promptly. The adversary will or won’t get a chance to respond to the letter. More often than not I’ll just schedule a phone conference, give everybody a chance to be heard, and give you a ruling.

Because I don’t have magistrates controlling discovery or being responsible in the first instance, people know they are not going to get a second bite at the apple. There is no appeal to a district court judge.

I also feel it’s easier for me. Once I’ve heard the parties and given them the rulings, it’s easier for them to plan their lives. They know with certainty what the lay of the land is. I think one of the things we offer our litigants and our litigators is a sense of firmness in that the case is moving forward, that it’s not stuck, that it’s not going to go on forever, that you know what the rules are, and you can predict the course of the litigation. Hopefully, you get a sense that this is all being done fairly and transparently. You give everybody one opportunity to be heard, you rule, and then you move on; that’s my view.

Judge Baylson on the other hand relies on magistrates and special masters for complex electronic discovery issues:

Let me say that the topic of search terms has come up, and this can be a contentious issue in a lot of cases. If there is a magistrate judge in the district who has expertise in that, that can be useful. Because frankly—and this is something I tell lawyer audiences all the time—if this is an antitrust case, you need to know not only has the judge ever dealt with an antitrust case or has background in antitrust law, but you also need to know, if you’re going to have discovery motions in front of the judge, what level of sophistication the judge has about electronic discovery. Because more and more district court judges have been practicing lawyers and have had some experience, whereas the older group among us has not, and that can make a big difference in the judge’s ability to rule on an electronic discovery issue.

So when the issue of search terms comes up, I happen to have a former law partner of mine who also has a masters in computer science, and I have appointed her as a master limited to the issue of search terms, and that’s been very effective in
moving the case forward and getting over that particular issue. Judge Friedman fell in the middle, explaining that he handles discovery disputes in non-complex cases, but regularly relies on magistrates or special masters in complex cases:

My practice in non-complex cases has been to do something like what [Judge Cote] does in New York, which is to say, if you’ve got a discovery dispute you try to work it out, and if you can’t work it out, you call my chambers and we’ll have a conversation that day or the next day. I don’t refer those things to a magistrate judge.

But in complex cases I do refer it. And I mentioned the railroad case with Judge Facciola and the e-discovery experience. The In re Vitamins Antitrust Litigation case, which I had briefly before it went to Judge Hogan, had a huge number of parties. And I said, “What about a magistrate or a special master?” And the lawyers on both sides said, “We think this would overwhelm a magistrate. How about a special master?” I said, “Come up with three names you agree upon.” They agreed upon three names, to my surprise, and I picked one and I appointed him.

Judge Friedman encouraged lawyers to avoid a “shotgun” approach when arguing a motion:

A shotgun approach usually doesn’t work very well, and it certainly muddies the waters more often than elucidates, it seems to me.

He also encouraged counsel to avoid using technical jargon or at least explain the jargon with a glossary.

Judge Baylson explained that educating the judge is very important and has a special resonance in antitrust cases. While he has found that handling discovery himself in antitrust cases has helped him understand cases better, he relies heavily on counsel when economic experts proffer reports that are very technical:

The lawyer has an obligation to make sure the judge understands what the expert economist is saying and, even if the judge doesn’t want to maybe show his or her ignorance by specifically asking about it, to really explain what the economist that the party has hired is talking about in plain language, or fitting it into a legal issue that’s relevant, or a factual issue that’s relevant in the case.

Judge Baylson also encourages counsel to use chronologies and charts to educate the court:

A lot of lawyers omit having a chart of prices in an antitrust case, or price movements. It can be very helpful, even in pre-trial hearings, to bring that and make that point to the judge, as well as in a jury trial.

Role with Expert Evidence. The judges also discussed their views on expert witnesses, which are an antitrust staple. Judge Cote encouraged counsel to select an expert who is not only well-qualified, but who will take the time to do the necessary work:

In terms of practice tips, you may choose your experts because they are very well known and admired in the field, and so you’re looking at their resume and their reputation. But I think it is more important to have an expert who is not only well-qualified, but also who’s going to do their homework.

And I’ve had Nobel laureates in my courtroom. It’s quite wondrous to be a judge, I have to say. It really is a thrill. But you can be stunned by the arrogance of some folks who think that just because of their name, their reputation, their resume, that that’s going to carry the day when they don’t know the facts.

Judge Friedman addressed the importance of the judge’s gatekeeper role when ruling on Daubert motions, but counseled lawyers to think through whether these motions are necessary in jury waived trials, or on pretrial matters resolved by the court.

One of the things I’ve always thought, and I’ve written a couple of short opinions on is this: When you think about the purpose of Daubert, under Daubert, and Rule 702, we, the judges, are supposed to be the gatekeeper. That’s the purpose of a Daubert hearing. We’re supposed to be the gatekeeper so that the jury does not hear “junk science.” Is it reliable, has it been...
Cote explained:

Judges Cote and Friedman both explained, counsel should be concerned about jurors having too short an attention span to using technology. I think a PowerPoint presentation in your court efficiently in the courtroom, and I think there's a danger of over- I think, however, that they expect technology to be used efficiently in the courtroom, and I think there's a danger of overusing technology. I think a PowerPoint presentation in your summation is not the way to go in my view. But in any event, having command of the technology, knowing that it works, testing it before the jury's hearing the testimony so you can use it efficiently to either cross-examine a witness with the excerpt from their deposition if it was videotaped or present the chart so it's on everybody's screen at the same time and the witness on the stand can circle what's important to them in a way that everybody can see it immediately. Having a fluency with technology in the courtroom is very important, and if you don't have someone on your trial team who has that fluency I think you should get them.

Judge Friedman agreed with Judge Cote:

They want us and you to be efficient once the trial starts. “No long bench conferences. Don’t take long lunch hours, judge, let’s move along. We’d rather sit five long days than eight abbreviated days or whatever the case may be.”

Argument on Motions. The judges were not of one mind regarding the usefulness of oral argument on motions in complex cases. Judge Baylson explained that he welcomes oral argument:

If I think the lawyers in a complex case, which most antitrust cases are by definition, want oral argument, they should really make that point to the judge and identify the issues that they think need to be explained verbally, and also welcome questions from the judge. As I think my colleagues also do, I do most discovery disputes by telephone. But sometimes it's really better for everybody if there's a hearing in court with a back-and-forth. And also you may want to make a record, which some judges do by telephone but most do not. So those are all things to consider.

Judge Friedman explained that in his view oral arguments are helpful in complex cases because the court is likely to have questions:

I think having you identify the issues you want to focus on at oral argument, or sometimes, if it's a really complicated case, that I know enough about and have thought enough about, I can issue an order in advance and say, “Please focus, among other things, on the following issues.” Or, “Here are the issues. We're going to have an hour for argument, here are the issues, file something telling me how much time you're going to spend on each issue and how you're going to divide up your time, if there are multiple parties, or whatever the case may be.

But I think oral argument in complicated cases and motions is really, really helpful to get the nuances and to get answers to the questions that are in my head and in my law clerks’ heads.

Judge Cote explained that she, by contrast, rarely hears oral argument:

I think generally I don’t have oral argument except in the following circumstance, and that is if I can identify an issue, or issues, that I need counsel to address so I can better rule on the motion. And if that happens, I will either hold a phone conference or issue an order identifying the issues that I particularly wish to address at oral argument, and of course give them freedom to talk about anything else they want to do.

I flipped my practice completely as a judge. I assumed I’d have oral argument in everything, but I would come to the bench with a draft opinion and the parties would regurgitate their briefs, and I’d read to them from my draft opinion. And I thought,
What is this exercise about? And I thought, You know, clients are having to pay attorneys to prepare for oral argument, and pay for their attendance. So I now have it the reverse: there’s a presumption there will be no oral argument—you can ask for it—unless I can identify an issue where I think it will be of help to me.

**Conclusion.** Judges Baylson, Cote, and Friedman offered insights and guidance that reflect both consensus and some differences in how federal district court judges manage important aspects of civil non-merger antitrust cases. The judges reminded counsel of their key role in educating generalist judges (and jurors) in a practical way about the facts of the case, the focus of expert evidence, and the antitrust standards that apply. Their comments also underscore the need for counsel to do so in a manner that both shapes and adapts to the case management procedures of the judge (and magistrate judge) presiding over their case.

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Non-Merger Civil Enforcement: An Overview of Recent DOJ and FTC Federal Court Litigation

By Sonia Kuester Pfaffenroth

Recent years have seen the Department of Justice and the Federal Trade Commission appearing with regularity in federal district court, with the agencies demonstrating a willingness to litigate in both the merger and non-merger context and with a number of high-profile trials now in the rearview mirror.

While the majority of civil conduct enforcement actions continue to be filed concurrently with settlements—which provide significant insight into the government’s theories—both agencies have seen an uptick in the number of contested cases filed in federal district court since the beginning of 2009 than over the similar time period immediately preceding. Put differently, both agencies had approximately twice as many contested actions filed in federal district court in the 2009–2017 time period as compared to 2001–2008. Although the absolute number of contested cases is limited—typically no more than one or two cases per year—this reflects a noticeable increase in the number of contested cases filed by the DOJ and a shift for the FTC toward filing a larger proportion of its contested actions in federal court rather than through its administrative process.

This article focuses specifically on the agencies’ non-merger federal court litigation during the last eight years. Challenges have involved a wide variety of industries. The DOJ has actively litigated cases relating to conduct affecting competition in high tech, health care, airline, and financial services markets while the FTC has continued its ongoing focus on the pharmaceutical space. Both agencies have brought challenges involving telecommunications. These cases provide visibility into the agencies’ priorities, views, and approaches. As a result, there are now a significant number of career attorneys and economists with recent federal trial court experience, which they will bring to future cases at the investigative phase with an eye towards potential litigation.

DOJ Litigation

Because the DOJ has no administrative adjudicative process, its civil enforcement cases, whether they are settlements or contested litigation, are filed directly in federal district court. In recent years, the DOJ has litigated a number of cases alleging Section 1 violations and one case alleging a Section 2 violation. The Section 1 cases can be divided into those like United States v. Apple, which involved an alleged restraint of trade that was primarily horizontal in nature, and others, like the ongoing litigation against the Carolinas Health Care System, which are primarily vertical in nature. The final case, challenging a sale of take-off and landing slots by Delta to United at Newark Airport, was noteworthy as a rare case alleging a Section 2 violation.

Section 1: Horizontal Restraints. The DOJ’s recent challenges to horizontal agreements include cases involving allegations of price fixing, market allocation, and information sharing. Three of the cases—alleging price fixing and market allocation—asserted that the restraints in question were per se unlawful, illustrating the DOJ’s consistent position that agreements between competitors which the government views as having no purpose other than to restrain competition will be treated as per se unlawful. This focus on per se conduct seems likely to continue—with a current senior DOJ leader recently pointing to past enforcement actions—like the e-books case discussed below—while emphasizing the importance of bright line rules in providing guidance to the business community. Only the last case, alleging information sharing, was alleged to be a violation under the rule of reason, which followed the DOJ’s stated position that information sharing agreements between competitors—standing alone—are not subject to per se treatment.

Per Se. In April 2012, the Antitrust Division filed suit against Apple and five publishers alleging that they had conspired, in response to the threat posed by the rapid increase

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in e-book sales and Amazon’s practice of price discounting, to raise the price of e-books and limit retail competition by changing the business model governing the relationship between the publishers and retailers. Specifically, Apple and the publishers moved from a “wholesale model” to an “agency model.” Under the traditional wholesale model, retailers purchased books from publishers and set price independently. Under the new agency model, retailers would act as agents for the publishers, who would set the retail price. Apple vigorously defended the case, arguing that its behavior should be analyzed through the rule of reason framework because (1) its relationship to the other defendants is vertical rather than horizontal—that is, Apple was a distributor and not a content provider, and (2) the DOJ’s “hub and spoke” theory was inappropriate as Apple was not a dominant market actor, which was generally the case with traditional “hub” defendants.

After a three-week trial, the court found that there was a horizontal price-fixing conspiracy among the publishers to raise the price of e-books and that Apple was a “knowing and active member of that conspiracy.” The court concluded that, notwithstanding Apple’s vertical relationship to its co-defendants, Apple participated in the conspiracy to set horizontal prices, which is treated as per se unlawful. Moreover, the court found that case law does not require the hub of a “hub and spoke” conspiracy to be a dominant player. The court’s ruling was affirmed by the Second Circuit, and the Supreme Court denied Apple’s petition for certiorari.

Only a few months after filing its suit against Apple, the Antitrust Division sued eBay, alleging that its agreement not to recruit or hire employees from Intuit Inc. constituted a violation of Section 1. The lawsuit followed a joint settlement of Section 1 case involving vertical restraints in a financial services market. Only the most recent of these cases remains in active litigation.

Unlike the per se cases discussed above, there was no allegation by the government that DIRECTV had entered into an agreement with any of its competitors not to carry the Dodgers Channel—only that DIRECTV had agreed with its competitors to share information regarding negotiations with Time Warner Cable to carry the “Dodgers Channel,” which was a partnership between Time Warner Cable and the L.A. Dodgers that held the exclusive right to telesport most live Dodgers games in the L.A. area.

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The DOJ has also recently litigated two Section 1 cases involving vertical restraints in health care markets, one involving an allegedly dominant provider and the other a dominant insurer, and one Section 1 case involving vertical restraints in a financial services market. Only the most recent of these cases remains in active litigation.

In 2010, the Antitrust Division and a number of states filed suit against American Express, alleging that its non-dis-
The DOJ alleged in its complaint that BCBS insured more negotiating competitive contracts with competing insurers. In its contracts with hospitals to prevent those hospitals from alleging that BCBS had used “most favored nation” clauses, filed suit against Blue Cross Blue Shield of Michigan (BCBS), together with the State of Michigan, in its contracts with health insurers to prevent insurers from providing patients with “steering” contract provisions in its contracts with health insurers. The district court concluded that American Express had market power based on its 26 percent share of the general purpose credit and charge card market, coupled with the high degree of loyalty of its cardholder base and a historical ability to raise price without merchant attrition. The district court further concluded that American Express’s non-discrimination provisions had caused actual anticompetitive harm. On appeal, the Second Circuit reversed and remanded with instructions to enter judgment for American Express, finding that the district court had failed to appropriately analyze the two-sided market because it had focused solely on the effect of the non-discrimination provisions on merchants and omitted consideration of the effects on the cardholder side of the platform. The court of appeals concluded that the government had failed to meet its burden to establish net harm to both cardholders and merchants. After an unsuccessful petition for rehearing en banc, DOJ did not seek a further appeal, but a number of state attorneys general filed a petition for certiorari. The DOJ opposed the petition, arguing that although the petition correctly argued that the decision by the Second Circuit was erroneous, the matter was not yet ripe for the court’s consideration. The petition for certiorari was granted on October 16.

In the health care arena, in June 2016, the Antitrust Division, together with the state of North Carolina, sued Carolinas Healthcare System (CHS), for its use of “anti-steering” contract provisions in its contracts with health insurers to prevent insurers from providing patients with financial incentives to use lower-cost alternative healthcare providers. The government alleged that CHS held an approximately 50 percent share of the market for the sale of general acute care inpatient hospital services to insurers, making it the dominant hospital system in the Charlotte area. CHS filed an answer and moved for judgment on the pleadings, arguing that the government had not alleged facts sufficient to show that the steering provisions in question had an adverse effect on competition. The court denied CHS’s motion, ruling that while CHS had raised important questions, they were not issues that were appropriate for determination at the pleadings stage, and required discovery and potential future determination by a finder of fact. The parties are entering discovery now, with dispositive motions set for August 2018 and trial set for November 2018.

The Carolinas litigation involves the inverse situation from the one that formed the basis for the DOJ’s 2010 litigation against Blue Cross Blue Shield of Michigan (BCBS). The Antitrust Division together with the State of Michigan filed suit against Blue Cross Blue Shield of Michigan (BCBS), alleging that BCBS had used “most favored nation” clauses in its contracts with hospitals to prevent those hospitals from negotiating competitive contracts with competing insurers. The DOJ alleged in its complaint that BCBS insured more than 60 percent of the commercial insurance market in Michigan, with an insured population more than nine times greater than its closest competitor. The government alleged that BCBS was entering into agreements with hospitals requiring hospitals to provide services to BCBS either at prices no greater than its competitors (“equal-to MFNs”) or at lower prices (“MFN-plus”) and that these agreement violated Section 1 of the Sherman Act. The government alleged that in many cases, BCBS negotiated the MFNs in exchange for increases in the prices paid for hospital services, which, the government argued, had the effect of driving up prices for BCBS’s competitors as well.

BCBS moved to dismiss on a number of grounds, including failure to adequately allege relevant product and geographic markets and state action immunity grounds. The court denied BCBS’s motion to dismiss, and discovery proceeded. On March 18, 2013, the State of Michigan passed laws that made it unlawful to use the type of MFNs that were the subject of the lawsuit. This legislative action rendered the lawsuit moot and the parties jointly moved to dismiss.

Section 2. In late 2015, the Antitrust Division filed suit against United and Delta, seeking to enjoin United’s acquisition of 24 airport takeoff and landing slots at Newark Liberty International Airport. Since 2008, Newark had been designated as a slot-controlled airport by the FAA, which limited the number of flights that were permitted to take off and land at the airport every hour. The FAA had imposed the constraints to address congestion and delay issues at Newark. The government alleged that United already held 73 percent of the slots at Newark and that it was, on a daily basis, not using all of the 902 slots it already held.

The case was noteworthy because it represented a relatively rare instance in recent years where the Antitrust Division alleged that United was using the proposed transaction to maintain and enhance its monopoly in Newark in violation of Section 2. The defendants moved to dismiss the case, arguing that all anticompetitive effects are speculative and could not sustain a Sherman Act claim, especially in light of the procompetitive effect of Delta being able to increase frequency to existing routes. United also argued that the relevant market—Newark Airport—was too narrow. Opposition motions were filed, but no ruling was made because on April 1, 2016, the Federal Aviation Administration announced...
plans to lift slot controls at Newark. The FAA cited new entry and increased competition as some of the benefits of lifting the slot constraints. 25 A few days later, the parties abandoned the proposed transaction, and the DOJ filed a stipulation dismissing the case. 26 Because the actions by the FAA prevented an adjudication of the Section 2 claim on the merits, it remains to be seen what approach the Division will take in future cases that have facts with the potential to support a Section 2 claim.

**FTC Litigation**

The FTC brings civil non-merger enforcement actions pursuant to its authority under Section 5 of the FTC Act. This includes not only cases alleging conduct that would violate the Sherman Act, which the FTC does not directly enforce, but also conduct that would otherwise violate the Act’s prohibition against “unfair methods of competition.” Section 13(b) of the FTC Act provides the FTC with the authority to seek preliminary injunctive relief to stop conduct during the pendency of FTC administrative action and further provides that in “proper cases” the FTC may seek a permanent injunction. Although the FTC more typically uses its authority under Section 13(b) to seek preliminary injunctive relief in connection with proposed mergers which might otherwise be consummated prior to the resolution of the FTC’s administrative process, the FTC at times opts to seek permanent injunctive relief in federal court with respect to alleged anticompetitive activity.

The FTC has in recent years filed several noteworthy cases in federal court under its Section 5 authority in civil conduct cases, all but one of which involved challenges to conduct by pharmaceutical manufacturers. 27 Most remain in active litigation.

Most recently, in February 2017, the FTC filed suit against Shire ViroPharma Inc., challenging ViroPharma’s alleged abuse of the FDA citizen petition process to maintain its monopoly on Vanocin Capsules and seeking permanent injunctive relief. The FTC alleged that ViroPharma made “repetitive, serial, and meritless filings” without “any supporting clinical data” in an effort to delay the FDA’s approval of competing generic products. The FTC alleged that over the course of six years, ViroPharma made at least 43 submissions to the FDA and filed several federal court proceedings to delay the FDA’s approval of a generic equivalent to Vanocin Capsules. 28 Shire ViroPharma has moved to dismiss the case, arguing both that the FTC lacks authority to seek permanent injunctive relief in this case because it is challenging past actions of ViroPharma and that ViroPharma’s challenged actions were *Noerr Pennington* protected petitioning activity. 29 Shire ViroPharma’s motion has been fully briefed and is awaiting decision.

Just a month earlier, in January 2017, the FTC filed suit against Qualcomm, Inc. in the United States District Court for the Northern District of California, alleging that Qualcomm had used anticompetitive means to maintain a monopoly in the supply of baseband processors, a component that allows a handset to communicate with an operator’s cellular network. The FTC alleged that Qualcomm is the dominant supplier of two types of baseband processors or “modem chips”—those compliant with CDMA standards and chips used in premium tier handsets, such as the Apple iPhone and Samsung Galaxy-S, which comply with advanced LTE standards, with a worldwide market share for both exceeding 80 percent.

The FTC proceeded on three theories. First, it alleged that Qualcomm used its monopoly in baseband processors, or “modem chips,” to extract non-FRAND rates on patents essential to cellular standards under a “no license no chips” policy. 30 Second, the FTC alleged that Qualcomm refused to license SEPs to its competitors in the market for baseband processors in violation of its FRAND commitments. Finally, the FTC maintained that Qualcomm had used its monopoly power to extract exclusive supply agreements from Apple. The FTC alleged that Qualcomm had violated the FTC Act by violating both Section 1 and Section 2 of the Sherman Act and also laid out a claim that Qualcomm’s practices constituted a violation of Section 5 of the FTC Act “regardless of whether they constitute monopolization or unreasonable restraints of trade . . . .” 31 The case was filed on a 2 to 1 vote, with a dissent from then-Commissioner, now Acting Chairman, Maureen Ohlhausen. Acting Chairman Ohlhausen described the Commission’s legal theory as “flawed” and “lack[ing] economic and evidentiary support,” further objecting that it was brought “on the eve of a new presidential administration” and would “undermine U.S. intellectual property rights in Asia and worldwide.” Ohlhausen disagreed with the Commission’s decision to proceed on not only a Section 5 claim theory based on violations of the Sherman Act, but also a standalone Section 5 claim. 32

The FTC secured an interim victory when the court denied Qualcomm’s motion to dismiss on June 17, 2017. The court held that the FTC had adequately pled each of its three theories and adequately stated a claim under both Section 1 and Section 2 of the Sherman Act, thus obviating the need for a standalone Section 5 claim. 33 Qualcomm has answered the complaint, and the case is progressing through discovery.

**Reverse Payment Patent Settlements.** The FTC has been challenging reverse payment patent settlements in the pharmaceutical industry or “pay for delay” agreements for many years. The earliest cases proceeded through the FTC’s administrative process, with the first case filed in federal court in 2008.

The first case the FTC filed in federal court was a suit against Cephalon, Inc., alleging that Cephalon had sought to block generic competition for its product Provigil by settling patent litigation initiated by potential generic competitors with payments to the generics and agreement by those generic competitors not to enter the market for an additional six years. 34 A second challenge in 2009 involved agreements settling patent litigation relating to AndroGel in which the
FTC alleged that Solvay Pharmaceuticals, Inc. had paid generic manufacturers to delay entry with a generic equivalent. After FTC losses in the district and appellate courts, the case was appealed to the Supreme Court, resulting in FTC v. Actavis, in which the court held that reverse payment patent settlements are subject to a rule of reason analysis.35

The FTC subsequently announced in 2015 that it had settled the Cephalon case for $1.2 billion dollars. This was the first FTC settlement in a reverse payment patent case since the Supreme Court’s ruling in FTC v. Actavis. Trial in the case was scheduled to begin on June 1, 2015.36

The FTC has followed up on those early cases with two additional actions filed in federal district court in the last three years. Both cases saw the FTC seeking to expand the boundaries of Actavis, challenging in the first case an agreement that involved “compensation” in the form of a separate authorized generic agreement relating to a different drug and in the second case an agreement that involved a commitment by the brand manufacturer not to enter with an authorized generic of the drug in question. Both cases remain pending.

In 2014, the FTC filed suit alleging that AbbVie, Inc. and Besins Healthcare, Inc. had filed sham patent infringement suits against generic drug manufacturers to delay approval of a generic version of their product AndroGel. The FTC further alleged that the brand manufacturers subsequently paid the generic manufacturers to drop their counterfeit suits and delay bringing a generic product to market. The complaint alleged two counts in violation of Section 5—one for monopolization against AbbVie and Besins relating to the filing of the alleged sham patent litigation and a second for restraint of trade against all defendants relating to the settlement agreement.37 Commissioner Ohlhausen dissented, arguing that it would be preferable to pursue the case in Part III proceedings.38

The FTC suffered a blow in AbbVie when the district court ruled in the defendants’ favor on their motion to dismiss, agreeing that no antitrust violation arose from the settlement of the patent litigation. The court reasoned that because the settlement of the patent litigation allowed Teva to enter with a generic prior to expiration of the patent in question but did not involve any payment to Teva by the brand manufacturers, under the Supreme Court’s decision in Actavis, there was no violation of the Sherman Act or Section 5 relating to the settlement agreement. Discovery with respect to the sham litigation was allowed to proceed.39 Acting Chairman Ohlhausen expressed frustration following the court’s ruling that the FTC had not proceeded via Part III administrative litigation where the FTC would have had the opportunity to consider the implications of the questions raised in AbbVie on a more rapid timeline than the federal court proceeding.40

The parties filed cross-motions for summary judgment on the remaining claim in June 2017. In September, the court granted the FTC’s motion for partial summary judgment, finding that the patent lawsuits in question were objectively baseless and that the FTC was therefore entitled to partial summary judgment on that element of their illegal monopolization claim. The court denied the defendants’ motion for summary judgment as to the monopoly power prong of the monopolization claim, ruling that the issue would have to go to trial.41

Most recently, in March 2016, the FTC filed suit against Endo Pharmaceuticals Inc. and other pharmaceutical manufacturers in the U.S. District Court for the Eastern District of Pennsylvania alleging that separate patent litigation settlements relating to Opana ER and Lidoderm included reverse payments in violation of Section 5 of the FTC Act. Notably, the FTC described the case as its first challenge to a patent settlement provision providing a generic company with a commitment that the branded manufacturer would not launch an authorized generic version for a period of time.42 Commissioner Ohlhausen dissented, noting that, although she believed that the agreements in question violated Section 5 of the FTC Act, she did not agree with the decision to seek disgorgement and would have preferred to see the case pursued through the FTC’s administrative Part III process.43

The defendants successfully moved to sever the allegations relating to Opana ER and Lidoderm on the grounds that they are different settlements with different generic manufacturers. Shortly thereafter, the FTC voluntarily dismissed its complaint.44 The following day, the defendants filed for a declaratory judgment alleging that the FTC Act does not authorize the FTC to challenge past conduct in federal court—which is similar to the argument later advanced by the defendants in the Shire ViroPharma case—and also that the FTC Act does not authorize the FTC to seek disgorgement.45 Several months later, the FTC announced that it had settled with Endo. The settlement places certain restrictions on its patent settlement agreements for 20 years, but does not include a disgorgement of profits.46 It also refiled its Lidoderm case seeking disgorgement in the U.S. District Court for the Northern District of California, where a related class action was already pending. The district court has stayed the FTC’s Lidoderm action pending resolution of the action for declaratory relief that remains pending in the Eastern District of Pennsylvania.47

Conclusion

Senior leaders from both agencies have emphasized the importance of stability and continuity in antitrust enforcement. As of the current time, the Department of Justice has initiated no litigation in civil non-merger enforcement cases since the change in administration and the Federal Trade Commission has initiated no federal court actions since former Chairwoman Ramirez resigned, leaving the FTC with only two commissioners. With the recent confirmation of Assistant Attorney General for Antitrust Makan Delrahim and the still vacant commissioner seats, the full contours of antitrust enforcement in the new administration remain to be

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seen. But there has been recognition that the business community values predictability in antitrust enforcement and that change is best approached with careful consideration.

1 The overall number of contested FTC competition-related enforcement actions is very similar in both time periods.
2 Only cases where the complaint was not filed concurrently with a settlement are included.
5 Apple, 952 F. Supp. 2d at 691, 706–07. The publisher defendants settled the government’s claims relating to the conduct in question. Only Apple proceeded to trial. Id. at 645.
12 Complaint, United States v. DIRECTV Group Holdings LLC, No. 2:16-cv-08150 (C.D. Cal. Nov. 2, 2016). AT&T acquired DIRECTV in 2015, subsequent to the conduct alleged, and was named as a defendant as the corporate successor to DIRECTV. Id. ¶¶ 2–3.
15 American Express, 838 F.3d 179, 204–07 (2d Cir. 2016).
21 Stipulated Motion and Brief to Dismiss Without Prejudice, Blue Cross Blue Shield, No. 10-cv-14155 (Mar. 25, 2013).
23 Complaint, United States v. United Cont’l Holdings, Inc., No. 2:15-cv-07992 (D.N.J. Nov. 10, 2015). Similarly, the DOJ challenged United Regional Health Care System under Sherman Act § 2 in 2011 for exclusionary contracts with commercial health insurers used to further its monopoly power, but this case was filed as a settlement rather than a litigated case. See United States v. United Regional Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011).
25 FAA Press release, supra note 22.
27 During the same time period, the FTC filed six additional cases that were substantively litigated through the FTC’s Part III process.
30 Standard-setting organizations will frequently require holders of patents that are essential to a standard (standard-essential patents or SEPs) to commit to license those patents on terms that are fair, reasonable, and nondiscriminatory (FRAND).
33 Order Denying Motion to Dismiss, Qualcomm, No. 17-cv-0220, 2017 WL 2774406 (N.D. Cal. Jun. 26, 2017). Qualcomm did not dispute the FTC’s allegations regarding market share. Id. at 19.
39 FTC v. AbbVie Inc., 107 F. Supp. 3d 428, 436 & n.6 (E.D. Penn. 2015). The court rejected the FTC’s argument that a separate settlement agreement relating to a different drug constituted a reverse payment relating to Andro-Gel. The court expressly opined that the separate agreement was itself pro-competitive.
40 Ohlhausen, supra note 38.
Deciding Between Bench and Jury Trial: Reflections After *US Airways v. Sabre*

BY CHARLES DIAMOND AND SERGEI ZASLAVSKY

**Antitrust Bench Trials Are Rare Enough in this “Age of Settlement.”** Trying an antitrust case to a jury is rarer still. When lawyers have to choose between a jury or bench trial, they debate endlessly whether their chances improve or diminish before one or the other. In antitrust cases particularly, the conventional wisdom holds that economic and business complexities put most disputes beyond the intellectual reach of the average lay jury; that defendants can count on getting a fair shake only when a judge decides the merits; and that plaintiffs prefer juries because the plaintiff uniquely stands to benefit from the confusion that arises from competing economic testimony, debates over unfathomable concepts like relevant market, and the seemingly intemperate things that business people put in emails when discussing the merits of competition they face. And everyone assumes that a jury will award damages more generously.

Conventional wisdom greatly oversimplifies the tradeoffs that an antitrust lawyer must consider in deciding whether to press for or resist a jury trial. Having recently finished an eight-week jury trial in the Southern District of New York representing the plaintiff in *US Airways vs. Sabre*, we offer some comments on how to decide between one or the other. The considerations we outline are equally applicable to plaintiffs and defendants. Indeed, in our case we opted for a bench trial, only to be thwarted when the defendants exercised their constitutional prerogative to have the case decided by a jury.

First, a few words about the case to set the scene, with the caveat that any concise summary of a complex litigation is by necessity an oversimplification. US Airways sued its largest distributor, Sabre, in 2011. Sabre is a Global Distribution System, or GDS. GDSs connect travel agents to airlines—each time a traditional (brick and mortar) travel agent books a flight through the GDS, the GDS charges the airline a booking fee, in the case of US Airways roughly $3.50 per travel segment (or $14 for a connecting roundtrip). To prevent US Airways from giving bookers an incentive to go through less expensive channels (for example, its website) Sabre’s contract included “full-content” provisions, which antitrust lawyers would recognize as “parity” or “most-favored-nation” clauses. These contractual restraints prevent the airline from offering any fare through a distribution channel other than Sabre unless the same fare is offered through Sabre, or from offering any inducements to book outside Sabre. Thus, even though a booking that came through Sabre cost US Airways approximately 20 times more than a booking that came through the airline’s own website, the contract prevented US Airways from offering discounts or even non-financial rewards (e.g., airline “miles”) for website bookings and from surcharging the travel agent for a booking that came through Sabre.

Although these “full-content” restraints are disfavored by airlines, Sabre was successful in achieving contracts with airlines that included these provisions. Roughly 50 percent of an airline’s income flows through the GDS channel, comprised of Sabre and two smaller GDSs, and much of this business comes from the handful of international travel management companies that manage business travel spending that is essential to an airline’s survival. Sabre passes along a portion of the fees it collects from airlines to the largest travel management companies as an inducement for them to book through Sabre. From the perspective of US Airways, this business model achieved supracompetitive fees for Sabre that it shared with the large travel agents to keep the model in place.

US Airways’ chief theory was that the “full-content” provisions were unreasonable restraints of trade under Section 1 of the Sherman Act and that they dampened competition between distributors for the airline’s business and thereby allowed Sabre to charge an inflated, supracompetitive booking fee. After five years of litigation, the case finally went to trial in October 2016. Following an eight-week trial in the Southern District of New York, the jury returned a verdict finding that Sabre violated Section 1 and awarding damages to the airline. The case is currently on appeal in the Second Circuit.

As we experienced during a tumultuous march toward a jury trial, deciding whether you really want one is a constant challenge. Though the right to trial by jury can be waived if not demanded at the pleading stage, most courts allow the parties to opt out of a jury right up to the start of trial, so the
Deciding whether you really want one is a constant challenge. Though the right to trial by jury can be waived if not demanded at the pleading stage, most courts allow the parties to opt out of a jury right up to the start of trial, so the question needs to be reconsidered . . .

question needs to be reconsidered right up to opening statements. Though the decision does not lend itself to a paint-by-numbers analysis, there are important considerations in antitrust cases counsel will want to weigh, even if the ultimate calculus is more art than science.

Variability: Does A Greater Margin of Error Favor You or Your Opponent?

Jury trials are inherently less predictable than bench trials. By the time trial rolls around in an antitrust case, the parties will likely have amassed significant signs of how the judge is leaning. The jury venire, by contrast, is largely a blank slate. Though social media (along with conventional research) can reveal much about potential jurors, it cannot match the predictive value of a judge’s track record in disposing of summary judgment and in limine motions, colloquy during argument, and views the court may have expressed during settlement discussions.

For even the strongest of cases, jury trials can be a roll of the dice. This is especially so in federal court, where a single hold-out can block a verdict. Even a judge with modest reservations about the plaintiff’s case may be a better bet than 6-to-12 complete strangers, any one of whom can stand in the way of victory.

Because they are lawyers like us, judges are generally easier to read. No big mystery exists as to the analytical lens the judge will use as the finder of fact: it is the same rule-based thinking that we have been deploying to analyze problems since law school. Jurors are a different animal. Each brings a unique set of life and professional experiences that will shape how he or she thinks about the case. Each juror will acquire and process information differently than the others, and likely differently than the judge, who has become accustomed to learning by reading and to thinking linearly. A judge may not reach the same conclusion as you, but the information the judge will use to make a decision is significantly more “knowable,” as are the factors she will likely consider relevant to her analysis.

From this flows a potential decision tool: The party whose case looks like a sure winner has reason to prefer a bench trial. But lower bench trial variance may drive the opponent in the opposite direction. A defendant with a seriously flawed case may prefer a jury, since juries up the uncertainty quotient, which favors the underdog. In the inevitable horse-trading that precedes every trial, reaching agreement with your opponent over the trier-of-fact is most achievable when both sides are evenly matched, and both have as much to gain (or lose) by enhanced predictability. If you find yourself in that situation, which way should you jump?

Is Your Case (or Defense) Tied to Themes that Will Resonate?

In deciding between a judge and a jury, one of the most important considerations is whether the principal theme of your case (or defense) is jury-friendly. Some antitrust cases may appear to jurors to allege “technical violations” that do not easily map to traditional notions of “right and wrong.” Or, to explain why the conduct is wrongful, a party may need to present a complicated economic theory that is not easily transformed into an intuitive story. Making matters worse, many antitrust cases inescapably entail industry jargon and business practices with which jurors will have little familiarity. Although skillful lawyers earn their keep by distilling complex cases into simple stories and accessible human themes, sometimes that is easier said than done. Cases (and defenses) that do not lend themselves to easy storytelling may be more suitable for a judge, who typically will be more inclined to “follow the law” even if the equities point in the opposite direction.

Fortunately, antitrust cases frequently do lend themselves to themes that can resonate with jurors. For the plaintiff, it can be David versus Goliath: a dominant bully abusing its position to harm competitors and customers. Or greed and dishonesty: wrongdoers conspiring behind the scenes to cheat the unsuspecting. For the defendant, a theme can be the virtues of aggressive competition: our economy was built by companies doing what they can to get ahead. Open competition has its winners and losers, and it is positively un-American to punish the winners for their superior skill, foresight, and work ethic. When your side of the case can naturally be told using one of these storylines (or better yet, a more novel but strongly resonant theme) and the other side cannot, a jury trial is likely to maximize your chances of winning, and winning big.

Applying these principles to our case, there was no easy answer. US Airways had a strong case, solidly supported by economics. Discovery yielded a trove of Sabre documents attesting to its anticompetitive goals and graphically (and colorfully) describing its leverage over airlines. But the economic logic, even abetted by email chains that we were contending witnessed, may appear to jurors to allege “technical violations” that do not easily map to traditional notions of “right and wrong.” Or, to explain why the conduct is wrongful, a party may need to present a complicated economic theory that is not easily transformed into an intuitive story. Making matters worse, many antitrust cases inescapably entail industry jargon and business practices with which jurors will have little familiarity. Although skillful lawyers earn their keep by distilling complex cases into simple stories and accessible human themes, sometimes that is easier said than done. Cases (and defenses) that do not lend themselves to easy storytelling may be more suitable for a judge, who typically will be more inclined to “follow the law” even if the equities point in the opposite direction.

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tracts containing the very competition-stifling restrictions that we said caused it antitrust injury—giving the defendants a ready-made jury-friendly theme: big corporations, no less than ordinary folks, ought to live up to contractual obligations they assume. Further, Sabre could offer evidence that US Airways accepted its first “full-content” contract (not the one we were suing over) in exchange for a booking-fee discount, fueling the theme that “you can’t have your cake and eat it too.”

US Airways, of course, had a response: Sabre used its market power to coerce the airline into agreeing to anticompetitive restraints that it would have adamantly rejected if it had the ability to walk away from the relationship. But this required showing that airlines do not always call the shots—a proposition at odds with the human experience of every juror who had boarded a commercial airline. We believed we were strong on the substance, but convincing a jury that a major air carrier was bullied into signing contracts that charged too much would be a formidable challenge.

An assessment of other likely battles in the case followed the same pattern. We claimed that Sabre’s restraints caused market dysfunction by disabling the price mechanism. An airline had to pay approximately 20 times as much for a booking made through Sabre as for a booking made through the airline’s own website. In a “normal” market, the airline would encourage travelers or their agents to book through the website or other cheap channels: by offering special web-only fares, by providing other benefits and discounts, or by charging the cost of the booking to the booker. GDSs would then have reason to compete to charge airlines less, as lower booking fees would make the distribution channel more attractive to bookers and result in more business being conducted through that distribution channel.

To win the case, we needed to convince the trier of fact that for price competition to work, there must be a link between cost (that the airline faces for a distribution channel) and price (paid by bookers for using that distribution channel); Sabre’s contractual restraints severed that link. Though logical to us as lawyers, questions persisted whether the average juror would follow and buy the argument. To make it more accessible to jurors who might have difficulty grasping economic concepts, we were prepared to distill it further: the contracts prevented airlines from discounting fares on their website (where many potential jurors go to buy their tickets). So the average leisure traveler was paying more than she should, and the average business traveler less, leading inescapably to the conclusion that leisure travelers like our typical jurors subsidize corporate chieftains booking through American Express (the travel agency, not the credit card). That Sabre imposed on leisure travelers booking on a website a portion of the cost of business travel had a nice ring to it, and we suspected it might resonate better than an abstract defense of the “price mechanism.”

But we were all too aware that Sabre would have a response that played equally well to a jury: Sabre just wanted to ensure an even playing field with other distribution channels. Why should its customers be deprived of access to all of an airline’s fares (including its cheapest) while the airline made them available over its favored channels? And how could travel agents possibly do their jobs if they could not see all of an airline’s fares when recommending to clients which flights to book? Cast in this light, we were made to sound like we were defending discrimination, and it changed the balance of “jury-friendly” themes. Explaining why a price signal is needed for allocative efficiency requires an economics lesson; explaining that Sabre just wants to be treated like other distributors and have the opportunity to sell all of the airline’s fares appeals to an innate sense of fairness.

Moreover, Sabre had a ready-made answer to our subsidiarization theme. How could it be the case that leisure travelers were subsidizing business ones when corporate travelers were buying all the expensive seats in the front of the plane, paying penalties for booking just days before departure, and buying costly refundable tickets? Moreover, would consumers really benefit from a reduction in the cost of Sabre’s services or from relief that would allow US Airways to pass along its cost savings in the form of lower fares? With many jurors unaccustomed to seeing airlines in the “victim” role and all too ready to hold any travel mishaps experienced over their lifetime against the airlines, Sabre would have a lot of material to play with.

**Is Your Narrative Jury-Friendly and Can It Be Told by Your Witnesses in a Compelling Manner?**

When an assessment of each side’s case themes is not dispositive, a trial lawyer must look beyond the themes to the actual evidence as well. Does your side have appealing and credible fact witnesses who can explain the story in a sympathetic and relatable way? Do the factual narrative and economic presentation lend themselves to storytelling? To explain why the other side is wrong, can you rely on documents that will grab the jury’s attention, such as emails that are both colorful and immediately revealing of the alleged wrongdoing without requiring convoluted explanations or strained re-interpretation?

In our case, our assessment of the witness lineups argued for taking the case to a jury. For example, we could rebut the anticipated “deal is a deal” theme with a soft-spoken, earnest Midwestern executive who exuded credibility when he explained that his airline had no choice but to sign the onerous GDS contract. It helped that on the eve of signing, when a competing airline faced expulsion from the Sabre system, the executive emailed his father a worried message saying “removal from . . . [Sabre] is death” (a passage the court admitted as a prior consistent statement). We also took comfort in knowing we could confront virtually every Sabre fact witness with handfuls of emails and PowerPoint presentations they would have to disavow. Many of these documents were damning on their face, such as a thread among a group of junior executives extolling the virtues of what they charac-
terized as Sabre’s business model: “Drink beer, play golf and pay agency incentives.”

But as in many plaintiff-cases, our witnesses were outsiders to the planning that went on within Sabre in developing the restraints we complained of. We realized early on that we would need experts who could cogently explain the economic pitfalls of parity clauses like Sabre’s, while deftly weaving into the narrative the most damaging party admissions unearthed during discovery. This was a task for top-notch teachers, so we focused on academic rather than testifying experience, choosing experts accustomed to commanding a classroom and distilling complexity for students.

For both sides, the case put a premium on fielding economic experts who could assimilate the disparate narratives provided by the different fact witnesses and supporting expert witnesses, and who could offer a comprehensive theory that tied everything together for the jury, all without lapsing into impermissible factual narration. An accounting expert, for example, can describe why the defendant’s return on invested capital is sky high. But the jury will wonder why that matters unless the expert testimony first teaches the dangers that flow from market power and identifies “economic profits” as a telltale sign of its existence and exercise. A thwarted entrant can testify that its superior technology failed to catch on, but that matters little unless the jury has already been taught that parity clauses prevent suppliers from steering customers to more efficient, lower cost alternatives, which stifles competition.

While our theory was complex and had many moving parts, it was ultimately grounded in logical concepts rather than econometric proofs. The former can be transformed into a narrative that makes sense for the jury; there is less hope for the latter. Like many antitrust cases involving abusive market power that is prolonged by artificial restrictions, ours could be boiled down to a familiar paradigm—the vicious circle. A distributor earning supracompetitive profits uses its market power to impose contractual restraints on its suppliers; the restraints short-circuit competition among distributors; and in the absence of competition, market power is preserved to be deployed again to extract anticompetitive terms when the next negotiation comes around. A verdict was needed to break the vicious circle.

Having experts who are both good storytellers and skilled teachers is only part of the calculus. Another key question to ask is this: Has discovery borne fruit in the form of admissible evidence capable of bringing an essential trial theme—in our case the “vicious circle”—to life? Our opponent’s documents gave us much to work with. The challenge of explaining why parity clauses can insulate against horizontal competition is made simpler when the defendant’s documents candidly state that it did not want to “drive [a] more competitive framework into [the] airline relationship side of [the] business.” The premise that parity provisions allow an inefficient company to continue to prosper is bolstered by a party admission that “we are not built for speed, agility and innovation.” The force of an opinion that the defendant exercises market power by threatening to cut off airlines from their customers is amplified when the defendant’s documents talk about “bury[ing] [the airlines] so deep in the display order that no one would ever find them.” And of course, the core contention that Sabre’s business model is built on overcharging airlines and paying off large travel agencies could hardly be expressed more concisely than Sabre’s own semi-joking description: “Extortion + bribery works!” The existence of potentially explosive material to augment what otherwise might produce only courtroom boredom is an important consideration in deciding whether to opt for a jury.

Does the Potential Damages Award Justify the High Variance of a Jury Trial?

Liability is only part of the analysis when deciding whether to choose a jury trial; damages matter too, and to clients they matter a great deal. Most lawyers, including the authors, believe that an angry jury doling out damages to a sympathetic plaintiff will be more generous than the average trial judge. While the academic support for this proposition may be mixed, there is no denying that having jurors call the shots injects a degree of variance that makes the outcome less predictable. It is just this unpredictability that drives defendants to distraction (and very frequently to settlement). The threat of an extreme verdict that a jury trial introduces is not a tool that a plaintiff’s lawyer will want to casually jettison.

In more clinical terms, the plaintiff will tend to favor high variance when there is a high cap (or no cap) on potential damages. That was the situation at the start of our litigation. With a chance to recover Sabre’s overcharge of US Airways for every year since 2007, the potential damages exceeded $400 million, well over a billion dollars after trebling. But a summary judgment on statute of limitations granted the year before trial reduced the potential recovery significantly. Having shrunk to 19 months, the damages period would only support a verdict of approximately $70 million (before trebling).

While it can be tempting to allow damages to control the choice of the trier of fact, at times even a plaintiff may prefer the lower level of outcome variance that a bench trial provides. As was our situation, prevailing can mean the elimination of contract terms or other abusive conduct that threatens to continue propping up a dominant firm. With due consideration of the future cost savings that competition can supply, as well as the flexibility that a healthy marketplace can afford, a big damage award may be less important than just winning a liability judgment. That may change the judge versus jury calculus.

Conclusion: The Best-Laid Plans . . .

The decision between jury and bench trial in US Airways was not easy or obvious, and the calculus was far from static. US Airways had a strong theory, grounded more in economics than in intuitive appeals to jury sympathy. That weighed in
favor of a bench trial. But US Airways also had the necessary ammunition for a jury trial: compelling storytellers and teachers, as well as evidence that was sure to grab jurors’ attention. With the potential damages recovery in excess of $1 billion (post-trebling), the high variance of a jury trial seemed worth the cost. But the calculus shifted when the court slashed the potential damages by limiting the recovery period. Now, achieving industry reform and ensuring the airline would be able to benefit from a more competitive distribution market going forward became the higher priority. With variance no longer the plaintiff’s friend, US Airways sought to reverse course and opt for a bench trial.

Unsurprisingly, the defendant now had the opposite goal: to keep the case in front of a jury. US Airways went as far as waiving all of its damages (above the nominal $20 amount that triggers the constitutional right to jury) and pressing only its “equitable” declaratory relief claim to ensure a trial before the judge. The strategy did not work; the court adjudged US Airways’ requested declaratory relief to be moot, and Sabre was all too happy to offer the $20 in remaining damages. To avoid a forced dismissal under Rule 68 (offer of compromise), US Airways reinstated its damages claim. That entitled the defendant to trump our preference for a bench trial, so the case was tried to a jury.

The decision between seeking a jury or bench trial is complex, and requires an honest and searching evaluation of your entire case: the themes, the witnesses, the evidence, the relief. Of course, deciding what you want is not the same as getting it. For all its analysis and handwringing, US Airways in the end had to live with a jury trial. But all’s well that ends well. A strong presentation that marries coherent analytical themes with compelling storytelling will appeal to any factfinder, be she a lay juror or a seasoned jurist. The verdict went for US Airways.


2 See Wissler, supra note 1, at 751. Though note that results pertaining to how individual jurors award damages do not necessary translate into reliable predictions into what groups of jurors do when jointly deciding on damages. See also Valerie F. Reyna et al., The Gist of Juries: Testing a Model of Damage Award Decision Making, 21 PSYCH. PUB. POL’Y & L. 280, 282, 288 (2015) (predicting that “[f]lower numeracy would . . . be associated with greater variability in numerical estimates of damages,” and finding as part of experimental study that while there was no correlation between numeracy and damage awards, “once other factors were controlled for in regression analyses . . . numeracy emerged as a significant predictor of variability in award judgments.”)

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Proving Antitrust Damages
Third Edition

LIKE ITS PREDECESSOR, Proving Antitrust Damages: Legal and Economic Issues, Third Edition is an accessible introduction to the legal and economic concepts of antitrust damages for use by counsel who may be new to the area. To serve more experienced antitrust practitioners, the third edition has been completely updated to capture the most important developments in this area and represents the most authoritative and comprehensive resource on the subject of antitrust damages. The third edition also features expanded economic content that address the economic principles underlying the measurement of damages. Written by economists, this content provides counsel with a deeper understanding of the relevant economic issues in a way accessible to those without formal economic training.

Proving Antitrust Damages is organized into three parts: Chapters 1–4 guide counsel through the legal requirements that a plaintiff must satisfy in order to establish a right to recover damages in an antitrust private action; Chapters 5 and 6 identify the economic concepts that are used in calculating damages and describe the econometric analyses that are used to differentiate the effects of anticompetitive conduct from other influences; and Chapters 7–9 discuss commonly arising issues associated with estimating damages related to overcharges, lost profits, and price discrimination under the Robinson-Patman Act.

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DECADE AGO THE U.S. SUPREME Court handed down its blockbuster ruling in Bell Atlantic Corp. v. Twombly. This decision, together with Ashcroft v. Iqbal, revamped the pleading standards for federal complaints and dramatically altered the practice for motions to dismiss those complaints.

Twombly has had an enormous impact on federal litigation. Indeed, as of the date of this writing, Twombly has been cited in over 175,000 cases. Twombly even prompted an attempt at legislative reversal, though that effort was ultimately unsuccessful.

Perhaps one of the most significant aspects of Twombly—and one that distinguishes it from other high-profile Supreme Court cases—is its practical effect on litigants. No responsible plaintiff’s attorney can draft a federal complaint without at least some consideration of Twombly’s pleading standard. Similarly, the resolution of numerous motions to dismiss in federal court now turns on whether a complaint’s allegations meet Twombly’s “plausibility” standard.

Not surprisingly, lower courts have frequently disagreed about how to interpret Twombly. Federal courts have offered differing interpretations of the meaning and scope of Twombly—an issue with both academic interest and practical relevance. As the leading appellate cases demonstrate, there are notable differences in how the circuits apply Twombly. Moreover, those cases have left unresolved an important question: whether Twombly applies to affirmative defenses as well as complaints.

The Twombly Standard
Twombly arose from the 1984 divestiture of AT&T’s local telephone business, which left a system of regional service monopolies (ILECs or Incumbent Local Exchange Carriers) that were excluded from the long-distance market. The Telecommunications Act of 1996 changed that by withdrawing approval of the ILECs’ monopolies and subjecting them to a host of duties intended to facilitate market entry (including obligations to share their regional networks with competitive local exchange carriers), but permitting the ILECs to enter the long-distance market. In 2002, a group of subscribers to local telephone and Internet services filed a class action complaint in the Southern District of New York, alleging that ILECs had conspired to preclude competition in violation of Section 1 of the Sherman Act.

The district court dismissed the plaintiffs’ complaint, holding that its allegations of parallel conduct, without more, failed to state a claim under Section 1. Rather, the district court ruled, “plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions.” On appeal, the Second Circuit reversed, holding that the plaintiffs’ parallel conduct allegations were sufficient to survive dismissal and that plaintiffs need not allege “plus factors” because the ILECs had failed to show that no set of facts existed that would permit the plaintiffs to demonstrate that the alleged parallelism was the product of collusion and not coincidence.

The Supreme Court granted certiorari and reversed, acknowledging that “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the... claim is and the grounds upon which it rests.’” Nevertheless, the Court held that a “plaintiff’s obligation to provide the ‘grounds’ of his entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. In the context of a Section 1 claim, a complaint must include “enough factual matter (taken as true) to suggest that an agreement was made.” In other words, the complaint must “plausibly suggest[]” an improper agreement and not be “merely consistent with” such an agreement.

In so holding the Supreme Court rejected language in its prior decision, Conley v. Gibson, which suggested that a complaint should not be dismissed unless a plaintiff could prove “no set of facts” in support of its claim, at least if interpreted literally. Applying the plausibility standard to the Twombly complaint, the Court reinstated the district
court’s grant of the motion to dismiss because plaintiffs had not “nudged their claims across the line from conceivable to plausible . . . .”17

The Response to Twombly
The American legal community greeted Twombly with much surprise and not a small amount of confusion.18 Among the many questions with which lower courts and litigators wrestled was whether Twombly applied only to antitrust claims or whether it established a general standard applicable to all complaints. Just two years later, in Ashcroft v. Iqbal, the Supreme Court confirmed that Twombly’s “plausibility” analysis applies to all complaints, not just those with antitrust allegations.19 Iqbal held that the plaintiff’s allegations of alleged unconstitutional treatment based upon religious and national origin discrimination under 42 U.S.C. § 1983 failed to nudge his claims “across the line from conceivable to plausible.”20

Leading Appellate Decisions Interpreting Twombly in Antitrust Cases
Twombly made clear that a Section 1 complaint cannot survive unless it pleads a “plausible” conspiracy. Lower courts have grappled with questions, such as what exactly a plaintiff must plead to survive a motion to dismiss (in the antitrust context as well as more generally) and how Twombly should be read in light of previous Supreme Court decisions on pleading standards. Different circuits have approached Twombly’s plausibility standard differently and, in some instances, have diverged on what is required under it. This divergence has been particularly evident in Section 1 cases applying Twombly. This article focuses the discussion on key appellate decisions interpreting Twombly in antitrust cases from the First, Second, Third, Sixth, Seventh, and Ninth Circuits.21

First Circuit. One of the first and most prominent First Circuit opinions applying Twombly to claims of an antitrust conspiracy was Evergreen Partnering Group, Inc. v. Pactiv Corp.22 The Evergreen complaint alleged a group boycott. The district court dismissed the complaint, finding that “there are legitimate business reasons that can as easily explain defendants’ refusal to deal with [plaintiff] or to compete with one another for market share as can any insinuation of a conspiratorial agreement . . . .”23 On appeal, the First Circuit reversed the dismissal. Noting the difficulty of distinguishing between allegations of “merely parallel conduct” and allegations of a “plausible agreement,”24 the First Circuit observed that “[t]he slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation has in part resulted from citations to case law evaluating antitrust claims at the summary judgment and post-trial stages, as the district court has done here.”25 The First Circuit approvingly cited the Second Circuit’s Anderson News opinion (discussed below),26 particularly its holding that “[t]he question at the pleading stage is not whether there is a plausible alternative to the plaintiff’s theory; the question is whether there are sufficient factual allegations to make the complaint’s claim plausible . . . .”27 The First Circuit then held that while “a complaint must at least allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible,” an antitrust plaintiff was not required to plead “plus factors” at the motion to dismiss stage.28 Applying this standard, the court held that the Evergreen plaintiff’s allegations went “much further” than the allegations in Twombly and, as such, plausibly alleged a conspiracy.29

Second Circuit. Like the First Circuit, the Second Circuit is somewhat more plaintiff-friendly in its interpretation of Twombly than certain other circuits. For example, in Starr v. Sony BMG Music Entertainment,30 the Second Circuit reversed the district court’s dismissal of a class action complaint alleging that major record companies had conspired to fix the prices of music purchased on the Internet in violation of the antitrust laws. The Starr plaintiffs alleged that major record companies had launched two joint venture music services through which the companies had sold music directly to consumers over the Internet.31 The plaintiffs alleged Section 1 violations, pointing to those joint ventures and instances of parallel conduct by the defendants (such as agreeing to raise prices).32

The district court granted the defendants’ motion to dismiss, holding that the plaintiffs’ “bald allegation that the joint ventures were shams is conclusory and implausible” because an illegal agreement could not be inferred from the operation of the joint ventures alone.33 On appeal, the Second Circuit reversed, finding that “[t]he present complaint succeeds where Twombly’s failed because the complaint alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants.”34 Specifically, the court held that Twombly requires merely that a plaintiff allege facts “to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.”35 The Second Circuit concluded that the plaintiffs’ allegations, taken as a whole, sufficiently suggested the existence of an agreement among defendants rather than independent action.36

The Second Circuit reached a similar conclusion in Anderson News L.L.C. v. American Media, Inc.37 In Anderson News, the plaintiff alleged that its competitors had conspired to boycott it and drive it out of business. After the district court dismissed the complaint under Twombly on the grounds that the alleged conspiracy was facially implausible,38 the Second Circuit reversed, finding that the plaintiffs had alleged an actual agreement, had identified the conspirators, and had pleaded details of conspiratorial meetings, sufficient to meet Twombly’s plausibility standard.39 In its detailed discussion of the Twombly standard, the Second Circuit observed that the trial court had incorrectly focused on whether there was a plausible alternative explanation for the defendants’ conduct.40 The proper analysis under Twombly was whether the complaint alleges sufficient facts to make the plaintiffs’ claims plausible. The court refused to apply a summary judgment
standard to a motion to dismiss, stating that “to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages . . . .”41 The Second Circuit has continued to apply the standards set forth in Starr and Anderson News to antitrust conspiracy claims.32

Third Circuit. In re Insurance Brokerage Antitrust Litigation was one of the first major Third Circuit decisions applying Twombly.43 In that case, the Third Circuit examined the relationship between pleading and summary judgment standards in antitrust cases:

Twombly aligns the pleading standard with the summary judgment standard in at least one important way: Plaintiffs relying on circumstantial evidence of an agreement must make a showing at both stages (with well-pled allegations and evidence of record, respectively) of “something more than merely parallel behavior,” something “plausibly suggestive of (not merely consistent with) agreement.”44 The Third Circuit then held that, under Twombly, “a claim of conspiracy predicated on parallel conduct should be dismissed if ‘common economic experience,’ or the facts alleged in the complaint itself, show that independent self-interest is an ‘obvious alternative explanation’ for defendants’ common behavior.”45 Moreover, according to the Third Circuit, an antitrust plaintiff alleging a conspiracy based on parallel conduct must plead “plus factors,” such as “(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.”46 The Third Circuit ultimately held that the Insurance Brokerage plaintiffs had failed to plausibly allege a conspiracy and affirmed the district court’s dismissal of the majority of the plaintiffs’ antitrust claims.47 Insurance Brokerage continues to be good law.48

Sixth Circuit. One of the first major Sixth Circuit decisions applying Twombly was In re Travel Agent Commission Antitrust Litigation.49 In Travel Agent, the Sixth Circuit affirmed the district court’s dismissal of the plaintiffs’ antitrust complaint. In doing so, it stated that “[t]he Twombly decision provides an additional safeguard against the risk of ‘false inferences from identical behavior’ at an earlier stage of the trial sequence—the pleading stage”50 and that “the plausibility of plaintiffs’ conspiracy claim is inversely correlated to the magnitude of defendants’ economic self-interest . . . .”51 The Sixth Circuit held that the plaintiffs’ allegations of conspiracy could just as easily be explained by rational economic action and lacked sufficient detail to “nudge” their claims from conceivable to plausible.52

The Sixth Circuit applied Twombly again in Erie County, Ohio v. Morton Salt, Inc.53 Although it affirmed the complaint’s dismissal, the Sixth Circuit cautioned that the standards applicable at the motion to dismiss stage and the summary judgment stage are different.54 Notably, the court held that “at the pleading stage, the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct.”55 Indeed, the plaintiff is not required to “allege a fact pattern that ‘tends to exclude the possibility’ of lawful, independent conduct.”56 The court noted that the “tends to exclude” language is drawn from Monsanto’s57 summary judgment standard, which does not extend to the pleading stage. Even though Erie County did not reverse the complaint’s dismissal, the case suggests that the Sixth Circuit may apply Twombly’s standard less strictly than some other courts, such as the Third and Ninth.58

Seventh Circuit. In re Text Messaging Antitrust Litigation was one of the first cases in which the Seventh Circuit had occasion to apply Twombly in the antitrust context.59 In an opinion written by Judge Richard Posner, the Seventh Circuit affirmed the district court’s denial of the defendants’ motion to dismiss and explained its interpretation of the Twombly standard.60 The court distinguished the terms “plausibility,” “probability,” and “possibility,” stating:

Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations underlying a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as “preponderance of the evidence” connoted.61

Applying this standard, the Seventh Circuit held that the plaintiffs had plausibly alleged a conspiracy, in particular by alleging the combination of parallel behavior, industry structure details, and certain industry practices that all “facilitate collusion.”62 Although the plaintiffs’ allegations provided only circumstantial evidence, the court emphasized that at the pleading stage the court “need not decide whether the circumstantial evidence . . . is sufficient to compel an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint’s ‘plausibility.’”63

Ninth Circuit. The Ninth Circuit appears to take a somewhat stricter view of Twombly’s plausibility standard (at least in the antitrust context) than do many of its sister circuits.64 For example, in name.space, Inc. v. Internet Corp. for Assigned Names and Numbers, the Ninth Circuit affirmed the district court’s dismissal of a complaint, holding that the defendant’s “decision-making was fully consistent” with rational, lawful business behavior.65 Notably, the court also held that “courts must consider obvious alternative explanations for a defendant’s behavior when analyzing plausibility;”66 and the court would not “infer an illegal agreement with outside interests simply because [the defendant]’s rational business decisions favor the status quo rather than [the plaintiff]’s untested alternative business model.”67 District courts in the Ninth Circuit have continued to apply this standard to antitrust conspiracy claims.58
Where Are We Now?
Ten years after Twombly, the appellate courts still grapple with the decision’s impact and the proper application of its plausibility standard to pleadings. Although the interpretive differences among the circuits are not clear-cut, certain general trends in antitrust cases are observable.

First, the appellate courts disagree on the issue of whether a court either can or should weigh inferences on a motion to dismiss (i.e., whether the “plausibility” standard applies only to plaintiff’s allegations or whether a court should also consider the plausibility of alternative explanations suggested by defendants). On this issue, the First and Second Circuits hold that courts are not required to weigh inferences, while the Third and Ninth Circuits have permitted such weighing of inferences. The Sixth Circuit has been inconsistent on this point, while the Seventh Circuit’s position appears to be closer to that of the First and Second Circuits.

Second, the circuits have reached differing conclusions regarding the necessity of pleading “plus factors” at the motion to dismiss stage. The clearest split on this issue is between the First and Third Circuits, with the First Circuit holding that pleading “plus factors” is not necessary at the preliminary stages of a lawsuit, and the Third Circuit requiring the pleading of at least one “plus factor,” even at the motion to dismiss stage.

Overall, the First and Second Circuits appear slightly more forgiving towards antitrust conspiracy plaintiffs than other circuits, while the Third and Ninth Circuits take a stricter view of Twombly’s pleading requirements. The Sixth and Seventh Circuits remain somewhere in the middle, depending on the specific allegations.

Twombly and Affirmative Defenses
One of the most significant and enduring disagreements among federal courts interpreting Twombly is whether Twombly’s “plausibility” pleading standard also applies to affirmative defenses, a question left unanswered by the Supreme Court’s decision. Initially, the majority of federal courts addressing this issue held that Twombly’s plausibility standard applied to affirmative defenses as well as to a complaint’s allegations. That consensus appears to be changing, however, as an increasing number of federal courts have begun to conclude that Twombly’s standard should not apply to affirmative defenses. Somewhat surprisingly, no federal court of appeals has explicitly ruled on the applicability of Twombly to affirmative defenses to date.

Lower courts applying the Twombly standard to affirmative defenses have reasoned that applying this heightened standard would “weed out boilerplate list[s] of affirmative defenses” and “further[] the underlying purpose of Rule 12(f), which is to avoid spending time and money litigating spurious issues.” For example, in Dion v. Fulton Friedman & Gullace LLP, the district court applied Twombly’s standard to affirmative defenses, holding that “[j]ust as a plaintiff’s complaint must allege enough supporting facts to nudge a legal claim across the line separating plausibility from mere possibility . . . a defendant’s pleading of affirmative defenses must put a plaintiff on notice of the underlying factual bases of the defense. Mere labels and conclusions do not suffice.”

As noted, however, an increasing number of district courts have rejected this analysis and held that “fair notice” is the applicable standard for affirmative defenses, even after Twombly. For example, in Bayer CropScience AG v. Dow AgroSciences LLC, a court in the District of Delaware held that the Twombly standard did not apply to affirmative defenses. The court offered nine separate reasons in support of that conclusion, including, most notably: (1) “textual differences” between Rule 8(a) and Rule 8(c) (which governs affirmative defenses); (2) limited discovery costs related to affirmative defenses; (3) the unfairness of applying the same pleading standard to a defendant with limited time to respond to a complaint; and (4) “the low likelihood that motions to strike affirmative defenses would expedite the litigation.”

To date, the appellate courts have not directly dealt with the affirmative defense issue, perhaps because it tends to arise far less often than does the adequacy of a complaint’s allegations. The closest a circuit has come to addressing this issue occurred in Simmons, where the Ninth Circuit continued to apply a “fair notice” standard after Twombly—but without analysis. And although this decision appears consistent with the trend towards not applying Twombly’s standard to affirmative defenses, it remains an open question whether the other appellate courts (or even the Supreme Court) will agree.

Conclusion
Twombly’s influence continues to be felt in courts throughout the country. Appellate courts and district courts have struggled to determine exactly what Twombly’s plausibility standard means and how it should be applied. Because appellate courts have not universally reached a single and uniform conclusion regarding the proper “Twombly standard,” practitioners should be mindful of the specific interpretation applicable in their circuit.

In the case of affirmative defenses, the rulings of district courts have been particularly inconsistent, even within a single circuit. Practitioners must look to the specific district court in which the case is filed to determine whether Twombly applies to affirmative defenses.

Whether the appellate courts will gradually move toward more uniformity in their application of the Twombly standard to motions to dismiss, and whether the Supreme Court itself will weigh in again should the circuit differences materialize into clear splits, are still open questions. It is clear, however, that Twombly has focused the bench and bar on the need for tighter and more detailed pleading, both in the antitrust context and more broadly.

3 According to the electronic case database Lexis Advance.
4 The proposed bill, the Notice Pleading Restoration Act of 2009, provided in relevant part that “Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).” 720 F.3d 33 (1st Cir. 2013).
5 Twombly, 550 U.S. at 548–49.
7 Twombly, 550 U.S. at 550–51.
9 Twombly, 313 F. Supp. 2d at 179. See Twombly, 425 F.3d at 114 (“But plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.”).
10 Twombly, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
11 Id. at 556. The Court also noted the practical significance of this pleading standard in light of the often exorbitant expense associated with discovery in antitrust actions. See id. at 557–60.
12 Id. at 557.
14 Twombly, 550 U.S. at 560–63.
15 Id. at 570.
18 Id. at 680 (citing Twombly, 544 U.S. at 569).
19 Key post-Twombly antitrust conspiracy cases from other circuits include the Fourth Circuit case, Loren Data Corp. v. GSX, Inc., 501 F. App’x 275 (4th Cir. 2012). In Loren, the Fourth Circuit affirmed the district court’s dismissal of a Section 1 claim, holding that the plaintiff’s allegations “must tend to exclude the possibility that the alleged co-conspirators acted independently and the alleged conspiracy must make practical, economic sense.” Id. at 281. The Fifth Circuit also addressed Twombly’s standard in antitrust conspiracy cases in Marucci Sports, L.L.C. v. National Collegiate Athletic Ass’n, 751 F.3d 368 (5th Cir. 2014). Although its analysis was not extensive, the Marucci court found that the plaintiff did not “allege any specific facts demonstrating an intention on the part of [defendants] to engage in a conspiracy,” and affirmed the district court’s dismissal. Id. at 375. The later Fifth Circuit decision of MM Steel, L.P. v. JSW Steel (USA) Inc., 806 F.3d 835 (5th Cir. 2015), was not a Rule 12 case (the court affirmed a jury verdict finding an antitrust conspiracy), but the court stated that “a plaintiff seeking to prove that a defendant joined an antitrust conspiracy without direct evidence of the conspiracy must present evidence ‘that tends to exclude the possibility of independent conduct.’” Id. at 843.
20 720 F.3d 33 (1st Cir. 2013).
22 Evergreen, 720 F.3d at 43–44.
23 Id. at 44.
24 680 F.3d 162 (2d Cir. 2012).
25 Evergreen, 720 F.3d at 45 (quoting Anderson News, 680 F.3d at 189–90).
26 Id. at 46–47 (“We are thus wary of placing too much significance on the presence or absence of ‘plus factors’ at the pleadings stage. While they are certainly helpful in guiding a court in its assessment of the plausibility of agreement in a § 1 case, other, more general allegations informing the context of an agreement may be sufficient. This is particularly true given the increasing complexity and expert nature of ‘plus factor’ evidence which would not likely be available at the beginning stages of litigation.”).
27 Id. at 47. Based upon a more complete record, the First Circuit subsequently affirmed the district court’s grant of summary judgment to defendants in Evergreen. See Evergreen Partnering Grp., Inc. v. Pactiv Corp., 832 F.3d 1, 3 (1st Cir. 2016). In doing so, however, the court reaffirmed the correctness of the pleading standard articulated in the 2013 Evergreen decision reversing the trial court’s dismissal. See id. at 7.
28 592 F.3d 314 (2d Cir. 2010).
29 Id. at 318–19.
30 Id. at 320 (quoting In re Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 442 (S.D.N.Y. 2008)).
31 Id. at 323.
32 Id. at 322 (quoting Twombly, 544 U.S. at 556).
33 Id. at 327.
34 680 F.3d 162 (2d Cir. 2012).
36 Anderson News, 680 F.3d at 186–89.
37 Id. at 189–90.
38 Id. at 184.
39 See, e.g., Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016) (reversing district court’s dismissal of antitrust conspiracy complaint and stating “[t]o survive dismissal, ‘the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment, or a trial.’” (citing Anderson News, 680 F.3d at 184)).
40 618 F.3d 300 (3d Cir. 2010).
41 Id. at 322 (quoting Twombly, 550 U.S. at 557, 560).
42 Id. at 326.
43 Id. at 321–22. In contrast, as discussed above, the First Circuit has held that an antitrust plaintiff may, but is not required to, allege “plus factors” in order to survive a motion to dismiss. See Evergreen, 720 F.3d at 46–47.
44 The Insurance Brokerage court found that the plaintiffs’ bid-rigging claims survived the motion to dismiss because the “plaintiffs have set forth particularized allegations of unlawful bid-rigging.” Insurance Brokerage, 618 F.3d at 338.
46 583 F.3d 896 (6th Cir. 2009).
47 Id. at 904.
48 Id. at 909.
49 Id. at 909–11.
50 702 F.3d 860 (6th Cir. 2012).
51 Id. at 868.
52 Id. at 868–69.
53 Id. at 869.
55 The Sixth Circuit has acknowledged, however, that “there is no general agreement on the exact pleading standards to use when resolving antitrust cases” and that “antitrust cases in this circuit, and in others, apply various approaches to adjudicating antitrust claims.” Food Lion, LLC v. Dean Foods Co. (In re Se. Milk Antitrust Litig.), 799 F.3d 262, 270 (6th Cir. 2014).
Indeed, in one of its first major decisions applying Twombly, the Ninth Circuit noted that the Supreme Court “made clear in Twombly that it was concerned that lenient pleading standards facilitated abusive antitrust litigation.” Starr v. Baca, 652 F.3d 1202, 1213 (9th Cir. 2011).

795 F.3d 1124, 1130 (9th Cir. 2015). Although the suit was brought only against ICANN, the plaintiff brought a Section 1 claim alleging that ICANN conspired with its board members and other industry insiders to restrain trade in implementing rules and procedures related to an application bidding process.

Id. (citing Eclectic Props., E.L., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)).

Id. at 1131.

See, e.g., Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co., No. 15-cv-01416-BLF, 2016 U.S. Dist. LEXIS 93263, at *25–26 (N.D. Cal. July 18, 2016) (“For a Section 1 antitrust claim, the complaint must allege facts ‘plausibly suggesting (not merely consistent with) a conspiracy. It is not enough merely to include conclusory allegations that certain actions were the result of a conspiracy; the plaintiff must allege facts that make the conclusion plausible.’ A court cannot ‘infer an anticompetitive agreement when factual allegations just as easily suggest rational, legal business behavior.’”) (quoting name.space, Inc., 795 F.3d at 1129–30).


Other circuits appear to be closer to the Third Circuit with respect to the necessity of pleading “plus factors.” See, e.g., Vedder Software Grp. Ltd. v. Ins. Servs. Office, 545 F. App’x 30, 32 (2d Cir. 2013) (allegations of parallel conduct must be supported by “plus factors”); Travel Agent, 583 F.3d at 907 (“plus factors” are “important when evaluating circumstantial evidence of concerted action”); In re Musical Instrs. & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015) (affirming dismissal and stating that “The Ninth Circuit has distinguished permissible parallel conduct from inimicable conspiracy by looking for certain ‘plus factors.’”).


See, e.g., In re Insurance Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010); name.space, Inc. v. Internet Corp for Assigned Names and Numbers, 795 F.3d 1124 (9th Cir. 2015).

See, e.g., Travel Agent, 583 F.3d 896; Erie County, Ohio v. Morton Salt, Inc., 702 F.3d 860 (6th Cir. 2012); Food Lion, LLC v. Dean Foods Co. (In re Se. Milk Antitrust Litig.), 739 F.3d 262, 270 (6th Cir. 2014); In re Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010).

See, e.g., Walker v. Charter Comms’n Inc., No. 3:15-cv-00556-RCJ-VPC, 2016 U.S. Dist. LEXIS 84510, at *4 (D. Nev. June 29, 2016) (“The [Supreme] Court has not determined whether the Iqbal pleading standard also applies to Rule 12(f) motions seeking to strike affirmative defenses under Rule 8(c)(1), and the issue among district courts is unsettled.”); Perez v. Gordon & Wong Law Grp., P.C., No. 11-CV-03323-LHK, 2012 U.S. Dist. LEXIS 41080, at *24 (N.D. Cal. Mar. 26, 2012) (noting that the Supreme Court has not answered this question); James V. Bilek, Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses, 15 Chi. L. Rev. 377, 378 (2011) (“Yet, while the Court may have announced the standard for complaints, it was silent as to what to do with affirmative defenses pled in an answer.”).

See Perez, 2012 U.S. Dist. LEXIS 41080, at *24 (stating that the “vast majority” of federal district courts presented with this issue have held that affirmative defenses are subject to Twombly’s plausibility standard); Justin Rand, Tightening Twiqtob: Why Plausibility Must Be Confined to the Complaint, 9 Fed. Cts. L. Rev. 79, 80–81 (2016) (citing Tiscareno v. Frasier, No. 2:07-CV-336, 2012 WL 1377886, at *17 n.4 (D. Utah Apr. 19, 2012)) (“[T]he major approach has been to apply the Twombly/Iqbal pleading standard to affirmative defenses . . . . [I]t is unclear whether that approach is still a majority position.”), and Stephen Mayer, Note, An Implausible Standard for Affirmative Defenses, 112 Mich. L. Rev. 275, 285 (2013) (“Although a majority of early courts applied the heightened standard, the Conley standard is now the majority approach.”).

See id.; see also Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc., 287 F.R.D. 111, 122 (D. Mass. 2012) (stating that most district courts initially applied Twombly plausibility to affirmative defenses but that “this is now the minority approach”).

See FTC v. AMG Servs., No. 2:12-cv-536-GMN-VCF, 2014 U.S. Dist. LEXIS 152864, at *7–8 (D. Nev. Oct. 27, 2014) (“No Circuit Court has addressed the question of whether Twombly and Iqbal or Conley governs a Rule 12(f) motion to strike an insufﬁcient defense.”) (citing C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1274 at p. 616 (3d ed. 2013)); Rand, supra note 75, at 80 (noting that “no federal appellate tribunal has ‘providing guidance’ on whether Twombly applies to affirmative defenses.”). The Ninth Circuit has addressed the standard for pleading affirmative defenses but has applied its pre-Twombly case law rather than directly addressing the Twombly standard. See, e.g., Simmons v. NavaJO Cty., 609 F.3d 1011, 1023 (9th Cir. 2010) (quoting Wyshak v. City Nat’l Bank, 607 F.2d 524, 827 (9th Cir. 1979)).
GLOBAL CARTEL ACTIVITY DOES NOT necessarily get much attention from many in-house counsel unless, unfortunately, their company is the subject of an investigation or lands on the right-hand side of the “v.” in private litigation. However, there are significant reasons that it should be a focal point for a corporation’s in-house counsel.

From a business perspective, alleged overcharges should be viewed by procurement personnel as possible theft of hard-earned margin. Overcharges resulting from price fixing, bid rigging, or other coordinated anticompetitive conduct—even at only a 10–12 percent overcharge—can add up to very real money and constitute actual business harm that affects a company’s bottom line. Effective management of a company’s risk-reward calculus in maximizing recovery without incurring undue time, expense, and business distraction starts with in-house counsel.

In considering whether and how to pursue damages, in-house counsel need to evaluate many issues, and likely assess strategically with businesspersons more than once, including:

- What is the best manner for us to identify and/or monitor potential cartel activity affecting our business?
- If a class action antitrust litigation concerns a product we purchase, when and how do we decide whether to participate as a class member?
- If we elect to opt out or otherwise proceed independently of a class litigation, should we consider negotiating individually or as part of a group?
- What should our expectations be in terms of recovery and how might they be affected by the path we choose?

And all the while, corporate counsel also must be mindful of the likely ongoing commercial relationships with members of the alleged cartel.

Of course, there is no “right” path for every (or even any) matter. Recovery can vary greatly depending upon the nature of the product involved, the number of purchasers, the number of suppliers, whether government investigations are underway or completed, the strength of the likely admissible evidence in the context of a civil trial, whether and how many plaintiff’s lawyers are willing to prosecute a matter (and at what price), and, to a great degree, the personalities and experience of the business teams and lawyers involved on each side. Based on these considerations, corporate counsel need to determine the best path to potential recovery for their company.

This article will provide a basic roadmap to the issues in-house counsel may encounter on the road to recovery, which should be considered in consultation with experienced outside plaintiff-side litigation counsel.

A Big (and Growing) Industry of Its Own: Cartel Damage Recovery

Cartels cause real monetary damages to companies worldwide, both large and small. It has been widely suggested that cartel activity increases in times of economic downturn, during which suppliers are more likely to feel margin pressures and seek to prevent price reductions and to pass on costs. Participation in cartels may also be driven by an opportunity for large personal bonuses. And while price fixing can arise across various products and services, certain industries possess attributes conducive to collusion—such as undifferentiated products, concentration among relatively few players, opportunities to signal and/or share pricing information, and high entry barriers. These factors have rendered some market sectors frequent subjects of price-fixing activity, including pharmaceuticals, transportation services, financial services, building materials, electronics, and food staples.

The Starting Point: Public Enforcement. Regulatory authorities—such as the Antitrust Division of the U.S. Department of Justice (DOJ) and the European Commission (EC)—sometimes undertake general competition studies, e.g., the EC’s recently issued report summarizing its concerns arising from restrictive licensing and distribution policies in e-commerce. Similarly, investigations into industry-wide activity involving multiple products, such as automotive parts, financial products, or generic drugs, may lead to findings against more than one group or against webs of conspirators.
Enforcement activity can thus have broad implications—and can even provide a prima facie liability case in a private damages action. (Indeed, in Europe, a “prohibition decision” of the EC may serve as proof that the conduct took place and was unlawful.) However, enforcement action also can be limited in scope—including as to the impacted temporal period, geographic area, product(s), and victims—as a result of negotiations between the defendants and the authorities, and fines ordinarily go to government enforcers rather than alleged victims. Accordingly, understanding private antitrust actions is essential for corporate counsel not only to see the full landscape of potential cartel activity (whether pursued by the government or not), but also the extent of potential harm—and to ensure that claim value is not left on the table.

Potential Locations of Private Damages Claims. Private antitrust recovery has become more complex in recent years, but there are opportunities throughout the litigation process for in-house counsel to discover and assess their company’s potential damages. Diligent corporate counsel cannot be content with simply “minding the mail” and timely filling out claims forms when class action notices arrive. Rather, they must keep in mind key considerations in the most likely jurisdictions for civil litigation, which we outline below.

United States. In the United States, a decade after the Supreme Court’s decisions in Twombly and Iqbal requiring a “plausible” claim at the pleading stage, commentators have noted an increase in successful motions to dismiss, as well as a decrease in antitrust cases being filed. In light of the higher threshold, those cases that are filed are increasingly well documented at the initial pleading stage. Since Twombly, antitrust class action complaints can span more than 100 pages, often with substantial reliance upon government investigations and/or findings. Thus, pleadings now offer corporate counsel far more information.

At the same time, consolidations of cases have become increasingly complex, as in In re Automotive Parts Antitrust Litigation in the Eastern District of Michigan, which involves more than 40 auto parts and nearly 200 defendants. And class certification has become increasingly more difficult in the wake of the Supreme Court’s decisions in Dukes and Comcast due to the substantial overlap with merits issues and extensive economic analysis now required at the class certification stage. All of these factors combine for significant challenges and potentially substantial investments of time and expense earlier in the cartel recovery process.

Europe. In Europe, private antitrust enforcement continues to develop, particularly with the issuance of the Damages Directive and the European Commission’s Collective Redress Recommendation. While implementation of the Damages Directive has been a slow process, with several EU Member States missing the December 2016 deadline for transposition, certain Member States have moved to the forefront as potential fora for private antitrust actions on a collective and multinational scale, including, subject to the future impact of Brexit, the United Kingdom (which allows for an “opt-out” class for UK nationals and an “opt-in” class for non-UK nationals), the Netherlands (in particular for its potential global settlement vehicle), and Germany (which has been open to assignment-of-claims models for collective activity). Diligent corporate counsel must now realistically look beyond the United States when considering antitrust recovery options.

Managing Recovery Expectations. For both in-house counsel and their business clients, the $64,000 (or more) question is “How much can I expect to receive?” There is, unfortunately, no universal answer—impact factors are far too numerous. Some learning exists: one study of 71 cartels concluded that even when cartels are discovered and private settlements occur, the payments average only 37 percent of alleged single damages. However, available information is limited principally to those class action settlements subject to notice requirements, since individual resolutions are ordinarily confidential. Even within the realm of class actions, results can vary greatly, and recovery is often measured as a percentage of total sales (or “turnover”), which is distinct from the applicable overcharge. Indeed, some cases settle before a detailed damages analysis has been completed and an overcharge percentage asserted.

However, based on available data, most recoveries fall in the single digits as a percentage of purchases. Even within a single litigation, settlement percentages may range from the low single digits to just over 10 percent against different defendants, depending both on total sales and time of settlement. Instances in which separate settlement classes are certified at different times for different defendants also may present different opt-out decisions for corporate counsel. A company willing to bring an individual or opt-out action may be able to exercise more control over litigation strategy, timing, and settlement structure, which can be leveraged into greater value.

With that background, we turn now to some of the key questions corporate counsel must consider when evaluating recovery opportunities.

Relationships with Suppliers: Yes, They’re Sensitive, But . . .

Corporate counsel seeking to recover damages incurred through alleged cartel overpayments must both ensure effective monitoring for cartel activity and balance the preservation of ongoing supplier relationships with the assertion of damages claims.

Monitoring Potential Cartel Activity. Establishing effective protocols for monitoring potential cartel activity enables early engagement and can create greater opportunity to control recovery strategy. Effective monitoring requires a relatively modest commitment of internal resources, but gains the strategic advantage of information—early information—on potential claims:

Proactive Monitoring: Procurement Team Training. Training procurement personnel to watch for activity associated with suppliers' business practices and to report findings promptly is essential. This can include providing training on identifying potential cartel activity, such as price fixing or market allocation agreements, and encouraging employees to report any concerns they may have. Effective training can help ensure that procurement staff are aware of the signs of cartel activity and know how to report it.

Monitoring Suppliers. Monitoring suppliers is crucial for identifying potential cartel activity. This can be done through regular audits, reviews of supplier contracts and agreements, and communication with suppliers to understand their business practices. Monitoring suppliers can help identify potential cartel activity early, allowing for a prompt response.

By implementing these strategies, corporate counsel can effectively monitor for potential cartel activity and make informed decisions regarding recovery opportunities.
ciated with cartel behaviors (e.g., decreases in numbers of bids, suppliers uninterested in expanding capacity, contemporaneous price increases from multiple potential suppliers) may allow the company to identify potential anticompetitive conduct on its own. For large purchasers, this may be a worthwhile investment, and can often be part of affirmative antitrust compliance training. Among the issues to consider are:

- If we commit to such training, should we focus on particular products? Particular regions? Are certain subsidiaries or divisions more likely to be affected?
- Should we evaluate our document retention policies to ensure that we will have purchasing data and contractual records that would be central to supporting a damages claim?
- Should we evaluate contractual provisions that can impact our ability to pursue potential damages claims (for example, suppliers may attempt to add arbitration clauses or class action waivers, and, conversely, some purchasers may be able to include terms that establish minimum damages should cartel activity occur).

The authors’ personal experience is that such training and deputizing of “cartel-watch rangers” may be welcomed by procurement departments. A few well-placed questions of supplier business teams (and their counsel) might save years of effort trying to recover damages.

Utilizing External Monitoring Resources. There are also numerous resources that in-house counsel can rely on to stay abreast of developing cartel activity early. For example, corporate counsel can subscribe to paid antitrust news alerts (e.g., MLex and Law360) or review daily ABA Section of Antitrust Law updates for contemporaneous reporting on government investigations and case filings. Corporate counsel also can engage outside lawyers, who will provide periodic updates in the form of client alerts concerning potentially relevant products or services and obtain greater detail and individualized recommendations as news of cartel activity and potential class action opportunities develop. Third-party claims processors can provide monitoring and claims submission support, although they generally seek a percentage fee for their services were the company to recover damages. It should be noted, however, that there are many potential recovery opportunities that, for a variety of reasons, do not receive government or media attention. Thus, having a solid network of counsel on whom you can rely is important to stay informed of opportunities.

Relationship Fundamentals: Reacting to News of a Cartel. Once you learn of possible cartel conduct involving one of your suppliers, first make an initial assessment of relevant supplier relationships—keeping in mind that the company may not do business with all or even most of the accused cartelists, to whom joint and several liability will apply. While every alleged cartel will be different, consider discussing the following with litigation counsel:

- Should we ask our supplier(s) for information? If so, should we do so through counsel-to-counsel communication?
- Should we sue our supplier? Should we seek to give notice first and arrange a potential confidential settlement (“Rule 408”) discussion—and, if so, who should be involved? If there is no class action yet to toll the statute of limitations, or if we are concerned about the breadth of the proposed class coverage, should we seek a tolling agreement?
- Is there a potential commercial resolution, rather than litigation, and how should it be structured and documented? Although these are delicate situations, all involved sides must take appropriate steps to protect the best interests of their company. The authors’ experience is that most commercial teams are more than willing to leave recovery to the lawyers, and to continue dealing with their counterparts as in the ordinary course of business. After all, the plants and factories of both suppliers and buyers must keep humming.

The Litigation Process: Decisions, Decisions, Decisions...

Once counsel has determined that the client has a potentially viable damages claim, the process of initiating and pursuing litigation presents several high-stakes decisions, including (1) selecting outside counsel, and (2) electing to stay in a class or opt out.

Outside Counsel Selection. Corporate counsel likely will want to research outside counsel candidates’ past recoveries and litigation experience, as well as industry-specific knowledge and established relationships with defense counsel. Cartel damage recovery has evolved as a specialized practice for more than a decade. In-house counsel can be guided further by the following considerations in selecting litigation counsel:

- At what point do we need to select outside counsel? Should we first contact class counsel (if a class action has been filed) or private counsel? Should we respond to inquiries from opt-out counsel? These decisions will likely depend on the client’s prior experience with class and opt-out counsel, as well as the size of the potential claim.
- What representation terms are appropriate for this claim, and how will costs be managed? While in-house counsel likely will have ample experience negotiating terms with outside counsel in more traditional litigation, such as contract or employment cases, suitable terms for an antitrust damages claim will vary depending on the recovery strategy, level of client involvement, size of the claim, and anticipated time to recovery, among other factors. Although contingency arrangements are common for such claims, hourly arrangements may be a suitable alternative for an out-of-court commercial negotiation approach, with a separate agreement if litigation becomes necessary. Recovery cases often include fees for necessary economic work (which can be hourly or contingency), which can be substantial. Representation terms are highly dependent upon the strength of the case, likelihood of recovery, and timetable for recovery.
Class Versus Opt-Out Actions. Whether to stay in a class action or opt out can be decided early, but corporate counsel may want to monitor the case developments while analyzing individual claim value to determine if a separate action would be more successful. Opting out, either alone or with other similarly situated firms, requires greater investment (at least of time, even assuming a full contingency arrangement with opt-out counsel), greater visibility and adversity, and increased exposure to discovery, potential counterclaims, or business retribution. However, class actions generally cannot provide the same level of control and flexibility in resolution—including potential commercial settlement and additional value for a global release—that opt-out claims can.

Counsel should consider the size of the potential claim, the supplier relationship, and the strength of collusion evidence when deciding whether to opt out of a class. An additional question to ask: Is this a direct or indirect claim?

- If direct, the business issues may be especially pronounced, and the supplier will likely argue for a pass-on reduction in a European claim.
- If indirect, a U.S. claim will be limited to states that allow indirect purchaser claims.19
- If both direct and indirect, it is important to consider the possibility that including an indirect claim could weaken the direct claim by providing defendants ammunition to support a pass-on argument.

As a further consideration, the company may enter into an assignment of a claim from a direct purchaser that supplies it (or vice versa), sharing the recovery in exchange for the reduced litigation costs.

Staying with the Class. If a company elects to remain in the class, a range of options exist, from active involvement as a class representative to passive participation. In considering whether to become a visible class representative, counsel should consider:

- The need for an alternative supplier if cut off by a defendant supplier, or willingness to lodge a possible group boycott claim if cut off by multiple suppliers; and
- The need to endure discovery, business distraction, and time commitment, as opposed to simply monitoring class action developments.

There are benefits to acting as a class representative, however, including:

- Potentially increasing overall settlement value due to industry knowledge and leverage;
- Exercising more control over the litigation, including appointment of class counsel and settlement strategy; and
- Potentially obtaining expense reimbursement or an incentive award (though usually insubstantial).

Opting Out. When deciding whether to pursue an opt-out claim, corporate alignment is critical, as the business team needs to understand the commitment involved in actively litigating a case, including the attendant costs, time, distraction, potential for tension in supplier relationships (possibly even concern among other suppliers not involved in the litigation at hand), and the risk of loss. Opting out means intentionally putting your company front and center as a named plaintiff in litigation and publicly accepting the challenge of demonstrating that your company’s likely current suppliers have indeed engaged in cartel activity for which the company is entitled to damages.

Weighing the prospects of recovery with the steps necessary to obtain a settlement or judgment can be a useful tool to help the client decide whether to pursue the claim. Some key questions to consider in deciding whether to pursue an opt-out claim include:

- Do we have adequate records to run an opt-out claim?
- Should we only opt out if there are many other similar buyers also opting out? This decision will require balancing the cost savings and the potentially stronger group claim with the flexibility of an individual claim (recognizing, too, that there are certain significant unknown factors, such as the level at which claims may be submitted in a class action).
- Should my company take a lead role in a group opt-out action? The considerations here are similar to those involved in deciding to become a class representative (absent an explicit incentive reward).
- Is there a statute of limitations issue? Has the claim been tolled by a class case or government investigation? If not, should we obtain standstill agreements from our suppliers to prevent the statute of limitations from running out while we evaluate our claim? Such concerns present an important reason to engage in proactive monitoring.
- If we opt out, what financial arrangements should we make with our outside counsel? How does opting out with other companies in a group affect those arrangements? The strength of the case will play a role in this analysis, but it may be difficult to determine prior to obtaining a damages estimate. If we agree on a contingency fee, what is a reasonable percentage and should we include expenses (e.g., economists)?
- Should we work with a litigation funder (or allow outside counsel to do so)? If so, how will this affect control over strategic decisions and what input will the funder have regarding settlements?
- Where should we litigate the claim? Multijurisdictional claims present several benefits, including increased leverage in settlement negotiations. As such, selecting a litigation forum is a key decision in cross-border cartel cases, as there are often multiple possible routes to court. Some factors to consider in identifying a suitable forum include whether the claim is direct or indirect, the location of the supplier and/or purchases, the cost involved in filing a claim, the availability of and cost involved in discovery, the presence of “loser pays” rules, and the value of filing in a “home court.”
- When should we file a claim? This is an extremely individualized decision that will depend on many factors, such as a standstill in settlement negotiations, the nature of the
supplier relationship, whether the client is a private or public company, the value of the claim, and the adverse cost risk and need for funding or insurance.

- What expenses and other costs should we expect if we opt out? This can include time and money incurred in offensive and defensive discovery, general counsel time involved in supervising and communicating with outside counsel, business time collecting purchase data and responding to defendants’ factual arguments, and record retention costs. Is the business team ready to take on the additional work of broad discovery requests and deposition notices?

- How will we manage privilege issues in Europe (where the “legal professional privilege” extends to written legal advice provided only by outside counsel and documents prepared only for the purpose of seeking such advice)? This consideration can affect the decision to seek litigation funding, as well as the challenges implicated when including multiple parties from multiple jurisdictions in the same case.

### Settlement

**Class Settlements.** Corporate counsel must measure the value of the settlement against the additional work involved in an opt-out claim, with an eye to maximizing recovery while avoiding time-consuming and potentially risky individual litigation. Consider:

- Are the terms favorable for the entire class, the named plaintiff, and/or absent class members?
  - If this is an “icebreaker” settlement, is a discount justified based on cost savings and valuable cooperation or other consideration?
  - Does the recovery sufficiently reflect the added time and cost involved in reaching the settlement? This question may be particularly relevant when evaluating a settlement with the last remaining defendant.

- Is there a reduction in the settlement based on opt-out percentages? If so, have the terms been negotiated in a way that will not adversely affect class members’ recovery?

- Is there a most-favored nation provision (MFN)? If so, are the terms reasonable (i.e., does it utilize an appropriate benchmark to measure a “better” deal)? Is the MFN based on relative market shares? Does it provide for a “first out discount” that may necessitate a premium for future settlements? Does the MFN contain a sunset provision (e.g., expiration if the class is certified or at the beginning of trial)?

- Is the release appropriately narrow or broad? Under the identical factual predicate doctrine, a settlement should not require class members to release future-conduct claims beyond those that arise from the materially identical continuation of the defendant’s past conduct.20

**Opt-Out Settlements.** As a preliminary matter, counsel should review supplier contracts to determine whether mediation and/or arbitration is required and, if so, whether it is possible to participate in a group or if the company is limited to individual adjudication. This issue may arise early in the class context as well, particularly if individual arbitrations are required, but the strategic impact there will be assessed by class counsel. Of course, counsel may decide to pursue mediation as a tool to move the discussion forward, regardless.

**Group Opt-Outs.** A threshold (and sometimes recurring) question is whether to act and negotiate individually or as part of a group. While group negotiations may result in cost savings, if the company has large claims and strong supplier relationships, acting quickly in individual negotiations can allow for better control over strategy and the terms of the settlement. Issues to consider include:

- How does opt-out counsel plan to manage the group of clients?
- Can our company—and should I—participate as a lead in negotiations?
- Can our company have private case conversations with defendant firms?
- Is there a perception benefit of being part of an opt-out group and acting jointly so as to maximize group recovery?
- Can we change our mind, and settle individually with defendants? Is there a penalty for withdrawal from the group? This will be a key question if reaching a business settlement is an option, as such agreements depend on future relationships and therefore are necessarily one-to-one.

**Individual Opt-Outs.** For a large company that is a particularly important customer for a defendant, one-to-one negotiations may be an attractive option in some cases. However, individual negotiations will likely require greater oversight by corporate counsel, particularly if the following questions arise:

- Should we raise litigation arguments or negotiate “commercially”? If one side raises these points, the other side will generally respond accordingly.

  - Common points plaintiffs might raise include: litigation risks, treble damages in the United States, simple or compound interest assessed on past damages in Europe (which can be even more significant on concealed cartels), joint and several liability, umbrella damages in Europe, increased damages due to a “run-off” period following the end of the cartel, and the possibility of a longer damages period or greater product scope than contemplated in government findings.

  - Common points defendants might raise include: time and scope limitations in government findings, economic analysis showing zero overcharge or unreliable plaintiff economics, pass-on (for direct purchaser claims in Europe), the value of cooperation, and litigation risks (such as territorial restrictions, statutes of limitations, and “loser pays” rules in certain jurisdictions).

- What is a reasonable settlement in an opt-out action? Should we work from single damages only? Should we provide discounting for the first settling defendant (in exchange for cooperation), and will the last settling defen-
The potential for a settlement may be driven by the need for candidates to be moved by the potential to be left “holding the bag”. Should we provide a discount if we didn’t have to file a claim or seek a premium if we did?

- Is there a leniency applicant? If so, these circumstances may motivate an early settlement with the amnesty applicant in exchange for the cooperation that applicant is required to provide to civil claimants in order to obtain protection under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA).

If we are suing a supplier, should we consider a forward-looking business solution? If so, are there any related legal issues to consider (e.g., price discrimination)?

- If this is an anticipated option, it may impact whether to engage external counsel on an hourly fee basis, as opposed to a contingency fee, so as to ensure aligned interests and eliminate uncertainty on valuation of a business resolution. It may also complicate use of litigation funding.

How broad should the release be? If the company is providing a global release, the settlement value should reflect that, even if some purchases occurred in regions where litigation may be a less likely threat (such as Asia and South America).

- In Europe, defendants may seek a release against contribution claims by other defendants. Such releases should be limited to the value of the claim against that particular supplier.

- In the United States, defendants may seek a release of class claims, but such releases should be limited to a settlement with or judgment against the settling supplier.

Should we give early settling defendants an MFN? Should we ask for an MFN as to other large opt-outs with which defendants are negotiating?

- How long before we receive payment? After all, while holding out may result in greater leverage, prompt payment and resolution offers the company commercial certainty.

**Conclusion**

Recovery of damages from alleged cartels can be a passive process. However, in-house counsel can best serve their companies—and potentially hand over to their CEOs substantial checks—by remaining sensitive to business needs and commercial relationships while keeping vigilant for recovery opportunities.

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10. No. 2:12-md-02311-MOB-MKM.
11. Wai-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (holding that a “rigorous analysis” is required for adjudicating class certification, often necessarily overlapping with inquiry into some of the merits of the underlying claims).
12. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (reaffirming Dukes’ rigorous analysis standard, to be established through evidentiary proof, and requiring a proffered expert’s model establish that damages can be measured on a class-wide basis).
17. See, e.g., In re Air Cargo Shipping Servs. Antitrust Litig., E.D.N.Y. Master File No. 06-MD-1775 (BMC) (VVP) (Settlements ranged from 2% to 10% of relevant sales.).
18. For example, in the Maritime Car Carriers case, General Motors filed an individual claim before the Federal Maritime Commission several months before the direct purchaser class complaint was filed and subsequently settled with all named respondents (defendants) before the class brief motions to dismiss. Order Denying Motions to Stay and Scheduling Briefing, Cargo Agents, Inc. v. Nippon Yusen Kabushiki Kaisha, FMC Docket No. 16-01, Doc. No. 19 (Mar. 16, 2017) (ordering respondents in the direct and indirect purchaser class cases to file their consolidated motions to dismiss by April 16, 2017); Initial Decision Approving Confidential Settlement Between General Motors and Nippon Yusen Kabushiki Kaisha, General Motors LLC v. Nippon Yusen Kabushiki Kaisha, FMC Docket No. 15-08, Doc. No. 23 (Oct. 14, 2016) (approving the settlement between General Motors and the final respondent and dismissing the proceeding).
19. Indirect purchases are often treated as a business issue in the United States, where recovery is substantially more difficult (due to challenges at class certification and the limitation to claims in states that have enacted statutes in response to the direct-purchaser rule in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)). Nevertheless, some major purchases may be made through an intermediary, such as shipping purchases, which large companies often purchase both directly and through freight forwarders. It is also possible that there may be an exception to Illinois Brick available (for example, a cost-plus contract). This underscores the importance of monitoring, because if the overcharge was passed on, the downstream purchaser must ensure that it is not unfairly treated, which may require either an assignment of the claim or a strong business message to the interme-
ACPERA limits the leniency applicants’ civil exposure to single damages based on its individual sales, as opposed to treble damages and joint and several liability. Antitrust Criminal Penalty Enhancement and Reform Act, P.L. 108-237 § 213(a)–(b).

20 See, e.g., Nat’l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 18 (2d Cir. 1981) (“If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either.”).
Furthermore, where traditional rules focus on when members of the class become clients of class counsel for purposes of communications, they often do so to the detriment of a separate, but related inquiry, which is whether and how class members’ rights may be best protected. Indeed, the general concern about free-flowing communication with absent class members prior to class certification, and in some jurisdictions, prior to the opt-out deadline, stems from the notion that counsel for either side might be inclined to engage in coercive or misleading communications. This concern may be amplified during the period between certification and expiration of the opt-out deadline, when the stakes are heightened and safeguarding class members’ rights is essential to ensuring fairness in class action litigation. In that sense, putative class members often benefit from the advice and guidance of counsel and would be better served by an analysis that focuses on how unrepresented class members are best protected, rather than when they are deemed to be “represented.”

Rules Governing Communications with Putative Class Members

Communications with putative class members are governed by three related authorities. First, under Fed. R. Civ. P. 23(d), a district court has broad discretion to make appropriate orders governing the conduct of parties in class action litigation. Specifically, Rule 23(d)(1)(C) authorizes district courts to issue orders imposing conditions on representative parties. Rule 23(d)(1)(E) further allows district courts to issue orders “dealing with similar procedural matters.” These provisions recognize that class actions are an important litigation tool, but are also complex, protracted, and subject to abuse. To prevent abuse, courts have at times issued orders restricting communications between counsel and class members under Rule 23.

Second, communications between attorneys and class members are governed by the Model Rules of Professional Conduct and/or state ethical rules governing attorney conduct. Model Rule 4.2 provides that a lawyer shall not communicate with an individual the lawyer knows to be represented by counsel about the subject of the representation. Model Rule 4.3 governs communications with individuals not represented by counsel and provides that a lawyer communicating with an unrepresented person must be very clear.
about the lawyer’s role in the case and must not give the impression that he or she is disinterested.8 Finally, Rule 7.3 restricts an attorney’s ability to solicit clients.9 Generally, attorneys cannot directly solicit individuals in person, by telephone, or by real-time electronic contact unless the person is a friend, relative, former client, or existing client.10 In contrast, written or recorded solicitations, especially if aimed at the general public, are usually permissible provided they are clearly labeled as advertisements.11

Third, notwithstanding Rule 23 and the Model Rules of Professional Conduct, under the First Amendment, a court cannot place unlimited restrictions on communications from attorneys to putative class members.12 Thus, if a court finds attorney-class member communications to be improper, it may need to consider whether and how restricting those communications might violate the First Amendment.

*Gulf Oil Co. v. Bernard,*13 a Supreme Court case involving pre-certification communications with putative class members, has emerged as the seminal case governing communications with putative class members. Employees brought discrimination claims against Gulf Oil.14 However, prior to filing any lawsuit, Gulf Oil reached a conciliation agreement with the Equal Employment Opportunity Commission, under which Gulf Oil agreed to offer back pay to its affected employees to settle their discrimination claims.15 As a result, the company began sending notices to affected employees offering back pay in exchange for a full release of discrimination claims.16 Shortly thereafter, a group of employees who had not settled, along with rejected employee applicants, filed a class action suit against Gulf Oil, which then ceased sending settlement offers to individuals who were now putative class members.17

Nevertheless, class counsel held a meeting with putative class members and recommended that they not sign Gulf Oil’s releases and return any back pay checks they may have received.18 In response, Gulf Oil sought a court order limiting communications between putative class members and class counsel.19 The district court granted Gulf Oil’s motion and issued a temporary order prohibiting all communications between class counsel and putative class members.20

But the story did not end there. Gulf Oil later requested a modification to the district court’s order to allow it to continue soliciting releases from class members.21 Class counsel opposed Gulf Oil’s request and simultaneously argued that the court’s earlier ban on communications between class counsel and class members violated the First Amendment.22 They further argued that class counsel needed to communicate with class members to obtain important information about the case and inform class members of their rights.23

Without taking evidence or making findings of fact, the district court banned all communications concerning the case between any party or its counsel and potential or actual class members not formally party to the action without prior approval of the court or if the communication was initiated by the client.24 Thereafter, as required by the court’s order, class counsel sought court approval to send a notice to class members urging them to speak to a lawyer before signing any release from Gulf Oil.25 The court denied class counsel’s motion in a one-sentence order.26

On appeal, the Supreme Court held that the district court abused its discretion in issuing its orders limiting communications between parties or their counsel and putative class members, explaining, “An order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.”27

The guidance of *Gulf Oil* and its progeny is that when determining whether counsel’s communications with putative class members should be limited, the court must inquire into whether the communications “threaten[] the proper functioning of the [class action] litigation.”28 For instance, the court must consider whether the communication might coerce class members into excluding themselves from the class; contain false, misleading, or confusing statements; or undermine cooperation with or confidence in class counsel.29 If not, the communication may be proper upon balancing the need for information against the potential for abuse.

### Applying the Rules: A Difference of Opinion on Representation

Whether and how plaintiffs’ and defense counsel may communicate with putative class members is not easily resolved by a simple reading of the rules. Rather, much depends on whether the class member is represented by counsel, a seemingly simple inquiry that is actually quite challenging in practice.

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Whether and how plaintiffs’ and defense counsel may communicate with putative class members is not easily resolved by a simple reading of the rules. Rather, much depends on whether the class member is represented by counsel, a seemingly simple inquiry that is actually quite challenging in practice.30 In order to apply this test in the class action context, courts have attempted to simplify the inquiry by drawing lines, which have not always been so bright.

A minority of courts hold that absent class members are deemed to be clients of class counsel prior to class certification.31 In these jurisdictions, once a case has been filed, class counsel may communicate with absent class members and defense counsel must only communicate through class counsel, even prior to certification.32 In *Dondore v. NGK Metals Corp.*,33 for example, the court addressed the question whether a defense attorney could interview potential witnesses who were members of a putative class without the
consent or involvement of class counsel. The court, applying Pennsylvania law, concluded that “[t]he ‘truly representative nature of a class action suit affords its putative members certain rights and protections including, we believe, the protections contained in Rule 4.2 of the Rules of Professional Conduct.”34 The court explained that unnamed class members have identifiable interests in the class action suit, including the right to challenge the adequacy of the representation by the named plaintiffs and the right to be informed of or enter into settlements.35 Accordingly, the Dondore court prohibited defense counsel from contacting or interviewing potential witnesses who were putative class members without the consent of class counsel.36

The vast majority of courts hold that putative class members do not officially become clients of class counsel until some point at or after class certification.37 Prior to class certification, absent class members are regarded as “relatively passive beneficiaries” of the named plaintiffs’ efforts.38 In other words, prior to class certification, absent class members do not have the duty to provide documents or make themselves available for depositions and, most importantly, they do not authorize class counsel to maintain the action on their behalf and therefore no attorney-client relationship may form.39 Rather, the relationship is triggered at class certification, which in turn triggers the protections of Rule 4.2 such that defense counsel may only communicate with putative class members about the litigation through class counsel.40 Class counsel, by contrast, may freely communicate with class members at that point.

Yet a minority of courts withhold putative class members’ client status even longer, until the opt-out period expires.41 These decisions are in line with both the ABA and the Restatement (Third) of the Law Governing Lawyers. In a formal ethics opinion, the ABA stated, “A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.”42 The ABA reasoned that an attorney-client relationship is established when the client either authorizes the representation or when there is some substitute for that authorization.43 Thus, because opting out allows putative class members the right to decline representation by class counsel, the attorney-client relationship cannot attach until the putative class member has chosen whether or not to opt-out of the class case.

Applying the Rules: A Practical Guide to Pre-Certification Communications

As an initial matter, both plaintiffs’ and defense counsel have legitimate reasons for wanting to communicate with class members. Plaintiffs’ counsel have an interest in notifying putative class members about the existence of the lawsuit and keeping them informed about their rights. Plaintiffs’ counsel may also want to interview putative class members about potential claims. Defense counsel may want to contact putative class members to obtain information about potential claims and relief,44 to make settlement offers,45 or to gather information for purposes of opposing class certification.46 The decisions outlined above put class action practitioners on notice to play by the rules. Thus, for example, regardless of whether the case is pre- or post-certification, communications that are abusive, coercive, or misleading are not permitted.47

Apart from such limitations, the current rules generally give defense counsel more freedom to communicate with putative class members pre-certification than post-certification. Because class members are considered by most courts to be unrepresented at the pre-certification stage of the litigation, defense counsel may be able to contact potential class members to obtain information about their claims or the relief they are seeking, or to make settlement offers. However, defense counsel should still tread lightly.

For example, communications with putative class members are not protected from disclosure in discovery proceedings. Furthermore, “Courts are wary [ ] of communications—frequently in the form of settlement attempts—that fail to convey the necessary context to allow potential class members to make informed decisions between individual and collective litigation.”48 Defense counsel should, in any communication with putative class members, make sure to clearly state their role in the litigation, inform putative class members of the existence of the class action litigation, and advise putative class members that they are not required to speak to defense counsel, making clear that there is no reward for speaking with defense counsel and no consequence for refusing to do so.49

Where defense counsel seeks releases or declarations from putative class members, it is advisable that these declarations or releases are only obtained after a clear articulation of class members’ rights, disclosure of the class action litigation, and identification of class counsel. For their part, class counsel should always be alert and prepared to seek court intervention to prohibit or rectify misleading or coercive communications.50

The current rules tend to afford class counsel less freedom to communicate with class members before certification rather than after. Prior to class certification, class counsel may publicly announce the class action and provide general information about the litigation to absent class members who contact them directly. However, class counsel must be especially careful in soliciting class members with whom they have no prior relationship, ensuring they are in compliance with Rule 7.3 or the relevant state’s ethics rules.51 However, prior to the point at which putative class members are deemed “clients” of class counsel, class counsel should be cautious about giving legal advice to absent class members since doing so may violate Rule 4.3.

Lingering Concerns in “Opt-Out” Jurisdictions

Once putative class members are deemed clients of class counsel—that is, once the class is certified and/or the opt-out period expires—class counsel may, among other things, freely...
seek information from class members as well as provide class members with information about the class action. On the other hand, at this point in the litigation, defense counsel may only communicate with putative class members about the litigation through class counsel. However, the nature of the relationship between class counsel and putative class members is not always clear, particularly between class certification and the opt-out deadline.

Where courts dispense with the majority rule that putative class members become clients of class counsel once the class is certified and withhold that status until after the conclusion of the opt-out period, class members may be left vulnerable to improper influence. After the class is certified, defendants may be especially motivated to settle with individual class members, as they are often facing trebled classwide damages in bet-the-company litigation. If the attorney-client relationship has not been established at that point, class counsel will find their hands tied in trying to protect the interests of the class and, after investing significant time and money in the case, risk losing putative class members to opt-out suits or separate settlements with defendants.

Allowing defense counsel to communicate with the class without the involvement of class counsel during this period is potentially harmful to class members even where defense counsel does not reach out to class members directly. For example, in Smith v. SEECO, an Arkansas state court certified a state class of Arkansas citizens. In a separate but related case, an Arkansas federal court certified a class that was not limited by residency or state citizenship.

Defense counsel thereafter negotiated a settlement with counsel for the state class on behalf of both the state and federal classes. The state court preliminarily approved the settlement and counsel for the federal class made an emergency motion in the Eastern District of Arkansas for a temporary restraining order. The federal court denied class counsel’s motion, stating that defendants’ settlement negotiations with class counsel for the state class, to the extent they related to the federal class, raised ethical questions that could not be addressed through the temporary restraining order sought by counsel for the federal class. Still, the court recognized that it was “troubling” that by negotiating a settlement that included the federal class, “defendants maneuvered themselves to do an end-run around the communication barrier.” Because attorneys for the federal class were never consulted, members of the federal class found themselves subject to a settlement that they never authorized.

Thus, even where defense counsel communicates with putative class members through an attorney, the class may still lack adequate protection if class counsel is not privy to the communication. In another example, in Dodona I LLC v. Goldman Sachs, a putative class of mostly large institutional investors brought suit against Goldman Sachs for violation of federal securities laws. After the class was certified, but prior to the expiration of the opt-out period, the defendants contacted in-house counsel for two class members to inquire about certain company policies relevant to the litigation. The court declined class counsel’s request to limit Goldman’s communications with attorneys for class members because the communications took place between skilled lawyers and there was therefore little risk of coercion or abuse of class members. However, even where communications take place with in-house counsel, no matter how skilled they may be, class counsel will generally be better attuned to the various nuances and complexities of the class action litigation and therefore better positioned to protect the interests of the class.

Further complicating matters is the fact that absent class members in class action litigation are often not sophisticated entities with their own in-house counsel from whom to seek legal advice. While class counsel may communicate with absent class members who contact them directly, those communications may not be protected by the attorney-client privilege in jurisdictions where no attorney-client relationship is established between class certification and the opt-out period—a time during which class members may benefit the most from legal advice. Thus, class counsel must carefully weigh the class members’ need for information against the risk of having to disclose potentially sensitive information later in the litigation simply by engaging in routine communications with class members.

In sum, ambiguities and problems still persist in using class certification as a means of determining when the attorney-client relationship is established and, therefore, whether and how plaintiffs’ and defense counsel may communicate with putative class members. Moreover, it is undeniable that the stakes are heightened once the class is certified. This is true on both sides of the “v” as class counsel has much invested in the case and defendants are facing class-wide damages in staggering amounts. Given these pressures, class members are still, if not even more, vulnerable to coercion and abusive, misleading communications between class certification and the expiration of the opt-out period.

It is at this point that courts should consider whether and how the rights of class members may be protected, rather than attempting to squeeze class action relationships into the traditional attorney-client mold. To continue to do so is to try to fit a round peg in a square hole.

The Better Question

Instead of attempting to draw bright lines, putative class members would be better served if courts focus their analyses on the fairness of the litigation by asking what the needs of absent class members are during the vulnerable period between class certification and expiration of the opt-out deadline. Between class certification and the expiration of the opt-out period, the importance of providing class members with truthful information about their rights and the need to guard against potentially misleading ex parte communications with class members are especially pronounced. Requiring defense counsel to communicate with putative class members through class counsel protects these class members. As individuals
whose rights are directly affected by the litigation, putative class members are entitled to this protection.

Moreover, this approach comports with *Gulf Oil*. Under *Gulf Oil* and its progeny, courts examine the circumstances surrounding the communications to determine whether the communications are misleading, abusive, or coercive such that they impair the functioning of the class action litigation. Notably, *Gulf Oil* was not decided based on whether the class members were clients, but instead looked to the risk of abuse and the policies underlying Rule 23 and weighed them against the First Amendment guarantee of freedom of speech.

Under this approach, in all jurisdictions, defense counsel would be permitted to communicate with class members about the litigation post-certification only through class counsel. This would not impair a defendant’s ability to speak, candidly, with putative class members about matters unre-

38 See, e.g., Winfield v. St. Joe Paper Co., No. MCA 76-28, 1977 U.S. Dist. LEXIS 13926, at *4 (N.D. Fla. Sept. 19, 1977) (holding defendants could contact members of the proposed class without prior consent from class counsel because “the members of the class are not ‘parties’ in the strict sense of the term” and are “relatively passive beneficiaries of the efforts of the plaintiffs in their behalf.”).

39 See, e.g., In re Chicago Flood Litig., 682 N.E.2d 421, 426 (Ill. App. Ct. 1997) (citing Winfield, 1977 U.S. Dist. LEXIS 13926, at *4, and finding class counsel is not entitled to attorneys’ fees from absent class members or opt-outs); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552 (1974) (addressing statute of limitations arguments, holding “[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.”).

40 See Manual for Complex Litigation (Fourth) § 21.33 (2004) (“[O]nce a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel.”); William B. Rubenstein, Herbert Newberg & Alba Conte, Newberg on Class Actions §19.6 (5th ed. 2015) [hereinafter Newberg on Class Actions] (“[F]ollowing certification, class counsel and absent class members have a formal, if unique attorney-client relationship. Absent class members are therefore ‘represented parties,’ and ethics rules prohibit opposing counsel from contacting them directly.”).


43 ABA Formal Opinion 07-445 (Apr. 11, 2007); See also Herbert Newberg & Alba Conte, Newberg on Class Actions § 15.6 at 15-44 to 15-45 (3d ed. 1992) (“In an action for damages under Rule 23(b)(3), the actual scope of the class cannot be determined until after the period for exclusion from the class has expired. At this time, the number and identity of class members who wish to opt out of the action will be known.”).

44 McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 295, 299 (D. Mass. 2004) (Defendant sought “to conduct the interviews so that it can realistically assess the scope and nature of the case brought against it. There is nothing inherently wrong with that.”).

45 Newberg on Class Actions, supra note 40, § 9.7 n.1.

46 Id.

47 See, e.g., Gulf Oil, 452 U.S. 89. State law also recognizes the danger of allowing unfettered communications with class members. The Southern District of New York stated with regard to New York Rules of Professional Conduct, “Rule 4.2 was designed to prevent [a] potential class member’s declarations would be used in connection with the defense of the litigation).

48 Although not the primary focus of this article, there are also significant concerns regarding communications between financially interested third parties and absent class members. For example, see generally Gulf Oil, 452 U.S. 89: Kleiner, 751 F.2d 1193.
Statistical Evidence, Antitrust Impact, and Class Certification: 
Tyson Foods and Antitrust Class Actions

BY MICHAEL G. MCELLELAN

IN 2016, TYSON FOODS, INC. V. BOUAPHAKEO presented the Supreme Court with a narrow, but significant, question: what role, if any, “statistical” or “representative” evidence could play in class certification proceedings. While the Supreme Court upheld certification of the wage-and-hour class at issue in Tyson, it declined to adopt broad or categorical principles regarding the use of representative evidence at class certification. Rather, the case turned on the substantive elements of the claims at issue in the case, and on basic principles: questions of fact must be resolved by a jury, and the Rules Enabling Act requires this precept to apply equally in both class and individual actions.

The issue thus became one of admissibility, i.e., whether evidentiary rules permitted the representative evidence at issue in Tyson to reach the jury. But this simple ruling may prove as consequential as a broad ruling on representative evidence, if not more so. In class actions, representative evidence is frequently used by experts seeking to show a relevant question is “common” and capable of class-wide resolution. The Court’s focus on evidentiary principles in Tyson suggests that the validity of such evidence (and on expert testimony generally) at the class certification stage turns on its admissibility. This means that a defendant opposing a certification motion involving such evidence must do so by challenging its admissibility under Daubert or risk losing the opportunity to argue that the evidence fails to demonstrate the predominance of common issues. And, when a plaintiff seeking certification survives such a motion, it may well have satisfied its burden of showing that the issue it seeks to prove through the representative evidence is common. Indeed, Tyson suggests that any post-Daubert inquiry is limited—focusing on what the expert testimony is capable of proving—and that anything further is more properly a matter for summary judgment or trial.

Tyson’s focus on Daubert, and on the limited scope of the post-Daubert inquiry at the class certification stage, reinforces the lines between the roles of juries and courts that often become blurred in class actions. Because these lines are particularly important in antitrust class actions, Tyson carries significant implications for such cases.

Representative Evidence in Antitrust Class Actions
Antitrust class actions frequently implicate the same issues present in Tyson. Certification of a class seeking damages requires that common questions predominate over any individual questions. Antitrust impact (i.e., “injury in fact”) flowing from a violation of the antitrust laws is a substantive requirement of any antitrust claim for damages. And, in antitrust class actions, a plaintiff’s proposed proof of “impact” often is critically important for the purpose of evaluating Rule 23(b)(3)’s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof.” For that reason, most antitrust certification motions rise or fall on whether the proponents of the class adequately “show that ‘antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual members.’” If they meet this burden, common issues will likely predominate.

Antitrust classes, which generally consist of all those purchasing a good affected by the violation, typically include individuals or entities whose purchasing histories differ. Some may have purchased different types or grades of the product; some may have paid individually negotiated prices; some may be large purchasers enjoying volume discounts; some may have purchased during times of greater or lesser demand, and so on. Without some method of accounting for these variances, proving antitrust injury requires individual inquiries into each class member’s circumstances, defeating predominance.

For those reasons, at class certification, plaintiffs traditionally seek to present a method of proving antitrust injury to class members through expert testimony accounting for the variances, such as regression analyses or statistical methodologies. Under the law, “a plaintiff’s burden to show injury in fact ‘is satisfied by its proof of some damage flowing from the unlawful conspiracy,’ which may be established by reasonable inferences drawn from circumstantial evidence.”

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This type of expert testimony may therefore help to show a common method exists for proving antitrust impact, satisfying the predominance requirement.

Such methodologies, however, require as inputs transactional or other sales data produced in discovery by defendants or third parties, as well as other industry data. While any economist or other expert would prefer to have market-wide data encompassing every class member’s transactions, real-world limitations generally make this impossible. Defendants or third parties may not maintain transactional data in usable form (or at all); third parties may successfully resist discovery; or the relevant industry data may simply not exist.

“Representative evidence”—samples of class member transactions, industry indexes, and the like—thus are frequently all that is available, and the viability of expert analysis relying on such evidence will often determine if common issues predominate for the purposes of class certification.

Tyson’s Background and Framework for Analysis

Background. Tyson was one of a series of cases decided by the Supreme Court in recent years affecting class certification standards. Two others are particularly relevant:

In Wal-Mart Stores, Inc. v. Dukes, the Court found that a proposed nationwide class of Wal-Mart employees alleging sex discrimination did not present a common question of law or fact for class treatment. The Wal-Mart plaintiffs sought to show class-wide liability through representative evidence; instead of showing common evidence of discrimination, the plaintiffs proposed a method where a sample set of class members would be selected, liability and damages would be determined for this sample set, and the results would then be extrapolated class-wide. The Wal-Mart court held that this “trial by formula” violated the Rules Enabling Act because it “enlarge[d] the class members’ substantive right[s]” and deprived defendants of their right to litigate statutory defenses to individual claims.

Amgen Inc. v. Connecticut Retirement Plans and Trust involved certification of a class alleging securities fraud claims. The Court considered whether a securities fraud plaintiff seeking to invoke the so-called fraud on the market theory of reliance in connection with a challenged misrepresentation was “material” to justify certification or whether proof of materiality was properly deferred for post-certification proceedings, i.e., summary judgment or trial. The Court held that proof was not necessary at certification because “the pivotal inquiry is whether proof of materiality is needed to ensure that the questions of law or fact common to the class will predominate over any questions affecting only individual members” as the litigation progresses. The Court noted that failing to prove materiality at the merits stage would not create individual issues, but would rather “end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate.” As the court put it, “to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison.” A failure to prove materiality would therefore show the class possessed a “fatal similarity,” which is “properly addressed at trial or in a ruling on a summary-judgment motion.”

Tyson Presents the Issue of Statistical Evidence. Tyson involved a post-trial appeal from a $2.9 million verdict in favor of a class of pork processors seeking unpaid overtime for time spent “donning and doffing” their protective equipment. Because the class members’ claims stemmed from allegedly unpaid overtime, class members were required to prove they worked over 40 hours a week, including time spent donning and doffing, to recover.

Tyson, however, had failed to maintain records of class members’ donning and doffing time, despite a statutory obligation to do so. Given this evidentiary gap, the plaintiffs sought to prove injury and damages using representative evidence—a study computing average donning and doffing time for a statistical sample of employees and a statistical expert relying on this average to provide testimony showing which employees had worked unpaid overtime, and how much.

At trial, the plaintiffs’ expert testified that her methods supported aggregate damage in the amount of $6.7 million, and the jury returned a class-wide verdict of approximately $2.9 million. Post-trial, the defendant sought to set aside the jury verdict, claiming that variations in donning and doffing time made the case unsuitable for certification. The district court denied this motion, and the court of appeals affirmed, acknowledging that the verdict “required inference” from the plaintiffs’ representative proof, but that such an inference was permissible.

The Supreme Court granted certiorari, and the defendants presented two questions:

First, Tyson challenged the use of “representative evidence,” claiming that reliance on a representative sample “absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims.” The defendant claimed that variations in donning and doffing meant that person-specific inquiries into whether any individual class member worked overtime would necessarily predominate over common questions, while the plaintiffs argued “that these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in [their labor expert’s] sample.”

Second, Tyson’s certiorari petition sought certification on the question of whether a certified class could contain “members who were not injured and have no legal right to any damages.”

The Supreme Court Declines to Issue a Broad Ruling. The Supreme Court affirmed certification. While it recognized the importance of the second question presented—whether a class could contain uninjured members—it declined to reach it, noting that Tyson had changed its position from that originally presented in its petition for certiorari.
The Court instead focused entirely on the first question: representative evidence, and when proposed common proof relying on it can show common questions “predominate.”

Despite being urged to rule broadly, the Court held that it “would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases.”36 Categorical rules did not make sense, the Court said, because a “representative or statistical sample, like all evidence, is a means to establish or defend against liability.”31 Thus, “[w]hether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on ‘the elements of the underlying cause of action.’”32

Instead, the Court rested its analysis on the language of evidence and admissibility, and, citing Federal Rules of Evidence 401, 403, and 702, noted that the permissibility of representative evidence “turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.”35 It then expanded on the specific application of these standards in class certification proceedings.

**Relevance.** Most significantly, the Court held that the Rules Enabling Act’s bar on expanding or narrowing a parties’ substantive rights through a Rule of Civil Procedure (such as Rule 23)34 required a court’s analysis of the relevance of representative evidence in class certification proceedings to be no more or less strict than that which it would apply in an individual case:

> In a case where representative evidence is relevant in proving a plaintiff’s individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act’s pellucid instruction that use of the class device cannot “abridge . . . any substantive right.”35

Thus, in analyzing the relevance of the representative evidence in question, the Court noted that, under longstanding FLSA precedent, when “employers violate their statutory duty to keep proper records,” an individual plaintiff need not make sense, because a “representative or statistical sample, like all evidence, is a means to establish or defend against liability.” Thus, “[w]hether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on ‘the elements of the underlying cause of action.’”31

**Reliability.** While it challenged the representative evidence’s persuasive value in the proceedings below, Tyson never sought to exclude the representative evidence under Daubert and Federal Rule of Evidence 702. The Court attached great significance to this. While it noted that “[r]epresentative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked,”37 the defendants’ failure to raise a Daubert challenge meant “there [was] no basis in the record to conclude it was legal error to admit that evidence.”38

**Certification and Merits Determinations.** Tyson reaffirmed the importance of resolving factual disputes for summary judgment or trial in both class and individual cases, holding that “[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury.”45 Thus, while there was a legitimate dispute over whether the representative evidence was in fact probative, “[r]esolving that question . . . is the near-exclusive province of the jury. The district court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing.”46

In response to the defendants’ claim that certification precluded them from litigating individual defenses, the Court invoked the “fatal similarities” concept described in Amgen. Because the representative study was admissible as common proof of injury and damages, the defendants’ “primary defense was to show that [the] study was unrepresentative or inaccurate.”47 And, because success on that defense would end the case entirely, that “defense [was] itself common to the claims made by all class members.”48 Thus, the Court reaffirmed that when a defendant claims that a class contains a “fatal similarity”—[an alleged] failure of proof as to an element of the plaintiffs’ cause of action, courts should engage that question as a matter of summary judgment, not class certification.”49

**Applying Tyson in Antitrust Class Actions: Evidentiary Analysis**

As one court noted, “Tyson did not create a rule limiting representative evidence beyond the well-established standards of admissibility.”50 Thus, Tyson suggests the relevant consideration for determining whether a particular piece of represen-
tative evidence is suitable for showing predominance at class certification is whether it would be relevant and admissible in a case brought by an individual class member. And, in individual cases—just as was suggested in *Tyson*—a defendant seeking to challenge an individual plaintiff’s use of expert testimony derived from representative evidence should seek to exclude that evidence via a *Daubert* motion challenging its relevance or reliability.51

When Is Representative Evidence Relevant in Proving Antitrust Injury in Individual Cases? Representative evidence can be highly relevant evidence of impact for individual antitrust plaintiffs.

The Supreme Court generally “excus[es] antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury,”52 instead permitting proof of injury by “just and reasonable inference.”53 This is so because the substantive nature of proving antitrust injury requires a plaintiff to engage in the necessarily vague process of proving what a world free of the antitrust violation would look like, and it would be unfair for an antitrust defendant to benefit from the vagaries it created.54 As such, individual plaintiffs commonly rely on regression or other economic analysis based on transactional or other data to prove they suffered antitrust injury, or for a variety of other purposes.55 And these models frequently rely on representative, or sample, data.56

Notably, an antitrust plaintiff’s burden of showing injury by “just and reasonable inference” closely reflects the burden faced by the plaintiff class in *Tyson*, which bore the burden of “producing sufficient evidence to show the amount and extent of [unpaid] work as a matter of just and reasonable inference.”57 While this strongly supports the idea that antitrust plaintiffs may prove antitrust impact using representative evidence, it also leads to a potential misunderstanding. In *Tyson*, the defendant failed to maintain records the law required it to maintain; that condition precedent entitled the plaintiffs to the “just and reasonable inference” standard.58 In the antitrust context, there is no such condition precedent: rather, all antitrust plaintiffs are entitled to the “just and reasonable inference” standard because “statistical evidence is required by the inherent nature of the substantive issue.”59

Accordingly, it would be a mistake to conclude in an antitrust case that representative evidence is only permissible if the defendant’s failure to maintain records created the need for sampling. Some courts, however, have fallen into this trap, mistaking *Tyson* as holding only that “‘representative evidence’ is a permissible means of ‘fill[ing] an evidentiary gap created by [a defendant’s] failure to keep adequate records.’”60 In antitrust cases, representative evidence is relevant under far broader circumstances.

When Does Representative Evidence Constitute a Reliable, Admissible Method of Proving Antitrust Injury? Given that representative evidence is relevant to proving antitrust impact in class cases, the question in any case is whether a particular analysis based on such evidence is “reliable” within the meaning of the evidentiary rules. “Regression and statistical analysis have been admitted in antitrust cases to prove injury and to determine damages.”61 However, “even where an expert’s methodology is reliable, if the analysis is not based upon relevant and reliable data, the expert’s opinion will be inadmissible.”62 As *Tyson* said, “representative evidence that is statistically inadequate or based on implausible assumptions” is insufficient.63

While statistical sampling in antitrust cases must be reliable, courts do recognize that most statistical analyses in antitrust cases “are not based on randomized controlled experiments. Rather they are observational studies grounded in real-world data. Consequently, they cannot be held to the same rigid standards of scientific precision.”64 This accepts the realities of litigation, where limited data may be all that is available.

**Sample Size.** Generally speaking, courts are reluctant to exclude representative evidence in antitrust cases simply because the sample itself is small. Rather, “[a]s long as a sample is representative—that is, it was not selected in a biased manner—sample size will not skew the results of the analysis.”65 Of course, a small sample size can affect the significance of the results, i.e., “whether the analyst can be confident that a perceived difference is due to the factor being studied rather than to chance.”66 But whether a particular study’s results are significant is testable, “using measures such as the t-statistic,” and thus, generally speaking, “small sample size goes to the weight rather than to the reliability (and admissibility) of a study.”67

**Sampling Process.** The sampling process, however, can be a different story. “[T]he reliability of any analysis depends upon an unbiased selection of sample data,”68 and a defendant able to demonstrate systemic bias in a sampling methodology has a stronger chance of successfully challenging its reliability.

*U.S. Information Systems v. IBEW Local Union No. 3* is an example. The plaintiffs in that case were contractors alleging that the union defendants conspired to exclude them from the market.69 Their economic expert’s report relied on a sample of third-party bidding data to conclude there was “considerable evidence that the defendants charged significantly more for telecommunications installation services than did the plaintiffs.”70 However, the plaintiffs’ sampling methodology disproportionately focused on specific “projects where the plaintiffs believed they had either been unfairly kept out of the bidding process or wrongfully denied the award.”71 Thus, the “process was systematically biased to select projects with the very price differential that [the expert’s] analysis was designed to test for.”72 This, coupled with the fact that the expert “performed no analysis that might rebut the finding of apparent bias,” led the court to find the data set unreliable and exclude all testimony derived from it.73 Such systemic, demonstrable bias may suffice to render a particular statistical sample unreliable, and therefore unusable under *Tyson*.74
But this is not to say that any allegation of bias will render a report inadmissible. The U.S. Information Systems court permitted the plaintiffs to submit a revised report excluding the biased data, which found the pricing differential persisted. Even though the defendants were “able to challenge specific projects as unrepresentative,” they could not “raise[] an inference of the type of systemic bias that appeared to taint the data” in the earlier report, and the revised report was thus deemed reliable. Any claimed selection bias must be systemic and real, which may require the party opposing certification to explain who was left out and why it matters. As one court put it, assertions that “there may be an unidentified market participant that would render [an expert’s] conclusions so flawed as to be inadmissible” will likely not suffice. Nor will it suffice to claim ignorance of how or why the particular samples were selected. A successful challenge requires specificity.

“Reliability” in Class Cases. Because Tyson focused on whether each class member could have relied on a sample to establish liability if he or she had brought an individual action, the reliability standards outlined above should apply equally to class cases. The obvious difference is that an individual plaintiff’s representative evidence need only be representative of its own experience, whereas Tyson requires that the representative evidence be representative of all or nearly all of the putative class members. In most respects, though, this dovetails with the individual case’s requirement that “representative evidence” be truly representative. Indeed, some pre-Tyson cases took this approach, finding representative samples unreliable after finding the selection process used to identify the samples was inherently biased. However, if the sampling process in a class case is not systemically biased to disproportionately include class members suffering antitrust injury, it should be reliable, even if a defendant can raise legitimate challenges to the representative nature of the sample.

When Will Representative Evidence Sufficient to Justify Class Certification?
If an antitrust plaintiff seeking certification of a putative class submits a Daubert-compliant expert report to show class-wide antitrust impact, then what? Tyson suggests that the certification inquiry comes close to ending there.

Rule 23 requires a plaintiff to show, “by a preponderance of the evidence,” that the element of antitrust impact is “capable of proof at trial using evidence that is common to the class.” The answer may lie in Rule 23 itself. A plaintiff’s burden under Rule 23 is not to prove antitrust impact; rather, its burden is to show that it has a reliable methodology for doing so. Similarly, under Daubert, an expert’s “proponent need not prove to the judge that the expert’s testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable.” Given the similarity between the two, Tyson can be read as largely collapsing the Rule 23 “preponderance” inquiry into the Daubert inquiry, meaning that a plaintiff who shows by a preponderance of the evidence that expert testimony based on representative evidence is reliable and therefore admissible, may, by doing so, also show by a preponderance of the evidence that common issues predominate (at least as to the subject matter of the expert analysis).

One significant lesson of Tyson, then, is that an antitrust defendant faced with a certification motion presenting expert testimony as a common method of proving antitrust impact must seek to exclude the testimony under Daubert or risk losing the opportunity to challenge the evidence’s ability to demonstrate predominance. Some post-Tyson cases seem to suggest this is correct: in Kleen Products LLC v. International Paper Co., the Seventh Circuit affirmed certification of an antitrust class, relying in part on Tyson in holding that “Defendants did not challenge Purchasers’ experts under Daubert and Federal Rule of Evidence 702, and so we accept their reports for what they are worth at this stage.”

That said, Tyson did suggest that there may be some light between Daubert and certification, holding that, without a Daubert challenge, the lower court could have denied certification “only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing.” And some post-Tyson courts continue to engage in a far-reaching Rule 23 inquiry even after finding expert evidence offered to prove impact admissible. Thus, Tyson potentially permits some limited, post-Daubert inquiry prior to certification. But Tyson’s adage that post-Daubert factual determinations rest with the jury must guide any such inquiry.

This leads to another Supreme Court case: Comcast Corp. v. Behrend. Comcast was an antitrust class action in which
the plaintiffs proposed proving class-wide damages through a regression analysis calculating the net economic effect on the class of four distinct theories of antitrust impact.\(^9^3\) The district court, however, had permitted only one of the four theories to proceed class-wide. Consequently, the regression included harm unrelated to the claim remaining in the case.\(^9^4\) Because of the disconnect between the plaintiffs’ single-theory class and four-theory proposed proof of damages, the Supreme Court found certification inappropriate.\(^9^5\)

While the Comcast defendants failed to challenge the admissibility of the plaintiffs’ expert’s testimony under Daubert, in contrast to its approach in Tyson, the Court held that this failure did not preclude a substantive challenge to the testimony.\(^9^6\) The distinction appears to lie in a footnote, where Justice Scalia rejected the idea that the issue before the Comcast court raised a question of fact: “[W]hile the data contained within an econometric model may well be ‘questions of fact’ in the relevant sense, what those data prove is no more a question of fact than what our opinions hold.”\(^9^7\) This somewhat ambiguous language suggests that, while the validity of a particular econometric model may be a question of fact for the jury, what that model is capable of proving if accepted by the jury is a question of law for the judge. While the latter is an appropriate consideration at the class certification stage, the former is not. Any post-Daubert Rule 23 inquiry must recognize this distinction, and focus not on disputed facts concerning how the model is constructed or the data it uses, but rather on the legal issue of what the model is capable of proving.

This reading of the two cases is consistent with one pre-Tyson court’s observation of the “subtle difference” between Daubert and Rule 23—Daubert focuses on “principles and methodology,” while Rule 23 focuses on “conclusions generated by the principles and methodology.”\(^9^8\) And it is consistent with Tyson’s reference to the “no reasonable juror” standard for summary judgement. In Tyson, the Court limited its Rule 23 inquiry to whether reasonable jurors could find class members spent “roughly equal time donning and doffing.”\(^9^9\) If no reasonable juror could so find, the conclusions of the study—even if accepted by the jury—would not be probative on the issue of injury. Thus, the study would suffer from the same fatal “disconnect” at issue in Comcast—a failure to show that injury was capable of being proven through the proffered representative evidence, contravening Rule 23.

Viewing Tyson through this lens also informs the role that the opposing expert’s critique of a plaintiff’s certification expert should play at the post-Daubert stage. Once the court is satisfied that plaintiff’s expert’s methodologies satisfy Daubert, the court should not weigh the merits of any critique of those methodologies. Rather, the court should accept the plaintiff’s expert’s conclusions for all they are worth, and limit its consideration of the opposing expert’s opinion to whether the plaintiff’s expert’s conclusions, if accepted by the jury, would constitute common proof of antitrust impact. Once Daubert is satisfied, certification should only be denied where the plaintiff’s expert’s methodology would be insufficient to show antitrust impact class-wide even if it, and all other evidence presented at certification, were accepted by the jury. This should only occur in circumstances like those in Comcast, where the expert’s conclusions do not “fit” the facts of the case or the definition of the class. Going further would run counter to Tyson, as well as Amgen’s adage that courts must “reserve[] consideration of . . . rebuttal evidence for summary judgment or trial.”\(^1^0^0\)

Conclusion

Admissible evidence is what matters in any case. Tyson underscores that this principle is just as true at class certification as it is at other stages in the litigation. In addition to proving a framework for analyzing the propriety of representative evidence, its focus on the admissibility of such evidence at class certification and on the need to reserve factual determinations for the jury heightens the importance of Daubert proceedings. This, coupled with Tyson’s suggestion that most post-Daubert critiques of an expert are a subject for summary judgment, not certification, carries important rules for practitioners pursuing or opposing antitrust class certification. Tyson may prove far more influential that its supposedly narrow ruling might suggest.

\(^1\) 136 S. Ct. 1036 (2016).
\(^3\) While antitrust injury contains a legal component (i.e., whether the claimed injury was of the type the antitrust laws were intended to prevent,) representative evidence will not generally be introduced to answer the legal question but rather to prove that the plaintiff has suffered injury in fact from the violation. See generally Cordes & Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 95 (2d Cir. 2007).
\(^4\) In re Madafinil Antitrust Litig., 837 F.3d 238, 262 (3d Cir. 2016) (quoting In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 306, 311 (3d Cir. 2008)).
\(^5\) In re Nexium Antitrust Litig., 777 F.3d 9, 24 n.20 (1st Cir. 2015) (quoting Hydrogen Peroxide, 552 F.3d at 311) (emphasis added in Nexium); see also In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252–53 (D.C. Cir. 2013) (“Common questions of fact cannot predominate where there exists no reliable means of proving class-wide injury in fact.”).
\(^6\) World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1478 (10th Cir. 1985) (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 114 n.9 (1969)).
\(^7\) See, e.g., In re TFT-LCD Antitrust Litig., 267 F.R.D. 291, 313 (N.D. Cal. 2010) (“Dr. Flamm’s report is supported by defendants’ transactional data as well as industry data, and courts have accepted multiple regression and correlation analyses as means of proving antitrust injury and damages on a class-wide basis.”).
\(^8\) 564 U.S. 338 (2011).
\(^9\) Tyson, 136 S. Ct. at 1048 (citing Wal-Mart, 564 U.S. at 367).
\(^1^0\) Id. (quoting Wal-Mart, 564 U.S. at 367); see also 28 U.S.C. § 2072(b).
\(^1^1\) Amgen Inc. v. Conn. Retirement Plans and Trust, 133 S. Ct. 1184 (2013).
\(^1^2\) Id. at 1190.
\(^1^3\) Id. at 1195.
\(^1^4\) Id.
\(^1^5\) Id.
\(^1^6\) Id. at 1196.

Tyson, 136 S. Ct. at 1048.


Id. at 232.

Id.

Id.; see also In re Photochromic Lens Antitrust Litig., 2014 U.S. Dist. LEXIS 46107, at *104 (M.D. Fla. Apr. 3, 2014) (“I cannot agree that Dr. Singer’s use of a 50% measure of statistical significance, by itself, is sufficient justification for denying class certification.”) (denying certification on other grounds).

Id. at 233.

Id.

Id. at 223.

Id.

Id. at 234.

Id. at 235.


Id. at *7.


Id. at *66–67 n.10.


Tyson, 136 S. Ct. at 1046–47.


Tyson, 136 S. Ct. at 1049.

Id. at 1047.

Id. at 1048–49.

Id. at 1049.

Id. at 1047.

Id.

Id. at 1047.

Id.

Id.

Id.

Id.

Id.

Id. at 1047.

Id.

Id.

Id.

Id.

Id. at 1046.

Id. at 1046.

Id. at 268, 283 (S.D.N.Y. 2000).

Id.

Id.

Id.

Id.

Id. at 1045 (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–88 (1946)).

Id. at 1046.

Id.

Id.

Id.

Id.

Id.

Id. at 1046.

Id. at 1049.

Id. at 1049–50.

Id. at 1046.

Id.

Id.

Id. at 1048.

Id.

Id.

Id.

Id.

Id.

Id. at 1048–49.

Id. at 1049.

Id. at 1047.

Id.

Id.

Id.

Id.

Id.

Id.

Id. (quoting Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011)).

Id.


Tyson, 136 S. Ct. at 1046 (quoting 28 U.S.C. § 2072(b)).

Id. at 1047.

Id.

Id. at 1048.

Id.

Id.

Id.

Id.

Id.

Id. at 1048–49.

Id. at 1049.

Id. at 1047.

Id.

Id.

Id. (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 107 (2009)).

Monroe v. FTS USA, LLC, 860 F.3d 389, 401 (6th Cir. 2017).

Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co., 998 F.2d 1224, 1239 (3d Cir. 1993) (“[A]ny problems with the underlying data should have been resolved under Federal Rules of Evidence 702 or 703.”).


In re Southeast Milk Antitrust Litig., 739 F.3d 262, 285 (6th Cir. 2014).


Tyson, 136 S. Ct. at 1047 (quoting Mt. Clemens, 328 U.S. at 687).

Id.


THERE HAVE BEEN SIGNIFICANT developments in the last 15 years regarding private enforcement of the European Union antitrust laws, culminating in a Directive issued in November 2014 intended to remove some of the barriers to private antitrust actions in the Member States. The Directive establishes that any person who has suffered harm caused by a competition law infringement, including indirect purchasers, may claim full compensation for that harm. It applies to both follow-on and stand-alone actions. The Directive creates a rebuttable presumption that cartel infringers cause harm; provides for a passing-on defense; establishes a presumption that an overcharge is passed on to indirect purchasers; and allows claims to be brought by indirect purchasers at all levels of the distribution chain.

The Directive also provides for limited discovery that was not previously available in most EU jurisdictions, allowing the parties to seek disclosure of “specific items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible” relating to their claims and defenses. That discovery may well turn out to be critical in quantifying the degree of pass-on in both direct and indirect purchaser actions in the EU.

The Member States were obliged to implement the Directive into their legal systems by December 2016, but to date not all have done so. Implementation of the Directive is likely to result in an increase in the number of direct and indirect purchaser cases brought in the EU Member States. Most of the cases to date have been follow-on cases alleging cartel infringements. Many have been direct purchaser cases in which overcharge tracing issues are not nearly as complicated as they are in multilevel indirect purchaser cases.

This article focuses on indirect purchaser claims and considers how those claims are likely to be litigated in the Member State courts under the Directive. It reviews the indirect purchaser litigation experience in the United States and, based on that experience (and recognizing that there are differences between the U.S. and EU systems), offers a number of suggestions for improving the management of indirect purchaser actions in the EU. Some of the suggestions may not be fully consistent with all of the elements of the system contemplated by the Directive, and others may require a revisiting or narrowing of certain of the principles identified by the European Court of Justice (ECJ) in its limited jurisprudence to date addressing private damage claims.

The goal of the article is to stimulate further discussion on the effective management of indirect purchaser actions in the EU Member State courts, while simultaneously assuring that the procedures for adjudicating such actions satisfy the principle of effectiveness articulated by the ECJ in its 2006 decision in Manfredi v. Lloyd Adriatico Assicurazioni SpA.

EU Framework
The existing framework for private enforcement of antitrust damage claims in the EU can be traced back to the ECJ’s Manfredi decision and its earlier decision in Courage v. Crehan, both of which recognized a broad right to sue by anyone injured by an infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). In Manfredi, the ECJ declared that all actions taken by Member States are subject to the twin requirements of equivalence and effectiveness, specifically:

[I]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to prescribe the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favorable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

The European Commission issued a Green Paper in 2005 and a White Paper in 2008 addressing issues related to the...
creation of a distinctly European system of private redress for competition law infringements. The Green Paper focused on “private enforcement,” while the White Paper spoke almost exclusively about the goal of “full compensation.”

At other times Commission officials spoke of the desire to avoid a “culture of litigation” and abusive litigation practices thought to be prevalent in the United States. Class actions were the principal perceived abuse. In an effort to avoid this abuse, when the Commission issued a “Recommendation” in 2013 addressing collective redress issues, it recommended that the Member States allow “representative entities” having a “direct relationship” to the rights claimed to have been violated to bring collective actions for competition law infringements, but only on an opt-in basis. The Commission recommended against contingency fees and third-party funding of such actions.

The Directive also authorized the Commission to issue “guidelines . . . on how to estimate the share of the overcharge passed on to indirect purchasers.” The Commission responded in October 2016 with a report of more than 300 pages entitled “Study on the Passing-On of Overcharges,” intended to provide the basis for a subsequent Commission “guidance” document for judges in the EU Member States on how to quantify, calculate, and trace overcharges in indirect purchaser damages cases. Based on this report, it seems reasonable to assume that the Commission’s “guidance” will endorse a broad right to damages by all claimants in the distribution chain, including consumers.

The Commission’s report indicates that the right to damages may potentially include overcharge claims by purchasers of products containing price-fixed ingredients or components, regardless of their value and relationship to the price of the ultimate finished product (e.g., price-fixed microchips contained in computers purchased by consumers or vitamins purchased by a manufacturer of soup or breads incorporating such vitamins). Direct purchasers conceivably could sue in one Member State, while first-level indirect purchasers might sue in another Member State. A collective action on behalf of first-level indirect purchasers might be brought in one Member State, while individual claims on behalf of others at the same or later level of distribution might be pending in other Member States.

In such a scenario, defendants might well find themselves subject to discovery on pass-on damage issues in multiple jurisdictions simultaneously. And it is not inconceivable that in a case involving a distribution chain with multiple levels, a court in one Member State might find that 60 percent of an overcharge was passed on from the first level indirect purchasers to the second, while a court in another Member State might find that the overcharge passed on was only 30 percent. Without some coordinated ground rules and filters for weeding out claims that are either too small (individually or collectively) or too complex to be adjudicated efficiently, either from a case management or cost perspective, there is a risk that Member State courts will be overwhelmed by the sheer number and complexity of such cases. There is also the risk that in an effort to provide a damage remedy to all claimants who can trace their injury to an infringement, the resulting remedy will be ineffective because it may overcompensate or undercompensate the claimant, resulting in more or less than “full compensation,” which is viewed as the guiding principle of EU private damage analysis.

Some European commentators have criticized the U.S. private litigation system as abusive, claiming that the costs and burdens of U.S.-style discovery, a plaintiff-friendly opt-out class action system, the absence of a “loser pays” rule, and the possibility of trial before runaway juries have all contributed to a toxic “culture of litigation” that the measures introduced by the Directive seek to avoid. Despite the claimed shortcomings of the U.S. private enforcement system, U.S. courts, beginning with the Supreme Court’s Associated General Contractors decision, have developed sensible mechanisms for identifying certain categories of indirect claims that are susceptible to dismissal at an early stage, and for effectively managing those that have been permitted to proceed. Some of these techniques merit consideration by EU competition policy makers and are addressed later in this article.

The Illinois Brick Rule in the United States

In the United States, not all claims—even those by direct purchasers—can be pursued under Sections 1 and 2 of the Sherman Act. Federal courts recognize that some claims are derivative of the claims of superior plaintiffs, some claims can potentially result in duplicative recoveries, and some claims are too remote to be actionable. Thus, even injuries that are directly traceable to an antitrust violation may not be sufficient to confer antitrust standing.

Of most significance, in 1977, in Illinois Brick Co. v. Illinois, the U.S. Supreme Court held, on policy grounds, that pass-on arguments could not be used offensively, and that consequently, indirect purchasers could not sue for damages under the federal antitrust laws. The majority opinion was influenced by the Court’s 1968 opinion in Hanover Shoe, in which it held that pass-on was not a defense in a Sherman Act suit seeking overcharge damages. In Illinois Brick, the Court declared that given its decision in Hanover Shoe, pass-on could not be used offensively or defensively and only direct purchasers were entitled to the full amount of an overcharge.

The Illinois Brick opinion relied on two pillars: deterrence and pragmatism. Although allowing direct purchasers to recover all of an overcharge, even if it was completely passed on, might result in windfalls and the wrong persons recovering the overcharge, the Court determined that the disgorgement of ill-gotten gains from wrongdoers was more important than assuring full compensation to the right victims. With deterrence as the primary goal, direct purchasers were best situated to detect overcharges. The Court also was concerned about the possibility of inconsistent judgments,
and potentially subjecting defendants to duplicative damage liability. 17

Despite Illinois Brick, direct purchaser standing is not automatic under U.S. antitrust law. Direct purchaser plaintiffs must still demonstrate that they have standing under the test established by the Supreme Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC). 18 There the Court identified five factors to be considered in deciding if a plaintiff has standing to sue under the federal antitrust laws: (1) the causal connection between the violation and the plaintiff’s harm, and whether the harm was intended; (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and whether the damages are too speculative; (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and (5) the existence of more direct victims. 19

The Indirect Purchaser Experience in the United States
following Illinois Brick, almost half the states adopted so-called Illinois Brick-repealer statutes allowing indirect purchasers to assert pass-on claims under state antitrust law. In 1989, in ARC America, the Supreme Court held that the Illinois Brick-repealer statutes were not preempted by the Sherman Act. 20

The complexity of a distribution chain, particularly when the defendants manufactured ingredients, raw materials, or components of the products purchased by the class, and the difficulty of proving uniform pass-on of alleged overcharges at each level of the chain through common proof, have been major stumbling blocks to indirect purchaser class actions, often resulting in dismissal of the claims 21 or the denial of class certification. 22 For those and other reasons, indirect purchaser class suits at times settle for relatively small amounts compared to the size of direct purchaser class settlements in the same case. Some U.S. indirect purchaser settlements provide for a cy pres payment (often to a public agency or nonprofit organization) when distribution to class members is impracticable or settlement funds are not claimed.

As a result of the passage of the Class Action Fairness Act of 2005 (CAFA), indirect purchaser actions brought under state law are frequently removed to federal court and often consolidated with direct purchaser cases for coordinated pretrial Multi-District Litigation (MDL) proceedings in a single federal court. Despite the resulting efficiency, one of the unintended consequences of this coordination is that federal judges are required to decide issues relating to state law indirect purchaser claims (many of which have never been addressed by the state courts) without any guidance or direction from the relevant state supreme courts.

Both federal and state courts have nevertheless been able to deal with state law issues on the basis of the AGC test or a modification of that test. A 2017 decision of the federal district court in the Northern District of Illinois is illustrative. Supreme Auto Transport LLC v. Arcelor Mittal 23 was brought under the antitrust laws of 21 states on behalf of a class of purchasers of consumer products containing steel (including refrigerators, dishwashers, ovens, automobiles, and air conditioners), seeking overcharges resulting from an alleged conspiracy by steel manufacturers to limit production. The district court dismissed the suit, relying on AGC, which the court believed essentially had been adopted by federal and state courts in all of the states involved. 24

Specifically, the district court held that the plaintiffs’ claims as indirect purchasers ran afoul of four of the five AGC factors. First, the complaint did not acknowledge the role of the direct purchasers of the steel, who manufactured and sold the steel-containing products to resellers, who ultimately sold the finished products to the class. Second, the more immediate victims were in a better position to maintain an antitrust suit. Third, it was implausible to claim that the defendants’ motive was to inflate the price of steel-containing products from which they did not profit. Finally, calculating damages for the class would be highly speculative because the products contained materials other than steel that could not easily be segregated and priced after the fact. 25

Crouch v. Crompton Corp., 26 another example, involved consolidated appeals of two class actions brought under the North Carolina antitrust statute, one by purchasers of products containing price-fixed rubber chemicals, and the other by consumers who allegedly paid overcharges on retail purchases made on credit card transactions. Relying on AGC, the state court dismissed the two actions because of the difficulties of proof, complexity of damage apportionment, the trivial amount of consumer recoveries, the enormous burden on the court, and the futility of a cy pres award. 27

There have been other indirect purchaser claims dismissed on remoteness grounds or because individual issues outweighed class issues, although some have withstood dismissal and have been certified. 28 There do not appear to be any indirect purchaser cases where an individual plaintiff or class prevailed at trial.

The EU Guiding Principles: “Full Compensation” and “Effectiveness”

In contrast to the overarching goal of deterrence in the United States, the European Commission’s 2008 White Paper and its 2014 Directive make it clear that the only legitimate purpose of an EU private damage action is “full compensation.” The Commission and the courts of EU Member States do not recognize deterrence as a goal to be accomplished through private enforcement. The EU dichotomy between public and private actions—between deterrence and compensation—makes it unlikely that the EU would ever adopt an Illinois Brick rule and limit overcharge recoveries to direct purchasers.

But how far should the availability of damage recoveries go? In Courage, the ECJ announced a broad “effectiveness”
In contrast to the overarching goal of deterrence in the United States, the European Commission’s 2008 White Paper and its 2014 Directive make it clear that the only legitimate purpose of an EU private damage action is “full compensation.”

rule for a damages remedy that on its face would allow all claimants injured by a competition law infringement to seek damages. The ECJ stressed that “[t]he full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.” 30

The ECJ’s language in Courage raised a critical question: if purchasers other than direct purchasers may sue for damages under EU law to meet the twin goals of full compensation and effectiveness, should all indirect purchasers be entitled to sue, regardless of how big (or small) their claim and regardless of how distant or attenuated their claim is from the alleged wrongdoing?

In the absence of guidance from the Commission or the EU courts, there will be inevitable tensions between the principles of “full compensation” and “effectiveness.” Allowing claimants at every level of a distribution chain to pursue damage claims, no matter how small and how difficult to trace, with all of the attendant costs on the judicial system, could make the private antitrust remedy less “effective.” To meet its goal of effectiveness, the Commission may need to narrow some indirect claims that the EU courts might otherwise permit on the basis of Courage and Manfredi.

The ECJ in Manfredi indicated that there might at least be a causation limit: “It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited.” 30 Surprisingly, the 2014 Directive does not say anything about the nature of the causal relationship necessary to support a claim under Manfredi, but leaves causation to national law. Under the national laws of most EU Member States, causation has always been an essential element of a claimant’s damage claim, and claims have been rejected for failure to establish causation. 31

Recommendations for the EU from the U.S. Experience

A number of questions remain unanswered regarding potential limits on indirect purchaser claims under EU law. In particular, should claims be permitted by consumers who may have suffered pass-on injury but who have no receipts to prove their purchases? Should recoveries be allowed in collective actions where the amount of any individual claim is less than the cost of administration (processing the claim and distributing funds to eligible class members)? Should the same rules apply to single products that move through the distribution chain unchanged as opposed to integrated products containing a price-fixed component? What happens when an integrated product containing a price-fixed component is used to provide a service (such as transportation on an airplane with price-fixed rivets)? Should passengers be allowed to sue for that portion of the ticket price attributable to the price-fixed rivets? Can pass-on be reliably calculated in downstream markets where there may be high levels of competition and notoriously small margins, as in supermarket sales? Would disgorgement ever be a more appropriate remedy than overcharge damages (as adjusted for pass-on), or would this run afoul of the EU rule that damages must be exclusively compensatory? Are there circumstances when cy pres recoveries should be allowed as a matter of last resort?

In addressing these issues, there may be lessons to be learned from the U.S. experience that can benefit judges and competition policy makers in Europe confronted with the challenge of developing an effective system of private antitrust redress. U.S. courts and antitrust enforcers continue to address many of the same tradeoffs that are currently being debated in Europe: whether certain indirect claims are too remote, or particular plaintiffs are not “efficient enforcers”; the costs imposed on the judicial system when indirect purchaser claims are permitted; the ability of the system to provide meaningful redress to consumers; and how to prove pass-on damages without imposing huge pre-trial discovery burdens.

The following suggestions are derived from the U.S. experience. While recognizing that some suggestions may not be entirely consistent with existing ECJ law on private rights of action (as well as national law governing discovery), they may nonetheless assist the European Commission in its preparation of the damages “guidance” document still to be issued and the Member States in developing an effective framework for the management of indirect purchaser claims in and across their respective jurisdictions.

The suggestions below take account of the ECJ’s admonition in Manfredi that private antitrust redress in the Member States must comply with the principle of effectiveness, i.e., the remedy must not be “practically impossible” or “excessively difficult” to pursue. While the European courts have provided little additional guidance on the meaning of effectiveness, procedural rules that increase the cost of pursuing claims (such as the “loser pays” rule) or prevent claimants from pursuing such claims (such as the prohibition of third-party funding) could run afoul of this principle in some circumstances.

1. Consider creating a European MDL mechanism for coordinating direct and indirect purchaser cases brought in the courts of different Member States. An MDL mechanism would make private remedies more effective in the Manfredi...
A number of questions remain unanswered regarding potential limits on indirect purchaser claims under EU law. In particular, should claims be permitted by consumers who may have suffered pass-on injury but who have no receipts to prove their purchases?

sense by allowing plaintiffs to share discovery materials and reducing pre-trial discovery costs. At a minimum, a document depository could be established so that defendants are not obliged to comply with overlapping and potentially duplicative discovery requests in multiple jurisdictions. Duplicative discovery requests can be burdensome even if discovery in most EU jurisdictions is more limited than in the United States. If a Community-wide mechanism is not feasible because of sovereignty concerns, consideration could at least be given to creating MDL mechanisms for coordinating and/or consolidating related private claims brought within a single Member State.

2. Consider the appointment of a special master to oversee and coordinate discovery on pass-on issues. The use of special discovery masters is common in the United States, saves judicial time, and can lead to consensual resolution of disputes among the parties and other efficiencies in the discovery process, regardless of how limited discovery may be under the Directive. These benefits also could be achieved from the use of discovery masters. The Directive does now include provisions for discovery of a wide variety of relevant documents.

3. Consider the appointment of a special economic master to assist the court in evaluating expert economic reports regarding the amount of pass-on at different levels of the distribution chain. Special economic masters have been used by U.S. courts to assist in the evaluation of expert testimony. Depending on the complexity of the economic evidence submitted by the parties, and depending on the economic sophistication of judges and their willingness to engage (and the parties’ willingness to accept) a special economic master, their retention may result in more focused and nuanced evaluation of such evidence, thus providing greater reliability to judicial findings on pass-on and economic issues. While courts in some EU jurisdictions, such as Germany and the UK, typically appoint their own economic experts to assist in the evaluation of evidence at trial, that is not the practice in all jurisdictions. In those jurisdictions where the court is asked to resolve conflicting expert testimony, the appointment of a special economic master would not necessarily avoid a “battle of the experts,” but likely would result in more reliable fact-finding on pass-on and other complex economic issues.

4. Consider adopting a “remoteness” test for some indirect purchaser claims. Courts could consider whether some claims should be disallowed on the basis of remoteness or other pragmatic considerations, including judicial economy, efficiency, and fairness to defendants. Such a test could be modeled after the AGC test in the United States, and would not allow certain indirect purchaser claims, such as one where there are other indirect purchasers who suffered more direct injury (thus promoting the deterrent function of private enforcement while avoiding some problems in tracing pass-on), or where the indirect purchaser claim is particularly attenuated. The “causal relationship” language in Manfredi could be interpreted to require a proximate cause kind of causal relationship rather than a more tenuous “but for” link to the alleged harm. While causation has traditionally been a matter of individual national law, and some EU jurisdictions may reject claims on remoteness grounds, there may be utility in establishing a uniform causation test similar to the AGC test.

5. Consider limiting recovery to the claims of direct and first-level indirect purchasers. Direct and first-level indirect purchasers are likely to have substantial claims, and limiting claims to these purchasers would be less problematic than tracing pass-on through an entire distribution chain. Direct purchasers arguably are in the best position to detect collusive behavior by their suppliers. First-level indirect purchasers may also be similarly situated. Claims by these purchasers can be pursued individually (or through aggregation with other large purchasers) without the need to bring a collective action. To the extent that deterrence is accepted as a proper coordinate goal of private enforcement, actions by these purchasers are likely to have a greater deterrent effect than actions brought by purchasers with smaller claims further down the distribution chain. Adoption of this proposed rule (and other rules for limiting the right to sue where causation/tracing issues are particularly difficult, or the anticipated recovery would be below a certain threshold) likely would require legislative or judicial overruling or limiting of the broad right to claim damages established by the ECJ and reaffirmed in the Directive.

6. Consider a rule that limits indirect purchaser claims involving products that are raw materials, ingredients, or components of other products. Indirect purchaser cases often involve finished products containing allegedly price-fixed raw materials, ingredients, or components. The cost of tracing and quantifying the pass-on through the distribution chain to the finished product, as well as the small amount that may legitimately be claimed by individual purchasers of the finished product, may justify denying them recovery in appropriate situations. If this is too extreme a rule, consideration could be given to a rule that would not allow indirect claims by purchasers of the finished product when the value of a price-fixed input, for example, is less than 10 percent of the value of the finished product.

7. Consider not allowing indirect purchaser claims when the value of any individual claim is less than a specified
threshold amount. Perhaps cost-benefit analysis could be applied in deciding whether some indirect purchaser claims are too small to be litigated. Limiting judicial remedies for indirect claims below a certain threshold would undoubtedly exclude a number of such claims, particularly consumer claims. A provision could be made for an alternative redress mechanism, such as the creation of a small claims tribunal to hear such claims. For example, a 50 Euro threshold might eliminate many indirect purchaser claims by consumers, but it is not clear that consumers would pursue claims in this amount in any event, particularly if their only options were to pursue the claim individually or as part of an opt-in class where they would potentially be liable for the payment of a defendant’s legal fees under the “loser pays” rule.

8. Consider eliminating the “loser pays” rule in indirect purchaser cases. Given the small value of individual recoveries in many indirect purchaser cases, the “loser pays” rule may be a powerful deterrent to the bringing of such claims in those jurisdictions where the rule is strictly applied. If the Commission and EU Parliament want to encourage indirect purchaser claims as a matter of public policy, and if it can be demonstrated that the “loser pays” rule discourages the pursuit of such claims because of the disparity between the potential recovery and the costs associated with bringing the claims, then the argument could be made that the rule violates the principle of effectiveness.

9. Consider eliminating lost sales as a measure of damages in follow-on cases. In the United States, most direct purchaser cases involve overcharge calculations. Additional damages based on lost sales typically are not calculated. The data and discovery needed to quantify such losses can be significant, and some of that data, particularly in the context of downstream indirect purchaser claims, will have to come from third parties who are strangers to the action and should not be burdened with the costs and diversion of discovery. Overcharges plus interest (which in the EU runs back to the date of the infringement) should provide sufficient compensatory damages for any purchaser, direct or indirect, who can establish injury as a result of an infringement. Even if lost sales were included as an element of damages, only claimants who are resellers (which would exclude consumers) should be entitled to such damages.

10. Consider establishing rebuttable presumptions for the amount of overcharge passed on and the amount of overcharge retained at different levels of a distribution chain. The Directive creates a rebuttable presumption that cartel infringers cause harm and that indirect purchasers are presumed to suffer pass-on if they can show that they purchased from a direct purchaser who suffered an overcharge. The amount of the pass-on at any particular level is not the subject of any presumption under the Directive, however, and will need to be established through litigation. Consideration could be given to the use of rebuttable presumptions with specified pass-on amounts to simplify damage analysis and incentivize settlements in indirect purchaser cases. Creating a rebuttable presumption, for example, that 50 percent of an overcharge was absorbed by the direct purchaser, might be sufficient to incentivize direct purchasers to settlement.

A 25 percent rebuttable presumption might have the same effect for first-level indirect purchasers.32 If not challenged by the defendant, it would permit direct purchaser and first-level indirect purchaser claims to be resolved efficiently because the amount of the overcharge would not be disputed, and in cases where there was a finding of infringement, the defendant could not dispute liability. The disadvantage of such a procedure is that the presumption may not have any empirical support, thus either contributing to windfalls or undercompensating plaintiffs who choose to rely on the presumption. The precise amounts of the overcharge presumption could be refined over time as the Commission and national competition authorities developed more reliable data on the amount of overcharge at different levels of the distribution chain and in different kinds of cases.

11. Consider the possibility of determining the overcharge at the direct purchaser level in collective actions and treating that amount as total damages for all purchasers in the distribution chain, both direct and indirect. Once the total amount of the overcharge at the direct purchaser level is determined in a collective action where other purchasers in the distribution chain are also claiming damages, counsel representing direct purchasers and all indirect purchasers could attempt to allocate the overcharge among the different levels of the distribution chain in a manner satisfactory to all. This is how class action settlements are allocated among different levels of purchasers in Canada. The court could also appoint a special economic discovery master to assist in deciding on the appropriate allocations. Because a defendant ordinarily has no interest in how a settlement fund is allocated, it would simply deposit the fund with the court and permit the different levels of claimants and the court to determine the allocations.

12. Consider a first-resort rule requiring parties to estimate overcharges using publicly available data before seeking discovery from third parties. Because the tracing of pass-on through different levels of a distribution chain is data intensive, and because most of that data may be available only from third parties (thus incurring costs on parties who have no stake in the litigation), a first-resort rule requiring estimates using public data might lead to settlement, or at least a narrowing of further discovery, if the estimates yield numbers the parties are willing to accept as preliminary calculations. Potential data sources include data compiled by government agencies, trade associations, or other industry sources. To the extent available, financial disclosure documents and other public data for direct purchasers and first-tier indirect purchasers might also be consulted.

To minimize the discovery burden on third parties, even in the case of limited discovery from such parties, courts might consider whether they could persuade the parties to agree on a single neutral economic expert to calculate pass-
on and overcharge issues. The expert could submit requests for information to the parties as well as third parties, avoiding third parties being served with discovery requests.

13. Consider carefully tailored use of *cy pres* as a last resort remedy in collective actions brought by end user consumers. The U.S. experience with *cy pres* awards has been mixed at best, so there are reasons *cy pres* may be a less than optimal remedy. *Cy pres* is also inconsistent with EU notions of compensation, since overcharged claimants obtain no monetary recovery. On the other hand, when faced with the choice of allowing wrongdoers to keep the fruits of their wrongdoing or having the funds go to organizations that might arguably benefit the victims, policy makers might conclude that a *cy pres* recovery is the lesser of two evils. In situations where the product goes through a distribution chain unchanged, and where there has been a determination of the amount of pass-on to end user consumers, a narrowly tailored *cy pres* award may merit consideration. In such circumstances, a *cy pres* award would have the benefit of disgorging ill-gotten gains, promoting deterrence, and potentially advancing the public good.

**The MasterCard Decision**

Many of our recommendations and the policy reasons underlying them are consistent with the landmark decision of the UK Competition Appeal Tribunal (CAT) earlier this year in the *MasterCard* case. The plaintiff in that case brought a collective action seeking to represent a class of approximately 46 million consumers claiming damages of more than £14 billion. The plaintiff claimed that all class members suffered injury because MasterCard had overcharged retailers through the imposition of an unlawful multilateral interchange fee, and the overcharge had been passed on to consumers, whether those consumers paid by cash or card. However, the CAT denied the application for a collective proceedings order. Stressing that damages for competition law breaches must be compensatory, the CAT held that the consumer claims were not “suitable for an aggregate award of damages,” and “there was no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated.”

Specifically, the CAT held that even if aggregate damages could be proved reliably, there was no feasible way of allocating those damages among class members on a reliable basis. They patronized many thousands of different retailers, and they received different levels of loyalty rewards and other benefits paid by card-issuing banks. The CAT also noted that much of the data needed to prove pass-on would come from third parties, making it extraordinarily difficult to prove the amount of pass-on to each class member.

If the CAT’s decision is affirmed on appeal (assuming that permission to appeal is granted) and followed in other EU jurisdictions, it could stand as a formidable obstacle to the maintenance of unduly complex indirect purchaser claims by consumers. As the CAT’s decision illustrates, proving aggregate damages and the amount of pass-on in actions brought on behalf of consumers will likely require discovery of economic data and other materials that the parties to the litigation may not possess. Given the ongoing claims in the UK against MasterCard brought by claimants at different levels of the distribution chain, all litigants would benefit from a mechanism to coordinate discovery and establish a central document depository.

**Conclusion**

The future of private antitrust litigation in the EU will require the courts to balance the dual principles of compensation and effectiveness. How that balance will be struck with respect to indirect purchaser claims remains to be seen.

Both goals might be met through a standing requirement that limits damages in certain cases to the first level of indirect purchasers, particularly in cases involving integrated components or complex purchasing patterns through multiple or varied distribution channels. To prevent the wrongdoer from benefitting in such cases, the damages suffered by more remote claimants possibly could be ascertained by a small claims tribunal charged with determining, to borrow from Judge Roth’s felicitous language in *Merricks*, an appropriate “rough-and-ready approximation” of their losses.

Rebuttable presumptions of the percentage of pass-on for different levels of indirect purchasers might also provide a more flexible approach. The EU would still be developing its distinctive system of private redress, preserving its own notion of pass-on as a defense, while allowing the evolution of rules differentially accounting for differing impacts at different levels of distribution.

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7 Id. at 3. In Europe deterrence it is generally considered the sole function of public enforcement. Damage recoveries, however, may approach or even exceed governmental fines. The combined effect, therefore, should increase deterrence.
11 “The governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in but for the breach.” Merricks v. MasterCard, [2017] CAT 16, at 35.
15 Illinois Brick Co., 431 U.S. at 745–47.
16 Id.
17 Id. at 730–31, 737 n.18.
19 Id. at 537–46.
24 Id. at *4–5.
25 Id. at *4–5.
27 See id. at *20–28.
30 2006 E.C.R. 1-6641, at I-6659 (emphasis added).
31 See, e.g., German Federal Court of Justice (BGH), Judgment of 12 July 2016, KZR 25/14, NJW 2016, 3527, 3531 (with further references); Higher Regional Court of Munich (OLG München), Judgment of 21 February 2013, U 5006/11 Kart, BeckRS 2013, 05429.
35 Id. at 31, 33.

Indirect Purchaser Litigation Handbook SECOND EDITION

IN 1977, THE U.S. SUPREME COURT decided in Illinois Brick that ‘indirect purchasers’ that is, purchasers who do not buy directly from the alleged co-conspirators, may not sue under federal law. This Handbook seeks to explain both the framework for indirect purchaser claims and the issues that commonly arise in indirect purchaser litigation. The book begins with an analysis of the Illinois Brick decision, along with the federal, state, and scholarly responses. Then, it considers questions of liability and standing for indirect purchaser claims and reviews procedural aspects of indirect purchaser litigation—jurisdiction, discovery, case management, and class certification issues. It also addresses the financial aspects—damages and settlements.

Finally, the book takes a look northward to seek lessons from Canada’s somewhat different experience with indirect purchaser claims. This Handbook takes no position on whether Illinois Brick was rightly decided or whether the benefits of indirect purchaser litigation are worth its costs. Rather, the Indirect Purchaser Litigation Handbook is intended as a guide for practitioners and courts, working in the world as it is today. The book also describes the different states’ reactions over the past two decades to the U.S. Supreme Court’s Illinois Brick decision.

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On Collective Actions Europe Stands Divided: Insights into Established Approaches on the Other Side of the Atlantic

BY ELLEN BRAUN AND LUKE STREATFEILD

F OR DECADES, THE UNITED STATES has blazed a trail in collective actions with its far-reaching class action regime attracting media interest even outside legal circles. Following the European Union’s promotion of private antitrust enforcement in recent years, legislators across Europe have adopted or are considering legislation for their own form of collective action regime. This surge in legislative activity has generated divergent mechanisms of collective redress within Europe, some modeled on precedents from the relevant legal culture, some designed by plaintiffs in the field. The United Kingdom and Germany are at the opposite ends of this spectrum: while the UK has chosen to introduce structured regulation, Germany has turned down such requests, instead allowing collective actions to develop organically within the existing civil procedure framework.

This article outlines the European legal framework and studies the fundamental differences between the emerging UK and German regimes. Against this practical background, we point out that there is a benefit from European jurisdictions’ competing for the “right” or the most culturally suitable system. But regulatory competition should be restrained by adopting a minimum standard as proposed by the EU Recommendation of 2013. The results of a comparative study by the Institute of Legal Reform of the American Chamber of Commerce (ILR) supports this conclusion, drawing on the U.S. experience of vexatious litigation. It points out the risks in the absence of regulatory safeguards brought about by low thresholds for bringing claims, including claims without merit.

EU Background
Recent efforts by the European Commission (the Damages Directive) have not translated into a uniform regulation of collective action regimes across the EU, notwithstanding numerous green and white papers extending back to 2004. This regulatory impasse flows from the EC’s general aversion towards an involvement in national procedural laws and to concerns about compromising the effectiveness of the competition law leniency system and settlement procedures. The marked absence of EU legislation on collective actions, combined with the facilitation of private enforcement actions via legislative changes anticipating and following the Damages Directive, has meanwhile led to rapidly evolving, but divergent approaches, across Member States.

Although the Damages Directive puts in place certain safeguards to protect against frivolous or unmeritorious claims, its primary purpose is to remove legal and procedural barriers to private damages actions; it looks to achieve this through more effective disclosure regimes, more lenient limitation periods, and a claimant-friendly presumption of harm caused by cartel participants. However, on the specific issue of collective enforcement, the Directive explicitly does not oblige Member States to take any steps—and this despite extensive analysis of the potential benefits, as well as concrete proposals, during the parliamentary consultation procedure.

The Recommendation on common principles for injunctive and compensatory collective redress mechanisms (the Recommendation)—which the EC published earlier, in 2013, with a view to preparing EU-wide harmonization—did not have much impact on Member State legislative action. This non-binding instrument contained “a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union, while respecting the different legal traditions of the Member States.” In particular, it endorsed a “horizontal approach” to private enforcement, expressed support for the “opt-in” principle, according to which the claimant party should be formed on the basis of the directly expressed consent of its members (compare the U.S. preference for “opt-out” class actions), adopted a narrow approach to legal standing (i.e., non-profit claimant parties should prove enough financial capacity to be able to represent the interest of claimants in an appropriate manner), and rec
ommended retaining the “loser pays” principle and prohibiting contingent legal fees.

While the Recommendation recognizes the importance of collective redress in promoting effective consumer protection and antitrust enforcement, it treads very carefully in terms of the litigation culture it is looking to encourage, attempting to strike the right balance between effective collective redress mechanisms across the EU and very strong safeguards to deter vexatious litigation. The EC’s call for evidence on the operation of collective redress arrangements in the Member States that closed in mid-August 2017 will likely show a rich legislative landscape across the EU with only limited influence from the Recommendation, as the two examples discussed below—Germany and the UK—apart demonstrate.

**Germany: Movement Towards Collective Action?**

Although Germany has, since 2005, been a jurisdiction with a plaintiff-friendly antitrust enforcement regime, German legislators have shown reluctance to develop a uniform mechanism for launching collective proceedings. In particular, the Christian Democrats and the Social Democrats (the two major political parties) have maintained their deep-rooted opposition, as expressed in a statement published by the German Parliament (Deutscher Bundestag) in 2011: “The German Bundestag is of the opinion that class actions based on the U.S.-model are for many reasons incompatible with European legal traditions. . . . The German Bundestag rejects a ‘claims industry’ and strongly opposes all initiatives and instruments that aid and abet any such culture of disputes.”

Therefore, to date, German civil procedure law does not provide for collective proceedings. This means that even substantively similar cases have traditionally been tried in separate proceedings and are subject to judgments that are binding on only the individual parties to the case. German antitrust legislation, the Act Against Restraints of Competition (ARC) [Gesetz gegen Wettbewerbsbeschränkungen], recognizes the mass harm caused by violations of competition law, but it does not provide an effective means for consumers to jointly “right” that wrong. As a result, alternative strategies have been developed by plaintiffs. The German Supreme Court (the Federal Court of Justice [FCJ]) has accepted such strategies, in particular, claims by third-party litigation vehicles, which bundle individual damages by assignment of claims, as long as the vehicle has sufficient liquidity to pay defendants’ legal fees should the claim fail.

Nevertheless, there have been small steps towards collective action in other specific sectors and under strict conditions, namely the Capital Markets Model Proceedings Act (CMMPA). In cases of loss suffered as a result of misleading or missing capital markets information in connection with the German Takeover Act, a model proceeding can be initiated to decide the key factual and legal questions. These basic questions will then be clarified by a central court, whose decision will be binding for every individual claim related to the matter. Until a decision is reached in the model proceeding, all other related individual legal proceedings are stayed. However, the CMMPA cannot be considered a true form of collective action since each party still has to file its own claim, and its scope is strictly limited to the sphere of capital markets.

**The Traditional Joinder of Parties.** In 2014, when asked how they would react to the EU Recommendation, the German government explained their stance on collective redress mechanisms in Germany by referring to the traditional set of rules offered by German civil procedure: “The system of collective redress recommended by the Commission already exists in principle in Germany. The Code of Civil Procedure includes appropriate tools allowing for the bundled handling of substantively similar claims (the so-called ‘subjective’ and ‘objective’ consolidation of claims).”

A joint claim by several potentially damaged parties is indeed permissible under the German Code of Civil Procedure (CCP), provided that: (1) the parties have a claim arising from the same factual and legal grounds; (2) their claims are substantively similar; and (3) the trial court is competent for all claims (“joinder of parties” or “subjective consolidation of claims”). This mechanism can be used for antitrust damages actions because breaches of antitrust law also implicate, for procedural purposes, the law of torts and may therefore be prosecuted in any court in whose jurisdiction the breach occurred—in other words (except for a regional cartel) in every German court.

Claimants also have the possibility of exchanging information regarding legal issues with each other in preparation for such a lawsuit. In the recent example of the truck cartel, this has been the approach of the Cologne “Competition Association,” which instructed a jointly financed expert with the aim of reaching an out-of-court settlement. In special cases, the Bundeskartellamt (Federal Cartel Office [FCO]) has even agreed to offer contact details of fellow plaintiff parties who applied for inspection of files and who consented to such information exchange (e.g., in the German sugar and rail cartels, where more than 130 and 70 applications for inspection of the file respectively were submitted to the FCO). Separately, the CCP enables the court to connect several pending lawsuits at its own discretion, provided that they are legally connected or could originally have been filed as one lawsuit.
The joinder of parties enables the simultaneous hearing of and judgment on all claims within one trial, but still leads simply to a consolidation of claims. Each party continues to be responsible for its own legal representation and, more importantly, each claimant is a party to the lawsuit (and therefore has to file his or her own claim). In light of this, the joinder of parties cannot be compared with collective action in the truest sense, particularly as it fails to overcome the issue of “rational apathy,” where there is limited incentive for individual claimants with only small losses to incur the time and cost of litigation, a risk typically attached to consumer mass-harm from cartel overcharges.

The traditional approach to tackling consumer mass harm caused by infringements of competition law under the ARC enables neither class actions nor other forms of collective redress for the direct benefit of consumers. Rather, ARC Sections 34 and 34a empower the FCO and trade associations as well as consumer associations to collect the “economic advantage” derived from breaches of competition law.

Despite authorizing trade associations and consumer associations to seek redress and being embodied by a broad definition of “economic advantage,” these provisions are toothless in two respects: first, while recognizing the harm caused, they establish neither a right to, nor a means of winning redress for the direct benefit of consumers. Rather, ARC Sections 34 and 34a empower the FCO and trade associations as well as consumer associations to collect the “economic advantage” derived from breaches of competition law.

The absence of a mechanism under legislation for collective consumer redress in Germany does not mean, however, that collective action has not been a developing feature of German jurisprudence in recent years. A bellwether case in this regard has been the follow-on damages case brought by the Belgian litigation vehicle Cartel Damages Claims (CDC) in relation to a hard-core cartel in the cement sector. The same method was later explored by Deutsche Bahn, which founded its own litigation vehicle to claim damages for itself and other companies (e.g., BMW, Continental) from undertakings involved in the air cargo cartel.

The underlying administrative proceedings against the cartel had begun in 2002 when the FCO discovered that numerous cement producers had entered into illegal quota and price-fixing agreements since the early 1990s. In April 2003, the FCO fined 12 companies a total of €702 million, the largest part of the fine being imposed on the six largest German producers—to date the highest fine in a single case in Germany.

Although the administrative proceedings were protracted and controversial, of much greater significance in the context of German jurisprudence was the private enforcement action launched by CDC in 2005. Aware of the extensive harm caused by the cartel, CDC approached victims and asked them to assign their damages claims against the cement producers to a special-purpose vehicle (SPV) it had established. The purpose of the SPV was the bundling of all the damages claims in one legal entity, which subsequently filed a single lawsuit. CDC agreed to pay €100 up front and variable consideration of between 65 and 85 percent of any damages awarded later. The final sum of antitrust damages claimed by CDC in its own name and on its own behalf amounted to approximately €176 million.

CDC enjoyed early legal success when the Regional Court of Düsseldorf rejected the submissions of the cement producers and ruled that CDC’s bundled claim was admissible, a decision later endorsed by the Higher Regional Court of Düsseldorf and ultimately the FCJ. The FCJ held it generally permissible that every potential claimant assign his or her damages claims to a litigation vehicle and this vehicle file one single lawsuit. The legal basis for the contractual assignment of a damages claim was established pursuant to the German CCP, which also expressly allowed for all claims to be litigated in one trial (i.e., the “objective consolidation of claims”).

Despite the endorsement of this alternative approach to collective redress, the Regional Court of Düsseldorf ultimately dismissed CDC’s action when it came to the substantive proceedings. The grounds cited for dismissing the claim were twofold. First, CDC had advised the court that, if it were to lose the case, it would “almost certainly” not be able to cover the defendants’ legal costs arising from the stated value of the claim, and therefore asked the court to reduce the “value of the dispute.” This was deemed an attempt to circumvent the “loser pays” principle and to shift cost risks to the defendants, which vitiated the assignments to CDC in the first place on grounds of unconscionability. CDC tried their luck a second time, but initially again without success: the underlying claims had in the meantime become time-barred since the original assignment was legally void. However, the question of limitation periods and whether the underlying claims are indeed time-barred is currently the subject of an appeal.

Supreme Court Requirements for Utilizing a Litigation Vehicle. Although CDC has so far been unsuccessful (pending the result of the appeal), the case sets an important precedent. After its initial success, none of the later judgments questioned the viability of this form of collective action per se, and the implication is clear: provided that two criteria are met, this form of collective action will most likely be considered admissible by German courts. These two criteria are: first, the litigation vehicle has to be sufficiently funded, which can be guaranteed, for example, through the joint liability of the assignees for legal costs; second, since acting as a litigation vehicle resembles debt collection, the vehicle must be registered as a debt collection company with the competent authority in accordance with the German Legal Services Act.

This method may be considered to be a practical “workaround” for collective redress, but whether it will lend itself to true consumer actions remains questionable. The diesel-
The Growth of Litigation Financing. The “loser pays” principle is established under German law pursuant to Section 91 of the CCP. The vast majority of EU Member States apply the same fundamental approach to costs (and indeed the EC is encouraging this in the Recommendation). This is another important difference from the U.S. system, where the liability of each party for its own costs (with the exception of cases involving frivolous claims) leads to a considerable reduction in potential cost exposure for would-be claimants.

Many potential claimants might be deterred from taking enforcement action if they have to assume joint liability or provide a guarantee for legal costs. Therefore, litigation financing is expected to play a big role in future damages claims in Europe. Substantial litigation funding is all the more important in Germany since contingency fee arrangements for lawyers are allowed only in exceptional circumstances.17

In this context, various third-party litigation funders have recently established business activities in Germany. In particular, a recent €30 million investment in Germany from Burford Capital may be a sign of further dramatic growth in this area. Unsurprisingly, Hausfeld, the firm partnering with Burford, announced in October 2015 that this will prove a watershed moment in litigation funding:

We believe we’ve changed the landscape in Europe in innovative fee and funding models so there is always a cost-free option . . . . The unique opportunity in Germany, which has an active competition authority . . . and a sophisticated competition bar, is a market we think is ready to take the place as a leader in private enforcement in the region.18

The legal environment in Germany concerning collective actions has developed in a somewhat paradoxical manner: due to the reluctance of German legislators to allow the development of a “claims industry” akin to the prevailing model in the United States, legislators have generally resisted all attempts to regulate this area (excluding the rather limited special legal provisions). This did not stop inventive parties from developing their own means of seeking collective redress in compliance with established German procedural law. This workaround relies entirely on German procedural rules, which are not designed with the pursuit of collective actions in mind. Fostered by the equally unregulated litigation funding, a claims industry may well be cultivated, against legislative intent.

Looking ahead, it seems that members of the German legislature may be changing their attitude towards collective actions. The former German Minister of Justice, Heiko Maas (Social Democrats), had proposed legislative change that was somewhat comparable to the previously discussed CMMPA, except it would apply to the German economy more broadly: consumer organizations and chambers of commerce would be able to file a claim at a central court, which would decide key factual and legal questions concerning the misconduct of a company.19 Should the court find an infringement, the parties would be able to refer to this central judgment in their own damages claim.

Although this bill was initially blocked by the Christian Democrats, it did not stop Maas from reinforcing his support for the principle of collective redress in the context of the factual and allegedly unlawful activities in the German automotive industry.20 Horst Seehofer, the leader of the Christian Social Union (typically considered a key political ally of the automotive industry), has claimed that he is not in principle opposed to further legislation in the wake of the diesel scandal and allegations of collusion in the car industry. The fate of this initiative is however now uncertain following the September 2017 election.

UK: Whole-Hearted Adoption of a Collective Actions Regime

The UK approach to establishing a legislative regime for collective redress for competition claims has been more structured and straightforward than the regime in Germany. UK legislators have explicitly endorsed collective proceedings as a means of enabling compensation for competition breaches that would otherwise not be cost-effective to pursue for large numbers of individual claimants with small losses.

In October 2015, the UK introduced a new procedure for collective redress via the Consumer Rights Act 2015 (CRA). This Act enacted amendments to the provisions on collective proceedings under section 47B of the Competition Act 1998. The pre-existing provisions under s.47B, whereby representative bodies could bring opt-in collective actions on behalf of consumers, had not been seen to be successful in providing effective redress. Only one case was brought—The Consumers Association v. JJB Sports PLC—in which the consumer association “Which?” brought an opt-in representative action on behalf of consumers who had purchased replica football (soccer) shirts. Even though over 2 million consumers were estimated to be affected by the alleged price fixing, only 600 signed up to the proceedings, which were settled early.

Since October 1, 2015, the UK’s specialist competition tribunal—the Competition Appeal Tribunal (CAT)—has been granted jurisdiction to hear collective proceedings for competition claims. The CAT can grant Collective Proceedings Orders (CPOs) by which a class representative can bring a competition claim on behalf of a class of claimants on either an opt-in or opt-out basis (subject to certain restrictions), and make Collective Settlement Orders (CSOs), by which claims can be settled on a collective basis, whether or not a CPO has been granted. The UK High Court (civil court) retains jurisdiction to hear competition claims, but cannot grant CPOs or CSOs, and can hear group litigation only via existing procedural mechanisms, such as Group Litigation Orders that enable common issues of fact or law to be dealt with jointly.

The new regime is strengthened by the power to grant CPOs on an opt-out basis.21 This provides a solution to the
The problem of rational apathy identified above, which may have contributed to the ineffectiveness of collective redress in the JJB Sports case. The CAT is also entitled to make an aggregate award of damages, without the need to investigate the specific damages suffered by each member of the class.

Although the regime offers a more effective system of collective redress, safeguards are in place to limit the potential for abuse. The loser-pays rule is preserved, and it is the class representative that is liable for defendant costs if unsuccessful. The opt-out jurisdiction is limited to claimants domiciled in the UK, and damages-based agreements are not available for opt-out proceedings. There are no exemplary damages available (unlike the United States, where treble damages make collective proceedings riskier for defendants), and the determination of proceedings by the CAT, rather than by a jury, should enhance the predictability of outcomes for participants.

The criteria for the grant of a CPO are set out in Sections 47B (5)–(9) of the Competition Act 1998 (CA), as amended by the Consumer Rights Act of 2015. The claims must satisfy two requirements. There is a “common issues” requirement, namely that the claims must raise the same, similar, or related issues of fact or law, and be suitable to be brought in collective proceedings (Section 47B (6) CA). It is also necessary for the proposed class representative to be authorized by the CAT on the basis that it is just and reasonable for that person to act as class representative.

The CAT’s caseload in the first two years of the regime has been light (which may derive from the staged approach to the introduction of the new limitation rules), with only two cases, namely Dorothy Gibson and Walter Hugh Merricks CBE, reaching the stage of class certification. However, these first two cases show a rigorous approach to developing the regime, while offering support to claimants, including in relation to funding, and shed helpful light in particular on how the “common issues” requirement will work.

Dorothy Gibson. Dorothy Gibson v. Pride Mobility Products Ltd was a follow-on action, on behalf of a class of some 27,000–32,000 claimants who allegedly purchased Pride mobility scooters between February 1, 2010 and February 29, 2012. The action followed on from administrative findings of infringements in March 2014 by the Office of Fair Trading (now Competition and Markets Authority). The infringements related to bilateral agreements or concerted practices between Pride and eight independent dealers selling its mobility scooters, whereby the dealers would not advertise certain models of Pride scooters online at prices below the Recommended Retail Price.

At the outset, the CAT distinguished the UK approach from the U.S. approach to class certification, and held that it is not a requirement that common issues “predominate” over individual issues, as required by Rule 23(b)(3) of the Federal Rules of Civil Procedure. The CAT also distinguished the procedural approach from the United States, where class certification typically is a very substantial stage involving discovery, deposition, cross examination of witnesses, and long hearings. Class certification in the UK involves a short hearing, held within months of the claim form being served, based on limited fact and expert testimony, and with very restricted disclosure of documents, if any.

When assessing the suitability of these claims to be heard collectively, the CAT focused on the problem of the common issues requirement. As a model, the CAT endorsed the approach articulated by the Supreme Court of Canada in Pro-Sys Consultants Ltd. v. Microsoft Corp.

The expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e., that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

In Dorothy Gibson, the proposed class was broad. Pride sold 38 models of scooters through 250–300 regular dealers. The OFT decision, by contrast, covered seven models and only eight retailers, and the period of infringement for each retailer varied within the two-year range of February 1, 2010 and February 29, 2012. The CAT was unwilling to approach the estimation of loss on the broad basis proposed, i.e., as flowing from Pride’s policy of requiring the RRP to be a floor to the pricing. This policy, absent specific agreement from a retailer, was not unlawful, as Pride was not in a dominant position. The analysis of loss had to flow from the findings of infringement in the decision, as this was a follow-on action.

The claimant’s expert had not approached the exercise of establishing loss on this basis, as he had not been instructed to do so but believed it would be possible. Instead of rejecting the application, the CAT granted an adjournment to allow the claimant to reformulate its claim on this basis (under protest from the defendant). This was an accommodating approach, and one that showed the willingness of the CAT to support claimants in seeking redress, while insisting on a rigorous approach to class certification and estimation of loss. The claim has subsequently been withdrawn.

Walter Hugh Merricks CBE. The CAT took a similarly rigorous approach to class certification in the more recent case of Walter Hugh Merricks CBE. These are collective proceedings brought on behalf of UK consumers, who allegedly suffered loss on purchases from merchants that accepted MasterCard payment cards between May 22, 1992 and June 21, 2008, on the basis that multilateral interchange fees (MIFs) applicable to transactions using those cards were anti-competitive and too high. These proceedings were brought on a grand scale, with losses estimated at around £14 billion, on behalf of around 46.2 million UK consumers.
The UK has carefully distinguished its approach to collective redress from the U.S. model at the legislative stage, and through the first cases.

The CAT followed Canadian authority on class certification, and safeguards are in place to avoid the development of a U.S.-style claims culture.

The CAT found that there were six significant issues: (1) the impact of EEA MIFs, which were held to be anti-competitive in the EC Decision against MasterCard dated December 19, 2007, on UK MIFs, which were not covered by that EC Decision; (2) the difference between those MIFs and counterfactual MIFs in the absence of an infringement; (3) the pass through of any overcharge from a merchant’s bank to the merchant itself; (4) the pass through of any overcharge from the merchant to the consumer; (5) the amount a claimant spent at each merchant; and (6) if the claimant held a credit card, what interest payments were made, and what benefit was received. Of these, issues (1) through (3) could be approached as common issues; issues (4) through (6) could not. However, the CAT clarified that there was no requirement that all the significant issues in the claims should be common issues, and moved on to the question of whether the case was suitable to be brought as collective proceedings. To tackle this question, the CAT asked whether, in practice, the applicant had put forward: “(1) a sustainable methodology which can be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages; and (2) a reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution.”

It was at this stage that the application failed. The CAT was troubled by the complexity of making an assessment of pass on across almost the entire UK merchant community for the 16-year period of the claim. Different merchants have different business models, and the CAT made clear that it required an analysis of the data that was reasonably available to assess this. The applicant proposed a “weighted average” pass on calculation, based on three potential sources of data: (1) information from other proceedings involving MasterCard, such as Sainsbury’s v. MasterCard; (2) information obtained on disclosure; and (3) publicly available data. However, the CAT found that these sources would yield insufficient data to allow a sufficiently sound assessment of pass on to be conducted.

As to distribution of any award of damages, the applicant proposed that this should be distributed to each member of the class on an annualized basis, for each year that the individual was a member of the class. The applicant accepted that this bore no resemblance to the individual loss, but argued that it was the only viable methodology.

The CAT emphasized that the governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in, but for the breach. Here, the proposed method took no account of: (1) individuals’ levels of expenditure; (2) the merchants from whom they purchased; and (3) the mix of products which they purchased. Distribution on the basis proposed, in the CAT’s judgment, would not result in damages being paid in accordance with the governing principle of restoration, and for this reason the claims were not suitable to be pursued by collective proceedings.

**Funding.** Although it was strictly unnecessary to do so, the CAT went on to consider whether funders’ costs and fees are recoverable out of undistributed damages in the litigation. In this case, the costs and fees payable to the funder were the greater of £135,000,000 or 30 percent of the undistributed proceeds up to £1 billion, plus 20 percent of the undistributed proceeds in excess of £1 billion. The CAT was not troubled by the size of the sums that stood to go to the funder in the event of success, and it even permitted the applicant and the funder to amend the Funding Agreement such that the obligation to pay the fees became a direct, albeit conditional, one. This finding will be welcomed by funders, as it provides increased certainty about the viability of litigation financing for collective redress.

The CAT has recently refused the class representative’s application for permission to appeal its decision in this case. The rejection was based on s. 49(1A) CA, which provides no right of appeal from class certification decisions. The CAT explained that the legislation appeared to reflect a deliberate policy to preclude prolonged litigation in the process of approving collective proceedings in the UK (unlike the procedures in the United States, and in Canada, where class certification decisions are frequently the subject of appeal).

The UK has carefully distinguished its approach to collective redress from the U.S. model at the legislative stage, and through the first cases. The CAT followed Canadian authority on class certification, and safeguards are in place to avoid the development of a U.S.-style claims culture. It remains to be seen whether the UK approach will serve as a helpful model for regulation in Europe more widely. The Damages Directive brought the procedural regime for competition claims across Europe closer in line with UK rules on disclosure, limitation, and pass on. The UK collective proceedings regime is still in its infancy, but given the careful and structured way in which the UK rules are being developed, in time it may offer an attractive model for implementing collective redress across Europe. At this juncture, the UK model will have to compete against the various other approaches towards collective actions within the European legal landscape.
American Chamber of Commerce, published a study in March 2017 that takes a critical view of the European collective redress landscape, in particular the failure to impose the safeguards identified in the Recommendation. These concerns are equally relevant to jurisdictions that refused to introduce systems of collective redress (e.g., Germany) as they are to jurisdictions that have introduced extensive legislation in the area (e.g., UK). The study considers these safeguards as a key factor in preventing an abusive litigation culture in respect of collective redress.

For example, according to the ILR, failure to preserve the “loser pays” principle may leave companies exposed to “blackmail settlements.” Furthermore, the ILR prefers opt-in over opt-out mechanisms, a factor not taken into account by the UK legislation described above. According to the ILR study, this mitigates the risk of representatives swelling claims and exploiting them for their own benefit; it also prevents representatives from conducting legal action for people without the opportunity to actively participate.

The ILR study also proposes limiting the standing to file a damages claim to affected parties or non-profit organizations. This would prevent German litigation vehicles, for example, from working on a contingency fee basis. Its key message is that rather than shying away from regulation (or regulating too liberally), detailed legislation should be adopted to enshrine key safeguards in European or national law.

Currently, instead of being harmonized at the EU level, as the Recommendation had in mind, these issues have become the subject of regulatory competition between European Member State jurisdictions. There are significant differences between the methods of collective redress across Europe, as the ILR points out. These differences will likely expand, as more and more legislators develop their own solutions, some with a bullish approach to consumer protection and, accordingly, plaintiff-friendly, others with a more balanced policy, and safeguards. Meanwhile, the parties, in particular defendants, will bear the burden of the lack of alignment in Europe on what protections would preserve the values enshrined in the less litigious European legal culture, while allowing for the introduction of collective redress mechanisms.

**Outlook**

The future of collective actions in Europe remains full of uncertainty. Will other countries follow the example of the UK in the course of regulatory competition? A number of legislative projects are already on their way, with the Netherlands appearing closest to following the UK. More importantly, will the European Union choose binding methods instead of a recommendation to guide its Member States down this road? Or will the feared claims industry emerge in certain countries that will then become a cautionary tale for others?

The reality may lie somewhere in the middle. While collective actions are vital in bringing justice to parties who have suffered damage, particularly for those lacking the incentive or resources to pursue a claim independently, they are also ripe for exploitation in the event of insufficient regulation. Given this dichotomy inherent in collective redress, and European wariness of abusive litigation, an EU legislative initiative along the lines of its 2013 Recommendation may be the best course of action, and it needs to be taken soon if the EU wants to lead the way.
German Legal Services Act (Rechtsdienstleistungsgesetz [RDG]), Dec. 12, 2007, BGBl. I at 2840, last amended by May 12, 2017, BGBl. I at 1121.

www.myright.de is an example. The founders pursue, as per their website, the objective consolidation route (Code of Civil Procedure, Sept. 12, 1950, as amended, § 260), see above. Currently, they have filed “sample claims” (“Musterklagen”) to test the waters.

Section 49b Abs. 2 Federal Lawyer’s Act (Bundesrechtsanwaltsordnung), Section 4a Lawyer’s Compensation Act (Rechtsanwaltsvergütungsgesetz).

Andrew Strickler, Hausfeld Move into Germany a Big Step for Litigation Funding, LAW 360 (Oct. 28, 2015).


See H. Maas, Gegen die Irreführer, HANDELSBLATT, July 26, 2017, at 48 (guest commentary).

Rule 119 of the Competition Appeal Tribunal Rules 2015 provides that the much more restrictive limitation periods from the previous 2003 Competition Appeal Tribunal Rules apply to claims arising before October 1, 2015, even if they were commenced after October 1, 2015. The High Court Rules apply to claims arising after 1 October 1, 2015.

24 The application to commence collective proceedings was received by the CAT on May 25, 2016, and the CPO hearing took place between December 12–14, 2016.
28 Id. at [67].
30 For an overview, see the website compiled by the British Institute for International and Comparative Law, https://www.collectiveredress.org/collective-redress/member-states.
1. Pursuant to its mandate under the Section’s bylaws, the Council provided general supervision, oversight and governance of the affairs of the Section. The Council received regular reports from representatives from the Antitrust Division of the U.S. Department of Justice, the Federal Trade Commission, the Multistate Antitrust Task Force, the Judiciary, the ABA Board of Governors, the Canadian Bar Association, the International Bar Association, the ABA Young Lawyers Division, and the ABA Law Student Division, as well as from Task Forces appointed by Section Chairs.

2. The Council approved proposals to publish the following books:
   - Rule of Reason Handbook, 1st Ed.
   - Telecom Antitrust Handbook, 3rd Ed.
   - Antitrust Law Developments, 8th Ed.
   - Cartel Law Basics for Executives
   - Transatlantic Pricing: Frequently Asked Questions
   - International Investigations and Merger Reviews—A Handbook for Antitrust Counsel
   - Proving Antitrust Damages, 3rd Ed.
   - Monopolization and Dominance Handbook
   - Joint Ventures: An Antitrust Analysis, 3rd Ed.


4. The Council approved submission of 25 sets of comments to U.S. and international government agencies regarding draft guidelines, rules, or policy documents.

5. The Council approved the 2016–2017 Section budget.

6. The Council approved appointment of a new committee, the Content Committee, to carry out and implement the recommendations of the Content Delivery Task Force.

7. The Council approved distribution of one free copy of the Model Jury Instructions in Civil Antitrust Cases to each of the 94 federal district court central libraries.

8. The Council approved co-sponsorship of programs with affinity bar associations of color.

9. The Council approved the Section co-sponsorship of a panel presentation with The Grapevine.

10. The Council approved the Section’s participation in the ABA’s Full Firm Section Membership Pilot Program.

11. The Council approved $105,000 in funding for the 2017 Judicial Conference.

12. The Council approved co-sponsorship of Antitrust in the Americas by one or more Brazilian Bar Associations.


14. The Council approved the Fall 2016 Council Meeting Minutes.


16. The Council approved the following Committee Long Range Plans:
   - Agriculture and Food
   - Civil Practice and Procedure
   - Compliance and Ethics
   - Corporate Counseling
   - Health Care and Pharmaceuticals
   - International
   - Legislation
   - State Enforcement
   - Trial Practice

17. The Council approved Fiscal Year 2018 Reserves Project Proposals.

18. The Council approved the 2017 Midwinter Council Meeting Minutes.

19. The Council approved $140,000 funding for the following additional Section Reserves Projects for FY 2018:
   - $15,000 for a Law Student Diversity Initiative
   - $25,000 Consultant Study on the Marketplace for Section Publications
   - $60,000 for one or more research projects
   - $40,000 for the Goldfarb documentary film project

20. The Council approved the waiver of 60-day notice of Officer nominations and of submission of revised proposed Officer slate at the Council’s 2017 Annual Meeting.
The Implications of Algorithmic Pricing for Coordinated Effects Analysis and Price Discrimination Markets in Antitrust Enforcement

BY TERRELL MCSWEENY AND BRIAN O’DEA

WHEN CONGRESS ENACTED THE Sherman and Clayton Acts over a century ago, the term “robot” did not exist. The framers of our antitrust laws would likely be amazed by the increasingly powerful and autonomous technologies, such as algorithms, machine learning, and artificial intelligence (AI) that have come to play a significant role in many firms’ competitive behavior. These technologies have the potential to deliver meaningful consumer benefits. For example, algorithms may enable firms to become more efficient and to provide consumers with personalized product recommendations. Big data and algorithms may also provide companies with insights that help them design better products and services.

But these technologies are also likely to present novel challenges for competition enforcers. We must understand the potential effects of intelligent, high-velocity pricing technologies on competition and adapt our enforcement approach to keep pace. For example, algorithmic pricing might contribute to overt collusion or facilitate tacit collusion. It is also possible, as we show in this article, that increasingly sophisticated price discrimination may lead to narrower relevant product markets, potentially increasing the chances that a merger will harm consumers in some relevant market.

Algorithmic Collusion

Some applications of antitrust law in the age of machines will be familiar. For example, the Department of Justice recently prosecuted two e-commerce sellers for agreeing to align their pricing algorithms to increase online prices for posters. In that case, United States v. Topkins, the humans reached an explicit agreement to use technology to fix prices. The application of antitrust law to that agreement was straightforward.

As algorithms and the software running them become more sophisticated, however, coordinated behavior may become more common without explicit “instruction” by humans. Challenging conduct where the role of humans in decision making is less clear may be more difficult under current law. For example, while express collusion is illegal, mere conscious parallelism is not. Separating one from the other can prove difficult even when dealing with solely human decision making. Professor Salil Mehra suggests that the rise of “robo-sellers” may make the task more difficult still: a number of current inquiries used to distinguish conscious parallelism from express collusion will be of limited use in the machine context. Concepts such as “intent” and “meeting of the minds,” he writes, “presuppose quintessentially human mental states” and thus “may prove less useful in dealing with computer software and hardware.”

Algorithms Might Contribute to Overt Collusion. The defendants in Topkins used pricing algorithms as an instrument to facilitate a pre-arranged price fixing conspiracy. In their recent book, Virtual Competition, Professors Ariel Ezrachi and Maurice Stucke refer to this as a “messenger” scenario: the pricing algorithms were following explicit human instructions to violate the antitrust laws and thus merely acting as “messengers” among the various co-conspirators.

It is worth pausing to consider why the Topkins defendants chose to employ algorithms rather than setting prices and monitoring their agreement directly. Algorithms may facilitate the stability of certain price-fixing schemes by enabling firms to more quickly detect, and respond to, attempts to cheat on the collusive pricing agreement. The U.S. antitrust agencies’ 2010 Horizontal Merger Guidelines specifically note that speed in identifying and responding to competitors’ strategic initiatives is a factor that makes markets more vulnerable to coordinated conduct. Swift competitive reaction times diminish each firm’s “prospective competitive reward from attracting customers away from its rivals.”

Margrethe Vestager, the European Commissioner for Competition, recently remarked on the potential for algorithms to sustain cartel behavior:

Every cartel faces the risk that its members will start cheating each other as well as the public. If everyone else’s price is high, you can gain a lot of customers by quietly undercutting them. So whether cartels survive depends on how quickly others spot those lower prices, and cut their own price in retaliation. By doing that quickly, cartelists can make sure that others will be less likely to try cutting prices in the
Competition enforcers must recognize the possibility that algorithms might facilitate cartel formation and maintenance. . . . A second possibility is that algorithms may facilitate tacit collusion between competitors.

future. And the trouble is, automated systems help to do exactly that.9

Competition enforcers must recognize the possibility that algorithms might facilitate cartel formation and maintenance. Detection of such arrangements may require novel investigatory approaches or additional resources.10 From a legal perspective, however, the analysis of the messenger scenario is “relatively straightforward.”11 Once detected, competition enforcers have the tools to challenge overt collusion. As Vestager put it, “no one should imagine they can get away with price-fixing by allowing software to make those agreements for them.”12

Algorithms Might Facilitate Tacit Collusion. A second possibility is that algorithms may facilitate tacit collusion between competitors. Ezrachi and Stucke describe this as the “predictable agent” scenario.13 Professor Salil Mehra notes that “automated pricing powered by algorithmic processing and mass data collection should reduce the costs to firms of] interdependent pricing.”14

The analysis closely follows that above, with the focus again on the speed with which algorithms can identify and react to changing market dynamics.15 Mehra posits that pricing algorithms will surpass humans in their ability to achieve and sustain elevated prices through coordinated interaction: “the increased accuracy in detecting changes in price, greater speed in pricing response, and reduced irrationality in discount rates all should make the robo-seller a more skillful oligopolist than its human counterpart in competitive intelligence and sales.”16 Ezrachi and Stucke contend that “as competitors’ prices shift online, their algorithms can assess and adjust prices—even for particular individuals at particular times and for thousands of products—within milliseconds. In other words, they can swiftly match a rival’s discount, thus eliminating its incentive to discount in the first place.”17

Bruno Salcedo goes a step farther in his recent paper, Pricing Algorithms and Tacit Collusion. Salcedo finds that under certain conditions, tacit collusion between firms employing pricing algorithms “is not only possible but rather, it is inevitable.”18 Salcedo’s findings “suggest that pricing algorithms are an effective tool for tacit collusion” and may lead to near-monopolistic pricing.19

It is probably too soon to assess the generality of the conditions underlying Salcedo’s model. For example, Salcedo’s model assumes that firms can, and do, decipher their competitors’ algorithms.20 Commentators correctly note that various features of pricing algorithms may increase market price transparency and reduce reaction times among competitors.21 But other features of pricing algorithms may enable firms to reduce transparency and mask their competitive initiatives. Algorithms can enable companies to engage in sophisticated price discrimination involving a combination of differential “list” prices and targeted discounts. Salcedo’s paper models a scenario in which firms have “the option to obfuscate their algorithms so they can never be decoded” but his model finds that, even with this option, firms “would never choose to obfuscate their algorithms.”22

The increasing power of algorithms and AI may indeed lead to more coordinated interaction but it is too early to say this with certainty. Future research may prove especially valuable in this area. If, in fact, new technologies are found to make coordinated interaction between competitors more likely, that would provide a strong argument for an enhanced focus on coordinated effects in merger analysis and for lower thresholds of concern related to coordinated effects.

Notably, the use of a pricing algorithm, by itself, does not raise antitrust concerns. And as the DOJ’s successful prosecution of algorithmic price fixing shows, enforcers will be able to identify and challenge the improper use of these new technologies in many cases. Nonetheless, the potential that pricing algorithms will facilitate tacit collusion beyond the reach of Section 1 of the Sherman Act is far from fanciful. Indeed, the Federal Trade Commission’s authority under Section 5 of the FTC Act to prosecute “unfair methods of competition” may be the only current tool available to police individual instances of algorithmic collusion.23

Price Discrimination Markets
To price discriminate successfully (i.e., charge different prices to different groups of consumers), firms must possess some degree of market power and there must be factors limiting the potential for buyers’ arbitrage. Economists recognize three main types of price discrimination: (1) first-degree, or so-called perfect price discrimination, in which each customer is charged a different price that perfectly matches his or her willingness to pay; (2) second-degree price discrimination, in which price depends on the quantity purchased (e.g., the seven-pound container of ketchup at your local wholesale club); and (3) third-degree price discrimination, in which consumers are sorted based on observable characteristics related to willingness to pay (e.g., student discounts).24

First-degree price discrimination is considered the holy grail of price discrimination because it allows the seller to capture all available consumer surplus in a market. Professor John Gourville has observed that “[h]istorically, first-degree price discrimination has been very difficult to implement, mostly for logistical reasons.”25 But that appears to be changing, as companies are gathering even more data about consumers at an individual level and learning to analyze and use that data in increasingly nuanced ways. A 2014 White House report on big data noted: “[T]he volume of information that
people create themselves—the full range of communications from voice calls, emails and texts to uploaded pictures, video, and music—pales in comparison to the amount of digital information created about them each day.”

More data and more powerful, faster analytics are enabling companies to sort customers into smaller and smaller groups. In 2014, the FTC issued a report on data brokers. The report found that brokers “hold a vast array of information on individual consumers” and noted that a single data broker “has 3000 data segments for nearly every U.S. consumer.” Companies are embracing pricing personalization as a business strategy. In 2013, Safeway’s CEO explained that “there’s going to come a point where our shelf pricing is pretty irrelevant because we can be so personalized in what we offer people.”

As price discrimination strategies become more individualized, they may begin to exhibit characteristics of first-degree price discrimination. Ezrachi and Stucke suggest that “[p]erfect price discrimination may be unattainable. But ‘almost perfect’ behavioral discrimination may be within reach.”

Consumers generally find the practice of price discrimination objectionable. As a matter of economic theory, however, the consumer welfare effects of price discrimination are ambiguous—and targeted price discrimination may actually benefit consumers in some situations. Price discrimination can increase market output and lower prices for certain groups of consumers. Indeed, some products and services would not be offered at all without price discrimination. As with tacit collusion, unilateral price discrimination is not, in and of itself, an antitrust violation. At the same time, as we explain below, algorithm-enabled price discrimination could significantly influence the merger review process in the near future by creating narrower product markets.

Increasingly Nuanced and Profitable Price Discrimination Strategies by Sellers Could Lead to Narrower Product Markets. Initially the Internet enabled more customers to access the same products at the same prices. This feature of digital commerce helped to flatten former geographic variations in pricing. In many cases, the growth of e-commerce contributed to a broadening or “merging” of regional relevant geographic markets. Even if you lived in a region where the brick-and-mortar price for an item was unusually high, to an online retailer you were just another customer in a much broader sales area. From a pricing perspective, you were largely anonymous.

Cartoonist Peter Steiner summarized this principle brilliantly in 1993 in what is now the most reproduced cartoon in The New Yorker’s history. In the cartoon, a dog sitting at a computer turns to his canine companion and explains: “On the Internet, nobody knows you’re a dog.”

Big data and powerful algorithms are turning that principle on its head. Today’s dog might well tell his companion: “On the Internet, everybody knows you’re a dog.” We are hardly the first to make this observation. As far back as 2003, Andrew Odlyzko wrote that “in practice, there are many who not only know you are a dog but are familiar with your age, breed, illnesses, and tastes in dogfood.” In fact, today’s technology not only knows these intimate details about consumers, it can also make predictions about their behaviors and desires. So even though the rise of digital commerce has historically led to a broadening of markets, increasingly sophisticated pricing algorithms could lead to narrower product markets in the future as a result of price discrimination strategies.

Under the 2010 Horizontal Merger Guidelines, the agencies specifically evaluate the possibility of price discrimination against targeted customers. The Guidelines note that price discrimination “may involve identification of individual customers to which different prices are offered or offering different prices to different types of customers based on observable characteristics.” Moreover, the Guidelines explain that “[w]hen discrimination is reasonably likely, the agencies may evaluate competitive effects separately by type of customer.”

The agencies have taken this approach in radio markets for example. Price discrimination markets also played a significant role in the FTC’s successful challenge to the merger of Sysco and U.S. Foods.

The Guidelines do not net out consumer welfare gains in one market against losses in another. If a targeted group of customers will be harmed by a loss of competition, that in and of itself is sufficient grounds to justify blocking the transaction. As Judge Sullivan wrote in FTC v. Staples, “Antitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market.”

The Guidelines state that “[t]he Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market.” The agencies may consider the broader effects of a transaction outside a specific relevant market in certain cases, but the Guidelines are clear that the decision to do so is an exercise of prosecutorial discretion.

Example 1: Price Discrimination Based on Car Ownership. Consider a product that serves a time-sensitive need of consumers. The product is sold by three online retailers (A, B, and C) and by three brick-and-mortar retailers (D, E, and F). Consumers are able to obtain the product immediately from the brick-and-mortar retailers. To compete, Firms A, B, and C advertise free overnight shipping. Firm A also employs a pricing algorithm that offers different prices to different consumers based on a variety of factors. Firm A proposes to acquire Firm B. The companies point to compelling evidence of intense firm-level competition with brick-and-mortar retailers. Firm A’s documents, however, reference data analytics showing that consumers who live in households without a car are considerably more likely to purchase the product online. Assuming the combined firm’s pricing algo-
algorithm can identify those consumers, the merger could enable the combined firm to increase prices selectively to customers without automobiles. Over 90 percent of U.S. households have access to a vehicle. Even if the majority of consumers would not be negatively affected by the proposed transaction, however, it may nonetheless be appropriate to define a price discrimination market for “product consumers who live in households without a vehicle.” As Table 1 shows, the post-merger competitive dynamics facing those consumers would be quite different from those faced by consumers with vehicle access.

Table 1: Price Discrimination Based on Car Ownership

<table>
<thead>
<tr>
<th>Consumer Category</th>
<th>Market Structure</th>
<th>Remaining Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Car (90%)</td>
<td>6-to-5</td>
<td>A, C, D, E, F</td>
</tr>
<tr>
<td>No Car (10%)</td>
<td>3-to-2</td>
<td>A, C</td>
</tr>
</tbody>
</table>

**Example 2: Price Discrimination Based on Political Viewpoint.** Consider again a market with six firms. Firm C has a reputation for being conservative and publicly supports conservative causes. Firm D has a reputation for being liberal and publicly supports liberal causes. Firms A, B, E, and F are politically neutral. Customer surveys show that most consumers do not take the political affiliations of the companies into account when making their purchase decisions. However, 10 percent of consumers identify as “very liberal” and report being unwilling to buy from Firm C. Another 10 percent identify as “very conservative” and report being unwilling to buy from Firm D. Through big data and analytics, it is possible for firms in the market to determine the political views of prospective customers and to personalize prices on that basis. Firm A proposes to acquire Firm B. As Table 2 shows, the merger would produce a different set of competitive dynamics for each set of consumers.

Table 2: Price Discrimination Based on Political Viewpoint

<table>
<thead>
<tr>
<th>Consumer Category</th>
<th>Market Structure</th>
<th>Remaining Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moderate (80%)</td>
<td>6-to-5</td>
<td>A, C, D, E, F</td>
</tr>
<tr>
<td>Conservative (10%)</td>
<td>5-to-4</td>
<td>A, C, E, F</td>
</tr>
<tr>
<td>Liberal (10%)</td>
<td>5-to-4</td>
<td>A, D, E, F</td>
</tr>
</tbody>
</table>

For the large majority of customers, the merger would reduce the number of sellers from 6 to 5. For those consumers who identify as “very conservative” or “very liberal,” however, it would reduce the number of sellers from 5 to 4. The competitive analysis would thus differ for the two groups. As in the first example, even if the agencies determined that the merger would not be anticompetitive for the majority of consumers, it might still lead to anticompetitive effects for very liberal and/or very conservative consumers. Thus, although it might sound odd from a market definition perspective, the agencies might appropriately define a price discrimination market for “politically liberal product consumers” and/or “politically conservative product consumers.”

Examples 1 and 2 involve price discrimination across a single dimension. In the real world, pricing algorithms may engage in price discrimination across multiple dimensions simultaneously. Our third example combines the first two fact patterns to show how multivariate price discrimination can lead to further fracturing of antitrust relevant product markets.

**Example 3: Price Discrimination Across Two Dimensions.** Consider again a product that serves a time-sensitive need of consumers and is sold by six firms with the following attributes:

Table 3: Firm Attributes

<table>
<thead>
<tr>
<th>Firm</th>
<th>Market Presence</th>
<th>Political Reputation</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Online</td>
<td>Neutral</td>
</tr>
<tr>
<td>B</td>
<td>Online</td>
<td>Neutral</td>
</tr>
<tr>
<td>C</td>
<td>Online</td>
<td>Conservative</td>
</tr>
<tr>
<td>D</td>
<td>Brick &amp; Mortar</td>
<td>Liberal</td>
</tr>
<tr>
<td>E</td>
<td>Brick &amp; Mortar</td>
<td>Neutral</td>
</tr>
<tr>
<td>F</td>
<td>Brick &amp; Mortar</td>
<td>Neutral</td>
</tr>
</tbody>
</table>

As in Example 1, consumers who live in households without a car are considerably more likely to purchase the product online. And as in Example 2, liberal consumers are unwilling to buy from Firm C and conservative consumers are unwilling to buy from Firm D. Through big data analytics, Firm A is capable of determining both the political views of prospective consumers and whether consumers have access to a vehicle. Firm A proposes to acquire Firm B. Table 4 presents the competitive dynamics facing each set of consumers.

Consumers who live in households with vehicles would face the same competitive dynamics as in Example 2 (depending on their individual political affiliation). Moderate and conservative consumers who live in households without vehicles would face the same competitive dynamics as consumers without vehicles in Example 1. Liberal consumers who live in households without vehicles, however, would now face a merger to monopoly.

It is worth pausing to consider the implications of these examples. First, it may be challenging for antitrust enforcers to detect situations in which algorithmic price discrimination leads to anticompetitive merger effects. At first blush, Example 3 would appear to present a straightforward 6-to-5 merger. And for 72 percent of consumers, it would be just that. Firm-wide diversion numbers in this example would likely obscure the competitive situation faced by specific demographic groups that might be subject to targeted price increases following a merger. Moreover, there would be little reason, ex ante, to suspect that the political views of consumers would be at all relevant in assessing competitive
effects. Merger enforcement is a fact-specific enterprise, however. Big data and analytics may enable companies to engage in profitable targeted pricing strategies that initially seem arbitrary or even bizarre. (The ability to draw these types of non-obvious connections is, after all, the great promise and peril of big data analytics.) Competition enforcers should therefore be vigilant in reviewing mergers involving sophisticated pricing algorithms and closely examine possibilities for targeted consumer harm.

Second, the size of specific price discrimination markets in which competitive concerns arise may be quite small compared to overall sales for a particular product. In this example, a relevant price discrimination market of “politically liberal product consumers who live in households without a vehicle” would account for just 1 percent of total consumers. Nonetheless, these consumers are highly vulnerable to an anticompetitive post-merger price increase. Indeed, they would likely face monopoly pricing following the merger of Firms A and B.

Third, each additional simultaneous dimension on which price discrimination occurs has the potential to increase the number of relevant markets exponentially. Recall the FTC report cited earlier, which found that a single data broker “has 3000 data segments for nearly every U.S. consumer.” The vast majority of these data segments are likely to be competitively insignificant for purposes of pricing any individual good or service. But when considered simultaneously by a pricing algorithm, it only takes a few salient inputs to quickly create a multitude of potential relevant markets.

We are faced, then, with the possibility that sophisticated price discrimination may reverse the trend towards broader relevant product markets in certain cases. A merger that might previously have required an analysis of competitive effects in one relevant product market may instead require antitrust enforcers to examine dozens, if not hundreds, of potential relevant product markets. Both the government and the parties would need to devote more resources to such an investigation. Moreover, the fracturing of relevant product markets on the basis of price discrimination could increase the chances that a given merger will harm consumers in some relevant market. In our third example, what might otherwise have been a straightforward 6-to-5 merger became a merger to monopoly for a relevant market made up of liberals without cars.

It may also prove more difficult to fashion appropriate structural remedies for competitive harm in targeted price discrimination markets than for competitive harm in local geographic markets. Often, divesting assets within local geographic markets can address competitive concerns in those markets while permitting the larger transaction to proceed. But companies are less likely to have discrete business assets associated with individual price discrimination markets.

So what are competition enforcers to do? In some cases, enforcers may choose to exercise prosecutorial discretion to permit a merger where the overall benefit to consumers clearly and materially outweighs harm to targeted consumers that cannot be remedied absent blocking the transaction. Alternatively, enforcers may wish to consider making an exception to their general (and well-placed) reticence to accept behavioral remedies, perhaps by accepting agreements by parties to “tether” prices for customers in price discrimination markets of concern to prices in certain other markets.

**Conclusion**

Increasingly autonomous and sophisticated algorithmic pricing raises novel challenges to which antitrust enforcers must adapt. Algorithms may facilitate express collusion by making cartels easier to create and maintain. Algorithms could also lead to increased tacit collusion between firms under certain conditions, a prospect against which the Sherman Act offers little protection. If new technologies make coordinated interaction more likely, competition enforcers will need to focus more on coordinated effects in merger analysis at lower market concentration thresholds. Ultimately, it may be necessary to rethink the role of human-focused concepts such as “agreement” under the antitrust laws.

These technologies are also likely to lead to increasingly sophisticated forms of price discrimination. As with algorithmic pricing generally, algorithmic price discrimination has the potential to provide consumer benefits, such as enabling companies to identify and offer discounts to targeted consumers who were previously priced out of certain markets. But price discrimination may also produce narrower antitrust relevant product markets. As we show in our examples, this may increase the chances that a given merger will harm consumers in some relevant market even if the remaining post-merger competition is sufficient to protect the majority of consumers. Under the Guidelines, the agencies normally will not simply abandon particular groups of consumers to a post-merger exercise of market power by trading off potential gains and losses across different relevant markets. But it may be difficult to fashion tailored structural remedies for price discrimination markets defined on the basis of consumer characteristics. Where a merger promises cognizable efficiencies but would enhance market power in one or more narrow price discrimination markets, behavioral remedies may prove to be the best enforcement option.

To adequately protect competition, enforcers must continue to examine whether assumptions and practices from the brick-and-mortar world hold true in the digital one.
The FTC has taken initial steps to expand its in-house expertise by adding technological experts to its staff. Press Release, Fed. Trade Comm'n, BCP’s Office of Technology, Research and Investigations (Mar. 23, 2015), https://www.ftc.gov/news-events/press-releases/2015/03/bcps-office-technology-research-investigation-next. One can imagine that technological experts will play a greatly expanded role in future cases, both at the FTC and at other competition agencies.

Ariel Ezrachi & Maurice E. Stucke

They examine a number of “collusion scenarios” involving algorithms and artificial intelligence in their book. This article discusses two of those scenarios.


See Salcedo, supra note 7, at 39–42.

Vestager & Stucke, supra note 7, at 56.

Mehra, supra note 5, at 1343.

This is unsurprising given that similar conditions contribute to explicit and tacit collusion. Indeed, the U.S. antitrust agencies assess the potential for explicit and tacit collusion jointly as “coordinated interaction” under the Guidelines. 

Guidelines, supra note 8, § 7.

Mehra, supra note 5, at 1340.

Ezrachi & Stucke, supra note 7, at 62.


Id. at 5, 20.

Id. at 4.

See, e.g., Ezrachi & Stucke, supra note 7, at 36; Mehra, supra note 5, at 1340; Vestager, supra note 9.

Salcedo, supra note 18, at 4.
It is not essential that Firm A have a unique capacity to price discriminate. The analytical framework would be the same if multiple (or even all) firms in the market possessed similar capabilities. All that is necessary is that one or more of the firms to which a particular group of consumers can turn, post-merger, is capable of identifying and targeting prices to that specific group. That firm need not even be a merging party. For instance, if Firm C possessed the ability to engage in targeted price discrimination, this would potentially be sufficient to analyze the effects of the merger in a narrow price discrimination market.

The analysis here and in our subsequent examples assumes that entry into the relevant market would not be sufficient or timely enough to deter or counteract any competitive effects.

As noted previously for Examples 1 and 2, the analysis here does not turn on Firm A having a unique ability to price discriminate. See supra note 44. But note also that algorithm-driven price discrimination is not inherently limited to online sellers. For example, brick-and-mortar retailers can track individual consumers in their stores using cell phone Wi-Fi signals. Stephanie Clifford & Quentin Hardy, Attention, Shoppers: Store Is Tracking Your Cell, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/business/attention-shopper-stores-are-tracking-your-cell.html. A brick-and-mortar retailer can engage in price discrimination by setting one shelf price and offering differential discounts to individual consumers through their phones or through coupons tied to store loyalty programs.

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72% x 0.9 (percentage of consumers with cars) x 0.8 (percentage of politically moderate consumers). The merger would reduce the available options for 18% of consumers from five to four. For 9% of consumers, this would be a 3-to-2 merger. It would be a merger to monopoly for 1%. The agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).
Buyer Power in Recent Merger Reviews

BY JONATHAN SALLET

MAGINE A MERGER BETWEEN TWO buyers that would increase the new firm’s buyer power over an important input it would purchase from upstream sellers. The merging parties assert that their increased ability to obtain lower prices will result in cost savings to them, some of which will be passed through to their downstream customers and that these lower prices are a procompetitive benefit. Opponents of the transaction allege that the increased buyer power, perhaps even constituting monopsony power, may substantially lessen competition in the market for the purchase of those inputs regardless of whether any of the fruits of the merger-specific buyer power are passed along to customers. That might happen, for example, if the increased buyer power resulted in lower prices to the upstream providers and had the effect of decreasing their output. On what basis should a reviewing agency or a court determine whether this buyer power is improper under Section 7 of the Clayton Act?

Two cases throw this issue into sharp relief. In 2012, the Federal Trade Commission closed its eight-month investigation of the acquisition of Medco Health Solutions by Express Scripts, Inc., two of the nation’s three largest pharmacy benefit managers (PBM), by concluding that “even if the transaction enables the merged firm to reduce the reimbursement it offers to network pharmacies, there is no evidence that this would result in reduced output or curtailment of pharmacy services generally.” Rather, the FTC emphasized, “It is likely that a large portion of any of these cost savings . . . would be passed through to PBM customers.”

Four years later, the Department of Justice sued to stop the proposed merger of two health insurers, Anthem and Cigna, and alleged, in part, that the increased buyer power of the combined firm would “enhance Anthem’s leverage—both over physician practices . . . and hospitals and physician groups” and, as a result “Anthem likely would reduce the rates that both types of providers earn . . .” The complaint predicted likely reductions in output from hospitals and physicians but the DOJ argued that “the Court need not answer the question whether lower rates on balance will reduce output or quality of care, or otherwise cause consumer harm.”

And the DOJ took the view that “Anthem’s defense that its acquisition of Cigna will enable it to lower reimbursement rates ‘confirms rather than refutes the anticompetitive purpose and effect’ of the acquisition.” In other words, the Department believed that in these circumstances harm to competition among purchasers of inputs proved a Section 7 violation no matter the effect on downstream competition.

It is axiomatic that buyers may be able to influence the terms on which they purchase goods and services. As the Horizontal Merger Guidelines explain, “Powerful buyers are often able to negotiate favorable terms with their suppliers.”

A recent example arose in the DOJ’s review of the Danone/White Wave transaction, in which it alleged that a newly combined company would be purchasing 70 percent of available raw organic milk from upstream Northeastern milk producers and that this increased buyer power would likely lead to the imposition of contract terms very favorable to the new company but very unfavorable to organic milk producers, who would be paid less for their organic milk. At the same time, the Horizontal Merger Guidelines emphasize that buyer power can result simply from factors unrelated to market power, such as through reduced transaction costs or the increased ability to take advantage of volume discounts.

So the question arises: Is the goal of antitrust low prices? Or is it to achieve competitive outcomes without regard to price levels? Recent merger reviews raise a series of important issues that include both the assessment of the nature of buyer power and the consideration of competitive effects. Two critical questions emerge: (1) Under what circumstances does the exercise of buyer power promote recognizable procompetitive outcomes, and (2) in what markets are such procompetitive efforts cognizable?

Monopsony and the Structural Presumption

Monopsony is a subset of buyer power—limited to circumstances that are the buyer-side equivalent of monopoly power held by a seller. Monopsony has long been recognized as a threat to competition precisely because “a monopsony is to the buy side of the market what a monopoly is to the sell side.” Areeda and Hovenkamp suggest that the line between monopsony and lesser forms of buyer power lies at the border between lower and higher output.

It is important to recognize, however, that lower output in the downstream market will not always result from the existence of monopsony power, for example, if the monopsonist sells downstream into a perfectly competitive product market. A paper mill may have market power in the local mar-

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ket to purchase timber and consequently will buy less timber to drive down the price the firm pays for timber. But if the firm sells paper into a perfectly competitive national market, there may not be any less paper sold as a result of this—other paper mills will expand their output by buying inputs in different upstream markets to offset the reduction by the monopsony mill, and paper prices will remain constant. Competition in the local market for timber is harmed, but there may be no downstream effect on consumers. The Horizontal Merger Guidelines expressly state that the agencies do not “evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.”16

The proposed Anthem-Cigna transaction would have combined two of the leading five national health insurance companies. Although its complaint largely raised seller-side issues,17 the DOJ focused as well on the exercise of buyer power in the upstream market in which health insurers agree to pay hospitals and doctors for the supply of medical services. Here, the Department alleged that combining the two companies would “enhance Anthem’s leverage” and as a “result of the merger, Anthem would likely reduce the rates that both types of providers earn by providing medical care to their patients.”18 By contrast, the merging companies counted on the same buyer-side dynamic as a basis for demonstrating efficiencies, asserting that their increased buyer power would lead to lower prices and thus directly benefit customers and consumers.19

The buyer-power issue was not decided by the district court, but the subsequent appeal to the D.C. Circuit featured the merging parties’ assertion that the district court had failed to credit their efficiencies, including the assertion of their ability to gain and pass through lower prices through increased buyer power. The D.C. Circuit upheld the district court judgment that efficiencies had not been adequately demonstrated, but in his dissent Judge Brett Kavanaugh set out his view of the buyer-power question, concluding that the proposed transaction could violate the Clayton Act, but only if the merged company “would be able to unlawfully push healthcare providers to accept rates that are below competitive levels.”20 As he explained:

[T]he exercise of monopsony power to temporarily reduce consumer prices does not qualify as an efficiency that can justify an otherwise anti-competitive merger. . . . Although both monopsony and bargaining power result in lower input prices, ordinary bargaining power usually results in lower prices for consumers, whereas monopsony power usually does not, at least over the long term. Therefore, the exercise of bargaining power by Anthem-Cigna is procompetitive because it usually results in lower prices . . . . By contrast, the exercise of monopsony power by Anthem-Cigna may be anti-competitive because it may result in higher prices.21

For Judge Kavanaugh, therefore, the critical question for the district court to resolve in the first instance—had the case continued—would have been: “Would Anthem-Cigna obtain lower provider rates from hospitals and doctors because of its exercise of unlawful monopsony power in the upstream market where it negotiates rates with healthcare providers?”22 Similarly, Commissioner J. Thomas Rosch in the Express/Medco case viewed the case as “subject to the principles of monopsony power,” and the FTC’s Closing Statement emphasized that “the proposed transaction would produce a firm with a smaller share of retail pharmacies sales—approximately 29%—than is ordinarily considered necessary for the exercise of monopsony power.”23

For purposes of this analysis, the common ground is that the creation of monopsony power supports a governmental action under the Clayton Act. But Judge Kavanaugh goes a step further, perhaps suggesting that the only form of buyer power that could be treated as illegal would be monopsony. The fundamental difficulty with such a contention is that it breaks the symmetry between seller and buyer power in merger reviews. The Clayton Act does not require that sellers in a horizontal merger have to gain a monopoly in order to raise the threat of harm to competition. This follows from the plain language of Section 7, which establishes as separate bases for liability transactions that would “tend to create a monopoly” and those that may “substantially lessen competition.” And the “substantially lessen” standard demonstrates Congress’s intent to attack potential harms to competition in their incipiency without regard to the likelihood of monopoly/monopsony.24 Neither clause specifies that harm must occur in a seller-side market rather than a buyer-side one.

Of course, the Horizontal Merger Guidelines establish a rebuttable presumption that a merger that creates significant concentration in a market is likely to increase market power.25 The concentration levels identified in the Horizontal Merger Guidelines are well below the shares associated with monopolistic power.26 In a market with an HHI above 2500, application of that standard would target, for example, the acquisition by a firm with 30 percent market share of a firm with 4 percent market share.27 This formula establishes the so-called structural presumption by which the antitrust agencies present a prima facie case that the merging parties must rebut (and, if that were successfully done, then requires the government to produce additional evidence demonstrating anti-competitive effects).28 This is also known as the Philadelphia National Bank presumption29 and it was used by both district courts in the recent health care mergers.30

The DOJ’s view in the Anthem case applies just this approach, invoking Philadelphia National Bank and the structural presumption as establishing a prima facie case on the seller side.31 The use of the structural presumption means that the DOJ would not have to show specific evidence of harm to establish its prima facie case. That, the DOJ argued, is the rule in sell-side mergers and, given its logic, it invoked the same rule in Anthem.32

Treating seller-side and buyer-side power as symmetrical, this article proceeds on the assumption that there is a merg-
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One should not assume that the “competitive process” position treats competitive effects as irrelevant. Here, the “incipiency” purpose of the Clayton Act is important, as is the notion that a buy-side analysis simply turns the normal sell-side analysis upside down. Thus, the buyer-power defense could be rejected either on the ground that it relies on the use of market power as an improper basis for “good” outcomes or that the asserted benefits require balancing harm in one market against benefits in another.

In her concurring opinion in Anthem, Judge Millett addressed the first issue, concluding that “a proffered efficiency cannot arise from anticompetitive effects” and, therefore, “once a court has found a Section 7 violation, a generic statement that prices will go down proves nothing by itself.” Judge Millett continued: “[I]ncreased bargaining power is not a procompetitive efficiency when doing so ‘simply transfers income from supplier to purchaser without any resource savings.’” Additional bargaining power absent resource savings could be used to artificially increase the percentage of the surplus created by the bargain that goes to the buyer, to the disadvantage of the seller.

When Do Lower Input Prices Constitute Harm and When Can They Be Treated as an Efficiency?

The DOJ argued in the Anthem case that it needs to “show only that the merger would give Anthem increased market power that risks harm to providers . . . .” First, the DOJ relied on a line of cases in which the Supreme Court rejected assertions that the antitrust laws should consider whether the use of market power might yield procompetitive outcomes. So, for example, in National Society of Professional Engineers, the Supreme Court rejected the claim that a prohibition on competitive bidding by members of an engineering association could be justified on the ground that low prices could mask inferior service, saying “the statutory policy [of the Sherman Act] precludes inquiry into the question whether competition is good or bad.” The Court emphasized, as well, the role of the judiciary, stating that a view of the rule of reason “based on the assumption that competition itself is unreasonable” would create a “sea of doubt.” Thus, the DOJ believed that once the structural presumption was established, merging parties would not be able to rely on the very same increase in buyer power to achieve “good” outcomes, including lower prices, in rebutting the prima facie case.

The DOJ invocation of the competitive process invokes a second basis for its conclusion, by focusing attention on the input market. Philadelphia National Bank holds that harm in one market cannot be offset by benefits in another, from which follows the conclusion that benefits to downstream consumers cannot be balanced against harm to upstream input suppliers. Symmetry requires that the potential disadvantage to suppliers be treated exactly the same as the potential disadvantage to buyers in a sell-side merger, which does not consider effects in other markets.

Areeda and Hovenkamp, in the section of their treatise on which Judge Millett relies, assert that “genuine resource savings” exist when, for example, newly merged firms qualify for quantity discounts or are able to search more widely for favorable prices available for their larger purchases, but not simply because the new firm has more bargaining power or, of course, monopsony power. In other words, where cognizable efficiencies exist, the new bargaining equilibrium between the merging parties and an input supplier may benefit both sides to the transaction; where such efficiencies do not exist, there is merely the transfer from input suppliers to buyers to which Judge Millett refers.

This is not the only view. Dennis Carlton and Mark Israel, asking “under what conditions can a merger of buyers lead to merger efficiencies that are due to changes in the bargaining outcome,” suggest that efficiencies would exist where the use of new-found buyer power would drive input prices closer to competitive levels or where the process of contract formulation becomes more efficient, such as where transaction costs are effectively reduced or asymmetric information problems are solved.

To what extent is the “competitive process” approach inconsistent with the FTC’s review of buyer power in Express Scripts/Medco? In that transaction, the “most highly-publicized and politically-charged issue” was whether the acquisition of one significant PBM by another would reduce the reimbursement rates that pharmacies receive from such firms, which undertake the task of establishing a network of pharmacies that can then be used by health plans as they offer prescription drug plans. PBMs assemble their networks by negotiating with pharmacies over the rate at which they will...
be reimbursed for filling prescriptions. Pharmacies alleged that the new firm would enjoy and exercise monopsony power.

The FTC’s Closing Statement cited the post-transaction market share of 29 percent of retail pharmacies’ sales as evidence that the new firm would not have monopsony power and relied, as well, on evidence that increase in the size of PBMs was not correlated with lower reimbursement rates paid to pharmacies. The Commission also referred to the potential benefit to consumers that would follow if lower input prices resulted in lower health care costs to consumers. 67 But the Closing Statement does not tell us whether such ability to obtain lower prices would result from cognizable efficiencies, that is to say resource savings, whether the competition benefits would appear outside of the relevant market, or whether buyer power short of monopsony could support a finding that the Clayton Act would be violated.

Considering the Puts and Takes of Buyer Power
Suppose that some portion of the increased ability to obtain lower input prices really does qualify as an efficiency, perhaps through decreased transaction costs that would not otherwise be available to the pre-merger firms, but also that there is increased buyer power not attributable to those efficiencies that could lead to anticompetitive outcomes. This situation could arise in cases that do not trigger the structural presumption. After all, the Horizontal Merger Guidelines are careful to caution that “[t]he purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones . . . .” 48

In United States v. Charter, the DOJ considered the impact of the merger of two cable operators that purchase video programming from upstream content companies. In its Competitive Impact Statement accompanying a settlement complaint, the DOJ neither alleged monopsony power nor concentration of the type that would qualify for the structural presumption. 49 Rather it alleged that the new company would be “a critical distribution channel” for online video and would have more leverage by virtue of having “over 17 million video subscribers” nationally. 50 Thus, the DOJ concluded that absent the proposed settlement, the combination would violate Section 7 by negotiating non-price contract terms that would “limit[] or foreclos[e]” online video distributors like Amazon, Hulu, or Netflix from obtaining “access to the video content that is vital to their competitiveness.” 51 It is important, in other words, to note that the alleged harm was not that the new company would gain lower prices, but that it would use increased buyer power to demand non-price terms that would be harmful to competition.

Take the facts derived from the Charter transaction as a hypothetical and imagine further that the merging parties had agreed that there would be a merger-specific increase in buyer power but had also argued that some portion of the increased buyer power resulted from true resource savings, which would result in lower costs to consumers. For these purposes, we are assuming that there is a merger-specific increase in buyer power, that both outcomes—programming limitations and lower prices to consumers—are equally likely, and that the increase in concentration neither triggers the structural presumption nor qualifies as monopsony.

In this hypothetical, the argument would be that there is more buyer power and that it is being used to impact the bargaining between the newly formed cable company and a programmer, that this bargaining should itself be understood to be a form of competition, and that the non-price terms limit output of the video programmers. But the hypothetical also assumes that there are cognizable efficiencies associated with some portion of the increased buyer power and that these are passed through, in whole or in part, to consumers. A critical question is whether and how, in balancing the effects in the input market, an antitrust enforcer or court should consider the downstream impact, perhaps as illustrative of potential impacts in the input market.

Conclusion
This analysis suggests that buyer-power merger reviews would likely be analyzed on the basis that: (1) the use of market power created separately from any efficiency or resource would support both a monopsony conclusion or, with lower market share, the structural presumption; both of which would bar the use of the same market power to justify allegedly pro-competitive outcomes and (2) Philadelphia National Bank bars a balancing of harm in the input market with benefits on the downstream consumer (or any other) market. Less certain is the treatment of such buyer power that falls short of the structural presumption, including when true efficiencies also exist.

1 Phillip Areeda & Herbert Hovenkamp, Antitrust Law § 575 (2014).
3 Id.
5 Plaintiffs’ Supplemental Memorandum on the Buy-Side Case at 2, United States v. Anthem, Inc., No. 16-1493(ABJ) (Dec. 19, 2016) [hereinafter DOJ Anthem Buy-Side Memo].
6 Id. at 4 (quoting Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 693 (1978)).
7 In the Anthem case, the general understanding was that Anthem would be able to bargain for lower prices from hospitals and physicians, but it is possible to imagine a buyer that does not bargain—for example a large manufacturer that simply sets the price it will pay for an input. That is, buyer power can involve bargaining power and bargaining leverage, see infra note 21, but it need not always.
8 U.S. Dep’t of Justice & Federal Trade Comm’n, Horizontal Merger Guidelines
Anthem

See, e.g., 17

See 15

Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 931 (1st Cir.) ("[T]he Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too high, not too low.") (emphasis added).

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.") (emphasis added).

Horizontal Merger Guidelines, supra note 8, § 12.


AREEDA & HOVENKAMP, supra note 1, § 575 ("The important and often overlooked consequence of monopsony power is reduced output on the monopsonist’s selling side: that is, since the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less.").


Horizontal Merger Guidelines, supra note 8, § 12, which also gives this example:

Example 24: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

See, e.g., Complaint at 5, United States v. Anthem, Inc., No. 16-1493(ABJ) (D.C. Cir. 2017).

Id. at 27.

It is important to understand that there was no disagreement that increased ability to obtain lower input prices would result from the proposed transaction. Rather, Anthem argued that the greater buyer power would lead to lower prices for its customers, which should be treated as efficiencies. Anthem took the position that its prices for inputs could be too low only if they fell below long-run marginal costs. DOJ Anthem Buy-Side Memo, supra note 5, at 9. At oral argument before the D.C. Circuit, Anthem agreed that its claim of lower prices would not be cognizable were an actual monopsony to result from the transaction. United States v. Anthem, Inc., 855 F.3d 345, 378 (D.C. Cir. 2017) (Kavanaugh, B., dissenting).

Anthem, 855 F.3d at 378.

Id. at 377-78 (citations omitted). As noted above, the Horizontal Merger Guidelines recognize that a combination of buyers can lead to lower transaction costs that will lead to lower input prices in a manner that qualifies as a cognizable efficiency. Horizontal Merger Guidelines, supra note 8, § 12. An issue arises around the use of the term "bargaining power." Economics literature treats "bargaining power" as "a party’s relative negotiating skill" and "bargaining leverage" as "a party’s payoff in case the negotiation breaks down and the parties fail to reach an agreement." Gregory Vistnes & Yianis Sarafidis, Cross-Market Hospital Mergers: A Holistic Approach, 79 ANTITRUST L.J. 253, 257 n.20 (2013). In context, Judge Kavanaugh’s usage appears to be synonymous with bargaining leverage that falls short of monopsony.

Anthem, 855 F.3d at 378.

ESI Closing Statement, supra note 2, at 1 n.2, 7-8.

Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (Congress “concern was with probabilities, not certainties.”). The Clayton Act was enacted in 1914 and reflected the events that Congress had observed since the passage of the Sherman Act in 1890. Because the Sherman Act was understood to focus chiefly on agreements between independent firms, the turn of the 20th century saw a merger boom because the acquisition of assets was thought to avoid antitrust issues. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 2.1c (5th ed. 2016). The Clayton Act, both as designed and then as amended in 1950, instructs antitrust enforcers to take a forward-looking perspective on pending transactions. See Bill Baer, Assistant Att’y Gen., Dep’t of Justice, Remarks at the American Bar Association Clayton Act 100th Anniversary Symposium (Dec. 4, 2014), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-bill-baer-american-bar-association-clayton-act-100th.

Horizontal Merger Guidelines, supra note 8, § 5.3 (“Market concentration is often one useful indicator of likely competitive effects of a merger.”).

Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) ("[N]umerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power . . . [where cases] involve claims of actual monopolization.").

HOVENKAMP, supra note 24, § 12.46; see ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 568 (6th Cir. 2014).


See United States v. Anthem, Inc., 236 F. Supp. 3d 171, 191 (D.D.C. 2017);


The structural presumption could be applied where the market for the purchase of an input has a post-merger HHI of above 2500 and the effect of the merger is an increase of more than 200, which is the current standard for a seller-side merger. The question of how to fashion a rebuttable presumption for buyer-side analysis is discussed in detail in Peter Carstensen, Buyer Power and The Horizontal Merger Guidelines: Minor Progress on an Important Issue, 14 U. Pa. J. Bus. L. 775, 817 (2012) ("if the post-merger HHI exceeds 2000, there should be a rebuttable presumption that the merger is illegal.").

See Rani Habash & John Scaf, An Inside Look at Monopsony Issues in the FTC’s Express Scripts-Medco Merger Investigation, ANTITRUST HEALTH CARE CHRON. 24 (ABA Section of Antitrust Law News.) (2012); see also United States v. Syfy Enters., 903 F.2d 659 (9th Cir. 1990).

DOJ Anthem Buy-Side Memo, supra note 5, at 1. The DOJ identified such harm as “lower reimbursement, diminished quality, or reduced innovation.”


Id. at 695.

435 U.S. at 696 (citation omitted).

Philadelphia National Bank, 374 U.S. at 370–71; see DOJ Anthem Buy-Side Memo, supra note 5, at 10 (citing Philadelphia National Bank for this conclusion).

Anthem, 855 F.3d at 369 (Millett, J., concurring). The majority opinion authored by Judge Rogers did not address the buyer-power issue expressly, because it affirmed the conclusion that the claimed efficiencies had not been proven, although it opined that the dissent’s “single-minded focus on price ignores that in highly concentrated markets like this one, lower prices, if they occur at all, may be transitory.” Id. at 366.

Id. at 371 (quoting AREEDA & HOVENKAMP, supra note 1, ¶ 975i, at 106 (2009)).


AREEDA & HOVENKAMP, supra note 1, ¶ 975i, at 106 (2009); see also Hori-
horizontal Merger Guidelines, supra note 8, § 10 (describing cognizable efficiencies).

45 Dennis W. Carlton & Mark Israel, Proper Treatment of Buyer Power in Merger Review, 39 REV. INDUS. ORG. 127, 130–31 (2011). For a discussion of the relationship between the FTC approach in Express Scripts and earlier statements reflecting a “more aggressive” DOJ approach, as well as a suggested analysis of the pros and cons of those DOJ statements, see John D. Shively, When Does Buyer Power Become Monopsony Pricing?, ANTITRUST, Fall 2012, at 90.

46 Habash & Scalf, supra note 34.

47 ESI Closing Statement, supra note 2, at 8. The Commission did not express-ly apply a structural analysis to the buy-side claim (other than to say that it would not qualify as a monopsony) although its conclusion about lack of competitive effects could be read to mean that any such concentration would have been offset by other market factors, such as the fact that “dispensing fees are negotiated individually between each PBM and each pharmacy.” Id. at 8 n.15. Two authors who provided support for Medco during the transaction describe a similar analysis. See Habash & Scalf, supra note 34.

48 Horizontal Merger Guidelines, supra note 8, § 5.3.

49 At the beginning of 2017, the new Charter had about 19% of the sub-scribers held by the top 7 national MVPDs. Mike Farrell, Top 25 MVPDs,


51 Complaint at 4, United States v. Charter Commc’ns Inc., 1:16-cv-00759 (RCL) (D.D.C. 2016), https://www.justice.gov/opa/file/846046/download. See also Nicholas Hill et al., Economics at the Antitrust Division 2014–2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron, 47 REV. INDUS. ORG. 425, 428–29 (2015). Discussing a similar proposed merger of cable operators, DOJ economists explained that “the [cable company’s] leverage . . . is believed to come from the size of its customer base. The advertising that a programmer can earn on its content depends upon the breadth of the audience that can see that content. Further, widely distributed content is more likely to garner buzz and praise than is content that can be seen only in a small part of the country. Thus, while Comcast and Time Warner Cable are rarely substitutes for access to particular customers, they are substitutes when a programmer is trying to build a national audience for content.” Id.
After the Obama Administration: What Comes Next in Antitrust Merger Enforcement Policy?

BY JOSHUA H. SOVEN AND JUSTIN EPNER

MOST COMMENTATORS ON THE Obama administration’s antitrust policy have focused on what they characterize as a more aggressive approach to antitrust merger enforcement than that implemented by the preceding administration. It is true that the Obama Antitrust Division and the Federal Trade Commission probably challenged several mergers that their predecessors would have cleared. But the administration’s potentially longest-lasting impact was that it persuaded a number of courts to adopt the administration’s preferred doctrinal approach to analyzing unilateral effects in transactions that involved differentiated product markets. The administration also altered the antitrust agencies’ tactical strategies for investigating and litigating challenges to these types of mergers. These changes are significant because the large majority of the agencies’ litigated merger challenges involve alleged unilateral effects in differentiated product markets.

Doctrinally, the Antitrust Division and the FTC during the Obama administration convinced courts in merger trials to define narrow product markets based on “direct effects” evidence and at the same time continue to apply the decades-old “structural” presumptions (based on market shares and concentration levels) when analyzing whether a merger is likely to reduce competition. This approach gave the administration the best of both worlds for litigation purposes: defining narrow product markets, which yield high market shares and concentration levels, and then using those market shares and concentration levels to argue that the transaction was presumptively unlawful.

Tactically, the agencies modified their investigation and trial strategies, choosing to conduct the investigations to prepare for litigation and rely more heavily on cross-examination of the parties’ witnesses in their cases-in-chief, while reducing their dependence on customer witnesses. Combined, these doctrinal and tactical strategies were instrumental in convincing the courts to block a number of transactions in unilateral effects cases and produced published decisions that favor the antitrust agencies.

The open question is what comes next: Will the Trump administration’s leadership team at the Antitrust Division and the FTC continue or depart from the Obama administration’s doctrinal and tactical approach in unilateral effects merger cases? Given the prevalence of these types of cases, the answer is likely to have a significant impact on the new administration’s merger enforcement policy.

The “Challenge” of Unilateral Effects

For the first century of the development of antitrust law in the United States, merger enforcement generally focused on preventing transactions on the ground that they would enable the remaining companies in the market to more easily coordinate their prices. The theory underlying these cases was that, as market concentration levels increased, the remaining companies would become more likely to coordinate their decisions on prices and output.

This emphasis on coordinated effects started to diminish when the U.S. antitrust agencies formally introduced the concept of unilateral effects in the 1992 version of the Horizontal Merger Guidelines. They did so because of the growing recognition among lawyers and economists that the potential source of a reduction in competition for a large percentage of the mergers the agencies reviewed was not post-merger coordination among remaining competitors. Coordination among competitors was in fact far less likely in many sectors than previously thought, either because competitors’ decisions on prices and output levels were not sufficiently transparent or the products in the “market” were sufficiently differentiated that coordination was not feasible. In contrast, the primary antitrust inquiry for many transactions was whether the merging parties could unilaterally raise prices post-deal because a substantial number of customers viewed the merging parties as their preferred alternatives and, consequently, would not switch to other options in response to a price increase by the merged companies.

Among antitrust practitioners and scholars, there was (and remains) a general consensus on the basic economics of unilateral effects. However, the introduction of unilateral effects analysis and differentiated product markets into the Merger Guidelines created three primary impediments to merger litigation because the concept was often at odds with the legal standards contained in decades of Supreme Court and lower court merger jurisprudence.

First, defining product markets is often challenging in cases that involve differentiated products. When products are differentiated by features and price (unlike commodities, which generally are differentiated only by cost), it is often harder to
discern clean functional “breaks” between the products that are “inside” and “outside” the putative product market. This difficulty complicates market definition. The problem extends to the language used to identify the contours of a relevant product market. The more heterogeneous the market sector, the more adjectives are sometimes required to describe the market, which in turn increases the likelihood that the court will conclude that the agencies have “gerrymandered” or “rigged” the market. Because the Supreme Court has held that market definition is a “necessary predicate” in a Section 7 case, the difficulty of defining markets in unilateral effects cases that involve differentiated products can pose a substantial litigation obstacle for the antitrust agencies.

Second, the economics of unilateral effects cases in differentiated product markets can make reliance on nominal market shares and concentration levels, and therefore the use of structural presumptions, less important. The focus of unilateral effects analysis is on the degree of competitive proximity of the products produced by the merging parties relative to the proximity of products produced by third parties. While a firm’s share of a market can be relevant to this inquiry, in many cases the relative degree of head-to-head competition between firms is far more probative. The challenge that arises from this dynamic is that it puts pressure on the agencies to demonstrate with “direct effects” evidence that the transaction will reduce competition.

While it is easy to say (as the agencies have said from time to time) that merger analysis should focus on direct evidence about competition between the merging parties and other competitors, gathering and persuasively presenting such evidence can present substantial challenges. In contrast, using basic arithmetic to show high market shares and concentration levels, and then relying on the Philadelphia National Bank and Brown Shoe structural presumptions, is generally a much easier route for the government in court.

Third, unilateral effects cases in differentiated product markets often involved price discrimination and bid markets, in which the agencies maintained that the merger would harm certain vulnerable customer groups but leave others unharmed. The economics of price discrimination were well understood, but there was little case law to support merger cases that focused on harm to only segments of the parties’ customers. The difficulties of proving price discrimination in court were exacerbated by challenges in finding evidence to demonstrate that the merging parties had the ability to identify and target a well-defined set of purportedly vulnerable customers.

Each of these challenges arose in merger cases during the Bush administration, most notably in the SunGard/Comdisco and Oracle/PeopleSoft cases, and the results had a substantial impact on the Obama administration’s subsequent approach to merger cases years later.

SunGard/Comdisco. In 2001, the Antitrust Division challenged the combination of SunGard and Comdisco, alleging that the transaction would reduce competition in the provision of shared hotsite disaster recovery services, which it contended was a relevant product market. The Antitrust Division alleged that shared hotspots was a distinct relevant product market and the merger was most likely to harm companies that utilized large-scale enterprise and/or mixed-platform data processing centers. However, the Division did not specifically allege the existence of a price discrimination market that consisted of these customers.

The trial lasted only two days and consisted of cross-examination of expert witnesses and argument by the lawyers. There was no live fact testimony. To support its case, including its allegations concerning the product market, the Division relied heavily on 50 detailed declarations from customers. Moreover, the Division’s testifying economist based a significant part of his analysis on the customer affidavits.

The court held that the Division failed to prove its putative shared hotsite relevant product market. Critically, the court ruled that the customer affidavits were not sufficient to meet the Division’s burden. The court concluded that the customer affidavits were “often vague and confused, perhaps due to the complexity of the issues and the difficulty in framing specific questions regarding the financial viability of switching from an external hotsite service to an internal solution.” The court also ruled that it could not rely on the affidavits because the Division failed to establish that the views expressed in them were representative of those of other customers: “there are more than 7,500 customers that currently use defendants’ shared hotsites. Without more information, the Court simply cannot determine whether these 50 declarations are representative of the shared hotsite client base.” Among antitrust lawyers, the challenge of demonstrating that testifying customers were reliable and representative of the market as a whole became known as the SunGard problem.

Oracle/PeopleSoft. Whereas SunGard was a sprint, Oracle was a marathon in demonstrating the difficulties of proving that a merger would cause unilateral effects in a differentiated product market. In Oracle, the Antitrust Division conducted a nearly nine-month investigation, followed by four months of litigation discovery and a four-week trial in October 2004 to challenge Oracle’s proposed acquisition of PeopleSoft.

The Antitrust Division alleged that the transaction would reduce competition in the provision of high-function financial management systems (FMS) and human relations management (HRM) software. As in SunGard, the Antitrust Division alleged that a certain category of customers was most at-risk but did not explicitly plead a price discrimination case. During the trial, the Antitrust Division called ten customers in its affirmative case, including Verizon, Pepsi, and Cox Communications. The Antitrust Division did not call any of the parties’ witnesses in its case-in-chief.

The court rejected the government’s customer-centric presentation, finding that the customers had failed to substantiate their concerns about the transaction:
The preferences of these customer witnesses for the functional features of PeopleSoft or Oracle products were evident. But the issue is not what solutions the customers would like or prefer for their data processing needs; the issue is what they could do in the event of an anticompetitive price increase by a post-merger Oracle. Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented. There was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle.

Still more problematic from the Antitrust Division’s standpoint was that the Oracle court issued rulings about the elements of proof required in a differentiated products unilateral effects case that set a high bar for the government.

First, the court held that, given that “narrow” product markets can exist in differentiated product sectors, the government was required to demonstrate that the parties would have a “post-merger monopoly or dominant position” in the market: “In a unilateral effects case, a plaintiff is attempting to prove that the merging parties could unilaterally increase prices. Accordingly, a plaintiff must demonstrate that the merging parties would enjoy a post-merger monopoly or dominant position, at least in a ‘localized competition’ space.”

Second, and relatedly, the court cast doubt on the reliability of market share and concentration presumptions in unilateral effects cases involving differentiated product markets:

> [D]efining the relevant market in differentiated product markets is likely to be a difficult task due to the many non-price dimensions in which sellers in such markets compete. . . . The inability clearly to define a market suggests that strong presumptions based on mere market concentration may be ill-advised in differentiated products unilateral effects cases . . . [I]t is generally misleading to suggest that a firm “controls” a certain market share in the absence of an analysis beyond market concentration. . . . Accordingly, a strong presumption of anticompetitive effects based on market concentration is especially problematic in a differentiated products unilateral effects context.

Consistent with its holding deemphasizing structural presumptions in unilateral effects cases, the court also critiqued the 1992 Merger Guidelines’ treatment of unilateral effects, including its presumption that a transaction that produced a firm with a 35 percent market share would cause anticompetitive effects:

> The Guidelines adopt a structural approach for addressing unilateral effects claims that closely mirrors traditional structural analysis. See Guidelines § 2.211. The biggest weakness in the Guidelines’ approach appears to be its strong reliance on particular market share concentrations. . . . A presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true.

Had other courts adopted the approach and doctrinal holdings in SunGard and Oracle, they could have caused material difficulties for the antitrust agencies’ ability to bring differentiated products unilateral effects merger cases. When the Obama administration took office, SunGard and Oracle were still good law and the leadership at the Antitrust Division and the FTC set out almost immediately to address the challenges they presented in merger litigation.

The Obama Administration Tackles Unilateral Effects

The Obama administration leadership at the Antitrust Division and the FTC put in place a three-pronged strategy to improve the agencies’ odds in litigation challenges involving unilateral effects in differentiated product markets.

**Step 1: Change the Merger Guidelines.** As the Oracle court explained, the 1992 Merger Guidelines’ treatment of unilateral effects in differentiated product cases neither reconciled the concept with the traditional structural merger framework nor provided a clear analytical alternative. Shortly after taking office, leadership of the Antitrust Division and the FTC sought to address this analytical tension and make the Merger Guidelines more litigation-friendly. The new version of the Merger Guidelines that the agencies issued in August 2010 is filled with statements designed to facilitate litigating unilateral effects merger cases.

First, to address market definition challenges, the 2010 Merger Guidelines maintain that relevant product markets in differentiated product sectors are often narrow and may not comport with standard industry views. The 2010 Merger Guidelines also state that “[r]elevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term ‘market.’” These principles potentially make it simpler for the agencies to prove product markets even when there is no clean functional break that delineates the outer boundaries of the market.

To further ease the market definition task, the 2010 Merger Guidelines state that market definition need not be the starting point of merger analysis and suggest it is appropriate to at least partially reverse-engineer product markets from competitive effects evidence: “Evidence of competitive effects can inform market definition . . . [such as] evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly[, which] can itself establish that those products form a relevant market.” In other words, the agencies said that if documents and/or merger simulation showed likely price effects from a merger, those price effects could satisfy the market definition test that the merging parties (and any very close competitors) by themselves constituted a relevant product.

In essence, the agencies were advocating for courts to run the Merger Guidelines backwards if needed to define relevant markets.

The 2010 Merger Guidelines also took aim squarely at the Oracle court’s holding that the government was required to show that a merger needed to produce a monopoly or dominant firm in a localized area of competition in order to satisfy its burden in a unilateral effects case involving differen-
tiated products. The Guidelines state that mergers can cause unilateral effects in differentiated product markets even when a majority of customers do not view the merging parties as their first and second choices:

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority.29

Finally, the 2010 Merger Guidelines attempt to make it easier for the agencies to prove price discrimination cases by providing a detailed exposition about how parties to mergers could cause competitive harm to some, but not all customers, through targeted price increases. And foreshadowing a reduced emphasis on customer testimony, the 2010 Merger Guidelines also note that customers may not be the preferred source of information about a merger’s competitive effects: “The Agencies may have access to information unavailable to customers that is relevant to evaluating whether discrimination is reasonably likely.”30

**Step 2: Change How the Cases Are Investigated and Litigated.** At the same time that the Obama administration was changing the Merger Guidelines, the leadership of the Antitrust Division and the FTC, along with the career lawyers and economists, reevaluated how to investigate and litigate unilateral effects cases. Most importantly, while customers remained key sources of information (and did testify for the agencies in several cases),31 the agencies structured their investigations in anticipation of cross-examining the parties’ witnesses in their affirmative case. To this end, the agencies used their timing agreements to incentivize the parties to produce quickly documents from key executives and then deposed those executives during the investigation with the objective of obtaining a transcript that they could use for cross examination at trial.

Relatively, the agencies continued a practice that the Bush administration started of incentivizing the parties to produce the documents and data relevant to their efficiencies claims early in the process and then taking 30(b)(6)-style efficiencies depositions during the investigation. The purpose of this strategy was to “lock in” the parties’ executives before the parties had fully prepared their efficiencies claims in order to rebut more effectively any efficiencies evidence if the agencies challenged the transaction in court.

**Step 3: Change the Case Law Through Litigation.** With the new Merger Guidelines in place, and armed with well-developed records often obtained through lengthy investigations, the Obama administration litigated more merger cases than any administration in the modern era. These cases both exemplified and resulted in significant changes in how the agencies tried cases and produced decisions that substantially refined the case law that applies to unilateral effects and price discrimination.

**From 2009 through 2016, the Antitrust Division brought nine litigation challenges, the majority of which involved unilateral effects. Four of these cases yielded holdings that are notable for the depth to which they addressed unilateral effects doctrine and their potential for long-term impact on merger investigations and litigation.**

**Antitrust Division**

From 2009 through 2016, the Antitrust Division brought nine litigation challenges, the majority of which involved unilateral effects. Four of these cases yielded holdings that are notable for the depth to which they addressed unilateral effects doctrine and their potential for long-term impact on merger investigations and litigation.

**H&R Block/TaxAct.** The Antitrust Division’s first merger trial during the Obama administration was in its challenge to H&R Block’s acquisition of TaxAct.32 Consistent with the revamped litigation strategy, the Antitrust Division did not call customers or proxies for customers but instead focused on cross-examining the defendants’ witnesses. Drastically, the Antitrust Division, relying on the 2010 Merger Guidelines, argued that the court should not use the framework for analyzing unilateral effects cases adopted by the Oracle court.33

The district court enjoined the merger, and in the process specifically declined to adopt several of the Oracle court’s key holdings. The court held that “[t]he fact that Intuit [a third party] may be the closest competitor for both HRB and TaxACT” did not “prevent a finding of unilateral effects for this merger.”34 The court also rejected the Oracle court’s holding that the combined parties must constitute a monopoly or have a dominant position35 and added that the government may not even need to define a relevant market in order to prove a Section 7 violation based on unilateral effects.36

**Bazaarvoice.**37 With its 2013 challenge to Bazaarvoice’s acquisition of PowerReviews, the Antitrust Division returned to the Northern District of California for the first time since the 2004 Oracle decision. The Antitrust Division alleged that the transaction would reduce competition in the market for ratings and review platforms, which are software products used to enable Internet sites to collect and display customer views of the products. Notwithstanding the statements in the 2010 Merger Guidelines that market shares and concentration ratios are generally less relevant for unilateral effects cases involving differentiated products,38 the Antitrust Division aggressively argued that it was entitled to a structural presumption under Philadelphia National Bank that the trans-
action would reduce competition. Bazaarvoice disagreed, citing work by the Division’s testifying economist, Carl Shapiro, and passages of the Merger Guidelines that advocated for a reduced role for market shares and concentration measures in unilateral effects cases. The court ruled in favor of the Antitrust Division, holding that it was appropriate to use market shares and structural presumptions in unilateral effects cases and that the Antitrust Division had established a presumption that the transaction was anticompetitive.

The case also validated the Antitrust Division’s strategic decision to not rely on customer testimony as part of its litigation strategy. As in H&R Block, the Division did not call any customer witnesses. Instead, it was the parties that unsuccessfully offered extensive customer testimony in support of their case. “Bazaarvoice pointed out that none of the 104 customers whose depositions [were] part of the record complained that the merger has hurt them.” The court rejected this evidence because, among other reasons, it held that “[i]t is difficult for those customers to discern what is actually happening in the market.” The court also found that “the customers were not privy to most of the evidence presented to the Court, including that of the economic experts” and there was the possibility of bias because they “had to testify about their market strategy in front of a vendor with whom most would be negotiating within a short time.”

Aetna/Humana and Anthem/Cigna. The Antitrust Division did not limit the use of its new strategy for bringing unilateral effects cases to mergers in the technology sector. In its last year in office, the Obama administration used the doctrine to block two large health insurance transactions: Aetna’s attempted acquisition of Humana and Anthem’s attempt to buy Cigna. The Division alleged that both transactions would produce unilateral effects, while continuing the dual-pronged approach of calling the parties’ executives in their affirmative cases and aggressively advocating for their preferred doctrinal framework.

In the Aetna/Humana litigation, the Division argued that the transaction would reduce competition in the provision of Medicare Advantage plans. In its affirmative case, the Division called six of the parties’ executives, including Aetna’s Chief Executive Officer, President, and head of exchange business, and Humana’s head of Medicare. As in the H&R Block and Bazaarvoice cases, the Division obtained the doctrinal holdings it wanted. The court fully endorsed the use of the structural presumption for analyzing whether a transaction is likely to reduce competition in a unilateral effects case. At the same time, the court continued the D.C. District Court’s rejection of the key holding in Oracle, holding that “mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition. That can be true even where the merging parties are not the only, or the two largest, competitors in the market.”

The Division’s trial tactics in the Anthem/Cigna case were comparable to those that it used in the Aetna/Humana litigation. In its affirmative case, the Division cross-examined Anthem’s and Cigna’s CEOs and several of the defendants’ vice presidents. The court also made two key doctrinal rulings in favor of the Division. It again applied the structural framework in the unilateral effects case, finding that the Division had established a presumption that the transaction would reduce competition in the sale of commercial health insurance to national accounts, given the parties’ high combined share of the market. The court also held that Anthem’s contention that United, not Cigna, is its closest competitor is “beside the point” because, in light of the structural presumption, an acquired firm need not be the buyer’s closest competitor for the combination to cause an anticompetitive effect.

Federal Trade Commission

During the Obama administration, the FTC achieved results that were similar to those of the Antitrust Division. The Commission litigated nine merger cases (winning all but one of them), and several of the decisions produced opinions that endorsed key components of the administration’s preferred doctrine for unilateral effects. Moreover, in the Sysco and Staples cases the D.C. District Court specifically endorsed the use of price discrimination markets, relying on the 2010 Merger Guidelines.

Sysco/U.S. Foods. In 2015, the FTC challenged Sysco’s proposed acquisition of U.S. Foods on the ground that it would reduce competition in the sale of broadline foodservice distribution to both regional and national customers. In contrast to the Antitrust Division’s approach in SunGard and Oracle, the FTC specifically alleged that the affected customers constituted a price discrimination market. The FTC alleged that there was a “distinct product market for broadline foodservice sold to National Customers.” Defendants responded that such a market was “contrived” and “factually and economically meaningless.”

The FTC’s strategy succeeded, resulting in a holding that will aid the agencies in future unilateral effects cases. After conducting a detailed review of the parties’ documents and third-party studies, the district court held that, while “defining a product market based on a type of customer seems incongruous . . . the customer’s requirements [can] operate to define the product offering itself.” The court then cited the 2010 Merger Guidelines’ treatment of price discrimination, and the Areada and Hovenkamp treatise’s discussion of the issue. The court did express some concern about the possibility of these authoritities supporting a finding that a single customer could constitute a product market. However, the court still held that application of the Brown Shoe practical indicia framework to the evidence in the records supported a finding on the evidence presented in that case that broadline distribution to a specific category of customers, national customers, is a relevant product market.

Staples/Office Depot. The FTC’s 2016 challenge to the Staples/Office Depot transaction led to additional endorsement of price discrimination markets by the D.C. District
Court. The Commission alleged that the sale and distribution of consumable office supplies to large business-to-business customers was a relevant product market. As in Sysco, the court cited favorably the Merger Guidelines’ doctrinal approach to price discrimination markets. The court then found that the evidence demonstrated that “[t]here [was] overwhelming evidence in this case that large B-to-B customers constitute a market that Defendants could target for price increases if they are allowed to merge.”

**Implications for the Future**

The Antitrust Division’s and FTC’s track records in unilateral effects merger cases during the Obama administration have the potential to have significant implications for merging parties during the Trump administration. There are now a number of court decisions that endorse the 2010 Merger Guidelines’ treatment of unilateral effects and price discrimination when defining markets, and at the same time still allow the agencies to rely on the government-friendly Philadelphia National Bank and Brown Shoe structural presumptions to prove that a transaction will produce anticompetitive effects. These holdings are somewhat in tension with the research and statements of two of the new Deputy Assistant Attorneys General for the Antitrust Division, who have emphasized that they believe the agencies should make enforcement decisions by relying on direct effects evidence rather than market shares and market concentration metrics.

A key indicator of the Trump administration’s merger enforcement policy will be whether it clears transactions with nominally high market shares but where the direct effects evidence indicates that the transaction is not likely to reduce competition. Relatedly, parties and the bar should closely watch whether and how heavily the administration relies on market shares and structural presumptions in litigation.

Tactically, the Trump administration will need to decide whether to continue the Obama leadership’s strategy of proactively using investigations to prepare for litigation and then rely heavily on cross examination at trial. It was these tactics, as much as any lowering of the substantive antitrust bar for making enforcement decisions in a handful of matters, which made the Obama administration’s antitrust enforcement efforts “feel” exceptionally aggressive to parties and their counsel.

Until there are clearer indications of how the Trump administration’s antitrust team will handle these issues, we continue to recommend that parties adopt highly proactive strategies for strategic deals that are likely to generate antitrust scrutiny. In particular, for strategic deals where litigation is a possibility, parties should consider the following strategies:

- Parties should prepare and make robust presentations to the antitrust agencies early in the process, including incorporating formal economic analyses when appropriate. The element of surprise is usually overrated, and often counterproductive, as a merger clearance strategy. It is far more important to keep the reviewing antitrust agency from ever putting the investigation into a “litigation mode.”

- Parties should consider the costs and benefits of complying with a second request more rapidly than is the norm. In a number of the cases described above, the parties gave the antitrust agencies a “long runway” to prepare for litigation. During the Obama administration, parties rarely achieved their objectives after prolonged merger investigations.

- Executives should prepare for Antitrust Division and FTC investigative depositions as if they are trial depositions to reduce the likelihood that the agencies obtain damaging testimony. Counsel must explain to their clients that Antitrust Division and FTC depositions during investigations are rarely neutral “fact-finding” proceedings. Rather, the agencies’ attorneys often use them to obtain admissions that can harm the parties and to obtain a transcript for use in cross examination at trial.

- For transactions with material antitrust risk that require a filing in the United States, parties should prepare for the possibility of litigation from the outset of the matter. Litigation readiness is essential not only to ensure victory at trial but also to ward off unreasonable settlement demands by presenting a credible strategy and capability to defeat the agencies in court.

Over the last eight years, the antitrust agencies have reworked their doctrinal and tactical approach to merger cases that involve unilateral effects in differentiated product markets. It remains uncertain whether the Trump administration will continue these strategies or reverse course. Regardless, merging parties would do well to prepare to respond to the new case law and the real possibility that antitrust agencies will not abandon their revamped investigation and litigation strategies.

4 See 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 913a (3d ed. 2009) [hereinafter AREEDA & HOVENKAMP] (“The economics literature on unilateral effects—and the expert economist conducting empirical tests—often dispenses with a conventional market definition in such cases, preferring to measure market power directly . . . .”). There are, however, significant differences of opinion about what types of evidence are sufficient to prove unilateral effects. See, e.g., James A. Keyte & Kenneth B. Schwartz, “Tally Ho!,” UPP and the 2010 Horizontal Merger Guidelines, 77 ANTITRUST L.J. 587, 627 (2011) (“[T]he UP [Upward Pricing Pressure] screen is incapable of providing reliable guidance to a court attempting to assess whether a proposed transaction may have a likely ‘unilateral’ anticompetitive effect in any line of commerce.”); Jerry A. Hausman & Gregory K. Leonard, Economic Analysis of Differentiated Products Mergers Using Real World Data, 5 GEO. MASON L. REV. 321, 337, 342 (1997) (“The DOJ and FTC’s [Merger Guidelines] recognize[] the possible unilateral price increasing effects of a merger. However, we view the analysis in the [Merger Guidelines] as incorrect. . . . In the wide range of oligopoly situations typically encountered in the real world, empirical evidence does not support the [Merger Guidelines] approach. Indeed, the [Merger Guidelines] cutoff points are not based on any actual empirical (or even theoretical) analysis that we have seen.”).


7 See AREEDA & HOVENKAMP, supra note 4, ¶ 914a (“In differentiated markets mergers between firms making ‘adjacent’ or similar product variations can have a much more significant anticompetitive effect than mergers between firms making more remote products.”).

8 See id.


12 Id. at 179.

13 Id. at 192.

14 Id. at 191.

15 Id. at 183.

16 Id. at 192.


18 Id. at 1131. The Antitrust Division’s efforts to support its case with customer testimony were complicated by testimony from customers that the parties offered in support of the transaction. See id. at 1133 (“Oracle [customer] witnesses testified about concrete and specific actions that they had taken and been able to complete in order to meet their firms’ information processing needs, apart from relying on the three ERP vendors that plaintiffs contend are a market unto themselves. Hence, the court finds on this basis, as well as an assessment of the witnesses’ credibility, that the testimony of the Oracle customer witnesses was more believable than that of the plaintiffs’ witnesses, despite the greater number of the latter.”). An additional challenge for the government was that PeopleSoft aided the government’s antitrust challenge to the transaction.

19 See id. at 1139 (“The court must demarcate such a ‘node’ or area of localized competition between Oracle and PeopleSoft as a prerequisite to finding any likelihood of unilateral anticompetitive effects.”). 1172 (“[P]laintiffs have failed to prove that there are a significant number of customers (the ‘node’) who regard Oracle and PeopleSoft as their first and second choices, if plaintiffs had made such a showing, then the court could analyze the potential for exercise of monopoly power over this ‘node’ by a post-merger Oracle.”).

20 Id. at 1118, 1123 (emphasis added).

21 Id. at 1121–22 (emphasis added) (citations omitted).

22 Id. at 1122–23.

23 See id. at 1117 (“[T]he Guidelines . . . are not sufficient to describe a unilateral effects claim.”). The court also explained that the case law that preceded Oracle provided little help. See id. at 1113 (“There is little case law on unilateral effects merger analysis. Few published decisions have even discussed the issue.”).


25 Id. ¶ 4.

26 Id.

27 The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See id. ¶ 4.1.1.

28 Indeed, the 2010 Merger Guidelines state that “[t]he ‘Agencies’ analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.” Id. ¶ 4.

29 Id. ¶ 6.1 (emphasis added).

30 Id. ¶ 3. It is important to point out that while the Obama administration’s antitrust leadership drove the new Merger Guidelines, the authors of the 2010 Merger Guidelines drew in part on the Commentary on the Horizontal Merger Guidelines that the Bush administration issued in 2006. U.S. Dep’t of Justice & Fed. Trade Comm’n, Commentary on the Horizontal Merger Guidelines (2006), https://www.justice.gov/atr/file/801216/download.


33 See id. at 84–85.

34 See id. at 83.

35 Id. at 84–85 (noting that “[s]ome commentators have criticized this [Oracle] standard” and “declin[ing] the defendants’ invitation, in reliance on Oracle, to impose a market share threshold for proving a unilateral effects claim”).

36 Id. at 84 (“[A] market definition itself may not even be required for proving a Section 7 violation based on unilateral effects.”).


38 The 2010 Merger Guidelines state that analyzing unilateral effects does not require market definition or calculating market shares or concentration levels because “[t]he Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products.” Merger Guidelines ¶ 6.1.

39 Bazaarvoice, 2014 WL 2039666, at *64.

40 Id. at *36 (“Bazaarvoice complained that Dr. Shapiro has previously written that market shares, HHIs, and other market concentration measures have little relevance to unilateral effects cases involving differentiated products, like this one.”).

41 Id. at *112 (“A firm’s market share is usually a primary measure of that firm’s presumed competitive significance.” (citing Philadelphia National Bank, 374 U.S. at 321)).
Id. at *13–14 (“Bazaarvoice’s business conduct after the merger was likely tempered by the government’s immediate investigation . . . . [T]he basis of Bazaarvoice’s (and other R&R platforms vendors’) pricing proposals in negotiations are opaque to customers . . . [and] the potential for witness bias was greater in this case than most.”). The parties’ efforts were also hampered by very damaging internal documents.


The court held:

There is no suspense about the outcome of this HHI analysis here: the Aetna-Humana merger easily surpasses the Guidelines’ concentration thresholds in all 364 of the complaint counties. Indeed, in more than 75% of the counties, the post-merger HHI would be greater than 5,000, and in more than 70% of the counties, the merger would cause an HHI increase of more than 1,000 points. And in 70 counties where Aetna and Humana are the only MAOs currently in the market, the post-merger HHI would reflect a merger to monopoly. Based on these compelling concentration figures, the government has established its prima facie case. Defendants do not attempt to argue otherwise. Thus, the government is entitled to a presumption that the merger would substantially lessen competition in the sale of individual Medicare Advantage plans in all 364 complaint counties.

Aetna, 2017 WL 325189 at *29 (citations omitted).

Id. at *37 (internal quotation marks omitted).

Id. at 38.

Id.


[53] Id. at 37.

[54] Id. at 38.

[55] Id.

[56] See id. at 38–39 (citing 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 534d (3d ed. 2007)).

[57] See id. at 39–40.

[58] See id.


[60] Id. at 118 (“The parties vigorously disagree on how the market should be defined.”).

[61] Id. at 127.

Are Merger Enforcement and Remedies Too Permissive?: A Look at Two Current Merger Studies

BY JOHN D. HARKRIDER

OVER THE LAST TWO YEARS, regulators, academics, and politicians from both political parties have focused a great deal of attention on whether antitrust merger policy is doing a good job protecting consumer welfare. On one side of the debate is the view that merger remedies are too lax, which has been partly fueled by John Kwoka’s work. Kwoka, a prominent antitrust academic, published a frequently cited study on mergers that reached the conclusion that American merger policy is lax and ineffective. Specifically, after reviewing a series of consummated transactions, he concludes that transactions cleared without conditions should have been subject to remedies and further that when remedies were imposed they “generally fail to prevent post-merger price increases.”

On the other side, about a year after the publication of the Kwoka book, the Federal Trade Commission released a study on merger remedies that concluded that merger remedies were effective. Significantly, Kwoka’s book has received far more attention domestically and internationally among practitioners, regulators, and academics than the FTC study. This is an odd result, given that the FTC study relies on much better data and empirical methods than does the Kwoka book.

Specifically, much of Kwoka’s analysis relies upon public data that does not necessarily match the sort of data relied upon by the agencies to evaluate the competitive effects of mergers. In addition, the bulk of the merger studies included in his meta-analysis were in three industries, which limits the ability to draw generalizable policy implications from the study. In contrast, the FTC’s Study benefited from the FTC’s unique ability to access non-public data, including the ability both to obtain the sort of product-specific transactional and sales data used in merger review and to conduct detailed interviews with market participants about the data and the impact of the merger under consideration. Given the disparity of reliability and rigorous analysis between the two studies, one should be cautious about drawing conclusions from Kwoka’s analysis that merger remedies are ineffective and further, given limitations in the data and the unrepresentative mix of industries used in the Kwoka meta-analysis, one should be careful about concluding that mergers are leading to higher prices based upon his work.

Kwoka’s Study

Kwoka conducted a retrospective meta-analysis of merger effects to evaluate the success of decisions and remedies imposed by the FTC and DOJ. The data that formed the basis of his study were empirical merger retrospective studies he deemed reliable. Each “data point” was the estimated merger price effect from an empirical study of consummated horizontal mergers, joint ventures, and airline code sharing agreements. Based on his analysis of these studies, Kwoka concluded that most mergers resulted in competitive harm. Kwoka relied upon that conclusion to further suggest that merger remedies are generally ineffective and that antitrust policy is excessively permissive.

Kwoka’s 2015 book advancing the view that merger control is ineffective has been influential, receiving attention from economists, lawyers, policymakers, academics, and regulators, both domestically and internationally. Many calling for increased merger enforcement do so while endorsing Kwoka’s book. The New York Times published an opinion piece that referred to Kwoka’s book as the most important evidence “that horizontal mergers may cause harm at levels of concentration much lower than the agencies now take seriously, and also that mere divestitures may not work well.” Additionally, a recent column in the Washington Post referenced Kwoka’s study to support the notion that mergers generally lead to increased prices and that antitrust enforcement is too permissive.

Beyond the positive reception of Kwoka’s book by the popular press, the American Antitrust Institute (of which Kwoka is a member of the Board of Directors) has cited Kwoka’s book. At the 2017 AAI symposium, Kwoka commented that the antitrust agencies’ approach to merger remedies is “stuck in the past,” advocating for an approach that incorporates business considerations and economic incentives. Additionally, prominent antitrust professor Jonathan Baker shined a positive light on Kwoka’s retrospective analysis of mergers, concluding that “debates over merger policy can no longer proceed without reference to empirical evidence.”
On the international front, academics commissioned by the European Union Directorate-General for Competition (DG Comp) to assess the retrospective studies of EU mergers also held Kwoka’s study in high regard, noting that his retrospective analysis was the precursor to the DG Comp’s study. They further implied that Kwoka’s study was credible.9

But Kwoka’s book has also received criticism. Then-FTC Chairwoman Edith Ramirez and current Acting Chairman Maureen Ohlhausen have both publicly objected to the conclusions Kwoka laid out in his book.10 At the same time, two economists in the FTC’s Bureau of Economics, including the Acting Director of the Bureau of Economics, published a critique of the book. These FTC economists criticized Kwoka’s methodology as a “substantial departure from standard meta-analytical methodology,” including “his failure to report standard errors” or to weight price effects by estimated variance. In the end, they rejected Kwoka’s conclusions.11 Kwoka has a response, claiming that the critique by these FTC economists is “without merit” and is an effort “simply to refight [the FTC’s] old parochial battles.”12

Analyzing mergers through the lens of antitrust law requires rigorous analysis of accurate and complete data. However, studies conducted outside of the antitrust agencies must generally rely upon public data that are characteristically incomplete and imprecise. Further, while there is some data from litigated mergers, the number of litigated mergers is extremely limited and generally is not focused on an analysis of whether the merger actually resulted in higher prices. Thus, any merger study that is largely based on public data will generally be less reliable than a study based on the market participants’ actual data.

Beyond the obvious limitations associated with Kwoka’s available evidence, his findings relied upon data that were not a representative sample of transactions. Instead, Kwoka’s study is over-weighted in hospitals, airlines, petroleum, and journal deals. Nearly three-quarters of the transactions come from only these four industries, while only 8.4 percent of Hart-Scott-Rodino filings from 2015 were energy or transportation deals.13 Such a disproportionate data sample cannot reliably predict overall merger outcomes.

Furthermore, Kwoka’s primary research sources lacked diversification given that a large fraction of the studied mergers come from only two studies. Kwoka acknowledged the lack of diversity, stating that the two studies accounted for around 2000 of the 3000 mergers studied in his meta-analysis: 1000 in hospitals and 1000 in banking.14 Therefore, it is difficult to justify the conclusions Kwoka makes about merger control across the board.

Are Journal Deals Representative?

A closer examination of academic journal deals illustrates the difficulty in drawing general conclusions about merger policy from studies of only 16 industries. In contrast, the Census reports on more than 1000 industries. Specifically, his study of roughly 50 different mergers includes eight deals that involve academic journals. These mergers are significant not just in number but also in impact, with the eight journal deals resulting in average price increases of 18 percent compared to roughly 6 percent for his entire study.

But there are two difficulties in drawing broad conclusions from an examination of mergers among academic journals. The first problem is that Kwoka relied on print journal prices, which is a questionable metric when most consumers use electronic platforms. Thus, we know neither whether the alleged increase in print journal prices was mirrored in electronic platforms nor whether any increase in the price of electronic platforms reflected increased value from access to more journals as a result of the merger.15

Further, there are real questions about the theoretic basis for concluding that mergers between academic journals lead to higher prices. This is because academic journals are not substitutes: one would not switch to a journal on immunology in response to a price increase in a journal on cultural anthropology. Indeed, journals are generally complements, and it is well understood that where products “are complements, a merger can be expected to lower prices, not raise them as in the typical case.”16 To address this issue, academics have considered portfolio effects, but the uniqueness of this theory should caution one against generalizing to mergers between products that do not fit this theory.17

FTC’s Study

Shortly after Kwoka’s book was published, the FTC published a merger study that examined the effectiveness of its consent decrees from 2006 to 2012.18 The FTC designed the Merger Remedies Study “to be more comprehensive in scope and broader in analysis” than its 1999 Divestiture Study.19

The FTC’s study utilized the agency’s unique and significant expertise to provide a report based on a representative sample of merger remedies coupled with extensive interviews of market participants, concluding that a significant majority of its merger orders was successful. The Merger Remedies Study included 89 Commission merger orders that were divided into three groups and evaluated using three distinct methods—a case study, a questionnaire study, and a study of pharmaceutical mergers.

First, the FTC followed a case study method (Case Study) to review 50 orders, which covered 184 relevant markets. This was the method used in the 1999 Divestiture Study, and comprised extensive interviews of market participants.20 Second, the FTC requested voluntary responses to questionnaires (Questionnaire Study) from 43 buyers that acquired assets under 15 divestiture orders in industries such as “supermarkets, drug stores, funeral homes, dialysis clinics, and other healthcare facilities.”21 Of the 43 questionnaires the FTC sent, 27 buyers responded either in writing or in an interview. The FTC’s questionnaire addressed “several areas of concern, including the due diligence process, the scope of the asset package, transition services, and post-divestiture operations.”22 In particular, the FTC required parties and
market participants to supply up to six years of confidential revenue and quantity data of the sort that parties would submit in a merger review process. Significantly, this data fit with precision the alleged antitrust market. Third, the FTC reviewed the remaining 24 orders involving mergers in the pharmaceutical industry. Since the FTC has significant experience in this area it followed “a standard approach for evaluating these mergers and designing relief.” The FTC compiled data from publicly available information, extensive interviews of various highly experienced divestiture monitors, and an in-house evaluation of the orders.

The FTC established a unique standard for each of the three groups of orders it studied. The FTC’s standard for judging whether the 50 orders in the Case Study were successful was measured based on “whether the remedy had maintained or restored competition in the relevant market . . . within two to three years” after the order. The FTC used market shares and market participants’ views of the post-divestiture market to determine the competition in the relevant market after the order. For the 15 orders in the Questionnaire Study, the FTC deemed a remedy successful if the divested assets were still operating in the relevant market identified in the complaint. The remaining 24 pharmaceutical orders were “considered successful if the buyer sold the product in the market post-divestiture.”

Of the 50 orders examined in the Case Study, the FTC reported that 100 percent of the divestitures involving an ongoing business succeeded. The Case Study also found that approximately 70 percent of divestitures involving limited packages of assets in horizontal, non-consummated mergers were a “success,” with an additional 14 percent deemed a “qualified success.” Additionally, while only four merger orders involved vertical concerns, the FTC determined that each of those was a “success.” However, the FTC also determined only 26 percent of horizontal, consummated mergers not subject to a consent order were a success.

Of the 15 orders in the Questionnaire Study, the FTC found that 90 percent of the divested businesses remain in the market. Thus, the FTC concluded that the clear majority of those orders was successful. Additionally, the FTC reported that 45 out of 60 on-market products divested in the 24 orders in the Pharmaceutical Study continued to be sold in the market post-divestiture. The FTC’s study also concluded that all transferred pipeline products were a success.

The Study also examined the process used to implement merger remedies, which included asking buyers whether the divested assets were obtained and whether there were any process-related concerns. The FTC’s report concluded that the Commission’s remedy process is effective because the remedies addressed the competitive concerns identified in the FTC’s merger investigation process.

Conclusion
Analysis of the appropriate enforcement of antitrust law must be based on the same rigorous approach that is used in merger enforcement. Indeed, one might argue that policy analysis should rely upon even more rigorous methods. That is because while a mistake in a case may impact consumers of the merging parties, a mistake in a policy decision can have broad and long-lasting effects on consumer welfare to the extent that it leads to an unwarranted change in merger enforcement.

In light of the discrepancies between the data and selection bias in Kwoka’s study versus the FTC’s study, the amount of weight given to Kwoka’s study is of great concern. Kwoka relied upon a limited data set, unrepresentative of the total population of transactions and based on public data, and has been criticized for failing to use sound empirical methods. The FTC, on the other hand, had access to data for all the mergers in the timeframe evaluated and was able to conduct detailed fact-based interviews about the data and the merger’s impact on prices. Given the disparity in methods, access to data, and conclusions, there are serious questions about relying upon the Kwoka study to conclude that merger policy, and in particular, merger remedies are too permissive.
Intellectual Property and Antitrust Handbook SECOND EDITION

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18. FTC DIVESTITURE STUDY, supra note 3.

19. Id. at 4.

20. The author participated in four different interviews with FTC Staff regarding the Case Study and submitted detailed price and quantity information in the exact product markets defined by FTC Staff in its investigation of the underlying deals. None of these data were available publicly and all information was provided pursuant to an FTC subpoena.


22. Id. at 29.

23. Id. at 11.

24. Id. at 1, 15.

25. Id. at 30.

26. Id. at 15, 19 (“A remedy was rated as a qualified success if it took more than two to three years to restore competition to its pre-merger state, but ultimately did so.”).

27. Id. at 30. Pipeline products are products in development and the divestiture was considered successful if all assets relating to those products were successfully transferred.
An Innovation In Merger Assessment?:
The European Commission’s Novel Theory of Harm in the Dow/DuPont Merger

BY ANDREA LOFARO, STEPHEN LEWIS, AND PAULO ABECASIS

In its recent review of the merger between chemical companies Dow and DuPont, the European Commission applied a novel innovation-based theory of harm. The concern was that the parties would find it profitable to reduce overall R&D investments post-merger, causing a reduction in the number of, as yet unidentified, new pesticide products at some unspecified point in the future. The Commission’s position is that its theory of harm did not mark a departure from past cases. Indeed, a recent paper co-authored by the EC Chief Economist claims, on the basis of a theoretical model, that horizontal mergers can be expected to reduce innovation, just as they can be expected to increase prices.

In this article, we consider the Commission’s arguments and present the view that economic theory has not solved the question of whether mergers increase or decrease innovation incentives. The impact of a merger on R&D investment incentives requires a complex balancing exercise of a number of factors that affect the incentives to innovate, most notably cannibalization and appropriability. These factors act in opposing directions.

**Cannibalization.** A merger may give rise to reduced incentives to innovate due to cannibalization. Pre-merger, each party has an incentive to engage in R&D in order to develop new products, which, if successfully brought to market, would compete against the products of its competitors (including those of the other merging party). Post-merger, the new entity would face a reduced incentive to do so. This is because the products resulting from innovation by one merging party would cannibalize the profits of the other merging party (both from its existing and future products); and, once this effect is internalized with the merger, the incentive to innovate would be reduced.

A simple example can be used to illustrate the logic behind the cannibalization concern. Suppose that firm A is contemplating an R&D investment of €50 in a new product that would deliver sales of €100. €20 of these sales would come
In the recent merger between chemical companies Dow and DuPont, the Commission applied an innovation theory of harm that was based on a much broader and more speculative concern than the theories that the Commission historically has relied upon . . .

R&D investment. However, in the presence of rival innovators, the investment may become far less attractive. For example, if A’s potential innovation gains would be shared equally with a rival innovator, firm B, each of firm A and firm B would get €50 if both firms are successful. More generally, as the number of potential rival innovators increases, the expected return that firm A can hope to obtain from its R&D investment decreases to the point where it may choose to refrain from investing in the project. For this reason, the reduction in the number of firms brought about by a merger between firm A and one of its rivals would increase the benefit the new entity could expect to obtain, giving it an incentive to invest where it may have chosen not to do so pre-merger.

**Closeness of Competition.** It is important to consider the role that “closeness of competition,” the extent to which the innovation efforts of one party give rise to products that are substitutable for those of the other party, plays in the assessment of both cannibalization and appropriability. It is clear that the greater the degree of this substitutability, the greater is the cannibalization effect as more of the sales generated by the new innovation represent diversion from the other party. This negative effect of innovation, which is taken into account by the merged entity, increases with the degree of closeness. As with standard unilateral effects concerns, this suggests mergers between close competitors are more likely to be problematic.

However, closeness of competition also has implications for the broader notion of appropriability discussed above. In particular, closeness of competition between the parties has a negative effect on appropriability pre-merger. The closer a rival’s innovative product, the more it depresses the gains from innovation. Therefore, the increase in appropriability is greater when the parties are close competitors compared to when they are distant competitors. In this regard, cannibalization and appropriability are two sides of the same coin—appropriability is an issue whenever cannibalization concerns are relevant, and closeness of competition increases both of these opposing effects.

**Efficiencies.** In addition to appropriability, it is important to note that the economic literature has identified a number of other mechanisms, such as efficiencies, whereby a merger...
between two firms may increase incentives to innovate. For example, a merger can increase the likelihood of successful innovation by combining different approaches and best practices of both parties. A merger may also increase innovation incentives if it brings together complementary assets that enable the parties to better realize, or appropriate, the benefits of innovation.

**Economic Literature Provides No Definitive View on the Relationship Between Concentration and Innovation**

The economic literature has historically not reached a definitive view on the issue of whether more concentrated markets are likely to generate higher levels of innovation than less concentrated markets. That fact is acknowledged in the Commission’s recent Competition Policy Brief, EU Merger Control and Innovation. That paper refers to Joseph Schumpeter, who first highlighted the appropriability mechanism and how less competition in a market is likely to lead to more innovation. It also refers to Kenneth Arrow, who reached the opposite view on the basis of the cannibalization mechanism. The Commission paper then refers to authors who have attempted to find some convergence between the two opposing views, reaching an overall finely balanced conclusion: “As long as competition policy promotes contestability (i.e., by keeping markets competitive) and does not unduly negatively affect appropriability, it will be compatible with both Arrow and Schumpeter and therefore will encourage innovation.”

A recent paper co-authored by the Chief Economic Adviser of the UK Competition and Markets Authority, Mike Walker, also recognizes the absence of a definitive view in the literature. While quite rightly emphasizing the importance of dynamic efficiency considerations in competition policy, it notes that “our standard workhorse models do not provide us with a good theory of the impact of market structure on innovation or of how innovation might be used in attempts to change the equilibrium,” that “economics does not yet provide the tools to allow us to make good empirical judgments on what market and organizational structures are conducive to innovation in specific cases,” and, as a result of competition reducing returns to innovation, that “oligopolies tend to be more innovative: this is the inverted U-shaped model of innovation.”

**Dow/DuPont Decision**

In the recent merger between chemical companies Dow and DuPont, the Commission applied an innovation theory of harm that was based on a much broader and more speculative concern than the theories that the Commission historically has relied upon—namely, that the parties would find it profitable to reduce overall R&D investments post-merger, causing a reduction in the number of innovative pesticide products (as yet unidentified) at some unspecified time in the future. The Commission considered that only five crop protection companies, BASF, Bayer, and Syngenta, as well as the merging parties, were globally active in the discovery, development, manufacture, and distribution of new pesticides. Although the merged entity would have continued to face competition from at least three major rivals, the Commission ultimately concluded that it would have a lower incentive to innovate than Dow and DuPont separately.

**EC Emphasizes Cannibalization Factor.** The Commission’s line of reasoning can be summarized as follows: pre-merger, Dow and DuPont individually had an incentive to engage in R&D in order to develop new products that, if successfully brought to market, would compete against the products of its competitors (including those of the other merging party). Post-merger, the combined Dow and DuPont would face a reduced incentive to do so because the crop protection products resulting from innovation by one merging party would cannibalize the profits of the other merging party.

Dow and DuPont argued that two key market features would ensure that cannibalization considerations did not play a significant role in the investment decisions of crop protection companies. The first factor was biological resistance. All crop protection products face a reduction in efficacy when used over time, as the targeted pests mutate to develop resistance to the product’s mode of action. This means that over a period of 5–20 years, depending on the relative use rate of the product and on other biological factors, products will no longer have the efficacy required by farmers to effectively deal with the pest. The second factor was regulation. In recent years, there has been a continued tightening of the regulations that govern crop protection products, with many having their application restricted or banned outright. As these regulatory pressures continue to grow, crop protection companies face increased uncertainty with regard to the length of time they will be allowed to sell their current products.

The parties provided extensive evidence showing that over time they strived to discover and launch new pesticides without waiting for sales of existing products targeting the same crop and the same pest to be affected by resistance and regulation. That is, the companies had largely disregarded any cannibalization effect that new products may have on sales of their existing products when launching new pesticides. They argued that the merged entity’s incentives would not be driven to a significant extent by cannibalization concerns because resistance and regulation considerations limited the amount of future profits that could be expected to flow from existing products.

While the Commission did acknowledge that resistance and regulation had important effects on innovation incentives, it failed to recognize that these factors directly affected the mechanism underpinning its theory of harm by reducing the impact of cannibalization on innovation incentives.

**EC Downplays Appropriability Factor.** Dow and DuPont submitted specific evidence highlighting the importance of appropriability considerations in their investment
decisions. In particular, they showed that the perceived threat of rival innovation in the same product space was an important negative factor taken into account when considering the commercial prospects of new active ingredients.

Unfortunately for the parties, this evidence did not get much traction with the Commission. In addition, while accepting that firms consider the possibility that their rivals may innovate in a particular space when evaluating the profitability of their R&D projects, the Commission did not consider it necessary to engage in a balancing exercise of cannibalization and appropriability effects. Instead, the Commission largely relied on some theoretical economic papers, claiming that these provided support to the conclusion that cannibalization is inherently likely to outweigh appropriability and that horizontal mergers can therefore be expected to negatively impact innovation incentives.

**EC Largely Disregards Efficiencies.** Although the Commission did agree that bringing together complementary strengths and expertise, as well as complementary assets, could in principle offset the negative impact of the merger on innovation incentives, it considered these as potential counterattacking efficiencies, for which the burden of proof lies squarely with the merging parties.

Justifying a merger before the Commission on the basis of efficiencies has proven to be very difficult even in the typical setting where concerns center on price increases. In particular, it is by no means easy to show, to the standard of proof required, merger-specific variable cost reductions that offset the upward pressure on prices brought about by standard unilateral effects. Indeed, the Commission has never justified the clearance of a merger that it would otherwise have blocked purely on the basis of efficiencies.

However, in a setting where concerns center on unquantifiable reductions in innovation incentives, the task becomes impossible. First, compared to static cost reductions, dynamic efficiencies that improve innovation prospects are likely to be harder to prove and may occur over a longer time horizon. Second, even if the merging parties could somehow quantify the increase in the probability of successful innovations that results from merger-specific efficiencies, it is not clear how this could be sufficient to offset an unspecified decrease in the probability of successful innovations presumed to arise as a result of unilateral effects.

Moreover, in a standard merger setting involving firms competing on price, it is not the case in practice that all mergers are blocked unless the parties can evidence concrete variable cost efficiencies. The Commission usually goes to some length to quantify the adverse unilateral effects predicted by standard models of horizontal competition and prohibits only those where price effects are likely to be significant.\(^1\) It would be perverse if merger policy were stricter on cases when concerns center on unquantifiable impacts on innovation incentives than when they center on quantifiable impacts on pricing incentives, given that predictions of adverse effects from theory are clearer in the latter case. But that is the direction suggested by the Commission’s approach in *Dow/DuPont*.

**Commission Rejects Existing Economic Literature on Innovation**

In *Dow/DuPont*, the Chief Economist team put forward the view that almost the entirety of the existing economic literature, which provides no definitive view on the relationship between competition and innovation, should be disregarded because the corresponding models do not focus on the impact of horizontal mergers and, as such, they do not shed light on the changes in incentives that the acquisition of a competitor is likely to bring about. A theoretical paper published in 2016 by former Chief Economist Massimo Motta and Emanuele Tarantino, which reached the conclusion that horizontal mergers are likely to reduce firms’ profit-maximizing R&D spending, was considered to be a notable exception to this general observation.\(^1\) The Commission’s economists relied heavily on this paper to support their claim that anticompetitive cannibalization effects are likely to dominate procompetitive appropriability effects.

However, the theoretical model on which this paper relied was one in which firms engage in R&D investments aimed at reducing their cost of production. Importantly, Motta and Tarantino could not derive the same conclusions with respect to R&D investments aimed at delivering new or better quality products. As the paper acknowledges, “Within a general model, the results are a priori ambiguous, as we are unable to sign the net result of effects going into opposite directions.”\(^1\) Because in *Dow/DuPont* the theory of harm put to the parties was that the proposed transaction would have reduced the merged entity’s incentives to develop new pesticide products, the Motta and Tarantino paper does not offer theoretical support for the Commission’s concern.

More generally, the suggestion that only economic research that focuses explicitly on the impact of mergers on innovation can be relevant is at odds with the Commission’s own use of entry studies in merger assessment. An article by Thomas Buettner, Giulio Fedérico, and Szabolcs Lorincz in the Fall 2016 issue of *Antitrust* notes that studying entry events can be informative in understanding the likely effects of mergers.\(^1\) The authors explained:

For example, direct estimation techniques can be used to measure the impact of past entry events (typically involving one or both of the merging parties) or past mergers. The insights from the direct estimation of past competitive events’ impact can then be used to make inferences on the possible effects of the merger at hand.\(^1\)

It follows from this (widely accepted) view that studies of the effects of entry can be relevant for understanding the effects of mergers. Further, an article by Aghion et al. provides evidence that “the threat of technologically advanced entry spurs innovation incentives in sectors close to the technology frontier, where successful innovation allows incumbents to survive the threat, but discourages innovation in laggard sec-
tions, where the threat reduces incumbents’ expected rents from innovating.”19

If the effect of entry on innovation incentives depends on empirical questions regarding the specific circumstances of an industry (i.e., entry may either spur innovation or discourage it due to the possibility that it affects rents from innovating), it would be odd if the effect of mergers did not also depend on similar empirical questions for similar reasons. A finding that entry has ambiguous effects on innovation but mergers have unambiguously negative effects on innovation would be difficult to square with the widely held view that entry events can shed light on likely merger effects.

Commission Economists’ Papers After Dow/DuPont Fail to Provide Support for Concerns

After the Dow/DuPont decision, the EC Chief Economist and colleagues from the Chief Economist teams produced two papers setting out the results of stylized theoretical models that consider the impact of a horizontal merger in a setting where firms innovate to discover new products. Both papers analyze the impact of a merger on incentives to innovate through two channels. The first channel relates to the reduction of price competition following a merger, which the authors report tends to favor innovation (The authors call this the “price coordination” channel.20) The second channel relates to the reduction of expected profits that innovation by one firm may cause on the other merging party. (The authors call this the “innovation externality” channel.) The merged entity takes account of this effect, and this may lead to downward pressure on its innovation incentives.

The first paper, published in June 2017, presents a simple model that the authors are able to solve analytically.21 The paper’s abstract makes the following broad claim: “We show that the merging parties always decrease their innovation efforts post-merger while the outsiders to the merger respond by increasing their effort. A merger tends to reduce overall innovation. Consumers are always worse off after a merger.”22

Taken at face value, this claim would indeed imply that mergers such as Dow/DuPont should be condemned on a priori grounds, without any need to delve into the factual evidence. However, these strongly worded conclusions are not justified and are contradicted by the authors’ own model. Specifically, one of the key propositions of the paper reads: “Total industry effort decreases after the merger if and only if n [i.e., the number of firms in the industry] is low enough.”23 In other words, total R&D effort (i.e., the sum of the R&D investments undertaken by all firms) does not necessarily decrease post-merger. It only does so if the number of firms in the industry falls below a certain threshold, which implies that a merger will give rise to an increase in total R&D efforts if the industry is not too concentrated.

Importantly, as the paper also acknowledges, the critical value of n (i.e., the number of firms below which a merger can be expected to give rise to a decrease in total R&D efforts) will vary depending on the parameters of the model.

It is easy to show that, under certain parameter values, only a merger to monopoly would give rise to a reduction in innovation efforts and consumer welfare.24 All mergers in less concentrated industries (e.g., mergers that decrease the number of suppliers from three to two, four to three, etc.) would, for those parameter values, give rise to an increase in total R&D investments and consumer welfare. This fatally undermines both the generality and the overall negative stance taken by the authors on the likely impact of horizontal mergers on innovation.

The second paper, published in July 2017, takes a different approach but makes similar claims regarding the effects of mergers on overall industry innovation.25 The authors report that it is not possible to solve this (more complex) model analytically. In other words it is not possible to offer a mathematical proof that shows under what conditions a given result (such as mergers produce less innovation) holds. Instead, the authors engage in numerical simulation, trying out various functional forms and parameters that specify demand conditions. The authors state that their simulations suggest that “under a broad set of parameters and assumptions,” the innovation externality effect dominates the product market competition effect “for concentrated industries.”26 They claim that negative innovation incentives tend to be stronger when the merging parties are close competitors and that while non-merging parties increase their innovation efforts following a merger, this does not compensate for the reduction of innovation effort by the merging firms. As a result, a merger between two out of a limited number of innovators is likely to depress innovation incentives, absent efficiencies.

As a general matter, theoretical economic models are most useful when they reveal new insights that are not otherwise obvious regarding the interrelationships between various effects. However, the model in the second paper provides no reasoning as to why the innovation externality effect tends to dominate, and, more importantly, we do not know from this exercise what it is about the cost and demand conditions the authors test that makes the innovation externality effect dominate. All that can be said is that for the particular set of specifications the authors consider, mergers tend to reduce innovation.

This leads to the question of whether there are other, untested specifications that give rise to different conclusions. It turns out that there are indeed such specifications, implying that the model does not in fact allow for the very broad conclusions that are assigned to it. In particular, for the demand functions that the authors analyze, a successful innovation tends to make firms’ demand more sensitive to their own price. As a result, the innovative firm may have an incentive to reduce price despite the increase in consumers’ willingness to pay.27 This implies that the negative innovation externality (i.e., the impact that a successful innovation in one product has on the profit of other firms) tends to be very large.
It can be shown that when innovation results in a fixed increase in demand at any given price level, the innovation externality may be positive. In this setting, innovative firms obtain a better product than their rivals, and will tend to compete less intensively with non-innovative competitors, who therefore gain from the innovation. This positive innovation externality implies that mergers may increase innovation for both the merging parties and their competitors. In other words, the framework proposed by the authors confirms, rather than overturns, the fact that the impact of mergers on innovation is ambiguous.

In short, neither the Motta-Tarantino paper, nor the Commission economists’ recent papers, can support the claim that a comparison of cannibalization and appropriability effects is not required because the former should be expected to dominate the latter. On the contrary, the only conclusion that can be legitimately inferred from these papers is, in line with the economic literature of the last few decades, that balancing appropriability and cannibalization is an exercise that cannot be trivialized. Put simply, the answer as to which of the two effects is likely to prevail in any given case cannot be found in the pages of industrial organization journals or by setting up more or less sophisticated theoretical models. As should always be the case, it can only come from a careful assessment of the specific facts of the case.

**Conclusion**

In its assessment of the Dow/DuPont transaction, the Commission considered that any potential impact of the proposed transaction on innovation was principally determined by cannibalization considerations. As a result, the Commission effectively presumed that any impact of the proposed transaction on innovation incentives would be negative. However, anticompetitive effects on innovation are far less likely than anticompetitive effects from mergers like Pfizer/Hospira, which bring together existing rival pipeline products for which the innovation work has essentially been done and for which the merging parties’ incentives can be appropriately assessed on the basis of the standard unilateral effects framework. In cases such as Dow/DuPont, where the concern is that the merger may reduce incentives to undertake overall R&D investments, the theoretical literature (including the papers on which the Commission relied) provides no support for a presumption that a reduction in the number of competitors will give rise to a reduction in innovation. Specifically, the Commission’s economists’ apparent willingness to rely on abstract theoretical model results to the exclusion of a more rounded factual assessment of cannibalization and appropriability effects is likely to be detrimental to effective merger control.

Due to the ambiguous relationship between concentration and innovation, not taking into account appropriability and other factors raises significant risks of over-enforcement that will actually diminish incentives to innovate and, in so doing, harm the long term vitality of industrial innovation on which future consumer welfare relies. Such an outcome would run contrary to Commissioner Vestager’s recently stated policy objectives of protecting innovation.

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4. See Vestager, supra note 2.
5. In addition to Pfizer/Hospira, the Commission has also looked at similar concerns in a number of other cases, including, for example, Case COMP/M.7278, GE/Alstom, Comm’n Decision (Sept. 8, 2015), http://ec.europa.eu/competition/mergers/cases/decisions/m7278_6808_3.pdf; Case COMP/M.7746, Teva/Allergan Generics, Comm’n Decision (Mar. 10, 2016), http://ec.europa.eu/competition/mergers/cases/decisions/m7746_4632_3.pdf; and Case COMP/M.8401, J&J/Actelion, Comm’n Decision (Jun. 9, 2017) (not yet published).
6. We assume for simplicity that costs of production are equal to zero.
8. Id. at 2.
10. Id. at 476.
11. Id. at 481.
12. Id.
13. Although the parties argued that other competitors also had significant R&D capabilities, their presence was disregarded due to perceived limitations in their geographic focus and product offering.
14. To account for the fact that standard models of price competition predict that all horizontal mergers increase prices absent efficiencies, Farrell and Shapiro introduced a notional “efficiency credit” that is granted to merging firms in their proposal to use the UPP test as an initial screen for mergers that should escape further scrutiny. The idea is that only mergers where the empirical evidence on closeness of competition suggests that price effects may be significant should be viewed as potentially problematic. Joseph Farrell & Carl Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, B.E. J. THEORETICAL ECON., Vol. 10: Iss. 1 (Policies perspectives), Article 9, http://faculty.haas.berkeley.edu/shapiro/alternative.pdf.
In principle, less product market competition could also exert downward pressure on firms’ incentives to innovate. However, in the Commission Economists’ papers the reduction in the intensity of price competition following a merger tends to favor innovation because it increases post-innovation profits more than it increases pre-innovation profits.

The cost function considered is 
\[
\prod = \frac{c(\omega)}{\omega} \cdot \exp(1 - \omega^2)
\]

where \(c(\omega)\) is an arbitrary parameter, for low enough values of \(\alpha\) or high enough values of \(\delta\). All other mergers deliver higher total efforts and a higher probability of innovation. Furthermore, it can be shown that whenever innovation increases with the merger, there are corresponding consumer welfare functions such that consumer welfare also increases with the merger. For example, when using the cost function as described above and a constant-elasticity of demand function of the form \(p(q) = q^\alpha\), then consumer welfare will increase with a merger for \(\alpha = 0.01\) and any \(\delta > 0.04\).

In the settings considered by the authors, the impact of demand becoming more elastic due to innovation can sometimes lead the innovative firm to decrease its price even relative to the situation where it has not innovated. This is counterintuitive because one might expect an innovation to give rise to less elastic demand, allowing a firm to increase price.

This footnote uses the same notation as the paper where the vector of all products’ prices and \(\delta\) is the vector of realized innovations in the second stage game. We denote \(\psi(p, \delta)\) as the demand for product \(i\) given \(p\) and \(\delta\). The authors consider some demand functions that are additively separable and linear in price, i.e., where the demand can be written as 
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\psi(p_i, \delta) = f_i(\delta) - g_i(\delta) \cdot p_i + \sum_{j \neq i} h_{ij}(\delta)
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Data Localization Laws And Their Impact on Privacy, Data Security And the Global Economy

BY BRET COHEN, BRITANIE HALL, AND CHARLIE WOOD

FROM MESSAGES SENT BY HORN across the Alps to printing press newspapers dispatched cross-continent by the Pony Express to viral cat videos shared across a 9000-mile-long transatlantic fiber optic cable, we have always sought to connect across vast distances via increasingly complex communications systems. But no such system has broken down geographical barriers quite like the modern Internet, with digital trade and cross-border data flows expected to continue to grow faster than the overall rate of global trade. Despite both domestic and global industries’ increased reliance on these data flows, more than two dozen countries have enacted or considered policies that require retention of data within their borders—so-called data localization policies—with the effect of restricting the free flow of information via the global Internet.

Countries enacting such measures have asserted that their goal is to protect their citizens’ privacy and security, but such countries may also be seeking—which they state so publicly or not—to protect their own national sovereignty by addressing difficulties in their traditional abilities to grant law enforcement access to data, protecting local business growth from global juggernauts, obtaining jurisdictional traction and controlling the flow of ideas, speech, or culture within their borders. Whatever the motivation, the rise of these data localization measures threatens to balkanize the global Internet, restrict both domestic and global trade, and precipitate an overall decline in digital privacy rights and data security for people across the globe.

We examine below the stated and perceived motivations behind this trend, potential privacy and security effects, and a select snapshot of the most significant such policies around the world.

What Is “Data Localization”? The term “data localization” generally refers to public policy efforts to require storage within a particular jurisdiction of data collected within that jurisdiction’s boundaries. For example, Russia, China, Indonesia, and others have enacted explicit “forced” localization requirements applicable to broad swaths of industry that require data to be stored on servers within their respective borders, while other countries, such as Australia, Germany, South Korea, and Venezuela, have enacted industry-specific laws that require certain financial, health and medical information, online publishing, and telecommunications data collected from their citizens to be stored on local servers. Many countries, including the United States, require data related to specified government transactions or important national security concerns to be stored locally.

In this article, we distinguish data localization from the broader and more widespread concept of personal data export restrictions found in some data protection laws. For example, the European Union and many other jurisdictions prohibit the international transfer of personal data unless the transferor takes steps to require that the recipient applies appropriate privacy protections before the information is transferred abroad. While these restrictions can make it more expensive and time-consuming to transfer data across borders, in some cases resulting in de facto data localization, they do not mandate data storage or processing within the country as do the data localization policies we address here. In addition, this article concentrates on localization efforts that apply broadly across industry sectors rather than more limited measures that focus on specific sectors or types of data.

Motivations Behind Localization While the Internet is global, regulation is local. Governments may push for data localization to achieve diverse policy goals, with many citing privacy, security, or law enforcement concerns as primary drivers of regulation. Indeed, many countries tailor their localization efforts to specific purposes. Some require as a matter of national security the local storage or processing of data by government contractors or data related to critical infrastructure such as power plants. Others mandate in-country servers for telecommunications providers to enhance law enforcement efforts. Yet other countries seek to bolster privacy protections and corporate accountability by requiring sensitive data related to citizens’ health or finances...
to be stored locally. Some governments also point to increased surveillance of global data flows by foreign intelligence agencies as a reason to try to keep data within their borders.

Yet, some commentators speculate that data localization efforts may be less about data protection than trade protection, requiring local storage or processing as a way to boost their local economies by propping up or kickstarting their domestic technology industries or the local digital economy. As global technology firms increasingly build servers around the world in an effort to decrease network latency and improve user experience, certain data localization policies may successfully influence local firms’ investment by ensuring their access to local markets. Detractors of the data localization trend, however, question the ability of such policies to meet the stated goals.

Economic critiques of data localization measures have questioned the asserted pretense that these measures bolster local industry, instead pointing to stymied economic growth due to such factors as loss of access to foreign markets and uncertainty for investors with regard to regulatory burdens. Economists have equated measures like data localization to import substitution as companies that seek local market access are forced to pay for in-country data storage or processing rather than “importing” such services to serve the local market. In addition, directing companies to install additional servers in specific countries can potentially have negative impacts on local and global user experience. Past a certain threshold, extra servers do not necessarily decrease latency for users—and could actually spur an increase—as these servers may not be connectable to the same backbone network, might be hampered by government or other intermediary access, or could be supported by less effective technology and staffing.

Data localization requirements may lead to increased infrastructure costs that may then be passed on to consumers. Data localization can also undermine data security, for example by restricting the use of a broader market of data storage and processing solutions or by forcing a company to splinter its data processing operations rather than consolidating it. We discuss potential privacy and data security impacts in more detail below.

When strict rules requiring local retention or processing of data have been introduced by governments that are not otherwise known to be staunch guardians of privacy and other civil liberties, critics suspect more nefarious or anti-democratic motivations—i.e., that these measures are thinly veiled efforts to force companies to retain information about local citizens within easy access of government authorities so as to stifle free speech and political dissent under the guise of data protection or national security. Requirements to retain messaging records and decrypt individual account information have been criticized as unconstitutional state intrusions. For example, in Kazakhstan the government has a history of shutting down social media and other forms of communication within the country in response to speech critical of the government, and some critics believe strict user identification requirements coupled with data localization measures are intended as a means to identify dissidents.

**Forced Data Localization May Impact Privacy and Data Security**

Regardless of the motivations for the data localization trend, the possible costs of such policies are potentially significant for individuals, companies, the global economy, and the nations that aim to cabin data within their borders. In some circumstances, data protection is a legitimate reason for governments to limit the transfer of certain types of data to jurisdictions where the data may be subject to higher risks. However, limiting cross-border transfers to recipients that will guarantee an adequate level of data protection is fundamentally different than forced localization, which may have—in addition to anticompetitive and anti-trade effects—net-neutral or negative consequences on the relative privacy and data security of individuals’ personal data. For example:

- **Greater data decentralization that makes it harder for companies to exercise control over data privacy and security.** A rising trend in forced data localization measures could result in companies either avoiding certain markets altogether or being forced to create and maintain numerous data centers. Such measures may hinder a firm’s ability to exercise business judgment in managing its business risks and needs, reduce opportunities to take advantage of global economies of scale and expertise that may benefit privacy and security, and create additional points of security failure or privacy non-compliance. When companies must stretch their limited security resources in numerous directions, rather than to a strategic few or to an overall data governance program, their security and privacy compliance infrastructure may start to look more like multiple houses, each with a locked door and guard dog, than a fortress manned by experienced soldiers. In addition, enterprises forced to operate in multiple jurisdictions (or forgo market access altogether) may have difficulty applying appropriate physical, technical, and administrative security controls when storing data in locations that may have language barriers, decreased availability of trained personnel, a lack of legal remedies for criminal or negligent data loss, or limited access to hardware or parts.

- **Greater risk of inaccurate information.** In certain cases, data localization requirements permit the cross-border transfer of data, but only after storing a localized copy. Where this is the case, companies based outside jurisdictions that enact forced localization measures are likely to transfer at least some of the data to existing data centers as well, due to the benefits of centralized data sets. This practice increases the locations where the data is stored, which in turn increases the number of times the data set must be revised or deleted to remain up to date. More locations increase the likelihood of error. For example, where a request for deletion leads to deletion on only one server, a request for access produces a stale record, or a request to correct a record is not effectuated.
companies and thus reduces the barrier for governments to access localization removes this choice from consumers and providing additional privacy protections. Strict forced data the percentage of requests being granted is down. Companies with many reports that show access requests are up but the companies increasingly push back on government access requests, where there are fewer protections baked into the system for protecting due process rights of users but are reluctant to comply may be actively choosing to store their data in jurisdictions where they believe users’ privacy and civil liberties will be protected and respected by the rule of law. Consumers in turn may choose to interact with companies which can commit to providing additional privacy protections. Strict forced data localization removes this choice from consumers and companies and thus reduces the barrier for governments to access information about their citizens, for good or for ill.

Key Data Localization Laws
From theoretical implications of data localization to practical application of these laws, both the largest country in the world—Russia—and the largest country by population in the world—China—have passed strict forced localization measures. As discussed below, the Chinese and Russian laws are thus likely to present the most risks and challenges to multinational companies. We also discuss below the laws now in place in Indonesia, Kazakhstan, Vietnam, and Nigeria.

China. After several years of discussions and revisions, the Cyber Security Law of the People’s Republic of China came into force on June 1, 2017. The law gives the Cyberspace Administration of China (CAC) broad latitude to regulate data practices of both local Chinese companies and multinational enterprises that do business within China, including the authority to require certain data to be stored locally, to require the maintenance and sharing of web logs, and to require entities to obtain consent for cross-border transfers of personal data. The CAC has released draft implementation rules that provide some insight into the government’s plan to implement these requirements.9

Significant uncertainty remains as of publication of this article as to the specific rules and procedures for assessing and reviewing data exports under the Cyber Security Law. It appears that the data localization requirements applicable to personal data and “other important data” will take effect on December 31, 2018, and it is clear from the law itself that the localization measures apply to operators of “critical information infrastructure” (CII). Draft export review measures published by the CAC, however, appear to extend the localization requirement to “network operators,” which are far more broadly defined under the law to include network service providers and owners or operators of any systems that gather, store, transmit, exchange, or otherwise process information.10 This definition, read most broadly, encompasses most if not all enterprises operating network infrastructure within China, as even non-technology-focused companies will operate information systems.

Based on comments made by representatives of the CAC at a public seminar concerning the implementation of the law, there is reason to believe that the localization measure will apply only to network operators’ systems and networks that interface with external networks, rather than systems that are entirely internal to an organization such as HR systems, but this position is not confirmed. There has also been some suggestion that smaller or less sensitive data transfers by network operators, such as those involving less than 500,000 consenting data subjects, would be subject to a self-assessment and notification requirement, rather than a substantive security review by the CAC or industry regulator. International transfers by operators of CII and by network operators exceeding these thresholds are expected to be subject to a substantive security review.

The definition of CII has evolved somewhat over the course of the implementation of the law. The most recent draft measures released for comment in July 2017 continue to leave the scope of CII to the discretion of the CAC, in consultation with other government authorities.11 Although the draft measures for the classification of CII have done little to clarify the precise scope, the scope is expected to include government agencies in sensitive fields such as energy, finance, and transportation, as well as public utilities, telecommunication and broadcasting networks, scientific research institutes, and manufacturers in sensitive fields. There is likely to be broad discretion for the CAC to add further categories, perhaps retrospectively.12
The effect of the localization measure is expected to be that, unless a security review has been successfully completed, operators of CII (and potentially network operators) will be required to locally store personal data and “other important data” collected within mainland China. The criteria for completing a security review have not yet been determined, but it seems reasonably clear at this stage that in order to be permissible, cross-border transfers must be necessary for business requirements, data subjects must have consented to exports of personal data, and the organization making the export must have assessed the security measures being applied to the transfer and the storage of the data at rest in the jurisdiction(s) of export, having regard to the sensitivity of the data involved, the risks involved in the transfer, and “other important matters” related to the transfer.\(^{13}\)

While the definition of “personal data” under the Cyber Security Law is broadly consistent with definitions used under data protection laws internationally, the concept of “other important information” is undefined and does not have any readily apparent analogy. Observers of Chinese law will note that the country already has prohibitions against the international transfer of state secrets. State secrets have a nebulous definition but likely fall within the scope of “other important information.” Clarifications from the CAC indicate that the relative importance of “other important information” is to be assessed from the perspective of the state, as opposed to individuals or companies.\(^{14}\)

Given the significant degree of uncertainty as to the scope and effect of the Cyber Security Law, the impact of the law is difficult to assess at this stage. It is clear, however, that this uncertainty is in and of itself generating a significant impact on multinational businesses with operations in China, as many organizations that are likely to be network operators under the law now believe that there is a significant risk that they will be required to localize at least some of their data (and corresponding systems) in China. The economic impact alone will be significant. Researchers estimate that company decisions based on Chinese retention requirements applied broadly across industries may reduce China’s GDP by up to 1.1 percent across all industries, with certain industries significantly higher (such as 2 percent in communications) and others significantly lower (.05 percent for metals and textiles), in addition to US$63 billion in consumer welfare losses.\(^{15}\)

Russia. Russia has one of the world’s first-implemented and most expansive data localization regimes, and has demonstrated a willingness to proactively enforce it. Its data localization law, Federal Law No. 242-FZ, went into effect on September 1, 2015.\(^{16}\) In contrast to preceding data localization laws of other countries, which typically required localization only for data related to certain industries or subject matters, Russia’s law applies to any personal data collected from Russian citizens within Russia. It also requires storage and processing of this personal data within the physical territory of Russia, as well as indication of the physical location of these databases in the notification form that most organizations subject to Russian data privacy law are required to file with the government. Russia’s telecommunications regulator and data protection authority, Roskomnadzor, is responsible for enforcement.

Shortly before the law went into effect, Russian regulatory authorities issued a non-binding clarification stating that, with respect to personal data collected online, the localization requirement did not apply to every service on the Internet available to Russian citizens.\(^{17}\) Rather, the product or service must be directed at Russia in some way. Relevant factors include whether a service has a Russian language option, uses a Russian top-level domain name, displays Russian-language advertisements, or accepts Russian currency as payment. The clarification also noted that users could not waive the statutory requirements by contract and that the law does not prohibit cross-border data transfers so long as the data is locally stored and updated in Russia, after which the personal data may be transferred outside of the country subject to the requirements of Russia’s general data protection law (e.g., with the consent of the data subject).

Russia has demonstrated its commitment to these requirements. Most notably, in November 2016, a Russian court of appeal ruled that professional social network LinkedIn violated the data localization requirement in the course of providing its services to Russian citizens. A company may be penalized for violating the data localization requirement by having access to its websites and other online services blocked by Russian Internet service providers. So overnight, 6 million Russian LinkedIn users were no longer able to access the site. LinkedIn continues to be blocked via the Internet and in app stores in Russia.\(^{18}\)

In addition, Roskomnadzor conducts scheduled and ad hoc compliance inspections of companies each year to assess compliance with data protection laws, including the data localization requirement. In September 2016, the agency released a report indicating that the vast majority of the over 1000 companies inspected in the first year the Russian law was in effect were in compliance with the data localization requirements. Roskomnadzor also reported that the information about the location of more than 63,000 databases containing personal data had been submitted.\(^{19}\)

Roskomnadzor’s enforcement activities appear to be encouraging compliance. A number of multinational companies now either publicly state that they comply with the data localization requirement or have reportedly purchased data center capacity in Russia in order to comply.\(^{20}\)

Indonesia. Indonesia has passed several laws and regulations since 2012 focusing on data localization, including Government Regulation 82 (Reg 82/2012), the Minister of Communication and Informatics (MOCI) Regulation 20 of 2016 regarding Protection of Personal Data in Electronic Systems (Reg 20/2016), and the MOCI Circular Letter No. 3 (2016). Regulation 82 requires that Electronic System Providers (ESPs) operating systems that provide ambiguously defined “public services” and process data of Indonesian res-
idents place their data centers and disaster recovery centers for their systems within Indonesian territory. Public services, if read broadly, could potentially include both government organizations and certain public-facing private sector businesses in various industries that are serving an Indonesian customer base through some digital means or otherwise collecting personal data of Indonesian residents. The regulations seem intended to cover the protection of personal data. However, there are indications that the data localization requirement may not be limited to personal data alone and may in fact be applied to all data. A spokesperson for the MOCI was quoted not long after Regulation 82 was passed as stating that the scope of Regulation 82 “covers any institution that provides information technology-based services.”

Given the significant degree of uncertainty as to the scope and effect of the Cyber Security Law, the impact of the law is difficult to assess at this stage. It is clear, however, that this uncertainty is in and of itself generating a significant impact on multinational businesses with operations in China . . .

Regulation 20—an implementing regulation of Indonesia’s Electronic Information and Transactions Law and Regulation 82 that was passed in December 2016 and will be effective in December 2018—sought to define “personal data” and provided more detailed provisions in an attempt to clarify Indonesia’s data processing requirements at every stage of personal data’s lifecycle. But it remains murky as to whether Indonesian authorities will apply the localization requirements extraterritorially to foreign businesses collecting personal data from Indonesian residents. Data stored locally may also be mirrored abroad, so long as the business obtains data subject consent, coordinates with the MOCI, and submits certain plans and reports to the government. Regulation 20 further requires that the transfer must also comply with cross-border personal data exchange legislation, even though no such legislation exists to date.

The Indonesian government has been active in issuing regulations related to Internet services, including a mandatory registration of e-commerce service providers (Presidential Regulation 74/2017) and a registration requirement for providers of Over-the-Top services (MOCI Circular Letter No. 3/2016), but has not yet issued implementing regulations in either case. Regulators often use registration requirements as a means to identify and enforce localization measures.

Implementation of these regulations threatens significant disruption of regional operating platforms that have tended to host Indonesian data processing operations in jurisdictions like Singapore, where a more advanced data center and telecommunications sector can be found. In addition, companies have reported that it is expensive and difficult to build data centers in Indonesia, at least in part due to the country’s lack of adequate infrastructure and uneven electricity distribution. Nonetheless, some companies operating within Indonesia (e.g., including foreign businesses like Microsoft Azure in its partnering with local data server providers) appear to be anticipating a broad interpretation of the law and are taking steps to comply before the localization requirements take effect in late 2017.

Kazakhstan. Since 2005, Kazakhstan has required any website using the Kazakh top level domain “.kz” to host its information locally. The Kazakh government enforced this rule in a highly public way in 2010, forcing Google briefly to route all traffic from “google.kz” to “google.com” to avoid hosting a server in the country. The Kazakh government retains the power to deny any application to register a “.kz” domain name if the applicant does locate servers within the country.

Kazakhstan expanded its data localization requirements in 2016 to require that all personal data collected within Kazakhstan be stored locally, similar to Russia’s data localization requirement. Kazakh government officials have stated that they believe processing and storing data inside Kazakhstan is essential from a “safety point of view” and that they have the means to enforce compliance, as the government maintains control over the Internet infrastructure in the country through its majority ownership in KazakhTelecom, Kazakhstan’s largest Internet service provider. All other telecommunications companies are required to connect their services through the government-controlled backbone, which provides the government with a strong degree of control over content provision, allowing it to block traffic to services that are found to be in non-compliance.

Vietnam. Vietnam’s Decree on Management, Provision, and Use of Internet Services and Information Content Online (Decree 72, signed into law in 2013), requires both foreign and domestic companies that operate Internet-based services to physically locate at least one server within Vietnam and to make those servers available for government inspection. It remains unclear exactly how Decree 72 will apply to foreign cross-border service providers and what effect it will have on cross-border data flow, but the Vietnam authorities have indicated they will release guidance clarifying this point.

In 2014, Vietnam released draft implementation guidance that would require all over-the-top services (i.e., online services delivering audio, video, or other media over the Internet) to maintain a server within the country. And in 2016, draft revisions to Decree 72 were released that would, inter alia, require Internet-based services to (1) store information content for at least 90 days after it is posted, (2) store information processing logs (including IP addresses) for at least two years after posting, (3) obtain detailed information...
about registered users of services, including ID numbers and contact information that would be verified against a national database, and (4) store data locally in Vietnam.31

Vietnam also requires telecommunications and information technology services to comply with its laws on information storage and requires that businesses “trading in civil encryption products” obtain licenses to do so.32 Vietnam asserts that the data localization measures in place are necessary to protect the security and privacy of Vietnamese Internet users and to allow law enforcement to manage websites committing copyright abuse or exploiting other content without permission.33

While not requiring localization, Circular 38/2016/TT-BTTTT (December 2016) of the Ministry of Information and Communications (MIC) requires foreign websites, social networks, online applications, and search engines, any of which are accessible in Vietnam, and that (1) receive one million or more visits from Vietnamese residents per month, or (2) lease a data center to store digital information in Vietnam, to register and cooperate with the MIC with respect to content that infringes the laws of Vietnam. This includes taking down and identifying individuals who post content that threatens national security, incites violence, propagates pornography, or contradicts national traditions.34

Nigeria. While no Nigerian statute specifically addresses data localization, the National Information Technology Development Agency (NITDA), the policy-implementing arm of Nigeria’s Federal Ministry of Communication and de facto data protection authority, has articulated “local content” requirements. In 2013, the NITDA issued Guidelines for Nigerian Content Development in Information Communication Technology. The Guidelines, which explicitly state their intent to drive indigenous innovation and promote the local Information Communication Technology (ICT) industry, include a mandate that all “subscriber and consumer data” be hosted locally.35 These Guidelines have not been revised since they were first issued; however, NITDA issued a “final notice” in October of 2015 stating that all affected entities must comply. Some commentators have argued that the legal basis for these particular Guidelines is uncertain.36

Absent enforcement action or further clarification, it is unclear how the data localization requirements will translate into actual obligations on companies, especially multinational companies. Indeed, it is not clear which companies are subject to the requirements. And the guidelines require compliance by “ICT Companies” and “all companies operating within the industry,” but they do not define what types of companies fit within this scope.37 The Office of the U.S. Trade Representative stated that the Guidelines appear to “require all foreign and domestic businesses to store all data concerning Nigerian citizens in Nigeria.”38 The U.S. Department of State, on the other hand, noted that NITDA was under new leadership as of September 2016, and that the Nigerian government had a history of “mixed signals on enforcement of local content requirements and their implications,” leading to “uncertainty over local content enforcement.”39

Conclusion

The common thread in the enactment of data localization laws around the world has been the desire of governments to exert local control over the Internet, at least as it is accessible to their citizens. Multinational companies, in particular those that rely heavily on the Internet, are caught in the crossfire. As these data localization laws proliferate, the cost of doing business globally increases because complying enterprises must either open new data centers, change their network architecture, or use a local cloud vendor. Meanwhile, privacy and security suffer as companies are forced to store data in a way that is not the most efficient or effective.

The reality is that data localization laws are here to stay. As companies invest in compliance and governments without these laws see the short-term benefits that accrue to the localizing government in the form of increased access to data and a boost to the local economy, more nations may want to get in the localization game. Without coalitions or policies to combat data localization efforts, the struggle between global business and nationalistic interests will most likely amplify over the years ahead.


13 Cyber Security Law, supra note 10, arts. 31 and 37.


24 See Telkomtelstra, Microsoft Launch Hybrid Cloud Solution, JAKARTA POST (Aug. 11, 2017), http://www.thejakartapost.com/adv/2017/08/11/telkomtelstra-microsoft-launch-hybrid-cloud-solution.html (“This is a joint effort to tap into Indonesia’s growing cloud services market, helping companies to comply with the local data residency policy, lower latency and better access performance, and trusted local support to implement cloud strategy into their business.”) (emphasis added). See Indonesia Heading for Sensible Cloud Policy?, ConnectedAsia (Jan. 25, 2016), http://www.connectedasia.com/indonesia-heading-for-sensible-cloud-policy/.


Private Equity Antitrust Handbook

The business of private fund advisers can raise substantial antitrust issues and these advisers may unwittingly run afoul of the antitrust laws and regulations if they are not aware of common pitfalls. This Handbook will describe typical private equity transaction structures and the governance issues arising there by focusing on compliance with U.S. competition law—particularly the Hart-Scott Rodino Act. It also addresses the antitrust analysis applied to private equity deals and foreign merger control issues that can arise.

There are over 4,000 private fund advisers registered with the Securities Exchange Commission and along with the United States, more than 160 jurisdictions that have merger control regimes. This Handbook was written to examine the increasing importance for private equity entities to know and understand the complexities of the antitrust and merger control laws in the United States, as well as other select jurisdictions. The Handbook is designed to be a resource for business people and legal practitioners, and as a useful guide at private equity firms underwriting a deal to determine whether the deal would be subject to antitrust review, and to understand the potential competition issues that arise in connection with their business. It will also assist legal practitioners working with private equity firms in navigating the particular intersections of antitrust law and the private equity industry and the issues that can arise.

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DAY 1

8:30–8:35  CONFERENCE OPENING

8:35–8:45  WELCOME REMARKS

8:45–9:45  SESSION I—RECENT DEVELOPMENTS IN KOREA
Our panel of senior Korean practitioners will review recent developments in Korean competition law and practice.

10:00–11:30  SESSION II—MERGER REVIEW IN NORTH ASIA
Merger reviews in China, Japan and Korea are presenting unique procedural and substantive issues both in domestic and international mergers. Our panel of senior private practitioners will explore developments in merger notification as well as key substantive issues including the role, if any, of industrial policy concerns in merger reviews.

11:30–12:00  KEYNOTE ADDRESS

12:00–13:00  LUNCHEON

13:00–14:15  SESSION III—IP LICENSING AND STANDARD ESSENTIAL PATENTS
The competition law treatment of IP licensing and SEPs continued to be a significant issue in a number of Asian jurisdictions as well as the EU, clearly reinforcing the importance of competition law to the exercise of patent rights. Our panel of inhouse counsel-only 1 and private practitioners will review the latest developments in China, India, Korea and the EU.

14:30–15:30  SESSION IV—PRIVATE DAMAGES ACTIONS—A NEW FRONTIER FOR COMPETITION LAW ENFORCEMENT IN ASIA?
Private competition law claims continue to grow in prominence in various Asian jurisdictions. In addition, Asian companies continue to find themselves involved in U.S. litigation both as defendants and increasingly, as plaintiffs. Our panel considers developments in private enforcement in Australia, Japan, and India as well as the U.S. as relevant to Asian corporations.

15:30–17:00  SESSION V—IN-HOUSE COMPLIANCE STRATEGIES IN A TIME OF COMPLEXITY
The implementation and administration of corporate compliance programs has become increasingly challenging for major Asian corporates as established enforcement agencies increase their activity and newer ones emerge. In addition, competition law compliance is often entwined with related compliance requirements in other areas, such as anticorruption and privacy. Our panel of senior inhouse counsel discuss their approaches to compliance.

17:00–18:00  RECEPTION

DAY 2

8:30–10:00  SESSION VI—BIG DATA AND COMPETITION LAW ENFORCEMENT IN ASIA
Big data continues to draw attention, not only in the U.S. and European Union, but also in Asian jurisdictions such as Japan and Singapore law. Our panel will explore recent agency initiatives and the potential application of domestic competition law regimes to the collection and use of data.

10:30–12:00  SESSION VII—DEVELOPMENTS IN CARTEL ENFORCEMENT IN ASIA, U.S., AND THE EUROPEAN UNION
The experience of agencies and defense counsel in major recent international and domestic cartel investigations has in many cases led to a rethinking of critical aspects of cartel enforcement, ranging from leniency programs to litigation. Our panel reviews recent developments in major jurisdictions.

12:00–13:30  LUNCHEON

13:30–14:45  SESSION VIII—CONFIDENTIALITY, PRIVILEGE AND PROCEDURAL TRANSPARENCY IN ASIAN COMPETITION LAW ENFORCEMENT
The treatment of information during the course of a civil, administrative or criminal agency investigation remains one of the most challenging practical issues for enforcers and respondents alike, particularly in matters involving multiple jurisdictions with different approaches to agency confidentiality, privilege and transparency. Our panel considers some of these tough issues.

15:00–16:45  SESSION IX—ASIAN ENFORCERS’ ROUNDTABLE

16:45–17:00  CLOSING REMARKS

17:00–18:00  RECEPTION
Scene 1:
The company seeks markers in the United States.

Scene 2:
The company interviews an employee that was cooperating with the EC.

Scene 3:
EC officials meet with counsel for the company.

Scene 2:
The company meets with the DOJ.

Scene 1:
The company secures a marker and leniency application in the EC.

Scene 1:
The company seeks markers in the United States.

Scene 2:
The company secures a marker with the client.

Scene 2:
The company engages in a criminal trial.

Scene 1:
The company engaged in a criminal trial.

Scene 2:
The company engages in a criminal trial.

Scene 3:
The company engages in a criminal trial.

Scene 2:
The company engages in a criminal trial.

Scene 1:
The company engages in a criminal trial.

Scene 3:
The company engages in a criminal trial.

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The company engages in a criminal trial.

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Scene 3:
The company engages in a criminal trial.

Scene 2:
The company engages in a criminal trial.

Scene 3:
The company engages in a criminal trial.
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